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STATE OF RELIGIOUS LIBERTY IN THE UNITED STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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STATE OF RELIGIOUS LIBERTY IN THE UNITED STATES

WEDNESDAY, OCTOBER 26, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:40 p.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, King, Jordan, Nadler, Quigley, and Scott.

Staff present: (Majority) Zach Somers, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Good afternoon. This Constitution Subcommittee is called to order this afternoon for the important purpose of examining the state of religious liberty in America. This is something, in my opinion, that this Committee should do on a regular basis, because religious liberty and freedom of conscience are the source of all other liberties that mankind has been endowed with. They occupy an absolutely essential place among our unalienable rights.

It is interesting to remind ourselves that Christopher Columbus was exercising his religious liberty when he went out into the oceans to find a new world and came upon America. It is also interesting to note that those who first colonized this Nation from England came here in search of religious freedom, religious liberty, and when they brought their Constitution forward, they had debates about the subject.

One Richard Henry Lee, in the discussion that preceded the composition of our Constitution, said "It is true, we are not disposed to differ much at present about religion. But when we are making a constitution, it is to be hoped for ages and millions yet unborn, why not establish the free exercise of religion as part of the national compact?" What an insightful question that he asked at the time. I am grateful that they proceeded on that basis.

Without religious liberty and freedom of conscience, all other liberties would cease to exist. That is why, from the Magna Carta to our own Bill of Rights, religious freedom has been recognized as the "first liberty."

Religious freedom and a thriving religious culture have always been defining attributes of life in America. Today, the United States is, comparatively speaking, a very religious Nation. In fact,

polls show that well over 90 percent of Americans actually believe in God. Despite the fundamental nature of religious freedom and its importance in American life, it has come under attack in recent years as never before. If it is to be preserved, we must be more awake and more vigilant than ever before.

We must remember that religious liberty involves much more than freedom of worship alone. Religious liberty is exercised both in private and in public and includes the freedom to build and operate all the institutions of religion.

Unfortunately, those who lack appreciation for the public component of religious liberty, and those who fail to see the need to make religious exceptions from many generally applicable laws, are putting the religious freedom that we cherish so much in grave danger for us all. Rather than taking advantage of the ample room the Constitution leaves for the accommodation of religion, increasingly Federal, state, and local governments are failing to create religious exemptions from otherwise neutral laws. As one prominent scholar of religious liberty has observed, government officials should "regard the free exercise of religion not primarily as a danger to be contained or a nuisance to be managed but as a human, social, and political good to be both protected and promoted."

However, so-called anti-discrimination policies that make no exception for religious beliefs are increasingly posing an ominous threat to religious liberty. For most religious groups, public service is a constituent element of their religious beliefs. Religious groups in America establish hospitals, operate homeless shelters, provide counseling services, and run agencies for adoption and foster care for children who might otherwise have no one in the world.

But in the name of anti-discrimination or neutrality, these traditional religious services to the sick and less fortunate are threatened as Federal, state, and local governments increasingly regulate private social services in ways that will not accommodate or even tolerate many religious beliefs on an otherwise neutral basis. These regulations are forcing religious groups to choose between abandoning their social work or abandoning their sincerely held religious beliefs in order to continue to serve the needy.

Additionally, there are some who wish to use the Establishment Clause to eradicate free religious expression in a manner that is the complete antithesis of the original intent of that noble clause in our Constitution. They wish to vanquish any acknowledgement of religion from the public square, pushing traditional religion behind closed doors and replacing it in public life with a new orthodoxy of leftist secularism.

That America is a Nation founded upon the Judeo-Christian principles of the Bible is an irrefutable axiom of history. Our very first president and father of our country, George Washington, hand-wrote in his own personal prayer book, "It is impossible to rightly govern the world without God and the Bible." Thomas Jefferson, our third president and one of the critical writers of our Declaration of Independence, authored the first plan of education to use the Bible for teaching and reading to students. Abraham Lincoln, our 16th president, said "I believe the Bible is the best gift God has given to man. All the good savior gave to the Earth was communicated through this book."

Now the Nation and the Constitution those leaders built and gave to ensuing generations also gave us the power as individuals to reject the religious beliefs that motivated them to do so. But we do not have the right to redact the history of our Nation's religious heritage or to crush the religious expression of individuals who still hold it in their hearts.

So oftentimes those who would trample underfoot the religious freedom of their fellow Americans do so in the name of a "strict wall of separation between church and state." But rather than pointing out the profound historical misinterpretation of that phrase, I will only remind all of us that while that phrase did indeed appear prominently in the Soviet constitution, it appears nowhere in the United States Constitution.

The religious freedom protected by the First Amendment encompasses more than the ability to seek religious truth behind the walls of worship. It includes the right to embrace and express one's religious beliefs in public. This means that Federal, state, and local governments must leave room for religious individuals and groups to serve the community in accordance with their sincerely held beliefs, welcome religious perspectives in the debate over important issues, public issues, and allow public acknowledgement of the importance of religion in America.

So, ladies and gentlemen, we should all remind ourselves this morning that true tolerance lies not in pretending that we have no differences as Americans, but rather in being kind and respectful to each other in spite of our differences, religious or otherwise, and I hope this hearing can shed light on the current state of religious liberty in the United States both in terms of areas where we are succeeding in embracing the American dream of true religious freedom and in those in which we are failing.

Thank you for being here, and I will yield now to the Ranking Member for an opening statement.

Mr. NADLER. Thank you, Mr. Chairman. I want to begin by thanking you for scheduling this hearing on a topic that is central to our common American values, our first freedom. I am concerned about threats to religious liberty in America, threats from legislatures, from the Supreme Court, from candidates, and from demagogues. Too often, the rights of unpopular minorities are trampled upon by the majority, and when it comes to religion, everyone is unpopular somewhere.

But threats also come from laws not necessarily targeting religion. Nonetheless, writing in *Employment Division v. Smith*, Justice Scalia said, "If prohibiting the exercise of religion is merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." He went on to make the appalling statement that, "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in, but that is an unavoidable consequence of democratic government. Precisely because we are a cosmopolitan Nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid as ap-

plied to the religious objector every regulation of conduct that does not protect an interest of the highest order."

Luxury? That appalling hostility to religious liberty, coming as it did from a Justice who is hailed as an icon of the conservative movement, was truly chilling. Congress responded swiftly with the Religious Freedom Restoration Act or RFRA, legislation that I was privileged to work on when I was first elected to Congress. It united groups as diverse as the American Civil Liberties Union and the National Association of Evangelicals.

The rule it restored, of strict scrutiny, did not provide a blanket exemption for all conscientious objections—the Supreme Court disposed of that approach in the *Estate of Thornton v. Caldor*—but rather it restored the balancing test that had served us so well for three decades. It is by balancing those interests, and forcing government to demonstrate an interest of the highest order before squelching a religious practice, that strikes the right balance.

Although the Supreme Court invalidated RFRA in the Boerne decision in 1997,at least as applied to states—it is still good law as applied to the Federal Government—I and Members from both sides of the aisle responded with the Religious Land Use and Institutionalized Persons Act, which passed in 2000 and remains good law.

But government is not the only threat to religious liberty. There are many in this country who continue to oppose the construction of houses of worship in our communities. We had a particularly ugly incident in my own district, although I am proud to say that the local community, local elected officials, and our courts stood up to the bigots and demagogues who opposed the right of local Muslims to erect a community center.

There are also those who believe that they have the right to deny employment or housing to others based solely on a person's religion. While I think most of us would accept that the ministerial exemption, the existence and scope of which are currently before the Supreme Court, is constitutionally mandated, some employers think they have a right either to refuse to hire someone, or to refuse to give them time off for religious observances, or to refuse to accommodate the wearing of religious articles.

So there are many threats to religious liberty in America today, and I am pleased we will have the opportunity to examine the broad range of those threats today. I thank you, Mr. Chairman. I yield back the balance of my time.

Mr. FRANKS. Without objection, the other Members' opening statements will be made part of the record.

And I want to welcome the witnesses and welcome those that are observing here today with us.

Our first witness is Bishop William Lori, the Bishop of Bridgeport, Connecticut, and the Chair of the U.S. Conference of Catholic Bishops' Committee on Religious Liberty.

Bishop Lori was ordained to the priesthood in 1977. He became Auxiliary Bishop of Washington in 1995, and was installed as the Bishop of Bridgeport in 2001. Bishop Lori is Chairman of the Board of Trustees of Sacred Heart University and past-Chairman of the Board of Trustees of the Catholic University of America.

Our second witness is Reverend Barry Lynn, Executive Director of Americans United for Separation of Church and State. In addition to his work as an activist and lawyer in the civil liberties field, Reverend Lynn is an ordained minister in the United Church of Christ. He appears frequently on television and radio broadcasts to discuss religious liberty issues. He has had essays published in outlets such as USA Today and the Wall Street Journal, and in 2006 authored the book "Piety and Politics: The Right-Wing Assault on Religious Freedom."

Our third and final witness is Colby May, Senior Counsel and Director of the Washington office of the American Center for Law and Justice. With the ACLJ since 1994, Mr. May specializes in Federal litigation, regulatory proceedings, communications and technology, non-profit tax issues, and First Amendment law. He has represented parties and filed friend of the court briefs in several landmark Supreme Court cases. Mr. May also serves as adjunct law professor at Regent University and on the boards of directors of several civic and charitable organizations.

Each of the witnesses' written statements will be entered into the record in its entirety, and I ask that each witness summarize his testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

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

[Witnesses sworn.]

Mr. FRANKS. Thank you. You may take a seat.

I would now like to recognize our first witness, Bishop Lori, for 5 minutes.

Bishop?

TESTIMONY OF WILLIAM C. LORI, BISHOP OF BRIDGEPORT, CT

Bishop LORI. Thank you, Mr. Chairman. On behalf of the United States Conference of Catholic Bishops, the USCCB, allow me to thank you for the inviting me to be with you today to offer testimony on religious liberty.

Religious liberty is not merely one right among others, but enjoys a certain primacy. Pope Benedict XVI recently explained: "It is indeed the first of human rights, not only because it was historically the first to be recognized but also because it touches the constitutive dimension of man, his relation with his Creator." Religious liberty is also first on the list in the Bill of Rights, and is commonly called our "First Freedom."

Religious liberty is also prior to the state itself. It is not merely a privilege that the government grants and so may take away at will. Instead, religious liberty is inherent in our very humanity, hard-wired into each and every one of us by the Creator. This insight is reflected in the laws and traditions of our country from inception. The Declaration of Independence boldly proclaims as a

self-evident truth that our inalienable rights are "endowed by our Creator"—not by the State.

Religious freedom is certainly an individual right, but it also belongs to churches and other religious institutions comprised of citizens who are believers and who seek, not to create a theocracy, but rather to influence their culture from within. An indispensable element of religious freedom is the right of churches "not to be hindered, either by legal measures or by administrative action on the part of government, in the selection, training, appointment, and transferral of their own ministers." We are grateful that the Federal courts, at least to date, have uniformly recognized this protection.

The Church also teaches that these rights of religious freedom are held not just by Catholics. Government has the duty "to assume the safeguard of the religious freedom of *all its citizens* in an effective manner, by just laws or by other appropriate means." The United States stands strongly for the principle that these rights of freedom are also rights of equality, that government should not impose any special civil disadvantages or otherwise discriminate against its citizens based on religion.

Although it may not have always lived up to its principles, our country's unique capacity for self-correction has always provided avenues to return to these principles. Regrettably, now is the time for such self-correction.

In the last few months we have witnessed grave threats to religious liberty. In August, the U.S. Department of Health and Human Services issued regulations to mandate the coverage of contraception, including abortifacients, and sterilization as preventive services in almost all private health insurance plans.

In May, HHS added a new requirement to some of its service agreements that would bar otherwise qualified service providers if conscience prevents them from facilitating abortion and contraception. USAID is increasingly requiring contractors to provide contraception in a range of international relief and development programs.

The Federal Department of Justice has started filing briefs actively attacking DOMA's constitutionality, claiming that supporters of the law could only have been motivated by bigotry. DOJ needlessly attacked the very existence of the ministerial exception before the Supreme Court, in opposition to a vast coalition of religious groups urging its preservation. At the state level, most recently in New York and Illinois, religious liberty protections associated with the redefinition of marriage have fallen far short of what is necessary.

The root causes of these threats are profound, but we can and must treat the symptoms immediately, lest the disease spread so quickly that the patient is overcome before the ultimate cure can be formulated and delivered.

As to the preventive services mandate, I urge the passage of the bipartisan Protect Life Act, Abortion Non-Discrimination Act, and Respect for Rights of Conscience Act. We welcome recent House action on some of these bills.

The illegal conditions that government agencies are placing on religious providers of human services may call for a Congressional

hearing or some other form of investigation to ensure compliance with applicable conscience laws, as well as to identify how these new requirements came to be imposed. Additional statutes may be appropriate to create new protections of conscience or private rights of action. Unfortunately, enforcement of the existing protections now lies principally with the very Federal agencies that may be violating them.

This body should reject the so-called Respect for Marriage Act and continue to defend DOMA in court as long as necessary. Moreover, DOJ's decisions to abandon both DOMA and the ministerial exception seem to warrant congressional inquiry. To the extent that state adoption and foster care services are federally funded, this opens an avenue for protecting the religious liberty of faith-based service providers which should be explored more fully.

Thank you for your attention, and again, for your willingness to give religious freedom the priority it is due.

[The prepared statement of Bishop Lori follows:]

Testimony of
Most Reverend William C. Lori
Bishop of Bridgeport

On behalf of the
United States Conference of Catholic Bishops

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

October 26, 2011

Mr. Chairman and distinguished members of the Subcommittee, allow me to thank you for the invitation and opportunity to be with you today to offer testimony on religious liberty. Let me also express my appreciation to you for calling this hearing on a topic of fundamental importance to our Church and to our Nation.

I am here today representing the United States Conference of Catholic Bishops (USCCB). I serve as Bishop of the Diocese of Bridgeport, and as the newly appointed Chair of the USCCB's Ad Hoc Committee for Religious Liberty. I will summarize my remarks and ask that my full written testimony be entered into the record.

I hope to address three topics today. First, I would like to offer a few brief reflections on the Catholic vision of religious freedom for all, as rooted in the inherent dignity of every human person, and this vision's deep resonance with the American experiment. Second, I would like to identify certain threats to religious liberty that have emerged with particular urgency in America today. And third, I would urge you to action in support of particular legislative measures that would secure religious liberty against these threats.

I.

Religious liberty is not merely one right among others, but enjoys a certain primacy. As the Holy Father, Pope Benedict XVI recently explained: "It is indeed the first of human rights, not only because it was historically the first to be recognized but also because it touches the constitutive dimension of man, his relation with his Creator." (Pope Benedict XVI, *Address to Diplomatic Corps, 10 Jan. 2011.*) The late Pope John Paul II taught that "the most fundamental human freedom [is] that of practicing one's faith openly, which for human beings is their reason for living." (Pope John Paul II, *Address to Diplomatic Corps, 13 Jan. 1996*, No. 9.) Not coincidentally, religious liberty is first on the list in the Bill of Rights, the charter of our Nation's most cherished and fundamental freedoms. The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." It is commonly, and with justice, called our "First Freedom."

Religious liberty is also prior to the state itself. It is not merely a privilege that the government grants us and so may take away at will. Instead, religious liberty is inherent in our very humanity, hard-wired into each and every one of us by our Creator. Thus government has a perennial obligation to acknowledge and protect religious liberty as fundamental, no matter the moral and political trends of the moment. This insight as well is reflected in the laws and traditions of our

country from its very inception. The Declaration of Independence boldly proclaimed as a self-evident truth that our inalienable rights are "endowed by our Creator"—not by the State.

Religious freedom is most commonly understood as an individual right, and it certainly is that. Religious freedom proceeds from the dignity of each person, and so protects each person individually. "[T]he exercise of religion, of its very nature, consists before all else in those internal, voluntary and free acts whereby man sets the course of his life directly toward God" (Second Vatican Council, *Dignitatis Humanae*, No. 3). Therefore individuals are "not to be forced to act in manner contrary to [their] conscience," nor "restrained from acting in accordance with [their] conscience." (Ibid.) Congress has shown special vigilance in protecting these individual rights of conscience, for example, in the form of the Religious Freedom Restoration Act (RFRA), which forbids the federal government from imposing any "substantial burdens" on religious exercise absent the most compelling reasons.

But religious freedom also belongs to churches and other religious institutions, comprised of citizens who are believers and who seek, not to create a theocracy, but rather to influence their culture from within. The distinction between Church and State, between God and Caesar, remains "fundamental to Christianity" (Pope Benedict XVI, *Deus Caritas Est*, No. 28). We look to the State not to impose religion but to guarantee religious freedom, and to promote harmony among followers of different religions. The Church has "a proper independence and is structured on the basis of her faith as a community the State must recognize" (Ibid.). An indispensable element of this independence is the right of churches "not to be hindered, either by legal measures or by administrative action on the part of government, in the selection, training, appointment, and transferral of their own ministers" (Second Vatican Council, *Dignitatis Humanae*, No. 4). We are grateful that federal courts in the United States—at least to date—have uniformly recognized this core protection under the Religion Clauses of the First Amendment.

Finally, the Church teaches that these rights of religious freedom—prior to all other rights and even to the State, and protecting both individuals and institutions—are held not just by Catholics, but by *all* people, by virtue of their common humanity. Government has the duty "to assume the safeguard of the religious freedom of *all its citizens*, in an effective manner, by just laws and by other appropriate means" (Second Vatican Council, *Dignitatis Humanae*, No. 6 (emphasis added)). Even in societies where one particular religion predominates, it is "imperative that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice" (Ibid.). The United

States stands strongly for the principle that these rights of freedom are also rights of equality—that government should not impose any special civil disadvantages or otherwise discriminate against its citizens based on religion. And although it may not have always lived up to this or other religious freedom principles in practice, our country's unique capacity for self-correction has always provided avenues to repair to these principles that have made it a great nation.

II.

Regrettably, now is the time for such self-correction and repair. In the recent past, the Bishops of the United States have watched with increasing alarm as this great national legacy of religious liberty, so profoundly in harmony with our own teachings, has been subject to ever more frequent assault and ever more rapid erosion.

As I mentioned previously, I am the Chair of the USCCB's new Ad Hoc Committee for Religious Liberty, which was instituted precisely to help resist these assaults and reverse this erosion. The Bishops of the United States decided in principle to institute a committee like this in June of this year, based on developments over the months and years preceding that date. That I am already appointed as Chair represents action at near light-speed in Church time, and attests to the urgency of the matter from the Bishops' perspective.

Although the Bishops' decision was based on facts arising before June, I am here today to call to your attention grave threats to religious liberty that have emerged even since June—grim validations of the Bishops' recognition of the need for urgent and concerted action in this area. I focus on these because most of them arise under federal law, and so may well be the subject of corrective action by Congress.

- In August, the U.S. Department of Health and Human Services (HHS) issued regulations to mandate the coverage of contraception (including abortifacients) and sterilization as "preventive services" in almost all private health insurance plans. There is an exception for certain religious employers; but to borrow from Sr. Carol Keehan of the Catholic Health Association, it is so incredibly narrow that it would cover only the "parish housekeeper." And the exception does nothing to protect insurers or individuals with religious or moral objections to the mandate. The "preventive services" mandate is but the first instance of conscience problems arising from the Patient Protection and Affordable Care Act

enacted in March 2010 – an act whose goal of greater access to health care the Bishops have long supported, but that we had persistently warned during the legislative process did not include sufficient protections for rights of conscience.

- In May, HHS added a new requirement to its cooperative agreements and government contracts for services to victims of human trafficking and to refugees who are unaccompanied minors, so that otherwise highly qualified service providers, such as USCCB's Migration and Refugee Services (MRS), will be barred from participation in the program because they cannot in conscience provide the "full range" of reproductive services—namely, abortion and contraception. This requirement is exactly what the American Civil Liberties Union (ACLU) has urged HHS to adopt in a lawsuit challenging the constitutionality of MRS's longstanding contract with HHS to serve victims of human trafficking. Ironically, ACLU has attacked the Church's exemplary service to these victims as a violation of religious liberty. Already, HHS has taken its major program for serving trafficking victims away from MRS and transferred it to several smaller organizations that frankly may not be equipped to assume this burden.

- The State Department's U.S. Agency for International Development (USAID) is increasingly requiring contractors, such as Catholic Relief Services (CRS), to provide comprehensive HIV prevention activities (including condom distribution), as well as full integration of its programs with reproductive health activities (including provision of artificial contraception) in a range of international relief and development programs. Under this new requirement, of course, some of the most effective providers helping to prevent and treat AIDS in Africa and other developing nations will be excluded.

- The federal Department of Justice (DoJ) has ratcheted up its attack on the Defense of Marriage Act (DOMA) by mischaracterizing it as an act of bigotry. As you may know, in March, DoJ stopped defending DOMA against constitutional challenges, and the Conference spoke out against that decision. But in July, the Department started filing briefs actively attacking DOMA's constitutionality, claiming that supporters of the law could only have been motivated by bias and prejudice. If the label of "bigot" sticks to our Church and many other churches—especially in court, under the Constitution—because of their teaching on marriage, the result will be church-state conflicts for many years to come.

- DoJ has also undermined religious liberty in the critically important "ministerial exception" case now pending before the Supreme Court, *Hosanna Tabor v. EEOC*. DoJ could have taken the position that the "ministerial exception," though generally providing strong protection for the right of religious groups to choose their ministers without government interference, didn't apply in the case before the court. This would be consistent with the uniform judgment of the federal Courts of Appeals for decades, as well the DoJ itself until now. Instead, DoJ needlessly attacked the very existence of the exception, in opposition to a vast coalition of religious groups urging its preservation through their *amicus curiae* briefs.

- At the state level, religious liberty protections associated with the redefinition of marriage have fallen far short of what is necessary. In New York, county clerks face legal action for refusing to participate in same-sex unions, and gay rights advocates boast how little religious freedom protection individuals and groups will enjoy under the new law. In Illinois, Catholic Charities has been driven out of the adoption and foster care business, because it recognizes the unique value of man-woman marriage for the well-being of children.

III.

These are serious threats to religious liberty, and as I noted previously they represent only the most recent instances in a broader trend of erosion of religious liberty in the United States. The ultimate root causes of these threats are profound, and lie beyond the scope of this hearing or even this august body to fix—they are fundamentally philosophical and cultural problems that the bishops, and other participants in civil society, must address apart from government action. But we can—and must—also treat the symptoms immediately, lest the disease spread so quickly that the patient is overcome before the ultimate cure can be formulated and delivered.

As to the "preventive services" mandate, and related problems under the health care reform law, there are three important bipartisan bills currently in the Congress: the Protect Life Act (H.R. 358), the Abortion Non-Discrimination Act (H.R. 361), and the Respect for Rights of Conscience Act (H.R. 1179). All three go a long way toward guaranteeing religious liberty and freedom of conscience for religious employers, health insurers, and health care providers. United with my brother bishops, and in the name of religious liberty, I urge these three bills be swiftly passed by Congress so they may be signed into law. We welcome the fact that H.R. 358 was recently approved by the House in a bipartisan vote, and that the

text of H.R. 361 has been included in the House subcommittee draft of the Labor/HHS appropriations bill for Fiscal Year 2012.

As to the illegal conditions that HHS and USAID are placing on religious providers of human services, this may call for a Congressional hearing or other form of investigation to ensure compliance with the applicable conscience laws, as well as to identify how these new requirements came to be imposed. Additional statutes may be appropriate, possibly to create new conscience protections, but more likely to create private rights of action for those whose rights under the existing protections have been violated. Unfortunately, the authority to enforce the applicable conscience protections now lies principally with the very federal agencies that may be violating the protections.

As to the attack on DOMA, this body should resist legislative efforts to repeal the law, including the Respect for Marriage Act (H.R. 1116). We also applaud the decision of the House to take up the defense of DOMA in court after DoJ abandoned it, and we urge you to sustain that effort for as long as necessary to obtain definitive confirmation of its constitutionality. Moreover, DoJ's decisions to abandon both DOMA and the "ministerial exception" seem to warrant congressional inquiry.

The religious freedom threats to marriage at the state level may fall beyond the scope of authority of Congress to control—except to the extent that state adoption and foster care services are federally funded. We believe this avenue for protecting the religious liberty of faith-based service providers should be explored more fully.

Thank you for your attention, and again, for your willingness to give religious freedom the priority it is due.

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Mr. FRANKS. Thank you, Bishop Lori.

Reverend Lynn, thank you for being with us this afternoon. You are recognized for 5 minutes, sir.

TESTIMONY OF BARRY W. LYNN, REVEREND, AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE

Reverend LYNN. Thank you very much, Mr. Chairman.

Mr. FRANKS. Reverend Lynn, would you make sure that microphone is on?

Reverend LYNN. How is this?

Mr. FRANKS. That sounds good.

Reverend LYNN. All right. Thank you, and thank you for holding this hearing.

We have a dizzying level of religious freedom in this country, and even more so if you happen to be a member of a well-established or majority faith in America. There is no war against Christianity being waged by elected officials, or even by Federal courts.

The real threat to religious liberty comes from those who seek special government blessings for those in favored faiths and conversely the treatment of members of other faiths as second-class citizens.

When real religious freedom is denied, we can look very ugly in America. When Muslims in Murfreesboro, Tennessee tried to erect a mosque and a lawsuit backed by the lieutenant governor claimed that Islam is not a true religion, we can look ugly.

When members of the community in Katy, Texas protested the construction of a mosque by staging pig races next to the property, we can look ugly.

When the Park 51 Muslim Community Center wants to erect a building on its own land and the American Center for Law and Justice sues to prevent them from doing so, we can look ugly and even hypocritical.

When religious freedom is delayed, we can look like a very coarse America. It took 10 years and a lawsuit from Americans United before the widow of U.S. Army Sergeant Patrick Stewart, killed in Afghanistan, was permitted to put a pentacle, a Wiccan sacred symbol, on her husband's memorial marker in a Nevada veterans cemetery. The VA in previous Administration refused to add that symbol to the 38 other emblems of honor because a top official there had heard Commander-in-Chief George W. Bush say on television that he didn't think Wicca was a real religion.

And how coarse that in Johnson County, Tennessee, when an atheist seeking merely to put up an historical display about the Constitution's guarantee of religious freedom in an open forum area of the courthouse is denied access and a commissioner says, "This is a good Christian community that welcomes people who move here. But if you want to attack God, you should leave." I wonder if that official would tell a firefighter putting out a blaze in his house to leave if he learned that that brave rescuer happened to be a freethinker.

When religious practice is compelled, we can look like a theocratic America. Bay Minette, Alabama offers certain offenders the so-called "option" to avoid jail or fines by going to church every week for a year.

Recently, Americans United reached a settlement with the heavily government subsidized Central Union Mission in the District of Columbia to end their practice of not allowing those in need to eat

lunch or have a bed for the night unless they agreed to attend a worship service.

When government supports religious preferences in hiring with tax dollars through the faith-based initiative, and two Administrations allow religious groups to give special preference to people of their own religion, we can look like a discriminatory America.

World Vision is one of the largest recipients of grants from the U.S. Agency for International Development. Government grants amount to about a quarter of that organization's total U.S. budget. Yet this organization will hire only those who are Trinitarian Christians even in predominantly Muslim or Hindu countries, arguing "that we're very clear from the beginning about hiring Christians. It's not a surprise, so it's not discrimination." Collateral to that, there are over 200 special exceptions and exemptions in Federal law for religious groups today. Now some groups, as we've heard, are seeking even more exemptions, ones that can cost vulnerable people good health care.

When certain expansive exemptions are passed, we can look like an America of special privilege for the powerfully connected, and sometimes these exemptions can make America look dangerous. A bill that just passed this House would actually permit medical workers to refuse to serve a patient even in a medical emergency. Under this proposal, a woman who needs an abortion to save her life may simply be left to die if the medical facility has a staff full of people who disapprove of abortion.

Let us not be fooled. You may hear some holy horror stories with, at most, a scintilla of truth. You may hear claims of rights being violated that do not really exist, with remedies proposed that are merely an excuse for obtaining special treatment. You will hear Biblical tenets used to justify legislation where the real basis for decision-making must not be holy scripture, as anybody understands it, but the core constitutional values shared by all of us.

In conclusion, there is an actual movement of several organizations in America to try to ban the use of sharia law in the courts. Sharia law is not the threat. The actual threat is that there are serious efforts afoot to try to twist the purpose of our own Constitution, and in this twist we will defy George Washington's promise that we would "give to bigotry no sanction." We would degrade James Madison's claim that in this country we cherish, in his words, "the mutual respect and good will among citizens of every religious denomination." That would not only make America look exclusionary, it would make it so, and that would be the ultimate tragedy for religious freedom in our country.

Thank you.

[The prepared statement of Reverend Lynn follows:]

Testimony of the

Rev. Barry W. Lynn

Executive Director

Americans United For Separation of Church and State

Submitted to

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

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

"The State of Religious Liberty in the United States"

October 26, 2011

Mr. Chairman, Ranking Member Nadler, and Members of the Subcommittee, thank you for this opportunity to present testimony on behalf of Americans United for Separation of Church and State (Americans United) on the "State of Religious Liberty in the United States."

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

Religious freedom issues are of particular importance to me personally, as I am both an ordained minister in the United Church of Christ and an attorney. I recognize that the United States is one of the most religiously diverse countries in the world and our constitution grants us some of the strongest religious liberty protections in the world, yet we still face threats to religious liberty in our country.

But, with all due respect to my colleagues on this panel, the real and imminent threats we face today are not of the sort they espouse. Indeed, what they see as threats can easily be characterized as attempts to obtain sweeping exemptions that harm the rights of innocent third parties; attempts to seek privileges reserved for religious entities even though they are engaged in commerce, acting as a traditional business, or serving as a government provider of services; and attempts to obtain religious exemptions even when such exemptions could deny others their fundamental rights, health, or even life. And, the religious freedom issues we see in public schools today are not that students are prevented from praying or practicing religion, but that there are strong institutional pressures that force them to participate in religious activities.

What I, and Americans United, see as the most imminent and egregious threats to religious freedom today are those that are suffered by members of minority faiths and non-believers in this country. It is these Americans who are being denied the basic rights that many of us practicing a majority faith take for granted every day. Of course, the religious majority in one community in this country may be the religious minority in another, making it even more important for all faiths to fight for the rights of the less popular religions in our nation.

In my day-to-day work, I see that adherents to less popular faiths and non-believers are increasingly being denied the right to gather and to engage in personal religious expression granted to other faiths. They face religious coercion and overt religious employment discrimination.

The Right To Worship and Congregate

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.[1] They also face community—and sometimes national—protests, intimidation, and threats of violence.

For example, when a Muslim congregation in Murfreesboro, TN sought to build a mosque, their signs were vandalized and destroyed,[2] their construction equipment was torched,[3] and their worship services in other locations were stopped by bomb threats.[4] Even though the local zoning board approved the project, members of the community sued to stop construction, arguing that Islam is not a true religion[5]—a claim backed by the Tennessee Lt. Governor.[6] The intimidation influenced construction companies, which became too afraid to even work on the project, delaying the construction.[7] And, the threats led to new costs for expensive security measures, such as cameras.[8]

In New York City, the proposed Park 51 Muslim community center prompted national backlash. The project had satisfied all zoning requirements and was legally authorized to move forward with construction. Nonetheless, groups that usually argue that zoning and historic landmark laws may not be used to stop the building of religious structures[9]

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[1] This is not to say that minority faiths don't also suffer from such roadblocks. In fact, The Justice Department has launched probes under the Religious Land Use and Institutionalized Persons Act (RLUIPA)—a law supported by Americans United—into 16 contested mosque sites in the U.S. since May 2010. Mike Esterl, "Georgia Mosque Gets Approval From Lilburn City Council," *Wall Street Journal*, Aug. 17, 2011. Retrieved Oct. 21, 2011, from <http://online.wsj.com/article/SB10001424053111903480904576513171323195258.html>.

[2] Jamie Gumbrecht, "Embattled Tennessee mosque to move forward with construction," *CNN*, Sept. 2, 2011. Retrieved Oct. 21, 2011, from <http://religion.blogs.cnn.com/2011/09/02/embattled-tennessee-mosque-to-move-forward-with-construction/>.

[3] *Id.*

[4] Scott Broden, "Murfreesboro mosque members celebrate groundbreaking," *Tennessean*, Sept. 29, 2011. Retrieved Oct. 21, 2011, from <http://www.tennessean.com/article/20110929/NEWS06/309290061/Murfreesboro-mosque-members-celebrate-groundbreaking>.

[5] *Id.*

[6] Elisabeth Kauffman, "In Murfreesboro, Tenn.: Church 'Yes,' Mosque 'No'," *Time*, Aug. 19, 2010. Retrieved Oct. 21, 2011, from <http://www.time.com/time/nation/article/0,8599,2011847,00.html>.

[7] *Id.*

[8] Scott Broden, "Murfreesboro mosque members celebrate groundbreaking," *supra* note 4.

[9] The ACLJ has filed numerous cases in favor of religious organizations, arguing that zoning and historical landmark laws do not trump the rights of religious organizations to construct buildings. Indeed, a memorandum on its website explains that "RLUIPA is a law designed to protect religious assemblies and institutions from zoning and historic landmark laws that substantially interfere with the assemblies' and institutions' religious exercise." "ACLJ Memorandum: An Overview of the Religious Land Use and Institutionalized Persons Act ('RLUIPA')-2004," *ACLJ Website*, Oct. 8, 2004. Retrieved Oct. 24, 2011, from <http://aclj.org/us-constitution/aclj-memorandum-an-overview-of-the-religious-land-use-and-institutionalized-persons-act-rluipa-2004>. And, in an amicus brief filed in *Barr v. City of Sinton*, the ACLJ argued that "zoning, nuisance, and historic preservation laws directly affect religious organizations more than most other kinds of laws; consequently, . . . [the] promise of restored religious liberty would become largely meaningless . . . if localities could substantially burden their religious free exercise through the application of these laws without having to undergo strict scrutiny." Brief for The American Center for

actually filed suit under those very laws to stop the construction of the community center.[10] Indeed, the American Center for Law and Justice (ACLJ) argued that the city should have granted the property landmark status, which would have prevented the construction of the community center.[11] Of course, attorneys on the case also admitted that they would not be challenging the building project if a church were to be built in that spot instead.[12]

These challenges to building projects are not isolated incidents. Those protesting the construction of a mosque in Brooklyn, New York, threatened to bomb the mosque, saying "[i]t's hot today, but things are going to get a lot hotter for people in this illegal structure."[13] In Katy, Texas, community members voiced their opposition to Muslims building a house of worship by staging pig races on the land next door to the proposed project, hoping to offend congregants because they do not eat pork for religious reasons.[14] In Lilburn, Georgia, protesters were honest when they tried to block construction of a mosque. One admitted: "I just don't like Muslims" and "I don't want them taking over our neighborhood."[15]

Mosques that have been serving their communities for years have also faced vandalism and actual violence. In Seattle, Washington, for example, a man attempted to set fire to several cars located in the mosque's parking lot and then fired a gun at worshipers as they were leaving prayer services.[16] As part of a pattern of harassment against the Dar El-Eman Islamic Center in Arlington, Texas, an individual set fire to the center's

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Law and Justice, et al. as Amici Curiae Supporting Petitioners at 13, *Barr v. City of Sinton*, 295 S.W.3d 287 (2009) (No. 06-0074).

[10] *Brown v. N.Y.C. Landmarks Pres. Comm'n*, No. 110334 (N.Y. Sup. Ct. July 7, 2011).

[11] *Id.*

[12] ACLJ attorney Brett Joshpe admitted that he would not be pursuing the case if a Christian church were being built on the same site: "Would I be personally involved in this matter if this were a church? No." Chris Moody, "Legal Advocacy Group Files Suit to Keep Muslim Community Center Away from Ground Zero," *The Daily Caller*, Aug. 6, 2010. Retrieved Oct. 24, 2011, from <http://dailycaller.com/2010/08/06/legal-advocacy-group-files-suit-to-keep-muslim-community-center-away-from-ground-zero-region/>.

[13] Thomas Tracy, "'What kind of America?' Hate-filled rally to stop mosque," *Brooklyn Paper*, June 28, 2010. Retrieved Oct. 24, 2011, from <http://www.brooklynpaper.com/stories/33/27/bn_tt_baypeoplemosquerally_2010_07_02_bk.html>.

[14] Cindy Horswell, "Not Ground Zero, but Katy mosque also stirs passions," *Houston Chronicle*, Sept. 7, 2010. Retrieved Oct. 21, 2011, from <http://www.chron.com/life/houston-belief/article/Not-Ground-Zero-but-Katy-mosque-also-stirs-1717134.php>.

[15] "Georgia Mosque Opponent: 'I Don't Like Muslims,'" *Council on American-Islamic Relations*, Oct. 27, 2009. Retrieved Oct. 24, 2011, from <http://sun.cair.com/ArticleDetails.aspx?mid1=676&&ArticleID=26112&&name=n&&currPage=1>.

[16] Florangela Davila, "Typical Muslims With Jobs and Families Now Bear Burden of Suspicion," *Seattle Times*, Sept. 11, 2002. Retrieved Oct. 24, 2011, from <http://seattletimes.nwsource.com/news/nation-world/sept11anniversary/oneyearlater/suspicion.html>.

playground.[17] In Columbia, Tennessee, three men spray painted swastikas and the term "white power" on the Islamic Center of Columbia before firebombing the mosque.[18]

Members of certain faiths still face community intimidation, vandalism, and threats each day in this country. It is hard to fathom that this type of discrimination against religious minorities still takes place today. These examples demonstrate real threats to religious liberty and it is incidents like those above that this panel should be trying to alleviate.

The Right to Private Religious Expression

In America today, adherents to minority religions are still often denied the basic privileges to express and identify with their religion that are granted to more popular and common religions.

Take, for example, U.S. Army Sgt. Patrick Stewart, who was killed while fighting in Afghanistan.[19] He was awarded a Purple Heart and a Bronze Star, but the government refused to grant him the right to display his religious symbol on his gravestone at the Veterans cemetery in which he was buried.[20] At the time, the government recognized 38 other religious symbols, but it took 10 years and a federal lawsuit filed by Americans United to force the U.S. government to recognize Wicca,[21] which has approximately 750,000 adherents in the U.S., as a religion deserving a symbol of its own.[22] Perhaps it is no surprise considering Congressmen have tried to ban Wicca worship on military bases[23] and then-President George W. Bush once claimed that Wicca wasn't really a religion.[24]

Sgt. Stewart's grave is purely personal to him and the symbol he chose to display on it has a profound impact upon him and his family. The symbol does not convey a message on behalf of the military or other soldiers (except to the extent it demonstrates their respect for religious freedom). Yet, the government—for 10 years—refused to see his symbol as being equal to the 38 other religions it deemed worthy of recognition.

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[17] "Texan guilty in mosque playground fire," *United Press International*, Feb. 24, 2011. Retrieved Oct. 24, 2011, from <http://www.upi.com/Top_News/US/2011/02/24/Texan-guilty-in-mosque-playground-fire/UPI-11361298534817/>.

[18] Mike Scarcella, "Tennessee Man Sentenced to 14 Years for Mosque Fire," *Legal Times*, Nov. 24, 2009. Retrieved Oct. 24, 2011, from <http://legaltimes.typepad.com/blt/2009/11/tennessee-man-sentenced-to-14-years-for-mosque-fire.html>.

[19] Alan Cooperman, "Fallen Soldier Gets a Bronze Star but No Pagan Star," *Washington Post*, July 4, 2006. Retrieved Oct. 21, 2011, from <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/03/AR2006070300968.html>.

[20] *Id.*

[21] *Id.*

[22] "How Many Wiccans Are There?," *ReligiousTolerance.org*, 2008. Retrieved Oct. 24, 2011, from <http://www.religioustolerance.org/wic_nbr3.htm>.

[23] Clarence Page, "Bob Barr Isn't Bewitched By Military Wiccans," *Chicago Tribune*, June 16, 1999. Retrieved Oct. 24, 2011, from <http://articles.chicagotribune.com/1999-06-16/news/9906160031_1_hood-open-circle-christian-coalition-new-age-earth-worship>.

[24] Alan Cooperman, "Administration Yields on Wiccan Symbol," *Washington Post*, Apr. 24, 2007. Retrieved Oct. 24, 2011, from <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/23/AR2007042302073.html>.

Sgt. Stewart is not the only American whose private religious speech has been treated differently than that of adherents to more popular religions. In Johnson, County, Tennessee, the County Commission created a "public forum" in the Courthouse lobby for displays relating to the development of American law.[25] A display featuring the Ten Commandments, quotations from historical legal sources, and Biblical verses was then placed in the forum, along with a pamphlet titled "Johnson County Historical Display," which contains "essays from local preachers and the statement 'the United States of America was founded on Christian principles.'"[26] But the Commission refused to allow Ralph Stewart to post his display in the forum.[27] It rejected his proposed display, which documented the historical roots of church-state separation, even though it features quotations from many of the same historical legal sources as does the Ten Commandments display.[28] At the meeting when the decision was made to deny the display, Planning Commissioner Mike Tavalario said: "This is a good Christian community that welcomes people who move here. But if you want to attack God, you should leave."[29]

Americans United filed a case against the County Commission on behalf of Mr. Stewart and the litigation is still pending. But, it again demonstrates that often, the government creates a forum for expression of religious expression it supports, but closes it to those of other religious beliefs.[30]

Compulsory Worship

Governments and communities around the country engage in tactics that make individuals feel compelled to engage in religious worship services even if they don't coincide with their religious beliefs. Government-compelled religion is often targeted at the most vulnerable in our society, such as those in the criminal justice system or in need of government social services. Compelled religion strikes at the core of religious freedom—no person should be coerced by the government into worshipping in any manner, whether that worship coincides with his or her religious beliefs or not.

Nonetheless, the City of Bay Minette, Alabama has adopted "Operation Restore Our Community," which allows misdemeanor offenders to avoid jail and fines if—and only

[25] Travis Loller, "Man Sues County over 10 Commandments Display in Johnson County," *Johnson City Press*, Jan. 14, 2011. Retrieved Oct. 24, 2011, from <http://www.johnsoncitypress.com/News/article.php?id=85391>.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Associated Press, "Man Sues Tenn. County Over Ten Commandments Display," *Fox News*, Jan. 13, 2011. Retrieved Oct. 24, 2011, from <http://www.foxnews.com/us/2011/01/13/man-sues-tenn-county-commandments-display/>.

if—they attend church services once a week for one year.[31] Participants will have to submit a signed statement proving attendance at church and answer questions about the services.[32] Of course, asking a person to choose between incarceration or church attendance is no choice at all. This program not only unconstitutionally coerces criminal defendants into attending religious services; it also endorses religion as the preferred method of rehabilitation.[33]

A case in which Americans United recently reached a settlement involved the District of Columbia's plan to provide $12 million dollars worth of cash and property to the Central Union Rescue Mission. The Mission provides food and shelter to the homeless in the District, but conditions those services upon attendance at Christian religious services. In order to stay overnight, guests must attend nightly services and, in order to stay for lunch, guests must attend morning services.[34] Indeed, all the social services provided at the Mission – including overnight shelter, meals, groceries, and counseling – require participation in religious activity.[35] Rather than provide services open to everyone—believers of all faiths and non-believers—the government had planned to support services that required individuals to attend Christian services. The government had unconstitutionally put its stamp of approval and its financial backing on services that required participation and conversion to Christianity.

These individuals seeking help at the shelter are forced to choose between food and shelter or religious services. The government has no place in coercing its citizens into such situations and government funding of such programs demonstrates a real and imminent threat to religious liberty.

Unfortunately, sometimes when the government steps up to protect our citizens from coercion, the community steps in to further ostracize or compel the individuals to comport with the majority religion. At Bastrop High School in Louisiana, the principal, in accordance with a student request and Constitutional mandates, replaced the graduation ceremony prayer with a moment of silence.[36] Rather than respect the religious freedom rights of the atheist student who requested that the prayer be removed or respect the rule of law, the student chosen to lead the moment of silence instead led the entire

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[31] Kelli Dugan, "Jail or church? Some Alabama offenders will get to choose," *Reuters*, Sept. 23, 2011. Retrieved Oct. 21, 2011, from <http://www.reuters.com/article/2011/09/23/us-alabama-crime-church-idUSTRE78M7FF20110923>.

[32] Connie Bagget, "Alabama court's church or jail sentencing option draws ACLU ire, national attention," *Mobile Press-Register*, Sept. 23, 2011. Retrieved Oct. 21, 2011, from <http://blog.al.com/live/2011/09/bay_minette_alternative_senten.html>.

[33] *Lee v. Wasserman*, 505 U.S. 577 (1992); *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068 (2d Cir. 1997), *judgment reinstated*, 173 F.3d 120 (2d Cir. 1999); *Everson v. Bd of Educ.* 330 U.S. 1 (1947).

[34] Complaint at 8-9, *Chane v. D.C.*, No. 1:08 cv 01604 (D.D.C. September 18, 2008).

[35] Complaint at 12, *Chane v. D.C.*, No. 1:08 cv 01604 (D.D.C. September 18, 2008).

[36] Mark Rainwater, "Student challenges prayer at Bastrop graduation," *Bastrop Daily Enterprise*, May 18, 2011. Retrieved Oct. 24, 2011, from <http://www.bastropenterprise.com/features/x2132687894/Student-challenges-prayer-at-Bastrop-graduation>.

audience and her fellow classmates in a recitation of the Lord's Prayer.[37] The student who led the prayer was not punished for violating the rules of the ceremony, infringing on the rights of other students, or disrespecting her fellow classmates. Instead, it was the student who held beliefs inconsistent with the majority who was punished: he was effectively forced to "participate" in a group prayer that he did not expect to hear when he entered his graduation ceremony.

After the graduation, Americans United joined other groups that sent a letter to the school, criticizing the fact that during the prayer, "school officials sat idly by" and "no apology has been delivered to the community by Bastrop High School officials or the Board of Trustees, for either past or recent events."[38]

Compulsory religion occurs at the hands of the government and sometimes irresponsibility of government promotes religious intolerance. It is true that there may not be a remedy for every act of religious coercion, but that does not mean the government should not attempt to preserve the rights of all in their community, regardless of faith of belief.

No Religious Test for Office

Surprisingly, persons of certain faiths and non-believers still face religious tests for office. The U.S. Constitution clearly states that there may be no religious test for public office.[39] Yet today, the rhetoric in the Presidential election declares some candidates as belonging to cults,[40] and designates persons of certain religions as unfit for cabinet positions.[41] It is no surprise, therefore, that local councils have also attempted to enforce religious tests on their citizens.

In Asheville, North Carolina, citizens fought to prevent a non-theist and member of the local Unitarian church, Cecil Bothwell, from being sworn in as a member of the City Council.[42] Bothwell "has called himself an atheist and post-theist, saying he believes in

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[37] Sandhya Bathija, "Bastrop Bullies: Damon's Classmates Show No Class At High School Graduation," *The Wall of Separation*, May 23, 2011. Retrieved Oct. 24, 2011, from <http://blog.au.org/2011/05/23/bastrop-bullies-damon%E2%80%99s-classmates-show-no-class-at-high-school-graduation/>.

[38] Press Release, "To Officials of the Bastrop High School and the Board Members of the Morehouse Parish Schools Regarding Prayer at Graduation Ceremonies," *ACLU Website*, May 26, 2011. Retrieved on Oct. 24, 2011 from < http://www.au.org/media/press-releases/archives/2011/05/bastrop.pdf>.

[39] U.S. CONST. art. XI, para. 3.

[40] Michael A. Memoli, "Vegas Debate: Perry defends pastor who called Mormonism a cult," *Los Angeles Times*, Oct. 18, 2011. Retrieved Oct. 24, 2011, from <http://articles.latimes.com/2011/oct/18/news/la-pn-perry-romney-mormon-20111018>.

[41] Justin Elliot, "GOP candidate: No Muslims in my Administration," *Salon*, Mar. 28, 2011. Retrieved Oct. 21, 2011, from <http://www.salon.com/2011/03/28/herman_cain_no_muslims/>.; Huma Khan and Amy Bingham, "GOP Debate: Newt Gingrich Comparison of Muslims and Nazis Sparks Outrage," *ABC News*, June 14, 2011. Retrieved Oct. 21, 2011, from <http://abcnews.go.com/Politics/gop-debate-newt-gingrichs-comparison-muslims-nazis-sparks/story?id=13838355>.

[42] Associated Press, "In North Carolina, Lawsuit Is Threatened Over Councilman's Lack of Belief in God," *New York Times*, Dec. 12, 2009. Retrieved Oct. 24, 2011, from <http://www.nytimes.com/2009/12/13/us/

the Golden Rule but thinks the question of whether there is a deity is irrelevant."[43] Citizens, believing non-believers should not hold office, relied upon a provision that still exists in the North Carolina State Constitution, which states: "The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God."[44] The fact that the state provision violates the United States Constitution[45] did not dissuade members of the community from trying to prove him unfit for office.

Ultimately, Mr. Bothwell was sworn into office and currently serves on the Council. But, some are still threatening to remove him from office. According to *The New York Times*, "one opponent, H. K. Edgerton, is threatening to file suit against the city to challenge Mr. Bothwell's swearing in. 'My father was a Baptist minister,' Mr. Edgerton said. 'I'm a Christian man. I have problems with people who don't believe in God.'"[46]

In Jacksonville, Florida, the city council subjected a Muslim nominee to the Human Rights Commission to ridicule and a questionnaire not provided to any other nominee.[47] Even after the Council eventually approved of his nomination, one City Council member still stated that he was not sure whether Muslims should be allowed to hold public office.[48]

In January, Governor Chris Christie nominated Sohail Mohammed to serve as a judge on the New Jersey Superior Court.[49] Mr. Mohammed, a Muslim, was considered an outstanding attorney and had recently worked on building trust between the Muslim community and federal law enforcement.[50] Nonetheless, some who fear the threat of Sharia law criticized the nomination.[51] In this case, Governor Christie stood up for religious freedom. Incensed over the accusations, he shot back saying: "It's just unnecessary to be accusing this guy of things just because of his religious background."

13northcarolina.html>.

[43] Joel Burgess, "New City Council members seated; Newman vice mayor," *Citizen-Times*, Dec. 9, 2009. Retrieved Oct. 24, 2011, from <http://www.citizen-times.com/article/20091209/NEWS01/912090328/New-City-Council-members-seated-Newman-vice-mayor>.

[44] N.C. CONST. art. VI, § 8.

[45] *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[46] Associated Press, "In North Carolina, Lawsuit Is Threatened Over Councilman's Lack of Belief in God," *New York Times*, Dec. 12, 2009. Retrieved Oct. 24, 2011, from <http://www.nytimes.com/2009/12/13/us/13northcarolina.html>.

[47] Julie Ingersoll, "Pray to *Your* God For Us: Christians on Jacksonville City Council Stir Anti-Muslim Sentiments," *Religion Dispatches*, May 7, 2010. Retrieved Oct. 21, 2011, from <http://www.religiondispatches.org/archive/2523/pray_to_your_god_for_us:_christians_on_jacksonville_city_council_stir_anti-muslim_sentiments_>.

[48] *Id.*

[49] Associated Press, "Muslim Picked for New Jersey Bench," *New York Times*, Jan. 13, 2011. Retrieved Oct. 24, 2011, from <http://www.nytimes.com/2011/01/14/nyregion/14christie.html?scp=2&sq=Sohail%20Mohammed&st=cse%3E.>.

[50] Lisa Fleisher, "Christie Blasts Critics of New Judge," *Wall Street Journal*, July 27, 2011. Retrieved Oct. 24, 2011, from <http://online.wsj.com/article/SB10001424053111903999904576470680561590162.html>.

[51] Frances Martel, "Christie Defends Appointing Muslim Judge: 'This Sharia Law Business Is Crap'," *Fox Nation*, Aug. 4, 2011. Retrieved Oct. 24, 2011, from <http://nation.foxnews.com/chris-christie/2011/08/04/christie-defends-appointing-muslim-judge-sharia-law-business-crap>.

Mr. Christie added: "I'm happy that he's willing to serve after all this baloney."[52] A specific question on Sharia law allowed Christie to expound further:

> "Sharia Law has nothing to do with this at all, it's crazy!" he cried. "The guy is an American citizen!" He concluded that the "Sharia Law business is just crap… and I'm tried of dealing with the crazies," adding with disgust and frustration that "it's just unnecessary to be accusing this guy of things just because of his religious background."[53]

Federally Funded Religious Discrimination

Another affront to religious freedom in the United States is that qualified individuals can be denied government-funded jobs based on nothing more than their religious beliefs or lack thereof. In accordance with current statutes, executive orders, regulations, and memorandum on the books today, religious organizations can both perform government services with government money and claim an exemption to the general rule that government contractors and grantees hire without regard to religion.

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, national origin, color, religion, and sex.[54] Title VII grants an exemption to religious organizations, however, allowing them to adopt hiring practices that favor fellow adherents to their particular faith.[55] Before the passage of charitable choice, it had been generally accepted that this exemption applies only when the religious organization is using its own funds, because it had not been extended to government-funded positions. Accordingly, the religious organizations that had partnered with the government for generations did not engage in religion-based hiring for positions that were funded with taxpayer money.

In contrast, the Faith-Based Initiative allows religious organizations to take government funds *and* use those funds to discriminate in hiring a qualified individual based on his or her religious beliefs or lack thereof. Because significant, direct government funding of religious organizations is of relatively recent vintage, neither the Supreme Court nor any court of appeals has directly addressed whether the Title VII exemption can constitutionally be interpreted to permit a religious organization to discriminate on the basis of religion for jobs that are funded with government dollars. We agree with the statement made by then-candidate Obama in his Zanesville speech: The federal government should never fund employment discrimination on the basis of religion.[56]

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[52] Lisa Fleisher, "Christie Blasts Critics of New Judge," *supra* note 51.
[53] Frances Martel, "Christie Defends Appointing Muslim Judge: 'This Sharia Law Business Is Crap'," *supra* note 52.
[54] 42 U.S.C. § 2000e-2.
[55] 42 U.S.C. § 2000e-1(g).
[56] On July 1, 2008, in Zanesville, Ohio, President Obama stated that: "If you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion."

Indeed, the government should *never* subsidize discrimination. Unfortunately, the Administration has not taken any steps to restore the decades-old federal ban on employment discrimination in publicly funded programs.

This issue is not just an abstract policy issue. Real people are suffering religious discrimination as a result of the policy. For example, World Relief, which receives about two-thirds of its funding from state and federal governments, claims to have had a longstanding policy of hiring only Christians but admits that such a policy "was never put in writing or enforced until this year."[57] Now, "[n]ew employees at World Relief have to prove they are Christians. They sign a statement of Christian faith and must get a letter of recommendation from their minister before being hired."[58]

Saad Mohammad Ali is an Iraqi refugee who had volunteered for six months at World Relief in Seattle, Washington.[59] A World Relief manager suggested that he apply for a permanent position as an Arabic-speaking caseworker position in the refugee resettlement program.[60] But, a few days after he applied for the job, the same manager called to tell him that he was not eligible for the position because he is a Muslim and not a Christian.[61]

Mohammed Zeitoun, also Muslim, worked for World Relief as an employment counselor, but is now looking for a new job because he refused to affirm the Christian mission of the organization.[62]

World Vision offers other recent examples of discrimination. According to *GlobalPost*, World Vision is "one of the largest recipients of development grants from the U.S. Agency for International Development, the federal government's foreign aid arm."[63] Government grants "amount to about a quarter of the organization's total U.S. budget."[64] Nonetheless, "World Vision hire[s] only candidates who agree with World Vision's Statement of Faith and/or the Apostle's Creed."[65]

Thus, even in Mali, a predominantly Muslim country, World Vision hires non-Christians only when they cannot find a Christian for the position.[66] Bara Kassambara, a non-Christian, therefore, was only eligible for a temporary job. And, Lossi Djarra applied for

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[57] Bob Smietana, "Charity Defends Christian Only Hiring," *Tennessean*, Mar. 31, 2010. Retrieved Oct. 21, 2011, from <http://www.knoxnews.com/news/2010/mar/31/charity-defends-christian-only-hiring/>.
[58] *Id.*
[59] Lornet Turnbull, "World Relief Rejects Job Applicant Over His Faith," *Seattle Times*, Mar. 10, 2010. Retrieved Oct. 21, 2011, from < http://seattletimes.nwsource.com/html/localnews/2011301098_worldrelief10m.html>.
[60] *Id.*
[61] *Id.*
[62] Manya A. Brachear, "Charity's Christian-Only Hiring Policy Draws Fire," *Los Angeles Times*, Apr. 2, 2010. Retrieved Oct. 24, 2011, from <http://articles.latimes.com/2010/apr/02/nation/la-na-world-relief-hiring2-2010apr02>.
[63] Krista J. Kapralos, "Non-Christians Need Not Apply," *GlobalPost*, Jan. 11, 2010. Retrieved Oct. 21, 2011, from <http://www.globalpost.com/dispatch/ngos/100110/world-vision-religion-foreign-aid>.
[64] *Id.*
[65] *Id.*
[66] *Id.*

a job as a driver, but a Protestant man was hired. Djarra said World Vision policy of preferring Christians makes the locals "angry" because "if you're not in their church on Sunday, you won't get the job. People don't have a chance." It is particularly frustrating to locals because "positions with foreign aid agencies are often the most lucrative gigs available."[67]

Fabiano Franz, World Vision's national director for Mali, defended the policy, explaining: "We're very clear from the beginning about hiring Christians. It's not a surprise, so it's not discrimination."[68] But, having a policy of discrimination does not negate its discriminatory effects.

Of course, there are other, earlier examples of religious discrimination with government funds that were likely also spurred on by the atmosphere created by the Faith-Based Initiative's promotion of federally funded religious discrimination. Alan Yorker, for example, was denied a government-funded job because the social service agency to which he applied would not hire a Jewish psychologist, even though he was "one of the top candidates for the position."[69] He was told: "We don't hire people of your faith."[70] And, Alicia Pedreira who, despite receiving excellent job performance reviews, was fired from a government-funded job because her sexual orientation was deemed incompatible with the religious mission of the religious employer.[71]

Government-funded religious discrimination strikes at the heart of the issue before us. How can we sanction the government denying jobs based upon the applicant's religious beliefs? How can we use taxpayer funds for positions we then deny those taxpayers because they hold disfavored religious beliefs?

Distorted Horror Stories

We also urge the Committee to be discerning about the anecdotes it hears today and in the future. We have encountered claims from the religious right in the past that, although based on a kernel of truth, often end up being false or exaggerated.

For example, the original reports out of a school in Massachusetts claimed that "an elementary school allegedly suspended a second-grader, . . . and required the boy to undergo a psychological evaluation after he drew a picture of Jesus Christ on the cross."[72]

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[67] *Id.*
[68] *Id.*
[69] Adam Liptak, "A Right to Bias is Put to the Test," *New York Times*, Oct. 11, 2002. Retrieved Oct. 21, 2011, from < http://www.nytimes.com/2002/10/11/us/a-right-to-bias-is-put-to-the-test.html?pagewanted =all&src=pm>.
[70] *Id.*
[71] Eyal Press, "Faith-Based Furor," *New York Times*, Apr. 1, 2001. Retrieved Oct. 21, 2011, from < http:// www.nytimes.com/2001/04/01/magazine/faith-based-furor.html?pagewanted=all&src=pm>.
[72] David Abel, "Taunton schools rebut report on child's Jesus drawing," *Boston Globe*, Dec. 15, 2009. Retrieved Oct. 24, 2011, from <http://www.boston.com/news/local/breaking_news/2009/12/ by_david_abel_g_6.html>.

After closer examination, it was revealed that the student wasn't suspended and the evaluation was not prompted based upon religion. Instead, the teacher saw the drawing as a "cry for help" because "the student identified himself, rather than Jesus, as the figure on the cross."[73] Following protocol, the teacher alerted the school's principal and staff psychologist.[74]

Upon filing a lawsuit against the Stevens Creek Elementary School in Cupertino, California, the Alliance Defense Fund (ADF) distributed a press release titled: "Declaration of Independence Banned from Classroom."[75] The *San Francisco Chronicle*, however, debunked those claims, explaining: "The Declaration of Independence is not banned from Stevens Creek Elementary School, or any classroom in Cupertino. Copies of the Declaration . . . . hang in the classrooms. It appears in textbooks distributed throughout the district."[76] The reality of the case was that the school had to restrict a teacher's use of supplemental materials because he was evangelizing students with those materials.[77] But rather than report that the materials were being used to evangelize captive students in a public schools setting, the message used then—and still today on the ADL website—is that the school banned the teaching of the Declaration of Independence.

Accordingly, we ask that you greet similar claims with caution.

Religious Exemptions

Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances. But, when faced with stories of members of minority faiths suffering true religious hardships—coercion, intimidation, discrimination— it is difficult to conceive that some claim that the biggest threat to religious freedom is that the religious exemptions already provided them are too narrow, even though expansions of most of these exemptions would create significant burdens on others.

An analysis by *The New York Times* of laws passed between 1989 and 2006 "shows that more than 200 special arrangements, protections or exemptions for religious groups or their adherents were tucked into Congressional legislation, covering topics ranging from pensions to immigration to land use."[78] The analysis also found that "new breaks have

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[73] *Id.*
[74] *Id.*
[75] Declaration of Independence Banned from Classroom, *ADL website*. Retrieved on Oct. 24, 2011 from <http://www.alliancedefensefund.org/Home/ADFContent?cid=3218>.
[76] Opinion, "Cupertino History Lesson," *The San Franscisco Chronicle*, Dec. 8, 2004. Retrieved on Oct. 24, 2011 from <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/12/08/EDGSVA7IJ31.DTL>.
[77] Joe Garofoli, "Battle over God in U.S. History Class," *The San Francisco Chronicle*, Dec. 8, 2004. Revisted Oct. 24, 2011 from <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/12/08/MNGPBA8DPL1.DTL>.
[78] Diana Henriques, "As Exemptions Grow, Religion Outweighs Regulation," *New York Times*, Oct. 8, 2006. Retrieved Oct. 24, 2011, from <http://www.nytimes.com/2006/10/08/business/08religious.html?pagewanted=all>.

also been provided by a host of pivotal court decisions at the state and federal level, and by numerous rule changes in almost every department and agency of the executive branch."[79] Religious organizations, therefore, surely cannot argue that the government is not respecting their needs for accommodations.

Americans United believes that, in a very limited number of instances, religious exemptions are required by the First Amendment. More often, religious exemptions are not constitutionally required, but are adopted for policy reasons. More and more frequently, however, religious exemptions are being drafted so expansively that they violate the Establishment Clause or negatively impact innocent third parties. It is this last category of exemptions that should be rejected.

The more expansive an exemption, the more likely it is to violate the Constitution. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,[80] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."[81] For example, in *Texas Monthly, Inc. v. Bullock*,[82] the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose "substantial burdens on nonbeneficiaries" or they are designed to prevent "potentially serious encroachments on protected religious freedoms."

Broadening a religious exemption for mandated insurance coverage of contraceptives means that more women would be denied quality reproductive healthcare;[83] expanding a conscience clause for medical providers would result in more individuals being denied life saving emergency care;[84] and extending exemptions to bars on LGBT discrimination would increase the number of individuals are forced to suffer violations of their civil rights.

Conclusion

We should all be thankful that we live in a nation with a dizzying level of religious freedom compared to so many other places on the face of the globe. Our country has something like 2000 different identifiable religions and some twenty million humanists, freethinkers and atheists. At our best we work for a common goal of preserving the

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[79] *Id.*
[80] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[81] *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).
[82] 480 U.S. 1, 18 u. 8 (1989).
[83] Comments by Americans United ou Proposed Regulations, Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621 (proposed Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).
[84] Comments by Americans United on Proposed Regulations, Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50274 (proposed Aug. 26, 2008) (to be codified at 45 C.F.R. pt. 48).

constitutional right of conscience for everyone. My friend, former Senator Lowell Weicker, once observed that if "the one true faith" wasn't in existence yet, if it came around, it would find its most fertile ground right here in the United States.

George Washington observed that the then new nation would "give to bigotry no sanction."[85] Indeed, that should be the goal of every witness here and every member of this body. Government—big, small or in-between—works best it does not embrace or repudiate particular faiths or religion in general, but rather is scrupulously neutral on that one area of life where the Constitution gives it no role under any circumstance: theological truth.

[85] George Washington's Response to Moses Seixas, August 21, 1790.

ATTACHMENTS

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September 30, 2011

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Washington, DC 20201

To Whom it May Concern:

We write to submit comments regarding the proposed rule entitled "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act" (hereinafter "Proposed Rule"), which was published in the Federal Register on August 3, 2011. The Administration undoubtedly will receive numerous comments that focus on various aspects of the regulation. Our comments, therefore, will focus solely on refuting assertions that the religious exemption is unconstitutionally narrow and urge the Administration to reject arguments supporting its expansion.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances. Such accommodations, however, must not be applied more broadly than is necessary to protect religious freedom. One danger of granting overly expansive religious exemptions is that they may have a negative impact on innocent third parties.

For example, the Proposed Rule seeks to provide women better healthcare by providing insurance for and thus access to contraceptives. Adoption of the proposed religious exemption would deny some women this access. Expansion of the exemption would further increase the number of women who would be denied access to contraceptives and lessen any connection the exemption has to easing any potential religious burden. Accordingly, the Administration should reject arguments urging expansion of this exemption.

Courts have already upheld two nearly identical religious exemptions against claims that they were unconstitutionally narrow.[1] In both cases, the courts concluded that these exemptions from insurance mandates for contraceptives violate neither the Establishment Clause nor the

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

Free Exercise Clause of the United States Constitution. There is no legal justification, therefore, for claiming that the exemption in the Proposed Rule should be expanded.

To the contrary, more expansive exemptions are actually more likely to violate the Constitution. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,[2] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."[3] For example, in *Texas Monthly, Inc. v. Bullock*,[4] the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose "substantial burdens on nonbeneficiaries" or they are designed to prevent "potentially serious encroachments on protected religious freedoms." Expansion, therefore, is not only unnecessary; it may actually increase the likelihood that the exemption will be found unconstitutional.

The Proposed Religious Exemption

The Affordable Care Act (The Act) requires that group health insurance plans include benefits for preventative care services, including contraceptives. Although not required by the United States Constitution nor the Act, the Proposed Regulation includes an exemption from this mandate for any "religious employer" that:

(1) has the inculcation of religious values as its purpose;

(2) primarily employs persons who share its religious tenets;

(3) primarily serves persons who share its religious tenets; and

(4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.

The Free Exercise Clause Does Not Require Expansion of the Religious Exemption

In accordance with the Free Exercise Clause,[5] religious beliefs do not excuse compliance with valid and neutral laws of general applicability. Such laws are subject only to rational review—the lowest level of scrutiny—and not strict scrutiny.[6] The Proposed Rule, which mandates all group health insurance plans to include coverage for contraceptives, is clearly neutral and generally applicable and would survive rational review.

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[2] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[3] *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).
[4] 480 U.S. 1, 18 n. 8 (1989).
[5] *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).
[6] *Id.; Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Courts deem laws neutral unless they "target religious beliefs" or "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation."[7] The Proposed Rule, on its face, does not single out religious organizations for disfavored treatment, nor does it contain a masked hostility towards religion. To the contrary, the bill mandates insurance coverage with the religiously neutral aim of improving women's health.

The religious exemption, of course, references religion. But, the reference serves to grant religious organizations *preferred* treatment—an exemption. The Supreme Court, in determining whether a law is neutral for purposes of the Free Exercise Clause, "has never prohibited statutory references to religion for the purpose of accommodating religious practice."[8] Such an application of *Smith* would defy common sense and would render all statutes with religious accommodations subject to strict scrutiny. Indeed, "a rule barring religious references in statutes intended to relieve burdens on religious exercise would invalidate a large number of statutes."[9]

The court in *Catholic Charities of the Diocese of Albany v. Serio*[10] examined an exemption that defined "religious employer" in almost identical terms. It explained that the "neutral purpose of the law," which was also to "make contraceptive coverage broadly available to . . . women—is not altered because the Legislature chose to exempt some religious institutions and not others."[11] It continued: "To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions."[12]

The Proposed Rule is also generally applicable: It does not "in a selective manner impose burdens only on conduct motivated by religious belief."[13] The law is not underinclusive in a way that suggests the government targeted one religion for disfavored treatment. And, it cannot be said that "the burden of the [Proposed Rule], in practical terms, falls on [certain religious] adherents but almost no others."[14] As explained above, religious organizations are granted *preferential* treatment, in the form of an exemption. "That the exemption is not broad enough to cover" all organizations affiliated with a religious entity "does not mean that the exemption discriminates" against religion.[15]

Because the law is neutral and generally applicable, the government need only justify the mandate and the narrow scope of the exemption as being rationally related to the government interest. Mandating that group insurance policies cover contraceptives, unquestionably, is

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[7] *Lukumi*, 508 U.S. at 533.
[8] *Catholic Charities of Sacramento*, 85 P.3d at 83.
[9] *Id.* at 84. Included among these statutes that provide a religious exemption for religious organizations is Title VII of the Civil Rights Act, which exempts religious organizations from privately funded employment decisions.
[10] 859 N.E. 2d 459.
[11] *Id.* at 522.
[12] *Id.*
[13] *Lukumi*, 508 U.S. at 543.
[14] *Id.* at 536.
[15] *Catholic Charities of Sacramento County*, 85 P.3d at 84.

rationally related to the legitimate government interest of improving women's health. Indeed, both *Serio* and *Catholic Charities of Sacramento County v. Superior Court* concluded that the state has a "substantial interest in fostering the equality between the sexes, and in providing women with better health care."[16]

Accordingly, the Free Exercise Clause does not require the government to grant religious organizations an exemption from the law, let alone provide one that is even more expansive than what is already proposed. Indeed, "*Smith* is an insuperable obstacle to [a] federal free exercise claim" that the exemption must be expanded.[17]

Neither the Mandate Nor the Exemption is Required by the Establishment Clause

The Proposed Rule Does Not Need to Be Expanded to Avoid the Targeting of Certain Denominations for Unfavorable Treatment

Another argument used by those who seek to expand the exemption is that it unconstitutionally targets certain faiths for unfavorable treatment in violation of the Establishment Clause. In accordance with *Larson v. Valente*,[18] laws that target certain denominations for unfavorable treatment are subject to strict scrutiny.

But again, the Proposed Rule does not single out certain religions. Instead, it imposes the same rule on all religious denominations—it does not pick and choose among them based upon their beliefs or popularity. In short, it does not play favorites with religion. As explained in *Serio*, a governmental "decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause."[19]

A contrary reading of *Larson* would actually run counter to the interests of those seeking expansion of the exemption, as it would "call into question any limitations placed by the [government] on the scope of any religious exemption—and thus would discourage the [government] from creating any such exemptions at all."[20] Accordingly, strict scrutiny is also not triggered under the Establishment Clause and expansion of the exemption is not justified.

The Religious Exemption Does Not Need to Be Expanded to Avoid Excessive Entanglement

Those supporting expansion of the exemption also argue that application of the exemption requires the government to make determinations about an entity's religious character and operations in such a manner so as to cause excessive entanglement in violation of the Establishment Clause.[21] Applying the exemption, however, does not require the government to parse religious doctrine, define religious practices, or interrogate employees about their faith.

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[16] *Serio*, 859 N.E. 2d at 468.
[17] *Id*. at 466.
[18] 456 U.S. 228 (1982).
[19] *Serio*, 859 N.E. 2d at 469.
[20] *Id*. at 526.
[21] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

Indeed, the Courts are frequently required to make determinations about the religious character of an organization to the extent required by this exemption. For example, the Free Exercise Clause requires Courts to determine whether an individual has a "sincerely held religious belief"; the Establishment Clause requires Courts to determine whether activities are secular or religious; and any statute with a religious exemption requires courts to determine whether an entity falls within its parameters. Expansion of the exemption, therefore, is not required to prevent excessive entanglement.

Expansion of the Exemption is Not Required to Prevent Intrusion into Church Autonomy
Proponents of expanding the exemption argue that the mandate interferes with matters of faith, doctrine, and church government. But, the Proposed Rule does nothing to interfere with a religious institution's decisions regarding its theological position on contraceptives or its teachings on the matter.[22] Nor does this Proposed Rule require the government to resolve internal church disputes involving the interpretation of church doctrine and regulations. Even application of the religious exemption does not turn on church policy regarding contraceptives. It instead turns on neutral terms that require no inquiry into the application or interpretation of church doctrines or regulations. Like in *Serio*, church autonomy "is not at issue"[23] when applying the mandate or the exemption. The Proposed Rule "merely regulates one aspect of the relationship between plaintiffs and their employers."[24] Once again, the law does not support expanding the exemption.

Even if the Proposed Rule Were Subject to Strict Scrutiny, Expansion of the Exemption Would Not Be Legally Required

Earlier, these comments discussed why neither the Free Exercise nor the Establishment Clause justifies the application of strict scrutiny to the question of whether the exemption is too narrow.[25] Even if a court were to determine that strict scrutiny applied, however, such scrutiny would still not require that the exemption be expanded.

The connection between a religious employer not subject to the exemption and its employee's ultimate use of that plan to cover contraception is far too attenuated to place a substantial burden on that employer. It is the individual employees who will make the independent private choice whether to avail themselves of prescription contraception as one of the many services under the group insurance plan. The intervening private choice that an employee makes breaks the circuit between the employer and any utilization of contraception, thereby vitiating any "burden" on the employer. In fact, under this Proposed Rule an employer may even formally communicate that it disapproves of the usage of contraceptives, whether to the public or to the

[22] *Catholic Charities of Sacramento County*, 85 P.3d at 77-78.
[23] *Serio*, 859 N.E. 2d at 465.
[24] *Id.*
[25] Proponents of an expanded exemption also argue that substantial burden test of strict scrutiny is justified under the Religious Freedom Restoration Act and the Free Speech Clause. We believe that none of these doctrines trigger strict scrutiny in this instance.

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

If there were a substantial burden, it surely would be overcome by a compelling state interest. As stated above, courts have already concluded that the state's interest in "fostering equality between the sexes, and in providing women with better healthcare" is sufficient to justify the law.[26]

The Policies of the Faith-Based Initiative Do Not Justify Expansion of the Exemption

One of the most troubling arguments is that the exemption should be expanded because entities that seek to use the exemption would have to forgo federal funding provided under the framework of the Faith-Based Initiative. Indeed, organizations should have to forgo federal funding if they refuse to offer health insurance benefits that the government deems important to women's health.

Some have noted that only entities that primarily serve persons of their own faith may utilize the exemption, but only organizations that serve persons regardless of faith may obtain funds under the Faith-Based Initiative. Proponents of expanding the exemption claim that organizations should be allowed to both receive federal funds under the Faith-Based Initiative *and* utilize the exemption in the Proposed Rule.

To the contrary, religious organizations that accept federal funds should have to adhere to the same rules as other organizations that receive federal funds. And, the federally funded workers hired by religious organizations should be extended the same benefits and rights provided to other workers. It defies common sense to think that the government would *loosen* the rules regarding insurance coverage for religious organizations that wish to receive the benefit of public tax dollars. Along with government funds comes certain requirements and when a religious organization accepts taxpayer dollars those rules must continue to apply. Accordingly, organizations that reap the benefits of federal funding should undoubtedly be denied an exemption from the insurance mandate.

Conclusion

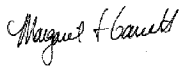
Neither the Free Exercise Clause nor the Establishment Clause requires that the Proposed Regulations provide religious entities an exemption from the insurance coverage mandate. Clearly then the law does not require that the Administration expand the exemption's

[26] *Serio*, 859 N.E. 2d at 468.

definition of "religious employer." Indeed, the more expansive the exemption, the more likely it is to fail constitutional muster. Accordingly, the Administration is under no legal obligation to expand the exemption and it should reject calls for expansion.

Please feel free to contact me with any questions you may have about these comments (202-466-3234). Your attention to this matter is greatly appreciated.

Sincerely,



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September 25, 2008

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Attention: Brenda Destro
Hubert Humphrey Building
200 Independence Avenue, SW
Room 728E
Washington, D.C. 20201

Re: Comments on the "Provider Conscience Regulation"

Dear Ms. Destro:

Americans United for Separation of Church and State submits these comments on the Proposed Rule entitled "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law" (Proposed Rule), which was published by the Department of Health and Human Services (HHS) in the Federal Register on August 26, 2008. Although the Proposed Rule has many flaws, we limit our comments to Sections 88.4(d)(1)[1] and 88.5(c)(4).[2]

The blanket religious exemption in 88.4(d)(1) and 88.5(c)(4) would provide workers in HHS-funded programs with an absolute and unqualified right to refuse to perform any service or activity if it is contrary to their religious convictions. These provisions violate constitutional and statutory law, and create bad policy. HHS should remove these provisions from its final rule.

Granting employees an absolute and unqualified right to refuse to perform their duties due to religious convictions violates the Establishment Clause of the First Amendment to the United States Constitution. In addition, although the Administration appears to

[1] Section 88.4 (d)(1) states that entities governed by the Proposed Rule shall not "require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the Department if such service or activity would be contrary to his religious beliefs or moral convictions."

[2] Section 88.5(c)(4) would mandate that entities that receive HHS funding sign a certification that they "will not require involvement in procedures that violate an individual's conscience as part of any part of any health service program, in accord with all applicable sections of 45 CFR part 88."

base its authority for the promulgation of this language on 42 U.S.C. § 300a-7(d) (Church Amendment D), the Proposed Rule reaches far beyond the confines of the statutory provision. Furthermore, the Proposed Rule conflicts with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq.* (Title VII), and the recent guidelines issued by the Bush Administration through the Equal Employment Opportunity Commission (EEOC).

Even if the Proposed Rule were not proscribed by constitutional and statutory law, the policy ramifications prompt its rejection: passage would endanger patients and threaten to overturn important medical decisions. Its astonishingly broad and far-sweeping reach extends beyond reproductive healthcare, such as sterilization and abortion, to areas such as end-of-life directives, patients with HIV, and psychiatric medicines. Allowing healthcare workers a blanket exemption from serving clients under these circumstances—with no consideration of the effect such exemption would have on the patients—creates a grave threat to safety and civil rights.

The Proposed Rule Violates the Establishment Clause of the United States Constitution.

In contrast to most accommodation laws, Sections 88.4(d)(1) and 88.5(c)(4) of the Proposed Rule provide no exceptions, no balancing, and no consideration of the effect such refusal would have on the employer, other employees, and patients.[3] Such a blanket exemption for employees' religious objections violates the Establishment Clause of the United States Constitution.

In *Estate of Thorton v. Caldor*, 472 U.S. 703, 710-11 (1985), the United States Supreme Court (in an 8-1 opinion) struck down a Connecticut law granting employees "an absolute and unqualified right not to work on their Sabbath." In

[3] *See, e.g.*, 42 U.S.C. §§ 2000e-2(a) & (c), 2000e(j) (Title VII of the Civil Rights Act) (requiring a religious accommodation in the workplace unless it would cause an undue hardship); 42 U.S.C. §§ 12101-12117, 12201-12213 (Americans With Disabilities Act) (requiring a reasonable accommodations for a person with disabilities unless it would cause undue hardship); 42 U.S.C. §§ 2000cc, *et seq.*, (Religious Land Use and Institutionalized Persons Act) (requiring governments to grant religious exemptions in zoning and institutionalized person cases where a federal rule creates a significant religious burden unless the government has a compelling interest to impose the rule without the exemption); 42 U.S.C. § 2000bb, *et. seq.* (Religious Freedom Restoration Act) (requiring the federal government to grant religious exemptions where a federal rule substantially burdens religion unless the government has a compelling interest to impose the rule without exemption).

finding an Establishment Clause violation, the Court focused on the fact that the right not to work was granted "no matter what burden or inconvenience this imposes on the employer or fellow workers." *Id.* at 708-09. The law provided "no exception," no account of "the imposition of significant burdens," and "no consideration as to whether the employer has made reasonable accommodation proposals." *Id.* at 709-10. The "unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses," and is unconstitutional. *Id.* at 710.

The Supreme Court invoked this principle more recently in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).[4] In *Cutter*, the Supreme Court upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA), which demands that the government grant religious accommodations in zoning decisions and in situations where institutionalized persons seek accommodations for religious practices and beliefs unless the government has a compelling interest to impose the rule without exemption. *Id.* at 722-23. The Court distinguished RLUIPA from the Connecticut Sabbath law in *Caldor*, concluding that the RLUIPA accommodation provision did not violate the Establishment Clause. According to the Court, RLUIPA, unlike the Sabbath law, did not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Id.* at 722. To meet the confines of the Establishment Clause, "an accommodation must be measured so that it does not override other significant interests." *Id.*

The Proposed Rule is not "measured," it does "override other significant interests," and it "elevates the accommodation of religious observance over . . . safety," including a patient's health or even life. *Id.* It applies "no matter what the burden or inconvenience [it] imposes on" others. *Caldor*, 472 U.S. at 708-09. Such an "absolute and unqualified" right to refuse to perform health services, therefore, violates the Establishment Clause. *Id.* at 710-11. As a result, Sections 88.4(d)(1) and 88.5(c)(4), which fail to protect patient health and safety, fail to meet constitutional muster and must be rejected.

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[4] *See also Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n. 11 (1987) (holding that granting state-funded unemployment compensation to a person who was laid off because she could not work on the Sabbath did not violate the Establishment Clause because it, unlike the Sabbath law in *Caldor*, did not single out religious employees as the only persons entitled to such treatment).

The Proposed Rule Improperly Extends Far Beyond What Is Contemplated and Intended by the Statute.

Even if Sections 88.4(d)(1) and 88.5(c)(4) were not unconstitutional, HHS should reject them because they extend beyond what is permitted by statute. Section 88.4 (d)(1) states that entities governed by the Proposed Rule shall not "require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the Department if such service or activity would be contrary to his religious beliefs or moral convictions." Although it is true that this language is taken from Section D of the Church Amendment, the Proposed Rule fails to limit the provision to sterilization or abortion, as the statute does. 42 U.S.C. § 300a-7(d).

"[T]he meaning of statutory language, plain or not, depends on context." *Bailey v. Robinson*, 516 U.S. 137, 146 (1995). Thus, one need look no further than the title of 42 U.S.C. § 300a-7 to understand its meaning: "**Sterilization or Abortion**." Accordingly, the only court to consider the scope of Section 300a-7 rejected the plaintiff's claim that the statute protected her from participating in the cessation of a patient's nutrition and hydration. The Court held that reliance on Section 300a-7 was "misplaced" because the statute "concern[ed] the right to decline to perform requested sterilization and abortion procedures based on moral or religious convictions." *Elbaum v. Grace Plaza of Great Neck*, 148 A.D. 2d 244 (N.Y. App. Div. 1989). HHS, therefore, should reject these provisions of the Proposed Rule or, at a minimum, must limit the scope of these sections to HHS-funded abortion and sterilization procedures.

Sections 88.4(d)(1) and 88.5(c)(4) of the Proposed Rule Would Conflict with Title VII and Decades of Religious-Accommodation Case Law.

For several decades, Title VII has been the preeminent federal statute addressing employment discrimination based on religion. 42 U.S.C. § 2000e, *et. seq.* Under 42 U.S.C § 2000e(j), an employer must accommodate an employee's religious observance or practice unless the accommodation creates an undue hardship on the employer.[5] The law respects the rights of religious employees, but also takes into consideration the burdens that the accommodation would place on third parties, customers, and patients. Accordingly, public safety, patient health, and the mandates of other laws must be considered before an employer makes a decision regarding a requested religious accommodation.

[5] *See also* 29 C.F.R. Parts 1605.1, 1605.2, and 1605.3.

After decades of Title VII enforcement, the meaning and reach of the statute is clear and well defined. Employers and employees have a basic understanding of their rights under the law. Furthermore, Title VII has served employees in the public health field well, finding in their favor in many instances.[6]

Nonetheless, Section 88.4(d)(1) of the Proposed Rule simply ignores Title VII and creates a separate religious discrimination exemption for healthcare workers in HHS-funded programs. This exemption, however, would require religious accommodation regardless of any burden placed on patients, co-workers, or healthcare facilities.

In addition to creating confusion, the Proposed Rule places employers in no-win situations. The requested accommodation **must** be granted regardless of the consequences. This is true even if adherence to the Proposed Rule would risk the life of the patient or would violate other laws. For example, in HHS-funded programs, the following could occur:

- When an employee refuses to treat a patient in an emergency situation for religious reasons, the employer would have to follow this Proposed Rule and risk the life of the patient.[7]

- A patient has the right to refuse treatment, including executing advanced directives to refuse life-extending treatment, such as feeding tubes. If a respiratory specialist, for religious reasons, were to object to terminating life-extending treatment, the health facility could find itself

[6] *See, e.g., Nead v. Bd. of Trs.*, No. 05-2137, 2006 WL 1582454 (C.D. Ill. June 6, 2006) (finding against an employer who failed to consider an accommodation for a nurse who said in an interview for a promotion that she would not dispense emergency contraception); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999) (holding in favor of a pharmacist who refused to sell condoms because the employer failed to consider an accommodation); *Tramm v. Porter Mem'l Hosp.*, No. H 87-355, 1989 U.S. Dist. LEXIS 16391, at *33 (N.D. Ind. Dec. 22, 1989) (ruling in favor of an employee who refused to clean abortion instruments because the employer did not consider an accommodation).

[7] This stands in contrast to Title VII caselaw, which does not require an employee to risk a patient's life in order to accommodate a religious practice or belief. *See, e.g., Shelton v. Univ. of Med. and Dentistry*, 223 F. 3d 220 (3d Cir. 2000) (holding that a hospital that offered to transfer a nurse who refused to treat certain pregnancy complications based on her religious views acted property because it was not required to risk that a patient be denied emergency medical treatment).

deciding whether to follow this Proposed Rule or violating the right of the patient to direct his or her own medical treatment.[8]

- If an employee's refusal to serve a patient could result in malpractice, the employer, under the Proposed Rule, would have to commit malpractice rather than require the employee to provide the requisite standard of care to a patient. This would not just risk providing the patient with sub-par health treatment, but could impose legal and monetary penalties on the employer.

- In one federal district court case, an employee argued that, as "a member of the Church of the American Knights of the Ku Klux Klan, a religious organization," he was compelled to display his tattoo of a "hooded figure standing in front of a burning cross." *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976, 978, 979 (N.D. Ind. 2000). Under Title VII, the employer could forbid that activity. *Id.* at 979. If, however, this same employee were to work for an HHS-funded healthcare facility and refused to treat African-American, other non-white, or Jewish patients, the healthcare facility would have to accommodate his refusal.

Accordingly, the Proposed Rule should be rejected because it endangers patients and risks placing employers in violation of other laws.

Sections 88.4(d)(1) and 88.5(c)(4) of the Proposed Proposed Rule Would Also Conflict with the EEOC's Recently Released Compliance Manual

The Equal Employment Opportunity Commission released a new Compliance Manual on "Religious Discrimination" on July 22, 2008—a mere three (3) months ago. 2 EEOC § 915.003 (2008). This in-depth manual "defines religious discrimination, discusses typical scenarios in which religious discrimination may arise, and provides guidance to employers on how to balance the needs of individuals in a diverse religious climate." *Id.* at 3. The manual applies to religious accommodation requests within all employment contexts, including those in public health. Indeed, the manual provides the specific example of when an employer must accommodate a pharmacist who refuses to

[8] *Elbaum v. Grace Plaza of Great Neck*, 148 A.D. 2d 244 (N.Y. App. Div. 1989) (holding that hospital workers who refused to remove artificial life support for a patient based on their religious beliefs were violating the patient's right to self-determination and thus the hospital was ordered to obey the wishes or transfer the patient to another hospital).

dispense or answer questions from a customer about contraceptives. *Id.* at 68-69. The manual explains that the employer must accommodate the pharmacist by allowing him or her to signal to another pharmacist to assist the customer. *Id.* It is only if such arrangement is not possible that he or she may be transferred to another position. *Id.* And even then, the pharmacist cannot be transferred to a "position that entails less pay, responsibility, or opportunity for advancement unless a lateral transfer is unavailable or would otherwise pose an undue hardship." *Id.*

This manual demonstrates that accommodations for religious belief and practice in the workplace are being administered properly and fairly. Under Title VII, as recognized by the EEOC manual, religious needs of employees are generally respected and accommodated unless they would unduly harm employees or third parties, such as patients seeking access to procedures and medication.

Sections 88.4(d)(1) and 88.5(c)(4) of the Proposed Rule Would Endanger Patients and Could Undermine the Goals and Programs of Health-Service Facilities.

Because Sections 88.4(d)(1) and 88.5(c)(4) provide employees an absolute and unqualified right to refuse service, patient health and health-service programs would be put at risk. The services an employee could refuse to perform include refusing to provide fertility treatments for a lesbian patient; provide or fill psychiatric, HIV, birth control, methadone, or sleeping aid prescriptions; or honor a patient's end-of-life decree that rejects life-prolonging treatment. Under the plain language of the provision, the following could take place:

- An employee who works in a psychiatric hospital could convert to a religion that opposes psychiatry and psychiatric medicine, and thereafter refuse to assist in any activities relating to psychiatry and psychiatric drugs. Even though this religious belief would essentially prevent the employee from performing any duties, the employer would be required to keep the employee on staff.

- An employee who works at a trauma center, which specializes in severely injured patients, could refuse to perform or assist in any case involving a blood transfusion. Again, this refusal could prevent the

employee from working on most cases in the center, but the employer would be required to keep the employee on staff regardless of the consequences to the patients.

- An emergency nurse could refuse to treat a person on the emergency room table because that person has HIV. The employer must allow this.

- A counselor could refuse to counsel unmarried, gay, or lesbian clients at an HIV clinic. And, the counselor could also refuse to counsel any patient at the clinic who suffers from drug addiction.

Again, because these sections of the Proposed Rule threaten patient health, HHS should reject them.

Conclusion

The blanket religious exemption created in Sections 88.4(d)(1) and 88.5(c)(4) violates the Establishment Clause of the United States Constitution and, thus, these sections of the Proposed Rule simply should be rejected. Even if the provisions were constitutional, HHS must limit them to abortion and sterilization so that they do not exceed the confines of the statutory authority. Finally, the Proposed Rule considers only an employee's religious convictions and totally disregards the countervailing healthcare needs of patients. Thus, Sections 88.4(d)(1) and 88.5(c)(4) should be rejected because of their deeply adverse policy ramifications. We urge HHS to carefully consider these comments because the Proposed Rule could have significant ramifications for the healthcare services of countless patients.

Please feel free to contact me at (202) 466-3234, with any questions regarding these comments. Your attention to this matter is greatly appreciated.

Sincerely,

Margaret F. Garrett
Assistant Legislative Director

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Mr. FRANKS. Thank you, Reverend Lynn.
And now, Mr. May, you are recognized for 5 minutes, sir.

TESTIMONY OF COLBY M. MAY, ESQ., DIRECTOR & SENIOR COUNSEL, WASHINGTN OFFICE, AMERICAN CENTER FOR LAW AND JUSTICE

Mr. MAY. Thank you, Chairman Franks, Ranking Member Nadler, and Members of the Constitution Subcommittee, for the oppor-

tunity to participate in this important hearing on the state of religious liberty in America today. As Edmund Burke rightly noted during the American founding, eternal vigilance is the price of liberty, and today's hearing is a necessary and valuable part of that vigilance.

The American Center for Law and Justice, the organization I represent today, defends religious liberties throughout the world. Nowhere is our effort more profound, however, than here at home. This Nation's founders cherished religious liberty and built our country on the assurance that America would be free to practice the religion of their choice without the fear of government interference. While the liberty to practice one's religion is greater in this country than in any other, conflicts between religious liberty and other interests do exist. In this conflict, many of our fundamental rights are sustained through the efforts of Congress and state legislatures. Others must be defended daily in the courts of our Nation.

In several areas, as Congressman Nadler noted, Congress and the courts have, in fact, successfully protected religious liberty in many ways, legislation such as the Religious Freedom Restoration Act that Congressman Nadler mentioned, the Religious Land Use and Institutionalized Persons Act, Title VII of the Civil Rights Act and, of course, the Equal Access Act. These are all good examples.

But with these successes, however, issues of controversy remain where courts have curtailed religious liberties. Among the most controversial are within the public schools and universities of our Nation. University speech codes, meant to create an environment in which all students can partake in the educational experience free from discrimination and harassment, have severely undermined religious liberties. In fact, religious students and groups can be prevented from sharing beliefs with other students out of fear of being charged with harassment. Vague policies deter students from espousing beliefs on issues of public concern such as the definition of marriage, gender roles, and absolute religious truth. Courts have given public university officials the power to punish students on the grounds that their religious speech is insulting or that it disrupts communal living.

Court decisions such as the Supreme Court's recent *Christian Legal Society v. Martinez* and the 11th Circuit's decision earlier this year in *Alpha Delta v. Reed* also restrict religious freedom on public colleges and school campuses. In upholding school policies that require religious groups to open their leadership positions to students who do not share the group's beliefs essentially destroys the equal right to associate freely with like-minded individuals as a recognized religious school group. Religious groups must now either open their leadership posts to those who revile and ridicule their deeply held religious beliefs, or they must cease to exist. Or, if they exist, they must do so as second-class citizens, ineligible for the benefits received by officially-recognized organizations.

The right of parents to direct and protect their children's religiously-based morals is another battleground. Religious parents who send their children to public school often find their religious morals contradicted by sex education courses, for example. Courts have allowed school districts to expose young children to sexual be-

havior that many religious parents and, in fact, many parents in general oppose.

Who can forget the ruling in *Brown v. Hot, Sexy and Safer Productions* where, during a mandatory-attendance AIDS prevention presentation, students were informed they were going to have a group sexual experience with audience participation; where profane, lewd, and lascivious language was used to describe body parts; and where oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex were advocated and approved? Few school districts provide opt-out options for parents, and even fewer schools inform parents as to when such controversial courses will be taught. In fact, the 1st Circuit's ruling in Hot, Sexy and Safer Productions held that children have no right to be free from exposure to vulgar and offensive language or debasing portrayals of human sexuality.

These issues provide merely a glimpse into the many areas where religious liberty faces problems in our country. In light of ever-changing discrimination laws and harassment policies, religious people continue to face a troublesome choice: violate deeply held religious beliefs, or receive punishment from the state and local officials. Undoubtedly, religious adherents will continue to face such dilemmas in the future.

The courts and the judges that preside over them will obviously largely determine the outcome of America's religious liberties. But the battle to maintain broad and robust religious liberties falls on each of us. In a speech to the military in 1789, President John Adams explained that the very nature of our constitutional government is being dependent upon religious and moral values. So I commend the Committee to read that quote which I provided in my statement to all of you.

Now, look, undoubtedly religious liberty has been and always must be the crucial cornerstone upon which our freedoms rest. Without it, as President Adams warned in that speech, we are doomed.

I thank the Subcommittee for a chance to participate in today's hearing. I look forward to any questions or discussions we may have. Thank you.

[The prepared statement of Mr. May follows:]

TO: **THE JUDICIARY COMMITTEE**
SUBCOMMITTEE ON THE CONSTITUTION
UNITED STATES HOUSE OF REPRESENTATIVES
HONORABLE TRENT FRANKS, CHAIRMAN
HONORABLE JERROLD NADLER, RANKING MEMBER

RE: **HEARING ON THE STATE OF RELIGIOUS LIBERTIES IN THE UNITED STATES**

BY: **COLBY M. MAY, ESQ.**
DIRECTOR & SENIOR COUNSEL
WASHINGTON OFFICE
AMERICAN CENTER FOR LAW AND JUSTICE

DATE: **OCTOBER 26, 2011**

Thank you Chairman Franks, Ranking Member Nadler, and the members of the Constitution Subcommittee for the opportunity to participate in this important hearing on the state of religious liberty in the United States today. As Edmund Burke rightly noted during the time of the American founding, "eternal vigilance is the price of liberty," and today's hearing is a necessary and valuable part of that vigilance.

I am the Senior Counsel and Director of the American Center for Law and Justice's Washington Office (ACLJ), and my testimony today is provided in that capacity. The ACLJ defends religious liberties throughout the world. Nowhere is our effort more profound, however, than here at home. This nation's founders cherished religious liberty. In fact, the Founding Fathers built this nation with the assurance that an American would be free to practice the religion of his or her choice without the fear of government interference. But although the liberty to practice one's religion is greater in this country than in any country in the world, conflicts between religious liberty and other interests do exist. In this conflict, many of our fundamental religious liberties are sustained through the efforts of Congress and state legislatures. Others must be defended daily in the courts across our nation.

In several areas, Congress and the courts have successfully protected the religious liberties of individuals and organizations. Legislation such as the Religious Land Use and Institutionalized Persons Act (RLUIPA) and Title VII of the Civil Rights Act of 1964, as amended, has solidified the legal protection of religious liberty. As a result of RLUIPA, religious believers may no longer be targeted for disparate treatment with regard to land use because of their religion or religious denomination. Because of Title VII, employees across the nation may observe fundamental tenets of their faith while earning a living. In the halls of public schools, students are free to pray voluntarily and generally to engage in religious expression. And, thanks to the Equal Access Act, student religious groups may meet on school grounds on the same terms as other extracurricular student groups. Additionally, conscience statutes have ensured healthcare professionals the right to refuse to perform abortions and sterilization procedures that violate their religious beliefs.

With these successes, however, have come issues of controversy and contention where courts have curtailed religious liberties. Among the most controversial are within the public schools and universities of our nation, where the effects of recent decisions on the young minds of our nation may adversely impact religious liberties in the future. For instance, university speech codes, meant to create an environment in which all students can partake in the educational experience free from discrimination and harassment, have severely undermined religious liberties. In fact, religious students and groups can be prevented from sharing beliefs with other students out of fear of being charged with harassment. Vague policies deter students from espousing beliefs on issues of public concern such as the definition of marriage, gender roles, and absolute religious truth. Courts have given public university officials the power to punish students on the grounds that their religious speech is insulting or that it disrupts communal living. These speech codes have the capacity to significantly burden religious expression in venues that should be open to the expression of the widest variety of ideas.

Decisions such as *Christian Legal Society v. Martinez* (Sp. Ct. 2010), *Truth v. Kent School District* (9th Cir. 2008), and *Alpha Delta v. Reed* (9th Cir. 2011) also have restricted religious freedoms on public college and school campuses. In upholding school policies that require religious groups to open their leadership positions to students who do not share the group's beliefs, these decisions essentially destroyed the right to associate freely with like-minded individuals as a recognized religious school group. Religious groups must now open their doors to those who revile and ridicule their deeply held religious beliefs, or they must cease to exist. Or, if they exist, they must do so as second-class citizens, ineligible for the benefits received by others, officially-recognized groups.

Court decisions adverse to religious liberties are not confined to college campuses. The right of parents to teach their children religiously-based morals has become a new battleground. Religious parents who choose to send their young children to public schools now find their religious morals contradicted by sex education courses. Courts have allowed school districts to expose young children to sexual behavior that many religious parents oppose. Who can forget the 1st Circuit's ruling in *Brown v. Hot, Sexy and Safer Productions* (1995), where during a mandatory attendance AID's prevention presentation students were informed they were going to have a "group sexual experience with audience participation"; where profane, lewd, and lascivious language was used to describe body parts and excretory functions; and where oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex were advocated and approved. Few school districts provide opt-out options for parents to protect the religious beliefs taught at home. Fewer schools inform parents as to when such controversial courses are taught. In fact, the 1st Circuit's ruling in *Brown* held that children have no right to be free from "exposure to vulgar and offensive language" or "debasing portrayals of human sexuality."

These issues provide merely a glimpse into the many areas where religious liberties will face problems in our country. In light of ever changing discrimination laws and harassment policies, religious people often face a troublesome choice: violate deeply held religious beliefs or receive punishment from state or local officials. Undoubtedly religious adherents will continue to face such dilemmas in the future.

The courts and the judges that preside over them will largely determine the strength of America's religious liberties. The battle to maintain broad and robust religious liberties, however, falls on each of us. As explained by President John Adams in an address to the military:

> "We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution, as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."

(Pres. John Adam's October 11, 1798 address to the military, *The Works of John Adams*, 1854, by Charles Francis Adams, Little, Brown & Co.)

I thank the Subcommittee for its part in protecting the religious liberties of the American people, and for its continued vigilance. I have also provided as part of my testimony a copy of ACLJ's recently completed "Religious Liberty in America: A comprehensive Analysis of Current Case Law and Legislation" (Fall 2011). I look forward to any questions Members may have. Thank you.

ATTACHMENT

RELIGIOUS LIBERTY IN AMERICA:
A COMPREHENSIVE ANALYSIS OF CURRENT CASE LAW AND LEGISLATION

Fall 2011

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EXECUTIVE SUMMARY

This memo seeks to provide a comprehensive analysis of the current legal landscape concerning religious liberty in America. **Section I** provides a general description of the First Amendment and specifically discusses the Framers' reasoning behind the Free Exercise Clause and the Establishment Clause. The former ensures that citizens may freely make decisions based on their consciences, and the later assures a kind of mutual non-interference by church and state in each other's affairs.

Section II discusses landmark Supreme Court cases and key legislation in order to provide a clearer understanding of the Court's evolving jurisprudence in regards to the Free Exercise and Establishment Clauses as well as Congress's response to its decisions. This section summarizes ten Supreme Court cases and two pieces of legislation which have significantly affected the condition of religious freedom over the last half century. Of particular importance is the *Everson* decision which interpreted the Establishment Clause to mandate strict government neutrality not just among religions, but between religion in general and irreligion. Also of significance is the *Smith* decision in which the Court interpreted the Free Exercise Clause to not require exemptions to neutral laws which incidentally create religious burdens.

Section III discusses eight issues currently significant to the exercise of religious liberty in various areas of society. **Subsection A** focuses on religious expression in schools and discusses subjects such as prayer, the Pledge of Allegiance, religious attire, and equal access. In regard to this area of the law, the Supreme Court has generally established that while school officials may not encourage religion, students do not abandon their First Amendment rights on campus, and are allowed to express their personal religious beliefs. Furthermore, schools must treat religious individuals and groups in the same manner as they treat other individuals and groups, and may not engage in discriminatory behavior against an individual or group solely due to religious beliefs.

Subsection B concentrates on issues related to religious expression in the workplace and specifically discusses religious speech / displays, religious attire, and the use of work facilities for religious reasons. Title VII protects against employment discrimination based on religious belief and mandates that employers must try and reasonably accommodate religious beliefs. Additionally, the Equal Employment Opportunity Commission mandates that employees with religious beliefs must be given the same benefits as those who do not hold such beliefs.

Subsection C focuses on matters of conscience and the rights of employees to refuse to comply with religiously objectionable tasks and policies. It discusses the rights of healthcare workers to decline to perform or assist in performing sterilizations and abortions, as well as the ability of pharmacists to refuse to dispense Emergency Contraception. Furthermore, it discusses the rights of religious organizations to hire in a manner that maintains their identity. Finally, it explores the rights of religious individuals and groups when their beliefs come in conflict with non-discrimination policies, especially those which list sexual orientation as a protected class. Courts have been divided in their rulings on this issue, but generally have not interpreted the Free Exercise Clause to contain a right to be exempted from generally-applicable non-discrimination laws.

Subsection D examines the constitutionality of policies authorizing government funding to religious schools. The Supreme Court has held that such policies are valid so long as they do not specifically fund religious activities and do not create excessive entanglement between the government and religion. Furthermore, the government may not condition the conferring of such funds based on a parochial school's level of religiousness.

Subsection E focuses on the constitutionality of religious monuments and displays. The Court has ruled that religious displays are not automatically unconstitutional because of their religious content; rather, they are only ruled to violate of the Establishment Clause if their surroundings suggest a message of government endorsement of religion. Recently, the Court has defended the constitutionality of religious monuments on public property and has stated that the government may freely choose to accept or reject certain types of religious monuments without having to accept other monuments expressing different religious beliefs. Finally, Ten Commandment displays in courthouses and public schools have consistently been struck down as unconstitutional.

Subsection F discusses the expansive protection that the Religious Land Use and Institutionalized Persons Act provides for religious organizations wishing to build new or expand previously existing structures. Such organizations may not be subjected to discriminatory zoning ordinances because of their religious beliefs and even neutral policies may not burden their religious practice unless the government has a compelling interest that it is achieving using the least restrictive means possible. Finally, the Church Arson Prevention Act and the Freedom of Access to Clinic Entrances Act authorizes the government to penalize anyone who defaces religious property or attempts to interfere with any person lawfully exercising the First Amendment right of religious freedom at a place of religious worship.

Subsection G focuses on the National Day of Prayer and a federal court's ruling that the general public may not challenge its constitutionality. Thus, although the Supreme Court has not ruled specifically on the constitutional issue, the National Day of Prayer is currently safe from public challenges.

Subsection H examines the rights of religious broadcasters to freely express their beliefs using radio, television, and other forms of media. Furthermore it discusses two FCC policies, the Fairness Doctrine and "localism," which have the potential to substantially limit religious broadcasters' First Amendment Freedoms.

Section IV provides a conclusion to the memo and reiterates that religious liberty must be vigilantly monitored to ensure that religion does not disappear from the public arena and that our nation continues to acknowledge its religious heritage.

The following list details which religious liberties are currently well-established, and those that are uncertain or overtly threatened.

Well-Established Religious Liberties:

- Right to personal and voluntary prayer in public schools
- Religious expression and religious attire in public schools
- Equal access for religious groups to school facilities and other benefits
- Religious expression, displays, and attire in the workplace
- Freedom to observe the Sabbath and other religious holidays and holy days
- Right of healthcare professionals to refuse to perform abortions and sterilization procedures
- Government funding for religious schools
- Freedom from discriminatory zoning ordinances
- Protection of religious property

Uncertain or Threatened Religious Liberties:

- Right of free speech on university and college campuses
- Right of student groups to freely associate
- Exemption from religiously objectionable classes
- Religious expression in graduation speeches
- Right of pharmacists to refuse to dispense emergency contraception
- The extent of the "ministerial exception" for religious organizations
- The rights of the Free Exercise Clause versus non-discrimination policies
- Ten Commandment displays

I. Introduction

The first alteration made to the United States Constitution concerned religious liberty. The framers viewed this right as so fundamental that they included it with other such cherished rights as the Freedom of Speech, Freedom of the Press, Freedom of Assembly, and Freedom to Petition the Government. These freedoms became the First Amendment to the Constitution, and to this day represent the most revered and staunchly defended liberties belonging to the American people. The First Amendment states in relevant part that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[1] and with these words, the framers ensured that every American would be free to practice the religion or his or her choice without fear of governmental interference. Currently every state constitution in America provides for the freedom to exercise one's religion,[2] which serves as compelling evidence that the framers' intent to ensure the freedom of religion has become an enduring and well-established right embraced by the American people.

The First Amendment contains an Establishment Clause and a Free Exercise Clause which function equally in protecting religious liberty. James Madison, author of the Bill of Rights, viewed the free exercise of religion as an "unalienable right" and therefore believed that "the Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[3] The Free Exercise Clause is essential for the institution of democracy as it ensures that citizens are allowed to freely make decisions based on their consciences without fear of reproach. In regards to the Establishment Clause, the framers wanted to ensure a kind of mutual non-interference by church and state in each other's affairs. In an 1802 letter to the Danbury Baptist Association, Thomas Jefferson stated that the purpose of the Establishment Clause was to build "a wall of separation between Church & State" in order to allow both institutions to operate freely from one another.[4] In this way, the Establishment Clause was intended to protect the right of the Free Exercise Clause; however, over the years the application of these clauses has proven to be complex. There arguably exists a degree of tension between the two, as courts are often forced to decide whether to enforce neutral, generally-applicable laws which have the incidental effect of burdening

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[1] U.S. CONST. amend. I.

[2] ALA. CONST. art. I, § 3; ALASKA CONST. art. I, § 4; ARIZ. CONST. art. XX, P 1; ARK. CONST. art. II, § 24; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; DEL. CONST. art. I, § 1; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 1, P 3; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 3; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights, § 7; KY. CONST. § 5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MD. CONST. Decl. of Rights. art. XXXVI; MASS. CONST. amend. art. XVIII, § 1, *amended by* MASS. CONST. art. XXXXVI, § 1; MASS. CONST. pt. I, art. II; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 5; MONT. CONST. art. II, § 5; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. pt. 1, art. V; N.J. CONST. art. I, P 3; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OKLA. CONST. art. I, § 2; OR. CONST. art. I, § 3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; S.D. CONST. art. XXVI, § 18; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; UTAH CONST. art. I, § 4; VT. CONST. ch. 1, art. III; VA. CONST. art. I, § 16; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 18.

[3] James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ I (1785), *available at* http://www.constitution.org/jm/17850620_remon.htm.

[4] Letter from Thomas Jefferson, President of the United States, to Danbury Baptist Association (Jan. 1, 1802), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html.

particular religious practitioners. To grant an exemption to such practitioners in the view of some observers promotes a certain degree of establishment, whereas, to allow the law serves to restrict the right of free exercise. The evolution of the Supreme Court's Religion Clause jurisprudence reflects this tension, and there exist a multitude of landmark cases which help to provide a clearer understanding of the Court's interpretation of both clauses and how such judgments have affected religious liberty in the United States.

II. Supreme Court Religious Clause Jurisprudence and Relevant Legislation

A. *Reynolds v. United States* (1878)

Reynolds v. United States marked the first significant case the Supreme Court heard concerning the Free Exercise Clause. During these proceedings, Reynolds, a Mormon, claimed his right to free exercise should allow him to be able to practice polygamy as part of his religious beliefs, despite its prohibition by federal anti-bigamy laws. The Court held that Reynolds's beliefs did not exempt him from his obligation under federal law and stated that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[5] To accommodate the beliefs of every practitioner notwithstanding the rule of law would make "professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[6] Therefore, the Court ruled that while the freedom of religious belief and opinion was limitless, the federal government had the ability to regulate actions that manifest those beliefs.

B. *Cantwell v. Connecticut* (1940)

Reynolds interpreted the Free Exercise Clause on a strictly federal level, and it was not until the case of *Cantwell v. Connecticut* that the Court ruled that the rights of free exercise could be applied to the states via the Fourteenth Amendment. The Court ruled that Cantwell, a Jehovah's Witness, should not have been prohibited from disseminating his religious views and soliciting funds from the general public. The Court declared the Connecticut statute in question to be unconstitutional as it required individuals to apply for a solicitation license, the approval of which was determined based upon the applicant's religious beliefs. The Court ruled that it was unconstitutional for state officials to judge anyone's set of beliefs because such actions "lay a forbidden burden upon the exercise of liberty protected by the Constitution."[7] Therefore, the Free Exercise Clause was ruled to apply to states in the way it applied to the federal government.

C. *Everson v. Board of Education* (1947)

Following shortly after the application of the Free Exercise Clause to the states, the Establishment Clause was held to restrict state governments as well. In *Everson v. Board of Education*, the Supreme Court announced that via the Fourteenth Amendment, the Establishment Clause would henceforth be applied to the states. The Court stated that the Establishment Clause prevented federal and state governments from setting up a church; aiding or favoring one religion

[5] *Reynolds v. United States*, 98 U.S. 145, 166 (1879).
[6] *Id.* at 167.
[7] *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

over another or over non-religion in general; forcing an individual to profess or recant from a certain belief; taxing individuals in support of various religious institutions; and finally, participating in the affairs of religious groups.[8] The Court's interpretation of the clause was unprecedented as it stated that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers."[9] Professor Donald Beschle aptly sums up the significant consequence of the Court's ruling as making, "the confident assertion that government must maintain a strict neutrality, not merely among religions, but between religion in general and irreligion."[10] This previously unheard-of "neutrality doctrine" has been instrumental in influencing the decisions of countless courts and remains *Everson's* biggest legacy.

D. *Sherbert v. Verner* (1963)

In 1963, the Supreme Court adopted an extremely expansive view of the Free Exercise Clause with its ruling in *Sherbert v. Verner*. Sherbert was a Seventh-day Adventist who believed that her religion prevented her from working on Saturday as she considered it to be the Sabbath. She was subsequently fired from her position for her refusing to work on Saturdays and was unable to find another job for the same reason. Despite her inability to find work, the South Carolina Employment Security Commission denied her unemployment benefits by because state law mandated that an applicant was ineligible for such benefits if he or she "ha[d] failed, without good cause . . . to accept available suitable work when offered him [or her] by the employment office or the employer."[11] The Court ruled South Carolina's policy imposed a burden on Sherbert's free exercise, and therefore, the only way it could be justified was if it advanced a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[12] The policy was found not to advance such an interest, and with this case the "compelling interest" doctrine, known later as the "*Sherbert* Test," was created. This doctrine was significant because it required states to provide a compelling interest such as public safety, health, order, etc. in order to justifiably burden an individual's religious practice.

E. *Wisconsin v. Yoder* (1972)

In *Wisconsin v. Yoder*, the Court ruled that the requirement to show a compelling interest applied to all laws, even those which were generally applicable, which had the effect of burdening free exercise. Justice Burger, delivering the Court's stated, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[13] In Yoder, the Court held that Wisconsin's compulsory school attendance law infringed the First Amendment rights of Amish parents who for religious reasons wished to educate their children at home. Thus, the Court ruled that governments could not justify burdening religious practitioners simply by

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[8] *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).
[9] *Id.* at 18.
[10] Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. PA. J. CONST. L. 451, 456 (2002).
[11] *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).
[12] *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).
[13] *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

claiming a law is neutral of a law; rather, the government had to be able to prove the compelling interest that the law served.

F. *Lemon v. Kurtzman* (1971)

One of the Supreme Court's most significant rulings in regards to the Establishment Clause was *Lemon v. Kurtzman* (1971). In *Lemon*, the Court ruled that a Pennsylvania statute which provided financial support to parochial schools by reimbursing the cost of teacher's salaries, textbooks, and instructional materials, was unconstitutional as it created excessive entanglement between the government and religion. In this case, Chief Justice Burger formulated a three-part test to determine if a statute or policy violates the Establishment Clause. Under this so-called *Lemon* test, for a law to be constitutional under the Establishment Clause, the law must, "first…have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[14] In regards to the first prong, the law must have a clear, secular purpose. Second, the law's primary effect cannot be targeted at helping or hindering religious groups; however, if a law's secondary effect is a burden to religious practice, it still passes this prong so long as a secular primary effect can be proven. Third, the law cannot create a significantly involved relationship with a religious institution. The Court stated that, "The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other;" however, the Court also realized that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."[15] The Court ruled the Pennsylvania statute failed this third prong, as it created "excessive entanglement" with parochial schools by requiring the government to continually analyze those school's curriculums to make sure that state funds were only being used for secular and not religious purposes.

G. *Lynch v. Donnelly* (1984)

The Court slightly modified the *Lemon* test in *Lynch v. Donnelly*. In *Lynch*, residents of Pawtucket, Rhode Island alleged that the city's inclusion of a crèche or nativity scene in the city's Christmas display was a government establishment of religion. The Court rejected this claim, acknowledging that while the crèche is identified with one particular religious faith, it would be curious "if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged…by the Executive Branch, by the Congress, and the courts for 2 centuries, would so 'taint' the city's exhibit as to render it violative of the Establishment Clause."[16] The Court specified that the Constitution does not "require complete separation of church and state;"[17] therefore, the government can make a certain degree of acknowledgement towards religion without violating any of the three prongs of the *Lemon* test, which the Court ruled was the case with the actions of the Pawtucket government.

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[14] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 674 (1970)).
[15] *Id.* at 614.
[16] *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984).
[17] *Id.* at 673.

What makes *Lynch* significant is the new interpretation of the first two prongs of *Lemon* test that Justice O'Connor formulated in her concurring opinion; her reading later came to be known as the "Endorsement Test". In regards to the first part of the test she stated, "The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion."[18] Likewise, she offered a distinct reading of the second prong:

> The effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion…What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.[19]

In Justice O'Connor's opinion, the most vital inquiry when deciding whether a government action violates the Establishment Clause is whether that action had the purpose or effect of producing an impression of endorsement. If the government appeared to be endorsing a particular set of religious beliefs, it could have the damaging effect of causing citizens to believe their political status could be affected for either sharing in or abstaining from those beliefs. O'Connor classified such endorsement as an "evil"[20] that needed to be avoided, and thus at the forefront of inquiries into alleged Establishment Clause violations. In *Lynch*, she believed that the crèche did not constitute such a message of endorsement as it was surrounded by other secular symbols which created a general holiday setting which "negate[d] any message of endorsement of [the crèche's] content."[21]

H. *Employment Division v. Smith* (1990)

Arguably, the Supreme Court's most controversial decision in regards to religious liberty was *Employment Division v. Smith* (1990). Smith and his co-worker Black ingested peyote as a part of a religious ritual of the Native American church. Both men were fired from their jobs at a private drug rehabilitation clinic when their employer discovered that they were ingesting peyote, as drug use violated the company's policy. The Oregon Employment Division denied them unemployment compensation because peyote use was criminal under Oregon law: thus, their discharge was for work-related "misconduct" and automatically made them ineligible to receive benefits.[22] The men argued that their rights under the Free Exercise Clause had been violated, but the Court held that Oregon did not violate the First Amendment by withholding unemployment benefits, as both men had violated state law. The Court stated, "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."[23] The Court made it clear that *Shebert's* "compelling interest" standard had historically applied only to state

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[18] *Id.* at 691.
[19] *Id.* at 691-92.
[20] *Id.* at 691.
[21] *Id.* at 692.
[22] *Employment Division v. Smith*, 494 U.S. 872, 873 (1990).
[23] *Id.* at 882.

unemployment compensation rules and cases in which multiple constitutional rights were at stake; furthermore, the Court had recently abstained from using the compelling interest test at all. The Court stated, "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."[24] In short, the Court in *Smith* ruled that as long as a law is neutral and generally applicable, it is constitutional despite any incidental burden it may place on religious exercise. This decision was significant in that it largely overturned the "*Sherbert* Test" by narrowly tailoring it to apply only to unemployment compensation cases and not to criminal prohibitions of particular forms of conduct.

I. The Religious Freedom and Restoration Act of 1993 (RFRA)

Many religious groups were upset by *Smith* because they believed that First Amendment rights could now be curtailed as long as the government's law or policy burdening religious exercise was neutral and generally applicable. In response to these concerns, Congress passed RFRA to re-establish the "compelling interest" standard established in *Sherbert*. RFRA stated, "[The] Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless such a burden "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[25] RFRA was passed to apply "to all Federal and State law."[26] Under RFRA, every law that had the effect of burdening religious exercise had to pass a strict scrutiny test to ensure that the law furthered a compelling interest and was the least restrictive means of furthering that interest. Any law that burdened religious practice without meeting both of these requirements was invalid under RFRA.

J. *City of Boerne v. Flores* (1997)

RFRA's reach was greatly limited by the Supreme Court's decision in *City of Boerne v. Flores* (1997).[27] In *City of Boerne*, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in the City of Boerne, but the city denied the request, citing an ordinance governing historic preservation.[28] The Archbishop challenged the city's ruling under RFRA, claiming that the ordinance burdened the church's free exercise of religion. In response, the Court held that RFRA was unconstitutional as applied to states because it exceeded Congress's power to enforce the Fourteenth Amendment.[29] By passing RFRA, Congress had sought to directly contradict *Smith* and had overstepped its bounds by intruding on the state's general authority to regulate its citizens' behavior. The Court stated:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by

[24] *Id.* at 884.
[25] 42 USCS § 2000bb-1.
[26] 42 USCS § 2000bb-3(a) (1993) (amended 2003).
[27] *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).
[28] *Id.* at 512.
[29] *Id.* at 536 (referencing U.S. CONSTIT. amend. XIV, § 5).

> changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.[30]

The Court reasoned that RFRA infringed upon the power of the Judicial Branch to engage in constitutional interpretation and thus failed to honor the separation of powers. Furthermore, the Court found that RFRA placed a "heavy litigation burden on the States," which far exceeded "any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[31] Thus, even though RFRA was designed to regulate policies such as the one contested in *City of Boerne*, the Court declared that because "the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control."[32] In short, the Court invalidated RFRA as to state and local governments; thus, RFRA could not be used to challenge the constitutionality of a state's laws or policies.[33]

K. *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (2006)

Although the Supreme Court held in *City of Boerne* that RFRA cannot be used to challenge state and local laws and policies, the Court subsequently held that RFRA can be constitutionally applied to federal laws. In *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (UDV), the UDV Church, claimed that federal law violated RFRA by placing an unjustified burden on its exercise of religion.[34] As part of its communion ceremony, members of the church drank a sacramental tea which contained hallucinogenic substances prohibited under the Federal Government's Controlled Substances Act.[35] The Court held that the burden on the church's religious practice violated RFRA because the Federal Government could not prove it had a compelling interest in applying the Controlled Substances Act to prohibit the church from using hallucinogenic substances as part of its religious rituals.[36]

L. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

In 2000, Congress passed RLUIPA to correct the problems the Court in *City of Boerne* found in RFRA. RLUIPA states, "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution"[37] and that "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution."[38] As in RFRA, the only exception to this mandate is if the law or policy "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[39] However unlike RFRA, which sought to

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[30] *Id.* at 519.
[31] *Id.* at 534.
[32] *Id.* at 536.
[33] The wording of RFRA was subsequently amended to only apply to the federal government, and any mention of state governments was removed.
[34] *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006).
[35] *Id.* at 423.
[36] *Id.* at 439.
[37] 42 USCS § 2000cc.
[38] *Id.* § 2000cc-1.
[39] *Id.*

regulate all laws that burdened religious practice, RLUIPA focused only on those laws and policies related to land use and institutionalized persons. In 2005, the Supreme Court ruled in *Cutter v Wilkinson* that RLUIPA protected the religious practices of prisoners and that the act provided a permissible accommodation of religion that does not violate the Establishment Clause. The Court's decision only applied to the institutionalized persons portion of the act, as it declined to rule on the section involving land-use.

M. Conclusion

In regards to the Religion Clauses, it is difficult to completely summarize the Supreme Court's current jurisprudence. Recently, the Court appears to be increasingly basing its decisions on the notion of government neutrality.[40] The Court has reaffirmed that Government policies that are neutral towards religion do not violate the Establishment Clause, even if various religions might be incidentally benefitted.[41] Therefore, Jefferson's "Wall of Separation" analogy is not how the Court currently views the Establishment Clause; rather the Court sees the clause as a mandate to treat all religions with equal and neutral criteria. Concerning the Free Exercise Clause, *Smith* continues to control the Court's decisions. As long as laws and policies are neutral and generally applicable, the Free Exercise Clause is not deemed to be violated, regardless of whether those laws and policies place a burden on religious practice. Hence, if policies and laws have a secular intent and are not aimed at hindering religious practice, it is difficult to successfully bring suit under the Free Exercise Clause. In conclusion, recent Supreme Court decisions first and foremost seek to ensure that laws and policies remain neutral and generally-applicable, so all individuals receive equal treatment, with no individuals or religious groups receiving benefits not available to all others. Consequently, the Court is no longer principally concerned with the incidental effects of neutral and generally applicable laws and policies.

III. Issues

A. Religious Expression in Public Schools

1. Prayer

Over the last half century, the Supreme Court consistently has invalidated any policies or practices which have served to explicitly or implicitly promote or encourage prayer during school hours or at school-sponsored events. In 1962, the Court ruled in *Engel v. Vitale* that a New York State policy that authorized the daily recitation of a short prayer by school officials violated the Establishment Clause. The Court stated, "Each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[42]

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[40] L. Scott Smith. *"Religion-Neutral" Jurisprudence: An Examination of Its Meaning and End*, 13 Wm. & Mary Bill Rts. J. 841 (2005).
[41] *Id.* at 842.
[42] *Engel v. Vitale* , 370 U.S. 421, 435 (1962).

The Court's ruling in *Wallace v. Jaffree* (1985) furthered this separatist sentiment when it declared unconstitutional an Alabama statute authorizing a one-minute period of silence in all public schools "for meditation or voluntary prayer."[43] The statute originally mentioned only "meditation" but was amended to include "voluntary prayer" as an attempt by the Alabama State Legislature, in the majority's view, "to return voluntary prayer to the public schools."[44] The Court held that the statute violated the first prong of the *Lemon* test because it had no secular purpose. However, the Court made it clear that the statute as it was originally written did not violate the Establishment Clause because "nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the schoolday."[45] Therefore, the Court stated that policies authorizing moments of silence were constitutional as long as they did not encourage prayer.

Lastly, the Court held in *Santa Fe Independent School District v. Doe* (2000) that it was unconstitutional for the Santa Fe School District to have a policy permitting student elections to determine whether "invocations" should be delivered at football games. The school district permitted student-led invocations before football games, subsequent to approval by a majority of the student body. The Court held that these invocations contained a religious message, and thus the policy permitting them endorsed religion in violation of the Establishment Clause. Furthermore, by allowing issues of religion to be decided by majority vote, the school district was discriminating against the views of minority religions. The Court's opinion stated, "In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[46] Therefore, the Court held that any policy that even implicitly promoted prayer served to give the impression of school sponsorship and created an impermissible establishment of religion by the state. *Santa Fe* was significant because the Court interpreted the Establishment Clause to not only prohibit government preference of one religion over another but also to prohibit showing preference to religious expression at all, as any encouragement of prayer was deemed unconstitutional.

In 2002, President Bush signed into law the No Child Left Behind Act. That act mandated that the Department of Education provide guidelines for constitutionally protected types of prayer in public schools. Furthermore, the Act declared that to receive federal funding, "a local educational agency shall certify in writing to the State educational agency involved that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools."[47] The Department of Education's guidelines cite *Santa Fe* in declaring that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses

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[43] *Wallace v. Jaffree*, 472 U.S. 38, 39 (1985).
[44] *Id.* at 57.
[45] *Id.* at 67.
[46] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).
[47] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, § 9524 (2002) (codified as amended at 20 U.S.C. § 7904(b)).

protect."[48] Therefore, as long as students are voluntarily engaging in prayer and are free from any type of governmental endorsement, their religious expression is constitutionally protected. Additionally, the guidelines state that students "may pray with fellow students during the school day on the same terms and conditions that they may engage in other conversation or speech."[49] While school authorities certainly have a right to maintain order with regard to student activities, "they may not discriminate against student prayer or religious speech in applying such rules and restrictions."[50] In short, as long as students' voluntary prayer is free from school officials' influence and do not infringe upon the rights of others, their prayer is protected under the Free Exercise Clause and Free Speech Clause and cannot be restricted by the government.

The Civil Rights Division of the Department of Justice (DOJ) has consistently held the stance that schools should not discriminate against constitutionally protected types of prayer. Most recently in 2007, the DOJ reached a settlement with a Texas public high school in which the school drafted a new policy to explicitly allow Muslim students to engage in mid-day prayers during the lunch hour. Previously, the school had barred students from kneeling in a corner of the cafeteria to recite their prayers, and had prohibited them from praying in unused space during the lunch hour, despite the fact that other students were allowed to meet in such spaces during that time. Former Assistant Attorney General Wan J. Kim applauded the decision and stated, "Students should not be required to choose between practicing their faith and receiving a public education."[51]

2. Religious Speech

The right of public school students to express their religious beliefs should be governed no differently than any other types of speech that may occur on school grounds. In *Tinker v. Des Moines* (1969), the Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;" however, the Court also acknowledged "the special characteristics of the school environment," that must dictate the ways in which speech is regulated.[52] Therefore, while the school can impose rules of order and pedagogical restrictions to govern student expression, the school may not implement such rules to target religious expression or discriminate against expression based solely on its religious content. In *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) the Court declared, "Viewpoint discrimination is…an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[53] In this regard, religious expression is not distinguishable from other types of speech and therefore must be protected and regulated by the same neutral standards which govern all acts of expression.

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[48] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); *accord Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 841 (1995).
[49] Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).
[50] *Id.*
[51] *Religious Freedom in Focus* (U.S. Dep't of Justice), May 2007, *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_25.htm#1.
[52] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
[53] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

The same standards used to protect individuals' religious expression also extend to religious groups as well. Whatever rights that a school affords to secular groups must also be given to religious groups. If a school allows secular groups to advertise in the school newspaper, make public announcements, or distribute leaflets, then the same privileges must be extended to religious groups.[54] School authorities are not allowed to discriminate against groups because they meet to pray or gather for other religious reasons. As with individuals, the school must treat all groups neutrally and may not engage in viewpoint discrimination.

The DOJ has consistently held that religious speech should be afforded the same protections given to all other types of speech. Most recently in 2006, the DOJ filed a brief as *amicus curiae* in two federal cases involving the religious expression of two students. In *Curry v. Saginaw School District* (ED. Mich. 2006), the DOJ's brief argued that the school district violated the Free Speech rights of a fifth grade student when the district prohibited him from distributing candy canes during a class exercise due to a religious message the candy canes contained.[55] In *O.T. v. Frenchtown Elementary School District Board of Education* (D. NJ. 2006), the DOJ's brief argued that the school district had engaged in viewpoint discrimination by not allowing a second grade student to perform a Christian song at a talent show.[56] In both of these cases, the District Courts decided in the students' favor, declaring that each respective school district had unconstitutionally restricted both students' Free Speech rights. However, the decision reached in *Curry v. Saginaw School District* was appealed, and the Sixth Circuit reversed the District Court's decision. The Sixth Circuit held that the decision to prevent the student from distributing the candy canes "was driven by legitimate pedagogical concerns," and therefore his "constitutional rights were not abridged."[57] Both of these cases are significant in that they show the DOJ's commitment to safeguarding students' rights to express their religious beliefs and that judicial interpretations vary as to which types of religious expression are free from school interference, and which ones are subject to regulation.

3. University Speech Codes

The majority of universities and colleges across the country maintain "speech codes" that prohibit expression that would be constitutionally protected in society at large.[58] These codes are meant to create an environment in which all students can partake in the educational experience free from discrimination and harassment; however, in practice they have resulted in unintended negative consequences for First Amendment rights. As government institutions, public universities are prohibited from interfering with freedom of expression and must generally respect rights guaranteed under the Constitution. The majority of speech is to be protected, but the Supreme Court has ruled that "speech that incites reasonable people to immediate

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[54] U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).
[55] *Religious Freedom in Focus* (U.S. Dep't of Justice), Oct. 2006, *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_20.htm#2.
[56] *Religious Freedom in Focus* (U.S. Dep't of Justice), Nov./Dec. 2006, *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_21.htm#1.
[57] *Curry v. Hensiner*, 513 F.3d 570, 580 (6th Cir. 2008).
[58] Foundation for Individual Rights in Education (FIRE), *Spotlight on Speech Codes 2011: The State of Free Speech on Our Nation's Campuses* 10, *available at* http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf?direct.

violence…harassment; true threats and intimidation; obscenity; and libel," fall outside of the First Amendment's safeguards.[59] Speech codes often misconstrue these categories and interpret them more broadly than is constitutionally justified. For instance, in 2003, the misuse of harassment regulations became so widespread that the Department of Education's Office for Civil Rights (OCR) issued a letter of clarification to all colleges and universities concerning the true definition of harassment. The letter read:

> Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.[60]

The over-application of harassment regulations poses a threat to religious expression in particular as students and groups can be prevented from sharing beliefs with other students out of fear of being charged with engaging in harassing behavior. For example, the University of Alabama prohibits any expression that "insults another student because of his or her race, color, religion, ethnicity, national origin, sex, sexual orientation, age, disability, or veteran status."[61] The University of Florida's speech code states, "Organizations or individuals that adversely upset the delicate balance of communal living will be subject to disciplinary action by the University."[62] With such vague policies as these, students and religious groups could be refrained from espousing beliefs on the definition of marriage, gender roles, and absolute religious truth, as their speech could be judged to be insulting to other students or disruptive of communal living, and therefore be categorized as harassment. In sum, speech codes have the capacity to significantly burden religious expression by reaching beyond constitutionally permissible restrictions of speech and therefore should be avoided.

4. Equal Access

The Supreme Court has held consistently that if a public school allows its facilities to be used by secular student groups during noninstructional time, the school must extend the same benefit to religious student groups. The Equal Access Act of 1984 states:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[63]

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[59] *Id.* at 12.
[60] Letter from Assistant Secretary, U.S. Dep't of Educ. Office of Civil Rights, to Dear Colleague (July 28, 2003) http://www.ed.gov/about/offices/list/ocr/firstamend.html.
[61] Univ. of Ala., Student Handbook, Definition of Harassment, http://www.studenthandbook.ua.edu/policyforstudents.html (last visited Aug. 16, 2011).
[62] Univ. of Fla., Student Handbook, Relations between People and Groups (Mar. 24, 2011), http://thefire.org/public/pdfs/c6184e6fe4beebe669af2c1cb2ed6f1b.pdf?direct.
[63] 20 USCS § 4071(a).

The Act declares, "A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[64] This legislation stipulates that schools must treat all student groups the same and may not condition use of its facilities based on a groups religious or non-religious viewpoints. The Court confirmed the Equal Access Act's constitutionality in *Board of Education of the Westside Community Schools v. Mergens* (1990). The Court held that the legislation did not violate the Establishment Clause and justified this decision by declaring, "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[65] Furthermore, the Court stated, "The proposition that schools do not endorse everything they fail to censor is not complicated."[66] By confirming the Act's constitutionality, the Court ensured that schools would not engage in viewpoint discrimination in determining which student groups could use their facilities, thus guaranteeing that equal standards would be applied to all.

The Court has held under the Free Speech Clause that the equal access principle extends to non-student groups and has ruled that if schools open their facilities for use by secular groups, they must open their facilities to religious groups. In *Lamb's Chapel v. Center Moriches Union Free School District* (1993), a local church applied twice to use a school's facilities to show a six-part film series on family values, but was repeatedly denied because the school board had issued rules and regulations which, while allowing the facilities to be used for "social, civic, and recreational uses," prohibited their use for religious purposes.[67] The Court unanimously held that this policy constituted viewpoint discrimination as the church's application was denied solely because the film series the church wished to show "dealt with the subject [of family values] from a religious standpoint."[68] The Court stated, "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'"[69] Furthermore, the Court held that allowing school facilities to be used for religious purposes on an equal basis with other purposes did not violate the Establishment Clause as "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."[70] In sum, the Court found that the government cannot make access to government property to speak conditional on the speech's viewpoint and that the government may extend benefits to a religious group in the same manner it does to a secular group and not violate the Establishment Clause.[71]

5. Right to Associate

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[64] *Id.* § 4071(b).
[65] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).
[66] *Id.*
[67] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 385 (1993).
[68] *Id.* at 394.
[69] *Id.* (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, (1984)).
[70] *Id.* at 395.
[71] In 2001, the Court reached an identical conclusion in *Good News Club v. Milford Central School*. In *Good News* Club, the court held that schools could not discriminate against a religious groups use of the school's facilities if they are generally available to be used by secular community groups. Both *Lamb's Chapel* and *Good News Club* ensure that religious groups may not be subjected to viewpoint discrimination.

The right to freely associate is currently the most problematic issue facing religiously-affiliated student groups at both high schools and universities. While the U.S. Constitution does not specifically mention the right to freedom of association, the Supreme Court has held that the Free Speech Clause of the First Amendment includes the right to associate for expressive purposes. In *NAACP v. Alabama ex. rel. Patterson* (1958) the Court declared:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly…It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech…. It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[72]

In *Patterson*, the Court articulated that individuals have the constitutional right to gather together for expressive purposes, and that the government could only curtail this right if in doing so, it was using the least restrictive means to achieve a compelling state interest.[73] This right is essential for all religious individuals who wish to gather with other like-minded believers to engage in worship, instruction, rituals, and celebrations.

Recently, the right to expressive association has been significantly jeopardized by multiple decisions from federal courts. In *Truth v. Kent School District* (9th Cir. 2008), a group of students wished to form a Bible club (Truth) and applied for a charter pursuant to the school's policy that "[u]nchartered clubs are not permitted to exist."[74] The Associated Student Body (ASB) Council denied Truth's charter request, citing concerns with its name; that its members had to sign a declaration of faith; and that its mission statement was overtly religious.[75] In other words, the ASB believed that granting a charter for Truth would lead to discrimination, as non-Christian students would not be able to become members of Truth. The student group challenged the ASB's action and claimed that rejecting their petition violated their rights under the Equal Access Act and the First Amendment. The Ninth Circuit disagreed and held that the school's decision to deny Truth official recognition was consistent with the Equal Access Act. The court declared, "The District denied Truth ASB status…based on its discriminatory membership criteria, not the religious content of the speech."[76] Therefore, the court held that Truth could not claim protection under the Equal Access Act. Furthermore, the court held that the government could exclude speech in a "limited public forum" "so long as its reasons for

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[72] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).
[73] *Id.; see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) ("We have held that the freedom [of expressive association] could be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'")
[74] *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 637 (9th Cir. 2008).
[75] *Id.* at 639.
[76] *Id.* at 645 (internal quotations omitted).

doing so [were] viewpoint neutral and 'reasonable in light of the purpose served by the forum.'"[77] It determined that the ASB constituted such a forum, with its purpose being "to develop attitudes of and practice in good citizenship within the school; to promote harmonious relations between students, clubs, and activities; and to act as a forum for student and faculty expression."[78] Therefore, the court held that to further the forum's purpose, the school could exclude Truth because its presence on campus had the potential to disrupt harmonious student relations, as Truth sought to limit its membership to solely Christians. In sum, the court held that to preserve a limited public forum, schools can use non-discrimination policies to deny benefits to religious groups so long as such policies are neutral and do not specifically target such groups because of the religious content.

Similar to the Ninth Circuit's decision in *Truth*, the Supreme Court held in *Christian Legal Society v. Martinez* (2010), that a school could deny recognition to a religious group based on a neutral policy.[79] In *Martinez*, a chapter of the Christian Legal Society (CLS) at Hastings College of Law was denied official "Registered Student Organization" (RSO) status by the school, because it required its members to sign a "Statement of Faith" by which they pledged to conduct their lives in accord with Christian principles, including but not limited to the promise to not engage in sexual activity outside of traditionally-defined marriage. The school believed this requirement violated its "accept all-comers" policy as it inherently barred non-Christian and homosexual students from becoming CLS members. The Court held that Hastings' RSO policy constituted a limited public forum; therefore, for the school to justifiably restrict the CLS, it had to prove it did so using viewpoint neutral criteria and that its actions were reasonable in light of the forum's purpose. The Court found that Hastings met both criteria and did not violate the First Amendment rights of the CLS members. With regard to neutrality, the Court declared, "It is…hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."[80] Furthermore, the Court contrasted between the case before it and the situation that occurred in cases such as *Rosenberger*. In cases like *Rosenberger*, "universities singled out organizations for disfavored treatment because of their points of view. But Hastings' all-comers requirement draws no distinction between groups based on their message or perspective."[81] In other words, unlike the situation in *Rosenberger*, Hastings' policy was not specifically targeted at the religious beliefs of a single group; rather, it expected every one of its student groups, secular or religious, to adhere to the same policy. The Court held, "An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.[82] The court also believed that Hastings could legitimately apply this policy as it sought to further the purpose of the limited public forum to bring "together individuals with diverse backgrounds and beliefs," to encourage "tolerance, cooperation, and learning among students."[83] In sum, the Court held that a university could constitutionally enforce an "accept all-comers" policy against any type of group, religious or secular, because such a policy is inherently viewpoint neutral and constructive in furthering an all-inclusive educational environment.

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[77] *Id.* at 649 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (internal quotations and citation omitted)).
[78] *Id.* at 649 (the above purposes were stated in the ASB Constitution).
[79] *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez.*, 130 S. Ct. 2971, 2978 (2010).
[80] *Id.* at 2293.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 2290

In conclusion, it is difficult to ascertain to what degree *Martinez* will affect the liberties of religious groups at public high schools and universities. The Court only ruled on the constitutionality of all-comers policies and did not address larger non-discrimination policies. Therefore, in theory, *Martinez* should only be applicable to cases in which a university or high school has a specific "accepts all-comers" policy and not a more general policy which bars discrimination against certain classes. Despite this, the Ninth Circuit seems to have already applied *Martinez* to a general non-discrimination clause. In *Alpha Delta v. Reed* (9th Cir. 2011), a Christian fraternity and sorority at San Diego State University (SDSU) were denied official recognition because they required their members to live in a manner that was consistent with Christian beliefs, therefore violating the university's requirements for recognition. To receive on-campus status, SDSU mandated that an organization not condition its membership or eligibility for officer positions on religious criteria; thus, these two Christian organizations could not be officially recognized while simultaneously dictating their own terms of association. Quoting *Martinez*, the court stated, "the fact that a regulation has a differential impact on groups wishing to enforce exclusionary membership policies does not render it unconstitutional."[84] Therefore, even though in *Martinez* the Court only specifically ruled on an all-comers policy, the Ninth Circuit used *Martinez's* logic to validate SDSU's application of its non-discrimination policy to deny recognition to Christian organizations. If courts continue to extend *Martinez* to apply to universities' general non-discrimination policies, as opposed to only "accept all-comers" policies, the capacity for student religious groups to freely associate while maintaining official recognition will be severely hindered.

6. Use of Religious Texts

The Supreme Court has held that while public schools cannot mandate that students read religious texts as devotional exercises, schools may include such texts as part of a curriculum consistent with the First Amendment. In *Abington School District v. Schempp* (1966), the Court held that a Pennsylvania statute that required reading of the Bible at the start of each school day violated the Establishment Clause. The school district believed its practice was within First Amendment bounds because it allowed for students to opt-out of listening to the Scripture reading , but the Court disagreed. The Court stated, "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[85] The Court made it clear that any policy authorizing actions favoring a particular religion was unconstitutional, regardless of whether students had to participate in such actions. However, the Court clarified that the Bible may reasonably judged to be "worthy of study for its literary and historic qualities" and that "nothing…said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."[86] Therefore, while schools may not use the Bible and other religious texts to further a set of religious beliefs, such texts may be used as instruments of learning in appropriate classes of history, literature, etc.

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[84] *Alpha Delta Chi-Delta v. Reed*, No. 09-55299, slip op. 9979, ___ (9th Cir. Aug. 2, 2011) (quoting *Christian Legal Soc'y*, 130 S. Ct. 2971, 2294 (2010) (internal quotations omitted)).
[85] *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 221 (1966).
[86] *Id.* at 225.

Currently, there is controversy in Idaho over a policy of the Idaho Public Charter School Commission (IPCSC) disallowing the use of religious texts in Idaho Public Charter Schools. The IPCSC adopted this policy on recommendation from Idaho's Attorney General, who believed that using religious documents or texts in public school curricula would violate Article IX, § 6[87] of the Idaho Constitution.[88] The Nampa Classical Charter Academy challenged this policy as violating First Amendment rights, and the case is currently being litigated before the United States Court of Appeals for the Ninth Circuit.

7. Religious Attire

A student's right to wear religious attire is governed by very similar standards to those relating to religious expression. In *Tinker*, students expressed themselves by wearing black to protest the involvement of the United States in the Vietnam War. The Court noted that wearing armbands, "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."[89] Therefore, the First Amendment protects wearing clothing which symbolizes a particular belief or opinion in the same manner as other forms of expression such as speech. *Tinker* established students' right to freely wear clothing symbolic of views, secular or religious, so long as wearing such clothing does not "substantially interfere with the work of the school or impinge upon the rights of other students."[90] Specifically, this decision ensures that students wishing to wear clothing or accessories representative of religious beliefs are entitled to express these beliefs freely as long as they do not do so in a disruptive manner. Accordingly, school officials cannot prohibit attire solely because it conveys a religious message; doing so would amount to unconstitutional viewpoint discrimination.

In 2010, a New York School District suspended a seventh grade student for repeatedly wearing his rosary to school, claiming that such attire resembled a gang symbol and was thus prohibited by the school's dress code. The student and his family claimed that such action violated his rights under the Free Exercise Clause and filed a federal lawsuit, which resulted in the court issuing an injunction allowing the student to wear his rosary.[91] Eventually, a settlement was reached in which the school district agreed to amend its dress code policy to allow rosaries to be worn.

8. Evolution, Creationism, and Intelligent Design

Federal courts have ruled consistently against school district policies that ban the teaching of evolution or try and subvert it with religiously-based theories. In 1968, the Supreme Court ruled in *Epperson v. Arkansas* that state law prohibiting the teaching of evolution in public school class was unconstitutional. The Court stated that Arkansas had enacted this prohibition

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[87] This Article states, "No sectarian or religious tenets or doctrines shall ever be taught in the public schools," and "no books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article."
[88] *Nampa Classical Acad. v. Goesling*, 2009 U.S. Dist. LEXIS 82456 (D. Idaho 2009).
[89] *Tinker v. Des Moines*, 393 U.S. 503, 505-06 (1969).
[90] *Id.* at 509.
[91] Stipulated Order Extending Show Cause Order/Temporary Restraining Order, *R.H. v. Schenectady City Sch. Dist.*, No. 1:10-CV-640 (N.D.N.Y. 2010).

solely because it deemed evolution "to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group."[92] The law had no secular purpose but was merely an attempt to advance Judeo-Christian beliefs within the government's educational facilities. The Court rejected this attempt and stated, "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[93]

The Court extended its ruling in *Epperson* when it declared any teaching of creationism to be unconstitutional regardless of whether evolution was taught concurrently. In *Edwards v. Aguillard* (1987), the Court struck down a Louisiana statute that although not requiring evolution or "creation science" to be taught, mandated that whenever one was taught, the other must be taught as well. Applying the first prong of the *Lemon* test, the Court found that the statute did not have a clear, secular purpose and therefore violated the Establishment Clause. The Court maintained that while it is "normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[94] The Court believed that the statute's true purpose was not, as the state legislature claimed, to "protect academic freedom,"[95] but rather to "narrow the science curriculum,"[96] and "advance the religious viewpoint that a supernatural being created humankind."[97] Therefore, the Court interpreted Louisiana's statute to violate the Establishment Clause as its teaching of "creation science" was simply an attempt to mask religious teaching using the guise of advancing secular aims.

Finally, one lower court has held that any teaching which may resemble or draw from creationist theory is unconstitutional and not a valid alternative to teaching evolution. In *Kitzmiller v. Dover Area School District* (M.D. Pa. 2005), the district court held that the school district's policy mandating that "intelligent design" be offered as a differing view to evolution science was unconstitutional as it advanced a form of religious belief. The school district's board of directors passed a resolution which stated, "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design."[98] The resolution mandated that teachers read a statement at the beginning of biology class to alert students that Darwin's theory contained gaps and that a book teaching intelligent design was available for those who were interested in exploring different theories about the origin of life. The court ruled that, "ID is nothing less than the progeny of creationism,"[99] and like the "creation science" described in *Edwards*, intelligent design sought to "utilize scientific-sounding language to describe religious beliefs."[100] In sum, the court in Dover ruled that any attempt to undermine a scientific theory with one which presupposed a supernatural being constituted endorsement of religion and thus could not be taught in public schools.

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[92] *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968).
[93] *Id.* at 106.
[94] *Edwards v. Aguillard*, 482 U.S. 578, 586-587 (1987).
[95] *Id.* at 586.
[96] *Id.* at 587.
[97] *Id.* at 591.
[98] *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).
[99] *Id.* at 721.
[100] *Id.* at 711.

9. Pledge of Allegiance

Supreme Court opinions contain numerous references to the Pledge of Allegiance, and while the Court has stated definitively that students cannot be compelled to recite ing the Pledge, the Court has not expressly held whether school-sponsored Pledge recitation violates the Establishment Clause because the Pledge contains the words "under God." In *West Virginia State Board of Education v. Barnette* (1943), the Court overruled its previous decision in *Minersville School District v. Gobitis* (1940) in which it had held that requiring students to recite the Pledge did not violate the free speech rights of students who objected. In *Barnette*, the Court held that students could not be forced to salute the flag nor recite the Pledge of Allegiance because such mandates represented a form of governmental interference with individual beliefs. The Court stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[101]

Recently, a challenge was brought against a Florida statute that required public school students to stand and recite the Pledge, with exemptions only being granted if a student provided a written statement from a parent excusing him from participating. An eleventh grade student in a Florida public school challenged the constitutionality of these requirements, and in *Frazier v. Winn* (11th Cir. 2008), the court held that the portion of the statute requiring students to stand during recitation of the Pledge should be removed as "students have a constitutional right to remain seated during the Pledge."[102] In regards, to the portion requiring parental consent to be exempted, the court cited *Yoder* in declaring that parents had a constitutional right to "guide… the education of their children"[103] and therefore concluded "that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech."[104] Therefore, while students do have a constitutional right to object to reciting the Pledge of Allegiance, the Eleventh Circuit held that requiring parental consent to enact this right does not violate the Constitution. While, it is well established that students do not have to participate in the Pledge of Allegiance, this right does not supersede their status as minors who are legally subject to parental control.

In regards to the actual content of the Pledge of Allegiance, the Supreme Court has not ruled authoritatively on the constitutionality of the phrase "one Nation under God." In *Engel*, the opinion of the Court contained a footnote which stated:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of

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[101] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
[102] *Frazier v. Winn*, 535 F.3d 1279, 1282 (11th Cir. 2008) (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274, 1278 (11th Cir. 2004)).
[103] *Id.* at 1285 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).
[104] *Id.* at 1285.

> belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.[105]

In *Engel*, the Court sought to distinguish between the unconstitutionality of compelled prayer and the permissibility of reciting documents and songs mentioning reference to a Supreme Being. While this language does not explicitly refer to the Pledge of Allegiance, it is applicable because the Pledge is a "patriotic or ceremonial exercise" that expresses devotion for the country and "contains references to the Deity."

The only challenge heard before the Supreme Court in relation to the Pledge's content came in a 2004 case entitled *Elk Grove Unified School District v. Newdow*. In this case an atheist alleged that the words "under God" violated the Establishment Clause as well as violating his daughter's right to non-belief under the Free Exercise Clause. The father shared joint-custody of the child with the child's mother, who on the contrary endorsed the religious content of the Pledge. Due to this discrepancy, the Court ruled that the father did not have prudential standing to sue in federal court and therefore ruled against the father without reaching the merits of the constitutional claim.[106]

Although the Supreme Court has not ruled on the constitutionality of the religious content contained in the Pledge of Allegiance, multiple lower courts have held that the words "under God" do not violate the Establishment Clause. For example, in *Newdow v. Rio Linda Union School District* (9th Cir. 2010) an atheist woman claimed that the words "under God" offended her non-religious beliefs and interfered with her right to direct her daughter's upbringing. Even though the child had never participated or been forced to participate in the reciting of the Pledge, the mother believed that its recitation "indoctrinate[d] her child with the belief God exist[ed],"[107] and therefore should not be permitted at school. The court disagreed and stated:

> We hold that the Pledge of Allegiance does not violate the Establishment Clause because Congress' ostensible and predominant purpose was to inspire patriotism and that the context of the Pledge--its wording as a whole, the preamble to the statute, and this nation's history--demonstrate that it is a predominantly patriotic exercise. For these reasons, the phrase "one Nation under God" does not turn this patriotic exercise into a religious activity.[108]

The First Circuit issued a similar decision in *Freedom from Religion Foundation v. Hanover School District* (1st Cir. 2010). This suit involved two agnostic parents who challenged the constitutionality of a New Hampshire statute that required its schools to allocate time each day for students to voluntarily recite the Pledge. The parents believed that the mention of God in the

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[105] *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

[106] Although the Court's opinion did not address the constitutional claim, in separate concurring opinions, Chief Justice Rehnquist and Justice O'Connor expressly stated that the religious content in the Pledge of Allegiance did not violate the Establishment Clause. Chief Justice Rehnquist stated, "Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one: participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church." *Elk Grove Unified Sch. Dist. v Newdow*, 524 U.S. 1, 31 (2004).

[107] *Newdow v Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1012 (9th Cir. 2010).

[108] *Id.* at 1014.

Pledge constituted an establishment of religion and thus violated the rights of their children who were forced to listen to it every day. The court, however, found that the New Hampshire stature passed all three prongs of the *Lemon* test. The court specifically stated that the statute's purpose was secular, and that in reciting the Pledge, students promised "fidelity to our flag and our nation, not to any particular God, faith, or church."[109] Additionally, the court declared that the statute's "primary effect [was] not the advancement of religion, but the advancement of patriotism through a pledge to the flag as a symbol of the nation."[110] Both the Ninth and First Circuits interpreted the Pledge of Allegiance in its entirety as a declaration of patriotism and not as religious expression, and therefore found the words "under God" to be constitutional and not to violate the Establishment Clause.[111]

10. Observance of Religious Holidays and Celebrations

The Supreme Court has never expressly ruled on observing and celebrating religious holidays in schools, so therefore case law on this issue is scarce. However, applying the Court's ruling in *Tinker*, students may express their religious beliefs as they apply to particular holidays, as long as they do so in a non-disruptive manner. Therefore, they may wear holiday attire that expresses a religious message; "express their beliefs about religion in homework, artwork, and other written and oral assignments;"[112] and distribute pamphlets explaining the religious meaning of holidays during non-instructional time. In sum, students have the First Amendment right to express their beliefs about religious holidays in the same manner in which they may express their religious beliefs in general.

Similarly, the Court has never addressed whether school officials must grant excused absences for students wishing to miss class to observe religious holidays and celebrations. In *Zorach v. Clauson* (1952), however, the Court declared that a New York statute that allowed absences for religious observance and education was constitutional. The Court stated, "We would have to press the concept of separation of Church and State to…extremes to condemn the present law on constitutional grounds."[113] Furthermore, the Court stated:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[114]

Accordingly, a school may have a policy in place to allow student to be absent for religious reasons and not violate the Establishment Clause.

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[109] *Freedom from Religion Foundation v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010).
[110] *Id.*
[111] *See also Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010); *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005); *Sherman v. Cmty Consol. Sch. Dist.* 21, 980 F.2d 437 (7th Cir. 1992).
[112] U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).
[113] *Zorach v. Clauson* 343 U.S. 306, 313 (2005).
[114] *Id.* at 313-14.

Although the Court has established that schools may adopt policies allowing students to miss class to observe religious holidays and celebrations, it has not held such policies to be required. The Department of Education, however, has stated, "Where school officials have a practice of excusing students from class on the basis of parents' requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment."[115] Thus, if schools allow absences for secular reasons such as sporting events, college visits, or court appearances, they may not discriminate against students who wish to miss class for religious reasons. Supreme Court precedent strongly suggests the Department of Education's position is correct: "[I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason."[116] In other words, if a student is entitled an absence for secular needs, he or she cannot be denied that benefit merely because the need is religious. The DOJ has committed itself to enforcing this right, and most recently in 2007 was instrumental in pushing a California school district to revise an attendance policy that had allowed for multiple excused absences for various secular reasons, but only one religious reason.[117] In sum, although the Court has not required schools to grant excused absences for religious reasons, a school must allow them if it allows such absences for secular reasons.

11. Exemptions from Religiously Objectionable Classes and Assignments

One of the most contentious issues within public education is whether students have the right to "opt-out" of objectionable classes and assignments for religious reasons. Currently, many states have statues that allow parents the right to remove their children from objectionable classes, but the Supreme Court has not decided whether the Free Exercise Clause requires such statutes. In *Yoder*, the Court established that parents had a right to "guide the religious future and education of their children," [118] and in *Pierce v. Society of Sisters* (1925), the Court affirmed that parents could elect to educate their children by means besides "instruction from public teachers only."[119] In other words, it is well-established that the government cannot force parents to send their children to public schools which conflict with their religious scruples; however, it becomes much more complicated for those parents who choose to send their children to public schools.

Currently, it is unclear to what extent parents may guide their children's in public schools. In *Epperson,* the Court acknowledged that states have the "undoubted right to prescribe the curriculum for their public schools,"[120] and, unsurprisingly, such a right is a source of great controversy when parents believe that the curriculum is offensive to the religious beliefs they wish to impart to their children. And while parts of a curriculum may indeed offend various religious believers, the Court made it clear in *McCollum v. Board of Education* (1948) that to "eliminate everything that is objectionable to…[religious] sects or inconsistent with any of

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[115] U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).
[116] *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993).
[117] *Scheidt v. Tri-Creek Sch. Corp.*, No. 2:05-CV-204 (N.D. Ind., complaint filed May 18, 2005), http://www.justice.gov/crt/about/edu/documents/casesummary.php#tricreek.
[118] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).
[119] *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).
[120] *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

their doctrines,...will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."[121]

While parents do not have the authority to make a public school change its curriculum simply because it is deemed to be offensive to religious principles; the decisive issue is whether or not parents may remove their children from classes containing objectionable material. The Supreme Court has never ruled on "opt-out" rights, but multiple lower courts have issued decisions. The Tenth Circuit held in *Swanson v. Guthrie Independent School District* (10th Cir. 1998) that school boards are not required to allow students "dual-enrollment" in which they attend some classes at a public school and the remainder at a private institution or at home. In this case, parents wished to home school their daughter for religious purposes but wanted her to experience the benefit of certain public school classes in such subjects as foreign language and music. When the school board denied their request to allow their daughter to be a part-time student, the parents claimed the board's policy violated their rights under the Free Exercise Clause. The court disagreed and held that the policy was neutral and did not place a religious burden on the parents as it did "not prohibit them from home-schooling [their daughter] in accordance with their religious beliefs, and [did] not force them to do anything that [was] contrary to those beliefs."[122] The court decision found that the Constitution did not require schools to accommodate religious beliefs by allowing parents to hand-pick which classes their children attended.

Extending the *Swanson* ruling, multiple circuits have held that the Constitution does not even require schools to provide "opt-outs" for specific lectures or lessons. In *Mozert v. Hawkins County Board of Education* (6th Cir. 1987), the court held that a Tennessee school did not have to provide an "opt-out" to religiously-objectionable readings in class because "governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required."[123] The First Circuit held in *Brown v. Hot, Sexy, & Safer Productions* (1st Cir. 1995) that an assembly that featured an explicit sexual education presentation did not infringe "sincerely held religious values regarding chastity and morality."[124] The court justified this decision by stating that there exists no fundamental privacy right to be free from "exposure to vulgar and offensive language and obnoxiously debasing portrayals of human sexuality," and an "opt-out" remedy is not required for a right that does not exist. Finally, in *Parker v. Hurley* (D. Mass. 2008) the district court held that a Massachusetts school that taught kindergarten and first grade students about same-sex marriage did not violate parents' right to free exercise or their right to freely raise their children. The school district had a policy that allowed students to "opt-out" of curriculum that "primarily involve[d] human sexual education or human sexuality issues;"[125] however, despite this policy, school officials decided to not inform parents before teaching such material. The court found this not to violate the Constitution and declared, "Students today must be prepared for citizenship in a diverse society. As increasingly recognized, one dimension of our nation's diversity is differences in sexual orientation. In Massachusetts, at least, those differences may

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[121] *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948).
[122] *Swanson v. Guthrie Indep. Sch. Dist.*. No. I-L. 135 F.3d 694, 698 (10th Cir. 1998).
[123] *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1068 (6th Cir. 1987).
[124] *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 527 (1st Cir. 1995).
[125] *Parker v. Hurley*, 474 F. Supp. 2d 261, 264 (D. Mass.), *aff'd*, 514 F.3d 87 (1st Cir. 2008).

result in same-sex marriages."[126] In short, the school did not have to follow its own policy because its primary focus in teaching about homosexual marriage was not human sexuality, but rather on "fostering an educational environment in which gays, lesbians, and the children of same-sex parents will be able to learn well."[127]

Thus, while school districts may have "opt-out" policies, multiple lower courts have found that the Constitution does not require school districts to have them or in some circumstances even enforce them. Even classes involving sexual education and health are not automatic grounds for a constitutional exemption, and are subject to the same policies that govern other classes. But parents do have some limited statutory rights. If a class involves any type of "survey, analysis, or evaluation," that involves their child's participation, the Protection of Pupil Rights Amendment entitles parents to review any and all instructional materials related to such surveys, analyses, or evaluations.[128] In addition, absent parental consent, no student is required to submit to any kind of test designed to reveal information concerning political affiliations, psychological problems, sexual behavior and attitudes, illegal and anti-social behavior, critical appraisals of family relationships, legally privileged relationships, and income.[129] However, barring the inclusion of a survey, the final authority for parents who wish to remove their children from religiously-objectionable classes or assignment rests with individual school policy.

12. Graduation Ceremonies

The two most contentious issues surrounding graduation ceremonies involve school sponsored prayer and religious content in graduation and valedictory speeches. The Supreme Court's decision in *Lee v. Weisman* (1992) currently serves as the controlling authority with regard to graduation prayer. In *Lee*, a school district invited a member of the local clergy to offer an invocation and benedictory prayers at the school's commencement exercises. While the school did not tell the clergyman what to say, the school required that the prayer be non-denominational and gave the clergyman guidelines concerning non-denominational prayer. The school district defended its practice by saying that attendance and participation in religious exercises at a graduation were strictly voluntary. The Court disagreed and stated that because high school graduation is such a significant milestone in American society, attendance is "in a fair and real sense obligatory."[130] The Court also reasoned that "public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction" made participation in the prayer not truly optional.[131] The Court stated that actions such as standing could easily be interpreted as participating in and approving the religious activities and thereby pressure a dissenting student "to pray in a manner her conscience will not allow."[132] The government may not apply this type of religious coercion, and any policy which allows it violates the Establishment Clause. Accordingly, school districts

[126] *Id.* at 274.
[127] *Id.* at 275.
[128] 20 U.S.C. § 1232h(a).
[129] *Id.* § 1232h(b).
[130] *Lee v. Weisman*, 505 U.S. 577, 586 (1992).
[131] *Id.* at 593.
[132] *Id.*

may not sponsor prayer at graduation ceremonies; under *Lee,* such action is held to violate the Establishment Clause.

While *Lee* prohibits the government from sponsoring prayer at graduation ceremonies, *Lee* does not prohibit students from praying together at private baccalaureate ceremonies. Justice Souter noted in his concurring opinion in *Lee* that students may "organize a privately sponsored baccalaureate if they desire the company of like-minded students."[133] Moreover, if a public school district rents its facilities to non-school groups during non-school hours, then the district must rent to religious groups such as the organizers of a religious baccalaureate service. The Court's rulings in *Mergens, Good News Club,* and *Lamb's Chapel* all support the notion that a policy of equal access for religious groups does not violate the Establishment Clause but rather exhibits a neutrality that does not treat religious groups more favorably or more hostilely than it treats secular groups. While schools may not sponsor or endorse baccalaureate ceremonies, their occurrence on school grounds is consistent with the Constitution.[134]

Graduation and valedictory speeches that contain religious language remain a highly contentious legal issue, with their constitutionality in dispute in the lower courts. The Department of Education states:

> Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression…that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content.[135]

For instance, if a student is selected to speak based on his grade point average, and is allowed to independently compose his speech, the school may not discriminate against any religious language the student may decide to use. *Santa Fe* supports this reasoning, as it distinguished between government speech and private speech; while the government may not endorse religion, private parties can and are guaranteed constitutional protection.[136] Furthermore, the Court noted that because a speech is given on school property to a public audience does not automatically mean that such speech is the government's speech.[137] In short, as long as a graduation speech can be reasonably understood as not endorsed or regulated by the school, it may freely refer to religion even if it is delivered on school property at school-sponsored events. Accordingly, the controversial question that must be answered regarding graduation speeches is whether their content can reasonably be attributed to the school or if it solely belongs to the speaker.

When a graduation speech is interpreted to bear the school's approval or sponsorship, its content may be subject to editorial control. In *Hazelwood School District v Kuhlmeier* (1988), the Court stated, "Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as

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[133] *Id.* at 629.
[134] U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9648 (Feb. 28, 2003).
[135] *Id.*
[136] *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 324 (2000).
[137] *Id.* at 302.

their actions are reasonably related to legitimate pedagogical concerns."[138] Based on this reasoning, if a graduation speech is interpreted to "bear the imprimatur of the school"[139] and constitutes an academic experience, the school may restrict it using neutral and generally applicable criteria.[140] The Supreme Court has stated that if student expression is deemed to relate to pedagogical concerns, school officials are entitled to "assure that participants learn whatever lessons the activity is designed to teach…and that the views of the individual speaker are not erroneously attributed to the school."[141] Thus, it is possible that restrictions on speech at graduations do not have to necessarily be viewpoint neutral.

The Supreme Court's distinction between private and government speech in *Santa Fe* has left open the possibility that speakers at graduation may include prayer or religious themes in their speeches. But this area of constitutional law remains highly unsettled, and the lower federal courts are split on whether schools may censor student graduation speeches based on content or viewpoint. Currently the Second,[142] Third,[143] Ninth,[144] and Eleventh[145] Circuits have required viewpoint neutrality for school-sponsored speech while the First[146] and Tenth[147] Circuits have held that viewpoint neutrality is not necessary in all circumstances.[148] Any graduation speech that is deemed to "bear the imprimatur of the school" and relates to "legitimate pedagogical concerns" may, under *Hazelwood*, have its religious content stripped from it depending on the part of the country in which it is being delivered.

B. Religious Expression in the Workplace

1. Title VII of the Civil Rights Act of 1964

In regards to freedom of religion within the workplace, Title VII of the Civil Rights Act of 1964 is the piece of legislation most frequently called upon to protect the right of Americans to practice their religion while simultaneously pursuing a career. Title VII applies to all public sector employers, as well as all private businesses which have fifteen or more employees on their payroll for at least twenty weeks out of the year. Title VII declares that an individual may not be discriminated against because of his religion in all aspects of employment, including hiring,

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[138] *Hazelwood Sch. Dist.t v. Kuhlmeier*, 484 U.S. 260, 273 (1988).
[139] *Id.*
[140] For example, the Tenth Circuit cited *Hazelwood* in *Corder v. Lewis Palmer School District* (10th Cir. 2009), to support its holding that the school district did not violate the Free Speech Clause by requiring valedictorians to submit their speech for approval beforehand, as well as requiring a student to apologize for making comments related to Christianity which were originally not a part of the approved speech. It furthered stated that the student's free exercise claim failed because the student was disciplined not because of her religious beliefs, but rather because she did not follow the religion-neutral policy of submitting her speech for prior review.
[141] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).
[142] *See, e.g., Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 629-33 (2d Cir. 2005).
[143] *See e.g., C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 173 (3d Cir. 1999), *aff'd in part by an equally divided court, en banc, vacated in part*, 226 F.3d 198 (3d Cir. 2000).
[144] *See, e.g., Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 827-30 (9th Cir. 1991).
[145] *See, e.g., Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1215 (11th Cir. 2004).
[146] *See, e.g., Ward v. Hickey*, 996 F.2d 448, 452-54 (1st Cir. 1993).
[147] *See, e.g., Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926-27 (10th Cir. 2002).
[148] *See, e.g.*, Chiras v. Miller, 432 F.3d 606, 615 n.27 (5th Cir. 2005) ("A split exists among the Circuits on the question of whether Hazelwood requires viewpoint neutrality.").

firing, compensation, benefits, or promotion.[149] Title VII defines religion to include "all aspects of religious observance and practice, as well as belief."[150] Therefore, employers may not in any way discriminate against religious practice in addition to belief.

Title VII also requires that employers must accommodate an employee's religious practices to ensure the requirements of employment do not conflict with the expression of religious beliefs. Employers may be exempted from this directive only if they can demonstrate that they are "unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of [their] business."[151] The Equal Employment Opportunity Commission (EEOC) has interpreted a "reasonable accommodation" to include but not be limited to flexible scheduling, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices.[152] This list contains several common methods that employers can use to remove any burdens that employment responsibilities have imposed on any employee's religious practice; however, employers are not absolutely required to make any possible accommodations, but only those that will not place an "undue hardship" upon the operation of their business. In *Trans World Airlines v Hardison* (1977), the Supreme Court held that an "undue hardship" resulted from any religious accommodation which created more than *de minimus* cost or burden upon an employer.[153] The EEOC has defined a *de minimus* cost to be any accommodation that is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires employees to do more than their share of potentially hazardous or burdensome work.[154] Therefore, an employer is not required to cater to an employee's religious needs if such an accommodation will create a burden to the operation of his or her business. Title VII thus creates a balance that ensures employees that they cannot legally be discriminated against due to their beliefs, and that employers must reasonably accommodate their religious needs; conversely, it enables employers to have some discretion in determining accommodations by not forcing them to incur any undue hardships.

2. Religious Speech and Displays

Title VII mandates that employers must reasonably accommodate their employees' religious practices; therefore, Title VII protects any religious speech employee's religion requires. Employees are allowed to share their faith at work as long as they do not infringe on the rights of other employees and do not interrupt the workplace agenda, as both of these could

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[149] 42 U.S.C. § 2000e-1.
[150] *Id.* § 2000e.
[151] *Id.*
[152] U.S. Equal Employment Opportunity Comm'n, Compliance Manual § 12 (2008), *available at http://www.eeoc.gov/policy/docs/religion.html*.
[153] In *Hardison*, a TWA employee, Hardison, could not work on Saturdays due to his religion. After making multiple attempts to accommodate his religious needs, TWA ultimately fired him because he had not accepted TWA's offers and continued to refuse to work on Saturdays. The Supreme Court held that TWA's action had not violated Title VII because "to require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).
[154] U.S. Equal Employment Opportunity Comm'n, Compliance Manual § 12- IV(B)(2) (2008), *available at http://www.eeoc.gov/policy/docs/religion.html*.

be considered undue hardships.[155] Additionally, employers and supervisors may also communicate their faith with subordinate employees as long as such actions are not institutionalized and employees are not shown preferential or negative treatment based upon accepting or denying such beliefs.[156] Generally, Title VII covers the majority of religious expression and is only limited when an employer can show that such expression hindered workplace efficiency either by disrupting the work of the employee expressing his or beliefs or by causing disturbances with co-workers being exposed to such beliefs.

Conversely, Title VII protects against harassing statements and conduct based upon an employee's religion. Harassing actions are defined as being unwelcome and "sufficiently severe or pervasive to alter the conditions of employment by creating an…offensive work environment."[157] An employee may never be "required or coerced to abandon, alter, or adopt a religious practice as a condition of employment,"[158] as such a condition threatens tangible economic and psychological harm. However, an altered working environment is not solely the result of tangible harms but can also occur if employees are at all discouraged "from remaining on the job, or…advancing in their careers," solely because of their religious beliefs.[159] Therefore, Title VII protects all employees from being subjected to antagonizing behavior due to their religious beliefs, and it assures them that they have the right to be free from a work environment which in any way limits them because of what they believe. In summary, Title VII creates a type of joint defense which protects employees from the unreasonable restriction of their religious speech, while simultaneously ensuring that no employee is forced to endure a hostile work environment created by harassing forms of religious speech.

Religious displays are generally governed by the same standards as religious speech. Employees may have religious displays at their workspace so long as such a display is necessary for the practice of their religion and does not disrupt the work environment or infringe upon other workers' rights. In *Powell v. Yellow Book USA* (8th Cir. 2006), an employee sued her employer for not forcing another employee to remove religious sayings attached to her cubicle. The court ruled in the employer's favor and stated, "An employer…has no legal obligation to suppress any and all religious expression merely because it annoys a single employee."[160]

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[155] *See* EEOC Dec. 6674 (1976). In this case, an orthodox Muslim who was fired for being "overzealous" in his conversations concerning his belief was found to have been the victim of discrimination. The employer's claim that the employee's actions created an undue hardship did not prevail as there was no evidence that the employees' actions impeded his ability to do his job, or disrupted the operation of the workplace. *See id.*

[156] *See Brown v. Polk Cnty.*, 61 F.3d 650, 657 (8th Cir. 1995) (court ruled that Brown, who was a supervisor of around fifty employees, did not impose an undue hardship upon his employer as the company had no evidence of "'imposition on co-workers or disruption of the work routine,' generated by occasional spontaneous prayers and isolated references to Christian belief" (quoting *Duane Terrell Burns v. S. Pacific Transp. Co.*, 589 F.2d 403, 407 (1978))); *see also EEOC v. Townley Eng'g & Mfg.*, 859 F.2d 610, 621 (9th Cir. 1988) ("Title VII does not, and could not, require individual employers to abandon their religion."). Requested accommodations must be based on religious doctrine and not merely personal preference. *Eatman v. U.S. Parcel Service*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002) An employer's requirement that individuals with non-traditional hairstyles wear hats did not violate the Title VII rights of an employee who wore dreadlocks as an expression of religious beliefsbecause the employee's decision was a personal preference and not required by religious tenets. *Id.*

[157] U.S. Equal Employment Opportunity Comm'n, Compliance Manual § 12- III(A)(2) (2008), *available at http://www.eeoc.gov/policy/docs/religion.html*

[158] *Id.*

[159] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

[160] *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1078 (8th Cir. 2006).

Powell contrasts with *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) in which the court ruled that an employee's religious display condemning homosexuality was not protected under Title VII. The court ruled that the display could be interpreted as demeaning to homosexual employees and thus had the potential to create a hostile work environment. Furthermore by accommodating the display, Hewlett-Packard faced an undue hardship as the display "would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably view[ed] as vital to its commercial success."[161] Together, these two cases serve to differentiate those religious displays Title VII protects and those that fall outside of its boundaries. In sum, religious displays are permissible in the workplace as long as they do not create a hostile or intimidating environment for other employees, and do not place an undue hardship on employers.

3. Religious Attire and Grooming

As with religious speech and displays, an employer must accommodate an employee's request to dress and groom himself in ways his religion requires unless the employee's request would place an undue hardship on business operations. This protection extends to government as well as private employees, so long as government employees' religious attire is clearly meant to represent personal beliefs and is not presented as a government viewpoint. The EEOC has declared that requests to wear religious head coverings and dress, (such as a Jewish *yarmulke* or a Muslim *hijab*) as well as requests to maintain certain types of hairstyles and facial hair (such as a Sikh's uncut hair and beard) represent religious practices protected under Title VII.[162] An employer is only exempted from accommodating these requests if granting them would jeopardize the safety of the work environment or create another type of undue hardship on the business.[163]

One controversial ground cited by employers not wishing to accommodate religious attire or grooming requests is that such requests would cause undue hardship by tainting the company's public image. In *Cloutier v. Costco Wholesale Corp* (1st Cir. 2004), a female Costco employee was denied her request to wear religiously-motivated facial piercings, due to a company policy prohibiting facial jewelry. The employee claimed that because her religious beliefs required her piercings, Title VII required Costco to accommodate her. The court disagreed and stated, "Granting such an exemption would be an undue hardship because it would adversely affect the employer's public image."[164] In contrast to *Cloutier*, the district court in *EEOC v. Red Robin Gourmet Burgers* (W.D. Wash 2005) held that an employer was required to accommodate a male employee's request to display religious tattoos, regardless of the employer's claim that such an accommodation would damage its reputation as a family-friendly establishment. The court justified its ruling by stating, "Hypothetical hardships based on unproven assumptions typically fail to constitute undue hardship . . . . Red Robin must provide

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[161] *Peterson v. Hewlett-Packard Co.* 358 F.3d 599, 607 (9th Cir. 2004).
[162] U.S. Equal Employment Opportunity Comm'n, *Religious Discrimination*, http://www.eeoc.gov/laws/types/religion.cfm (last visited Aug. 16, 2011).
[163] *Id.; see also Webb v. City of Philadelphia*, 562 F.3d 256, 260-61 (3d Cir. 2009) (Court granted summary judgment against police officer's request to wear a "religious" headscarf while in uniform and on duty since the accommodation would present an undue hardship.)..
[164] *Cloutier v. Costco Wholesale Corp.* 390 F.3d 126, 136 (1st Cir. 2004).

evidence of 'actual imposition on co-workers or disruption of the work routine' to demonstrate undue hardship."[165]

Cloutier and *Red Robin* represent a current division among courts in interpreting the extent to which Title VII protects religious attire and grooming. If one reads *Cloutier* broadly, it may have grave implications for those wishing to wear religious attire as businesses could simply cite a desire to maintain their public image as legitimate grounds for denying exemptions to dress-code policy. In conclusion, the right to wear religious attire is fairly established and enforced, but there is the possibility that court rulings that have negatively affected minority religions could be applied more generally and hinder mainstream faiths as well.[166]

4. Observance of Religious Holidays and Celebrations

In regard to an employee's request to be excused from work for religious reasons, the EEOC has stated that voluntary substitutes and shift swaps are examples of reasonable accommodations that do not impose an undue hardship upon an employer's operation.[167] However, an employer does not have to permit a substitute or swap if by doing so it could incur added costs or unfairly affect the amount of work that other employees have to perform. As with other areas of religious practice in the workplace, an employer must try and reasonably accommodate an employee's request to miss work for religious reasons, but only if such a request does not pose more than *de minimus* cost or burden.

5. Use of Work Facilities for Religious Reasons

The EEOC states that an employer must meet an employee's need to use work facilities for religious reasons if such a request can be reasonably accommodated without causing undue hardship.[168] If an employer allows office space to be used for non-work, non-religious purposes, the employer must allow the space to be used for religious needs; denying religious usage would constitute religious discrimination. However, if an employer's policy only allows company property to be used for work-related reasons, an employee's religious request is less likely to prevail. For example, in *Berry v. Department of Social Service* (9th Cir. 2006), the court held that an employer did not have to meet a Christian employee's request to use a conference room to conduct prayer meetings because the employer did not allow other non-work related groups to use the space. Furthermore, the employer "did not prohibit its employees from holding prayer meetings in the common break room or outside, but declined to open the [conference room] to

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[165] *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 U.S. Dist. LEXIS 36219, *19 (W.D. Wash 2005) (quoting *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981)).

[166] In *Brown v. F.L. Roberts*, 419 F. Supp. 2d 7, 17 (D. Mass. 2006), a district court judge observed, "[i]f *Cloutier's* language approving employer prerogatives regarding 'public image' is read broadly, the implications for persons asserting claims for religious discrimination in the workplace may be grave. One has to wonder how often an employer will be inclined to cite this expansive language to terminate or restrict from customer contact, on image grounds, an employee wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics. More likely, and more ominously, considerations of 'public image' might persuade an employer to tolerate the religious practices of predominant groups, while arguing 'undue hardship' and 'image' in forbidding practices that are less widespread or well known." *Id.*

[167] U.S. Equal Employment Opportunity Comm'n, *Religious Discrimination*, http://www.eeoc.gov/laws/types/religion.cfm (last visited Aug. 16, 2011).

[168] *Id.*

employee social or religious meetings as such use might convert the conference room into a public forum."[169] Therefore, employers retain primary control over their facilities, but they must still make reasonable efforts to accommodate their employees' religious needs. Additionally, employers are not allowed to generally make their facilities available for non-work related purposes and subsequently deny their use for religious reasons. The Supreme Court has made it clear that a benefit "that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free…not to provide the benefit at all."[170] Thus, employers may not be hostile towards religion in the workplace and must not provide benefits in a discriminatory fashion.

C. Right of Conscience

For the purposes of this memo, the term "Right of Conscience" refers to the ability of employees to be able to refuse a work-related task which they judge to be morally objectionable based on the tenets of their religion. This type of situation has gained the most media attention within the healthcare industry, but individuals across a wide range of professions are daily forced with the difficult decision of either performing tasks in violation of their religion, or objecting to such tasks with the fear of facing repercussions. The following sections detail some of the environments where vocational / legal duties and religious beliefs most often clash; at issue in each situation is whether the Free Exercise clause or various statutes allow employees and organizations to be exempted from neutral, generally-applicable policies.

1. Healthcare Professionals

Within the healthcare industry, doctors, nurses, and other medical personnel face the possibility of performing or assisting in procedures, such as abortions and sterilizations, that conflict with their religious beliefs. Passed in 1973, the Church Amendments sought to address this dilemma by prohibiting any entity which received federal funding from forcing "an individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions…."[171] Furthermore, the Church Amendments proscribed any discriminatory action targeted towards an individual "because he refused to perform or assist in the performance of such a [sterilization] procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions…."[172] Because of the Church Amendments, hospitals and health clinics that receive federal funding cannot compel any

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[169] *Berry v. Dep't of Social Servs.*, 447 F.3d 642, 657 (9th Cir. 2006).

[170] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984)). Despite this statement, the Seventh Circuit ruled that General Motors did not violate Title VII by providing resources to recognized employee "affinity groups", while simultaneously refusing to recognize one based on Christianity. The court justified its ruling by stating, "General Motors's Affinity Group policy treats all religious positions alike--it excludes them all from serving as the basis of a company-recognized Affinity Group. The company's decision to treat all religious positions alike in its Affinity Group program does not constitute impermissible 'discrimination' under Title VII." *Moranski v. General Motor Corp.*, 433 F.3d 537, 541 (7th Cir. 2005). This case may be somewhat of an anomaly and may not represent a trend in the courts.

[171] 42 USCS § 300a-7(a)(1).

[172] *Id.* § 300a-7(c)(1).

individual to perform a sterilization or abortion procedure to which he or she objects on religious grounds, nor can an objector be subject to any kind of employment discrimination because of his or her refusal to perform one of these procedures.

Much in the same way that the Church Amendments protect individuals, the Weldon Amendment and the Public Health Service Act protect organizations who do not wish to perform or pay for abortions. Both of these pieces of legislation ensure that hospitals, health clinics, and insurance providers will not face governmental discrimination due to their decision not to provide or fund abortions. Specifically the Public Health Service Act states that no government that receives federal financial assistance may "subject any health care entity to discrimination on the basis that--the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions."[173] Accordingly, this act, along with the Weldon Amendment, ensures that healthcare entities, such as religiously-affiliated hospitals, will not be penalized for following conscience and refusing to support abortions. Furthermore, the Public Health Service Act states that post-graduate physician training programs that do not provide training for abortions must be judged by the same accreditation standards as other programs that do provide such training.[174] In this way, the Act ensures that medical schools that do not provide abortion training will not be forced to provide that training to be accredited.

In 2008, President Bush passed a series of regulations to ensure that government agencies complied with the non-discrimination polices of the Church Amendments, Weldon Amendment and the Public Health Services Act (collectively known as the Conscience Statutes), and were not compelling individuals or healthcare entities to perform or fund abortions. Citing concerns "about the development of an environment in sectors of the health care field that [was] intolerant of individual objections to abortion or other individual religious beliefs or moral convictions,"[175] the regulations sought to clarify the obligations placed on government agencies by federal law. The regulations also required that recipients of federal funding certify in writing their compliance with the Conscience Statutes' requirements. Finally, the regulations clarified several definitions. Most notably, the regulations interpreted the Church Amendments' provision which stated that an individual could not be forced to perform or assist in performing an abortion or sterilization procedure. The regulations defined "assist in the performance" to mean "any activity with a reasonable connection to a procedure, health service or health service program, or research activity;" such activities included "counseling, referral, training, and other arrangements for the procedure, health service, or research activity."[176] The regulations did not alter existing law in any way but simply ensured compliance with existing laws and provided an overall better understanding of obligations those laws imposed and protections they provided.

Citing the Bush-era regulations alleged potential for confusion and harm, President Obama authorized new regulations that largely rescinded the Bush regulations. Obama's regulation removed the section of the Bush regulations that required written certification of compliance with non-discriminatory laws and the section defining statutory provisions. The

[173] 42 USCS § 238n(a)(1).
[174] *Id* § 238n(b)(1).
[175] 73 Fed. Reg. 78071, 78073 (Dec. 18, 2008).
[176] *Id.*at 78097.

Obama Administration removed the certification section because that section imposed financial and administrative burdens upon healthcare entities and because the Administration simply believed that the certification requirements were "unnecessary to ensure compliance with the federal health care provider conscience protection statutes."[177] The definitions section was removed because there was concern that if interpreted too broadly, healthcare providers could be led to mistakenly believe they had the right under the Conscience Statutes "to refuse to treat entire groups of people based on religious or moral beliefs."[178] The new rule clarified the original purpose of the Conscience Statutes, stating:

> The Federal provider conscience statutes were intended to protect health care providers from being forced to participate in medical procedures that violated their moral and religious beliefs. They were never intended to allow providers to refuse to provide medical care to an individual because the individual engaged in behavior the health care provider found objectionable.[179]

The new rule made it clear that providers could not claim the Conscience Statutes to justify not treating someone whose lifestyle conflicted with the providers' religious beliefs; therefore, the statutes' protection only extended to those individuals who were being coerced to perform religiously objectionable procedures such as abortions and sterilizations. The changes made by the Obama administration did not alter previously-existing federal laws, but they did significantly limit the breadth given to them by the 2008 Bush Regulations.

One of the main impetuses for rescinding the Bush-era regulations was the fear that the broad language of the definitions section could be used to justify limiting access to contraception. The Obama administration was concerned that the word "abortion" could be interpreted to include "contraception" and thus lead providers to believe that the Conscience Statutes allowed them to refuse to provide birth control and emergency contraceptives based on religious objections. The new rule clarified that federal law, stating, "There is no indication that the federal health care provider conscience statutes intended that the term 'abortion' included contraception."[180]

Despite this clarification, there currently exists much debate surrounding the rights of those religiously-opposed to dispensing contraception, and pharmacies are at its forefront. Many pharmacists believe that types of emergency contraception such as Plan B are immoral and to dispense them amounts to participating in the taking of human life; therefore, they do not believe that their religious beliefs allow them to dispense emergency contraception to customers. The American Pharmacists Association (APhA) has stated that it "recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patients' access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal."[181] In this way, pharmacists are not forced to violate their

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[177] 76 Fed. Reg. 9968, 9974 (March 25, 2011).
[178] *Id.* at 9973.
[179] *Id.*
[180] *Id.* at 9974.
[181] *Federal Conscience Clause*, Gov't Aff. Issue Brief (Am. Pharmacists Ass'n), Mar. 2009, at 3, *available at* http://www.pharmacist.com/AM/Template.cfm?Section=Home2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=15688.

consciences so long as they ensure that patient's needs are met by another willing pharmacist or healthcare professional. Currently five states explicitly allow for pharmacists to refuse to distribute emergency contraception;[182] five more states have broad refusal clauses that do not specifically mention pharmacists, but may apply to them.[183] Conversely, only California requires that pharmacists fill all valid prescriptions.[184]

Two of the most noteworthy rulings to date on this issue have resulted in somewhat conflicting decisions regarding pharmacist's rights. In *Stormans, Inc. v. Selecky* (9th Cir. 2009), the court upheld a Washington state law which required pharmacies to deliver lawfully prescribed FDA-approved medications, among which was emergency contraception. The court justified its ruling by stating that the law was neutral and that its "neutrality…[was] not destroyed by the possibility that pharmacists with religious objections to emergency contraception will disproportionately require accommodation under the rules."[185] Conversely, in *Morr-Fitz, Inc. v. Blagojevich* (Ill. Cir. Ct. Apr. 5, 2011) an Illinois state court invalidated a state law compelling pharmacists to dispense emergency contraception as the court declared that the law violated the state's RFRA and the First Amendment Free Exercise Clause.[186] It seems that until one of these types of cases reaches the Supreme Court, decisions will continue to be made on a case-to-case basis depending on state law; therefore, the constitutional right of pharmacists to be able to refuse to dispense emergency contraception is currently unclear.

2. Churches, Religious Schools, and Other Religious Organizations

Under Title VII, religious organizations are allowed to show preferential treatment for members of the same religion in employment decisions and thus can legally discriminate using religious criteria. Title VII states that it does not apply to a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[187] In this way, a Roman Catholic school may choose to hire a Catholic teacher instead of a Protestant teacher solely for religious reasons and not be found liable for discrimination under Title VII. However, Title VII does not allow employers to discriminate based on other criteria such as race or sex.

Additionally, the Supreme Court has ruled that religious organizations may not discriminate against protected classes. In *Bob Jones University v. United States* (1983) the Court held that the IRS could remove a Christian university's tax-exempt status due to its racially discriminatory policies despite the fact that the school claimed the policies were based upon Biblical interpretations. The Court held that the IRS could justifiably burden the university's First Amendment rights because "the Government [had] a fundamental, overriding interest in eradicating racial discrimination in education" that "substantially outweigh[ed] whatever burden

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[182] Arkansas, Georgia, Idaho, Mississippi, and South Dakota. *see* Guttmacher Instit., *State Policies in Brief: Emergency Contraception*, 2 (2011), *available at* http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf
[183] Colorado, Florida, Illinois, Maine, Tennessee. *See Id.*
[184] *Id.*
[185] *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1131 (9th Cir. 2009).
[186] *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, (Ill. Cir. Ct. Apr. 5, 2011) (order granting declaratory and injunctive relief), *available at* http://media.aclj.org/pdf/judgerienziruling_20110405.pdf.
[187] 42 U.S.C. § 2000e-1.

denial of tax benefits place[d] on [the university's] exercise of [its] religious beliefs."[188] *Bob Jones* held, in effect, that the government had such a compelling interest in assuring equal treatment for all of its citizens that it could legitimately burden the university's free exercise of religion to achieve that interest. Therefore, both Title VII and the Supreme Court place limits on the extent to which religious organizations may avoid adherence to government non-discrimination policies.

Recent events in Illinois illustrate the possible danger to free exercise imposed in the name of nondiscrimination. Illinois enacted a new law entitled the Religious Freedom Protection and Civil Union Act.[189] This Act has legalized same-sex unions and has forced Catholic adoption agencies either to assign children to same-sex couples in the same way as they would heterosexual couples or lose their foster care and adoption contracts with the state. The state has already chosen not to renew its contracts with those Catholic adoption agencies electing not to comply, and currently the matter is being heard in a state court.[190] Examples such as this one are evidence that religious organizations are not always free to fully determine and follow their mission statements as government anti-discrimination policies often place pressure on religious groups to significantly change their policies or in some circumstances completely disband.

One protection that religious organizations can employ against burdensome government policies is the "ministerial exception." The ministerial exception can best be described as a sort of "blanket protection" that prevents the government from interfering with the internal affairs of religious bodies such as churches, synagogues, and mosques. Although this right is not specifically stated in the First Amendment, multiple courts have interpreted the First Amendment to contain this exception.[191] Even in *Employment Division v. Smith*, the Supreme Court acknowledged that the government may not "lend its power to one or the other side in controversies over religious authority or dogma."[192] Federal courts have almost unanimously agreed that the government may not from enact policies or make judgments concerning a religious organization's internal affairs as doing so would violate the Establishment Clause as well as the organization's rights under the Free Exercise Clause. Therefore, the ministerial exception enables a religious organization to conduct its employment practices in some ways that may otherwise constitute discrimination under Title VII without fear of governmental reproach. The courts, however, are significantly divided in their opinions about the breadth of the ministerial exception's protection and whether it should apply to religious organizations other than churches, synagogues, etc. Currently these questions have been answered on a case-by-case basis, but later in 2011 the Supreme Court will hear a case entitled *Hosanna-Tabor v. EEOC* that likely will answer at least some questions about the ministerial exception's reach.[193] In *Hosanna-Tabor*, the Court will decide whether religiously-affiliated schools may operate their

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[188] *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).
[189] 750 ILL. COMP. STAT. ANN. 75/1-75/90 (LexisNexis 2011).
[190] *See* Manya Brachear, *State Severs Foster Care Ties with Chicago Charities*, Chicago Tribune, July 11, 2011, *available at* http://articles.chicagotribune.com/2011-07-11/news/chi-state-severs-fostercare-ties-with-catholic-charities-20110711_1_children-with-unmarried-cohabiting-catholic-charities-civil-unions.
[191] *See McClure v. Salvation Army*, 460 F.2d 553, 558, 560 (5th Cir. 1972); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724–25 (1976) (all of these cases hold that religious bodies have an absolute right to elect their leaders free from government interference).
[192] *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).
[193] *See EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010).

employment practices under the protection of the ministerial exception or whether or not they must abide by Title VII regulations. Whatever the Court decides will be of great significance to religious organizations and could substantially affect their ability to conduct their employment practices in a manner consistent with their religious beliefs.

3. Religious Beliefs and Anti-Discrimination Policies

Over the last decade, there have been increased instances of religious beliefs coming into conflict with non-discrimination policies. Meant to be neutral, these policies often have the incidental effect of pressuring a religious individual or group to condone lifestyles and decisions they morally oppose. In 2000, the Supreme Court made one of its most controversial rulings when in *Boy Scouts of America v. Dale* the Court decided that the Boy Scouts could legally revoke the membership of an assistant scoutmaster because of his homosexuality despite a New Jersey law that prohibited discrimination based on sexual orientation. The Court determined that the Boy Scouts engaged in "expressive association" as they sought to recruit scoutmasters who would "instill values in young people;"[194] one of the values the Scouts held was its belief that homosexual activity is immoral.[195] Therefore, the Court ruled that forcing the Scouts to accept an openly homosexual leader would force them to send a "distinctly different message"[196] than they desired, and therefore such action would significantly hinder their right of expressive association. The Court's ruling essentially gave the Boy Scouts the constitutional right to bar homosexuals from becoming leaders.

Although *Dale* affirmed a group's right to associate, it did little to address the rights of religious believers whose beliefs about homosexual activity collide with state anti-discrimination laws. Currently under Title VII, "sexual orientation" and "gender identity" are not listed as protected classes, and therefore discrimination based on either of these characteristics is not grounds to file a complaint with the EEOC. But many state and local governments have adopted policies that makes such discrimination illegal and therefore allow aggrieved parties to sue individuals or corporations that they believe unfairly targeted them based on their sexual orientation or gender identity. A question of great significance for religious individuals is whether state and local policies prohibiting discrimination based on sexual orientation can legally burden their free exercise by forcing them to extend equal benefits to proponents of a lifestyle that they find to be morally objectionable or to suppress speech objecting to that lifestyle. A related issue is whether states may allow private businesses to apply their own policies against sexual orientation discrimination to restrict employees' religiously-motivated speech disapproving of homosexuality.

Religious believers generally have not fared well in these types of cases. Courts have held that companies may apply their non-discrimination policies to legally fire[197] and restrict the speech[198] of religious employees expressing their disapproval of homosexuality. In such cases,

[194] *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000).
[195] *Id.* at 671-72.
[196] *Id.* at 652.
[197] *Bodett v. CoxCom*, 366 F.3d 736 (9th Cir. 2004) (The court held that a Christian employee who voiced her beliefs about homosexuality to an openly-gay employee had violated her employer's non-discrimination policy and thus she had not been fired because of her religious beliefs, but because she violated a legitimate policy.)).
[198] *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (see explanation in section B2).

courts judged that under Title VII, employers do not have to accommodate religious beliefs that impose more than a *de minimus* cost upon business operations; therefore, employers can legally enforce non-discrimination policies against religious expression objecting to homosexuality because such expression has the potential to disrupt the harmonious office relations that the policy is trying to preserve. In other words, Title VII's protection for religious speech expressing disapproval of homosexuality is practically non-existent as such speech may be deemed offensive, and thus accommodating it would create a negative work environment that would impose an undue hardship on employers. In this manner, courts will likely continue to consider employer nondiscrimination policies to be a legitimate mechanism to suppress religious speech by employees objecting to homosexuality. Moreover, non-discrimination policies and laws are forcing people in professions such as psychology[199] and reproductive services,[200]and people in the business of renting properties,[201] to either recant their religious beliefs about homosexuality, or express their views openly and suffer the repercussions. In summary, the increasing emergence of non-discrimination policies which list sexual orientation as a protected class will continue to significantly burden the religious practice of individuals objecting to such practices, as the government's interest to create a society of equality will be judged to be a higher priority than an individual's free exercise rights.

D. Government Funding for Religiously Affiliated Organizations

1. Goverumeut Subsidies for Religious Schools

In determining the constitutionality of policies that direct government funds towards religiously-affiliated schools, the Supreme Court has traditionally held that such policies do not violate the Establishment Clause as long as they do not favor certain types of schools over others, and ensure that funds are only used for secular purposes and materials. Despite the strict separationist doctrine advocated in *Everson*, the Court in *Everson* held that the government could provide benefits to families of religious and non-religious students alike. The Court held that a New Jersey statute which allowed students going to parochial schools to be reimbursed for bus fares in the same way as students who went to public schools was constitutional. The Court defended its decision by stating, "The [First] Amendment requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[202] In this way, the Court made it clear that the Establishment Clause only required a neutral approach to religion, and not one which actively disfavored it. Similarly, the Court

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[199] *See Ward v. Wilbanks*, 2010 U.S. Dist. LEXIS 127038 (E.D. Mich. 2010) and *Keeton v. Anderson-Wiley*, 733 F. Supp. 2d 1368 (S.D. Ga. 2010) (Both of these cases involve students in separate counseling masters degree programs, who were threatened with expulsion for professing their religious beliefs, especially in regard to their views on homosexuality. Both of their respective schools believed that their views made them unfit to counsel homosexual clients, therefore they required them to change their viewpoints as a condition of receiving their accreditation. These cases are currently being litigated in the Sixth and Eleventh Circuits respectively.).

[200] *See North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145(Cal. 2008) (California Supreme Court ruled that a physicians' religious beliefs did not exempt from California's Unruh Civil Rights Act, and therefore they had to provide IVF to a lesbian couple.).

[201] *Smith v. Fair Employment and Housing Division*, 12 Cal. 4th 1143(Cal. 1996) (California Supreme Court ruled that a landlord could not refuse to rent apartment to unmarried couples, as her religious principles did not exempt her from her obligations under California's Housing Discrimination Code.).

[202] *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

held in *Board of Education v. Allen* (1965), that a New York law requiring public schools to lend textbooks to private and parochial schools did not violate the Establishment Clause because it was neutral towards religion. The Court viewed the law as Constitutional because it did not favor one religion over another or religion in general, and "the financial benefit [was] to parents and children, not to schools."[203]

The Court recently applied the holdings in *Everson* and *Allen* in *Zelman v. Simmons-Harris* (2002). In *Zelman*, the Court upheld an Ohio voucher program that provided financial aid for certain students so they could attend the public or private school of their choosing, including religious schools. The program was intended to allow students who lived in areas with poorly performing public schools to be able to attend other public and private schools; however, no other public schools participated, and 82% of the private schools participating were religious. It was later found that 96% of the participating students in the program were attending religious schools. Plaintiffs challenged the law as improperly funding religious activity, thus violating the Establishment Clause.[204] The Court disagreed and stated:

> In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.[205]

Therefore, the Court ruled that the program's effects did not matter as its purpose was not to favor religion. It was purely meant to advance educational goals, and families were free to use the funds to choose the educational option that they deemed best. In sum, the Supreme Court consistently has ruled that the government may pass policies that direct funds towards religious institutions so long as such policies have secular goals, do not favor one religion over another, or religion in general, and that any financial aid reaching religious institutions does so as the result of private individual choices.[206]

Although the government may constitutionally direct funds towards religious schools, it only may do so if it can avoid excessive entanglement with the religious mission of the institutions it is benefitting. In *Lemon*, the Court held that a Pennsylvania statute providing financial support to parochial schools by reimbursing the cost of teacher's salaries, textbooks, and instructional materials was unconstitutional because it required the government to constantly ensure that its funds were only being used for secular purposes. This continual monitoring created an entangling relationship because it forced governments to interfere in religious organizations' internal affairs, and is thus could infringe on religious liberty. Consequently, because of the prohibition of creating entangling relationships, governments may not judge the religiousness of an institution which receives its funds.

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[203] *Bd. of Educ. v. Allen*, 392 U.S. 236, 244 (1965).
[204] *Zelman v. Simmons-Harris*, 536 U.S. 639, 647 (2002).
[205] *Id.* at 662.
[206] *See Mitchell v. Helms*, 530 U.S. 793, 835 (2000); *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14 (1993).

Despite its prohibition of excessive entanglement, for a number of years, the Supreme Court routinely held that direct aid to "pervasively sectarian" schools violated the Establishment Clause because any funds those schools received, even those to be used for secular purposes, would necessarily become religiously tainted and be used to indoctrinate students. In *Mitchell v. Helms* (2000), the Court rejected this "pervasively sectarian" doctrine as inconsistent with the Establishment Clause because it required the government to condition its aid based on a recipient's level of religious commitment, thereby causing government to discriminate against religion. The plurality stated:

> [T]he inquiry into the [the school's] religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs.[207]

Therefore, the state may not condition its aid on the intensity of an institution's religious beliefs as such a practice requires the government to routinely evaluate an institution's religious nature before it can support it with aid. The Tenth Circuit recently applied *Mitchell* in *Colorado Christian University v. Weaver* (2009), when it ruled that it was unconstitutional for the state to gauge the religiosity of a student's university in determining whether he was eligible for scholarship funding.[208]

2. Government Funding for Religiously Affiliated Social Programs

In 2002, President Bush issued Executive Order 13279. That order ensured that faith-based social programs would be entitled to the same legal protection and benefits guaranteed to secular programs. The Order stated, "The Nation's social service capacity will benefit if all eligible organizations, including faith-based and other community organizations, are able to compete on an equal footing for Federal financial assistance used to support social service programs."[209] Accordingly, it explicitly stated that "No organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs."[210] The Order clarified that faith-based organizations receiving federal funds could maintain their religious character and did not have to remove any religious references from their names or religious symbols or icons from their buildings.[211] The only stipulation for receiving financial assistance was that activities such as religious instruction and worship had to take place separately from any social program receiving assistance.[212] In sum, Executive Order 13279 ensured that faith-based social programs had the same access to federal funding as other social groups and that they could receive such funds without having to compromise their religious identity or hiring practices.

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[207] *Mitchell v. Helms*, 530 U.S. 793, 828.
[208] *See Colorado Christian University v. Weaver*, 534 F.3d 1245 (2008).
[209] Exec. Order No. 13,279, 67 Fed. Reg. 77141 (Dec. 12, 2002).
[210] *Id.*
[211] *Id.*
[212] *Id.*

In his presidential campaign, President Obama pledged to reform the Bush Faith-Based Initiative so that federal funds would not go to organizations that proselytized and that discriminated in their hiring practices using religious criteria.[213] Accordingly, he issued Executive Order 13559 which amended President Bush's former Order in an attempt to clarify prohibited uses of federal funding.[214] However, despite his campaign promises, this new Order did little to change Order 13279 and did not address the issue of religious hiring by federally-funded faith based organizations. It reaffirmed that religious social programs were equally eligible for federal funding and that such social programs did not have to abandon their religious identity to receive funds. One of the few significant changes made stated that the government "must monitor and enforce standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities."[215] This provision was added to ensure that federal funding complies with the Establishment Clause by not being used to further overtly religious activity. There is a possibility that this change could be used by the government to excessively restrict funding to organizations it deems overly evangelistic, but currently this has not been an issue, and thus the protections ensured in the Bush initiative remain intact.

E. Religious Displays and Monuments

1. Public Religious Displays

Justice O'Connor's invention of the "endorsement test" in Lynch heavily influenced subsequent Supreme Court decisions concerning government religious displays. In *Lynch*, O'Connor stated in her opinion that government action violated the Establishment Clause if it conveyed to a so-called reasonable observer a message that the government endorsed or disapproved of religion.[216] Under this interpretation of the Establishment Clause, whether a government religious display violates the Establishment Clause depends on whether the display, in the context of all relevant surrounding facts, would lead the hypothetical reasonable observer to conclude that the display promotes or gives the appearance of favoring one religion over another or religion over non-religion (or vice versa).

The Court applied the "endorsement test" in *County of Allegheny v. ACLU* (1989) to justify different rulings concerning the constitutionality of two of Pittsburgh's holiday displays. One of the displays was featured on the Grand Staircase inside the county courthouse and consisted of a crèche, or nativity scene, which included the banner "Gloria in Excelsis Deo!" (Glory to God in the Highest!). The other display was featured on a publicly-owned piece of property outside an office building and contained a Christmas tree, a menorah, and a sign with a message proclaiming the city's support of liberty during the holiday season. The Court held that the crèche violated the Establishment Clause while holding that the second display was permissible as it did not advance religion. The Court stated that "the effect of a crèche display

[213] *See* Laura Meckler, *Faith-Based Program gets Wider Focus*, Wall Street Journal, February 5, 2009 *available at* http://online.wsj.com/article/SB123379504018650159.html.
[214] *See* Exec. Order No. 13,559, 75 Fed. Reg. 71319 (Nov. 22, 2010).
[215] *Id.* at 71320.
[216] *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

turns on its setting;"[217] thus to be permissible, a nativity scene must be situated in a context which contains an overall secular message. In contrast to the crèche in *Lynch*, which was surrounded by non-religious symbols such as Santa Claus and reindeer, the one in *Allegheny* was unaccompanied. Furthermore, the *Allegheny* crèche was situated in the main part of the county courthouse, a building which clearly represented governmental authority. The Court thus concluded that because the crèche stood alone and was featured in such a prominent location, an observer would reasonably believe that the county "support[ed] and promote[ed] the Christian praise to God that [was] the crèche's religious message."[218] In summary, the Court ruled that it was not merely the presence of religious content which violated the Establishment Clause, but rather that such content appeared in a context suggesting government endorsement of its message.

In contrast to its ruling about the crèche, the Court held that the city's display containing a Christmas tree, menorah, and sign proclaiming its support of liberty did not endorse religion and accordingly did not violate the Establishment Clause. The Court held that the presence of a Christmas tree and menorah together did not serve as an endorsement of the Christian and Jewish faiths, but rather "simply recognize[d] that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in [American] society."[219] Therefore, the display had a secular purpose, as it sought to celebrate the holiday season in general and not promote a specific religious viewpoint. Additionally, unlike the nativity scene in the courthouse, the menorah and Christmas tree were located in a much more neutral venue and did not immediately suggest governmental endorsement. In conclusion, both *Lynch* and *Allegheny* illustrate that when determining the constitutionality of a display containing religious symbols, the display's context and setting are as important as its content in determining whether the display violates the Establishment Clause.

The crèche in *Lynch* was government owned; the crèche in *Allegheny*, although privately sponsored, appeared in a non-public forum on government property. In *Capitol Square Review & Advisory Board v. Pinette* (1995), the Supreme Court ruled on the constitutionality of a private religious display on government property that was a public forum. In *Pinette*, the Ohio Chapter of the Ku Klux Klan wished to place a cross on the Columbus Capitol Square. But the request was denied because the Advisory Board believed that granting the request would violate the Establishment Clause. The Board determined that because the square was in such close proximity to the seat of government, allowing a cross to be placed there would produce the perception of government endorsement. The Court rejected this argument. The square was "a traditional public forum open to all without any policy against free-standing displays;"[220] therefore, to prohibit a display because of its religious connotations was to engage in content discrimination. The Court stated:

> We find it peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter

[217] *Cnty. of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 599 (1989).
[218] *Id.* at 600.
[219] *Id.* at 616.
[220] *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 759 (1995).

> of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.[221]

Therefore, regardless of the square's proximity to the seat of government, the Board's decision to prohibit a private display in a public forum because the display was religious constituted an unconstitutional restriction of free speech. Furthermore, it is unreasonable to say that an observer would misinterpret the presence of a cross as a sign of government endorsement when the square was routinely used to feature various displays and messages which clearly represented private, and not government speech. This distinguished *Pinette* from *Allegheny*. In *Allegheny*, the Grand Staircase in which the crèche was placed was not a public forum; therefore, because the staircase was not available to all, the government was found to be unconstitutionally favoring a religious message.[222] In short, if a government maintains a public forum, it may allow private, religious displays in the same way as it does secular displays without violating the Establishment Clause.

2. Religious Monuments and Memorials

Recently, there has been increased controversy over the constitutionality of religious monuments and memorials on public property. Normally, these monuments are established with private funds and placed in public parks or on the grounds of federal and state buildings with the government's permission. However, despite being built with private funding, multiple suits have been brought before federal courts challenging the validity of such monuments under the Establishment Clause.

Currently, there exists no clear consensus amongst the courts' various decisions. In *Salazar v. Buono* (2010), the plaintiffs sued to challenge the constitutionality of a memorial cross located in the Mojave National Preserve. The cross had been erected by a veterans association in honor of American soldiers who died during World War I. The Court held that the cross did not have to be dismantled. The Court reasoned that, "The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."[223] Furthermore, the Court declared, "The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society… Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework."[224] The Court held that the cross's presence did not represent the government's endorsement of Christianity because the cross was raised not to promote a Christian message but rather to honor the lives of men who had died serving their country.[225] The Court's decision in *Buono* reaffirmed that the mere presence of religious content on public property does not violate the Establishment Clause; government does not advance a religious message merely because a memorial on government property has religious symbolism.

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[221] *Id.* at 763-64.
[222] *Id.* at 764.
[223] *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).
[224] *Id.* at 1818-19.
[225] *Id.* at 1816.

Whereas *Buono* the Supreme Court ruled solely on the constitutionality of religiously-themed monuments on public property, in *Pleasant Grove v. Summum* (2009), the Court considered whether a government could be selective in the types of privately donated monuments it allowed to be placed in its public parks. In *Summum*, the Summum church believed that the city of Pleasant Grove was compelled to allow a statute containing the organization's "Seven Aphorisms" to be placed in one of its public parks, because it had done so for a monument containing the Ten Commandments. Summum argued that to allow the Ten Commandments while simultaneously rejecting the Seven Aphorisms constituted an instance of viewpoint discrimination by the government; therefore, the city had to either accept or reject both, and did not have the option to choose one over the other. The Court disagreed and held that while governments may not freely discriminate against the content of private speech in a public forum, the government's own speech is not governed by the Free Speech Clause.[226] The Court stated:

> There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.[227]

The Court reasoned that based on Summum's argument, when the United States accepted the Statue of Liberty from France, it would have also had to accept a Statue of Autocracy from Imperialist Russia.[228] The Court concluded that the ramifications of such reasoning would either result in the government having to accept all statues, or more feasibly, having to reject everything. The government is not bound to such standards, and therefore it is appropriate that its own speech is not restricted by the First Amendment. Accordingly, the government is not forced to accept any monument it does not desire to, and may exercise discretion in selecting and rejecting privately- donated monuments.

3. Ten Commandment Displays

The most controversial and contested types of religious monuments are those containing depictions of the Ten Commandments. Displays containing the Ten Commandments (whether in monuments or otherwise) continue to result in highly-contested court decisions. Decisions regarding the constitutionality of Ten Commandments displays have been decided by narrow margins, and this area of the law remains highly unsettled.

The Supreme Court's first significant ruling regarding Ten Commandments displays occurred in *Stone v. Graham* (1980). In Stone, the Court held that a Kentucky law mandating that a copy of the Ten Commandments text be displayed in every public school classroom was unconstitutional. Applying the *Lemon* Test, the Court found that even though the law specified that copies of the Ten Commandments were to be donated using private funds, the law could not pass Lemon's first prong as the law had an explicitly religious purpose. The Court stated:

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[226] *Pleasant Grove Cit. v. Summum*, 129 S. Ct. 1125, 1131-32 (2009).
[227] *Id.* at 1132.
[228] *Id.* at 1137-38.

> Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.[229]

The Court held that despite whatever secular reasons Kentucky gave for requiring schools to post the Ten Commandments, the Commandments are inherently religious and thus cannot be endorsed by government.

The Court's decision in *Stone*, however, does not mean that all government Ten Commandments displays are unconstitutional. Rather, constitutionality depends upon context – the physical context in which the display appears and the historical context surrounding the government's decision to display the Ten Commandments. Because of the importance of context, cases involving the constitutionality of Ten Commandments displays are highly fact sensitive. Two cases decided by the Supreme Court on the same day in 2005 –*Van Orden v. Perry* and *McCreary County v. ACLU* – illustrates this.

In *Van Orden*, the Supreme Court held that a Ten Commandments monument on the Texas State Capitol grounds did not violate the Establishment Clause due to its broader meaning within the context of all the other monuments surrounding it.[230] While the Court did not produce a majority opinion, the plurality defended the monument's constitutionality while simultaneously acknowledging two sides of Establishment Clause jurisprudence. Commenting on these two opposing influences, the plurality stated:

> Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.[231]

In *Van Orden*, the plurality believed that Texas's Ten Commandments monument represented a very "passive use" of the religious text, and, situated among the other monuments on the Texas Capitol grounds, it did not necessarily endorse a Judeo-Christian religious message but rather only represented one strand of the state's political and legal history.[232] Therefore, requiring that Texas remove the monument would represent unnecessary hostility towards religion and would prevent Texas from recognizing its own religious heritage.

On the other hand in *McCreary County,* the Court relied on Stone to invalidate the multiple efforts made by two counties in Kentucky to post the Ten Commandments in their

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[229] *Stone v. Graham*, 449 U.S. 39, 42 (1980).
[230] *Van Ordern v. Perry*, 545 U.S. 677, 691-92 (2005).
[231] *Id.* at 683-84.
[232] *Id.* at 691-92.

courtrooms.[233] McCreary and Pulaski Counties decided to post copies of the Ten Commandments in their respective courthouses.[234] The ACLU of Kentucky sued the counties and sought a preliminary injunction against maintaining the displays.[235] After the ACLU sued, each county's legislative body proposed a new display that would place the Ten Commandments alongside eight other historical documents that all contained a religious theme.[236] The district court eventually held that both displays were unconstitutional, prompting the counties to pass a new resolution to install a third type of display entitled "The Foundations of American Law and Government Display."[237] That display featured the Ten Commandments alongside eight historical documents that were mostly different from those in the previous display.[238] These documents were accompanied by an explanation meant to educate citizens about the significance of each document in regards to Western legal thought and the nation's history.[239]

The Supreme Court ultimately held that all three displays were unconstitutional because each had a predominantly religious purpose. Relying on *Stone*, the Court easily invalidated the first display, and likewise invalidated the second as the documents that surrounded the Ten Commandments were narrowly selected to specifically refer to God and Christianity; therefore, the display represented an improper endorsement of religion.[240] In regards to the third display, the Court held that it was also unconstitutional because the "…Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."[241] The Court held that from the beginning, the two counties' original purpose had always been to project religious values, and regardless of the nature of the third display, "[n]o reasonable observer could swallow the claim that the Counties had cast off the [original] objective so unmistakable in the earlier displays."[242] In sum, the Court in *McCreary* reaffirmed its decision in *Stone* that the Ten Commandments were inherently religious, and furthermore ruled that this fact was not automatically negated or lessened simply by surrounding them with other historical documents.

The importance of historical context in Ten Commandment display cases is further illustrated by the Tenth Circuit Court of Appeals' decision in *Haskell County v. Green* (10th Cir. 2009). In *Green*, the Court ordered that a Ten Commandments monument at the Haskell County Courthouse be removed because it violated the Establishment Clause. The circumstances in *Green* were remarkably similar to those in *Van Orden* as both Ten Commandment monuments were privately-donated and located on prominent government property surrounded by other monuments; however, the court believed there was enough of a difference to distinguish *Van Orden* from *Green*. In looking back on the monument's history, there was clear evidence that the monument had been donated for purely religious reasons. Moreover, the county officials who

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[233] *McCreary Cnty. v. ACLU*, 545 U.S. 844, 868-870 (2005).
[234] *Id.* at 851.
[235] *Id.* at 852.
[236] *Id.* at 852-54.
[237] *Id.* at 854-56.
[238] *Id.* at 855-56.
[239] *Id.* at 856.
[240] *Id.* at 854-855.
[241] *Id.* at 873.
[242] *Id.* at 872.

voted on the monument had openly espoused their religious beliefs, blurring the line between their private and public obligations as state officials. The court wrote:

> In a small community like Haskell County, where everyone knows everyone, and the commissioners were readily identifiable as such…we conclude that the reasonable observer would have been left with the clear impression--not counteracted by the individual commissioners or the Board collectively--that the commissioners were speaking on behalf of the government and the government was endorsing the religious message of the Monument.[243]

Therefore, although the display in *Green* had much in common with the display in *Van Orden* , the Tenth Circuit ultimately decided that the historical context surrounding the county's decision to display the Ten Commandments was more important than the monument's proximity to other monuments.

McCreary,as noted, likewise illustrates the importance of historical context. But while the Court's decision regarding the third display in *McCreary* was heavily affected by the preceding displays and the purpose behind them, the Court did not state that past actions displaying a religious purpose would forever taint government efforts to include the Ten Commandments in a larger display.[244] Thus, a current case before the Supreme Court, *DeWeese v. ACLU*, has the potential to set a significant precedent. In *DeWeese*, a judge hung a display in his courtroom entitled "Philosophies of Law in Conflict." That display contained two posters entitled "Moral Absolutes: The Ten Commandments," and "Moral Relatives: Humanist Precepts."[245] The first poster contained the Ten Commandments, and the second one contained quotations from various judges, humanists, and historical documents; furthermore, below the posters the judge included a small paragraph suggesting that the country is "paying a high cost in increased crime and other social ills for moving from moral absolutism to moral relativism since the mid 20th century."[246] The Sixth Circuit held that the display was unconstitutional in large part because "the history of Defendant's actions [regarding an earlier display] demonstrates that any purported secular purpose [for the present display] is a sham."[247] In other words, the Sixth Circuit arguably held that Judge DeWeese's actions concerning the previous display forever tainted –and thus would invalidate– any future attempts from dealing with the display's subject matter.

DeWeese is presently pending before the Supreme Court on a petition for writ of certiorari. That petition argues, among other things, that the Sixth Circuit's holding that Judge DeWeese's past actions demonstrate that any other attempt to create a display dealing with the same subjects must serve only a religious purpose and that holding conflicts with *McCreary* and with decisions from other circuits. If the Court grants certiorari in *DeWeese*, the Court will have

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[243] *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 803 (10th Cir. 2009).
[244] *See McCreary Cnty.*, 545 U.S. at 843-44.
[245] *ACLU v. DeWeese*, 633 F.3d 424, 426-427 (6th Cir. 2011).
[246] *Id.* at 427.
[247] *Id.* at 432.

the opportunity to clarify what role actions concerning previous displays play in analyzing a subsequent display's constitutionality.[248]

F. Zoning and Religious Land Use

1. RLUIPA

The Religious Land Use and Institutionalized Persons Act (RLUIPA) protects houses of worship and other religious organizations from zoning ordinances that target religious organizations for different treatment or place a substantial burden on their ability to freely exercise their religious beliefs. RLUIPA states, "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," and that no government shall "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."[249] Furthermore, no government may "totally exclude[ ] religious assemblies from a jurisdiction," or "unreasonably limit[ ] religious assemblies, institutions, or structures within a jurisdiction."[250] Even if a land use regulation is neutral, RLUIPA provides that the regulation may not substantially burden the free exercise of a religious institution unless the government can demonstrate that the regulation is "in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[251]

In determining what specifically constitutes a substantial burden, no exact definition exists; rather courts must use a "case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise."[252] Similarly, courts have found it difficult to define what specifically constitutes a compelling government interest; however, courts have found that "loss of tax revenue" does not represent such an interest. Governments may not punish organizations for a benefit they have bestowed upon them, and thus cannot cite a religious organization's tax-exempt status as grounds for denying a request for a building permit.[253] While religious organizations still must apply for zoning permits and follow the same requirements as other land

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[248] It is possible, however, that if the Court grants certiorari in *DeWeese*, it would not reach the merits; DeWeese has also argued that the plaintiffs' purported injury from the display – offense at the display – is not sufficient to confer standing.

[249] 42 USCS § 2000cc(b)(1)(2).

[250] *Id.* § 2000cc (b)(3).

[251] *Id.* § 2000cc(a)(1).

[252] *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004); *see also Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 321 (D. Mass. 2006) (finding that government significantly burdened a church when it denied its request to build a parish center which would be utilized for office space and for church-related gatherings. The court made this ruling despite the finding that the church could have met its religious needs by using its existing structures); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (finding a substantial burden was imposed upon a Jewish School when it was not allowed to expand its facilities to accommodate a growing student body).

[253] *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) ("So universal is the belief that religious and educational institutions should be exempt from taxation that it would be odd indeed if we were to disapprove an action of the zoning authorities consistent with such belief and label it adverse to the general welfare." (internal citation omitted)).

users, they are protected from religiously-biased policies, and even some neutral regulations, that would hinder their capacity to build and expand their structures. Although the Supreme Court has never ruled on the constitutionality of RLUIPA's land use section,[254] the Department of Justice consistently investigates and prosecutes occurrences of religiously-motivated zoning discrimination. RLUIPA is widely enforced and has been used frequently to prevent zoning ordinances to be applied in ways that discriminate against or substantially burden religious organizations.[255]

2. Protection of Religious Property

Two laws offer significant protection for both religious property and for the practitioners who make use of that property to exercise First Amendment rights. The Church Arson Prevention Act and the Freedom of Access to Clinic Entrances Act (FACE) grant the government the authority to punish anyone who destroys religious property. The Church Arson Prevention Act penalizes anyone who "intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempt[s] to do so…."[256] Furthermore, both acts penalize anyone who attempts to obstruct an individual from practicing his religion at his place of worship. FACE specifically punishes anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship."[257] These two acts provide that those who target property because of its religious nature will face punishment and that people's right to practice their religion in their chosen house of worship will occur without obstruction or fear of harm or injury.

G. National Day of Prayer

36 U.S.C. § 119 states, "The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals."[258] Congress enacted this law in 1952, but its origins date back to the time of George Washington when he declared:

> The Honorable the Congress having recommended it to the United States to set apart Thursday the 6th of May next to be observed as a day of fasting, humiliation and prayer, to acknowledge the gracious interpositions of Providence…The Commander in Chief enjoins a religious observance of said day and directs

[254] In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court addressed the constitutionality of the institutionalized persons portion of RLUIPA, but declined to make a ruling on the section concentrating on land use.
[255] *See Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'r*, 613 F.3d 1229, 1237 (10th Cir. 2010); *Midrashi Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004).
[256] 18 USCS § 247(a)(1).
[257] 18 USCS § 248(a)(2)
[258] 36 U.S.C. § 119.

> the Chaplains to prepare discourses proper for the occasion; strictly forbidding all recreations and unnecessary labor.[259]

Since 1952, every President of the United States has declared a day of prayer in which he calls upon all Americans to spend the day in reflection and prayer. In 2010, the United States District Court for the Western District of Wisconsin held in *Freedom from Religion Foundation, Inc. v. Obama* that the statute authorizing the National Day of Prayer violated the Establishment Clause. The court held that the statue had both the purpose and effect of advancing religion by encouraging prayer. The court stated:

> Establishment clause values would be significantly eroded if the government could promote any longstanding religious practice of the majority under the guise of "acknowledgment".... the government crosses the line between acknowledgment and endorsement when it "manifest[s] [the] objective of subjecting individual lives to religious influence," "insistently call[s] for religious action on the part of citizens" or "expresse[s] a purpose to urge citizens to act in prescribed ways as a personal response to divine authority." This is exactly what § 119 does by encouraging all citizens to pray every first Thursday in May. If the government were interested only in acknowledging the role of religion in America, it could have designated a "National Day of Religious Freedom" rather than promote a particular religious practice.[260]

The Seventh Circuit reversed the district court's decision because the plaintiffs did not have standing to sue. The Court found that the plaintiffs had not suffered any legal injury from the statute authorizing the National Day of Prayer because the only injury they alleged was offense at the government calling for a day of prayer. The court stated, "Offense at the behavior of the government, and a desire to have public officials comply with (plaintiffs' view of) the Constitution, differs from a legal injury."[261] Although the Seventh Circuit did not reach the merits of the constitutional issue, it did preclude the general public (at least in the Seventh Circuit) from challenging the National Day of Prayer in the future. If the other federal courts follow the Seventh Circuit's lead, the National Day of Prayer will only cease to exist should the President decide to discontinue its proclamation.[262]

H. Broadcasting

The Constitution's Framers considered freedom of the press to be of the utmost importance. As James Madison wrote: "[T]o the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error

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[259] *The Writings of George Washington, from the Original Manuscript Sources* 1745-1799 (John C. Fitzpatrick, ed. 1931), *available at http://www.questia.com/PM.qst?a=o&d=34093650*.
[260] *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1055-56 (D. Wis. 2010) (quoting *McCreary Cnty. v. American Civil Liberties Union*, 545 U.S. 844, 877 (2005)).
[261] *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011).
[262] *See also Freedom from Religion Found., Inc. v. Perry*, 2011 U.S. Dist. LEXIS 82870 (S.D. Tex. July 28, 2011) (holding plaintiffs lacked standing).

and oppression."[263] In modern times, this freedom has been expanded from print sources to include radio, television, satellite, and internet media, which collectively broadcast information on an extensive range of subject matters. Among these, religion occupies a significant role as many faith-based organizations have used various broadcasting mediums to communicate religious beliefs and opinions. Therefore, when these organizations take advantage of media opportunities, the protections guaranteed under the First Amendment's Free Exercise and Freedom of the Press Clauses are in full effect. However, despite the rights enjoyed by religious broadcasting organizations, several Federal Communications Commission (FCC) initiatives pose a risk to these liberties.

1. Fairness Doctrine

In an effort to create a balanced and impartial broadcast forum, the FCC in the 1940's created what came to be known as the Fairness Doctrine. In explaining its reasons for creating this policy, the FCC stated, "[T]he public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies to all discussion of importance to the public.[264] The Fairness Doctrine created a two-part obligation for broadcasters to "provide coverage of vitally important controversial issues of interest in the community served by the station" and to "afford a reasonable opportunity for the presentation of contrasting viewpoints."[265]

In 1969, the Supreme Court upheld the doctrine's constitutionality in *Red Lion Broadcasting Co. v. FCC* and justified its decision by stating, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[266] Despite the Court's decision in *Red Lion*, the FCC decided to abolish the Fairness Doctrine in the 1980s. The FCC found that the doctrine deterred free speech because the doctrine made broadcasters more hesitant to address controversial topics. The Fairness Doctrine was recently removed from the Code of Federal Regulations.

2. Localism

Although the Fairness Doctrine is no longer enforced, another policy suggested by the FCC known as "localism" has the potential to hinder religious freedom in a similar manner. The FCC has maintained consistently that one of broadcasting's main purposes is to provide local communities with news and programs that are relevant to their needs and interests, thus ensuring that programming does not become overly syndicated and homogenized. In the words of former FCC Chairman Michael Powell, "Fostering localism is one of this Commission's core missions and one of three policy goals, along with diversity and competition, which have driven much of our radio and television broadcast regulation during the past 70 years."[267]

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[263] 1799: Report of the Virginia House of Delegates *reprinted in The American Republic: Primary Sources*, (Bruce Frohnen ed. 2002).
[264] *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949).
[265] Federal Commc'n Comm'n, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* 277 (2011), *available at* www.fcc.gov/infoneedsreport.
[266] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).
[267] *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12445 (2004) (*Localism NOI*) (Powell, Michael K., Chairman, concurring).

In 2008, the FCC released several new policy proposals to promote localism across the broadcasting spectrum. Among these proposals was the requirement that all broadcast licensees create permanent Community Advisory Boards, comprised of various community leaders, to better identify and understand issues of concern to its local community.[268] Such a requirement could pose a significant burden to religious broadcasters in particular as they will be forced to consult with an Advisory Board and alter their religious programs in a way that meets the Board's satisfaction. Religious broadcast organizations could potentially find their licensee's status or eligibility for renewal in jeopardy should they not fully comply with the Community Advisory Board's recommendations. This would place religious organizations in the adverse position deciding whether to risk losing their FCC license or following the Advisory Board's proposals and in so doing possibly contradicting their religious convictions and beliefs. These religious broadcasters could well lose their particular religious voice and identity if they must set aside those carefully calculated, thoughtfully, and prayerfully-developed programming choices to serve an agenda weighted by considerations different than the ones those broadcasters follow. In conclusion, recommendations by the FCC to promote "localism" by mandating Advisory Boards risk posing a significant burden to religious broadcasters' rights and therefore should not be implemented as they could stifle free speech and prevent these organizations from being able to freely exercise their religion.

IV. Conclusion

This memo's purpose has been to provide a comprehensive view of the current status of religious liberty in America. Based on the analysis of key court cases and legislation, it is clear that there are some freedoms that have been securely established, and others that remain in question or even in jeopardy. Religious freedom must be vigilantly monitored to ensure that mentions of God and faith do not completely disappear from public schools and government institutions. That freedom must be defended to assure free expression in the workplace, and equal treatment for religious individuals. And finally, religious freedom must be guarded to ensure that religious organizations can continue to associate based on their mission statements, remain autonomous, and not be forced by the government to condone morally objectionable activity. The Establishment Clause and Free Exercise Clause will continue to be interpreted in a variety of ways but one constant that must never be forgotten is that the United States is a religious nation, and "our institutions presuppose a Supreme Being."[269] Any law or policy that treats religion hostilely or attempts to unduly limit its practice must be ruled unconstitutional and held to directly violate our historical values. If that happens, one of our most sacred and valued liberties will never be compromised and will remain vibrant for future generations.

[268] *See Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1336-38; 1339 (2008).
[269] *Van Orden v. Perry*, 545 U.S. 677, 683-84 (2005).

Mr. FRANKS. And I certainly thank all the witnesses.

We will now begin with the questioning time, and I will recognize myself for 5 minutes, and I will begin with you, Bishop Lori, if I might.

I know social work is a large part of the Catholic Church's mission. However, it appears that some of the government policies re-

lated to private social services are increasingly failing to make exceptions for sincerely held religious beliefs.

What is the impact of that failure to make exception for religious beliefs having on the Church, especially as it relates to medical services and adoption and foster care? What, in practical terms, is it doing to you?

Bishop LORI. Sure. Indeed, providing social services is integral to our mission. It flows from preaching the Gospel, celebrating the sacraments, and that is what sustains and motivates the work that we do.

What is beginning to happen as the result of exemptions—for example, the HHS exemptions for private health insurance plans—is that we are worried that if those rules become enforced, we will be hindered in our ability to provide health insurance services for our employees. Also, in some states such as Massachusetts and Illinois, because of the convictions of Catholic Charities organizations about the nature of marriage, they have been driven out of adoption services and foster care services. I guess those would be kind of some of the examples I'd like to cite.

Now, at the larger level, Catholic Relief Services has been denied a contract by USAID because of a newly added rule that it would have to provide access to so-called reproductive services in order to qualify. And so Catholic Relief Services, which has a splendid record of serving the poorest of the poor. The same with Migration and Refugee Services. They too are being driven out of, or not able to compete for, government contracts because of their convictions about human life and about contraception. And so, as a result, they've been taken off the playing field, if I could put it that way.

That was not terribly articulate, but I hope you get the point.

Mr. FRANKS. I get the point, absolutely. Thank you, Bishop, for all your good work, sir.

Mr. May, if I might switch gears here a little, as you know, I am one of the co-chairs of the Religious Freedom Caucus here in the Congress. And, of course, as we look across the world, it is not just direct persecution of a particular faith, but sometimes the anti-discrimination laws in a particular area are used to keep someone from criticizing a religious perspective, and I certainly believe a person has a right to criticize my faith or to examine its veracity, and they do on a regular basis.

So I want to ask you a question along those lines. It is a challenging question. But last week, the Daily Caller and others reported that certain Islamic religious groups met with the Department of Justice and recommended that there be cutbacks in anti-terrorism funding, curbs on investigators and, for our purposes, "a legal declaration that U.S. citizens' criticism of Islam constitutes racial discrimination."

Now, Mr. Tom Perez, the head of the Civil Rights Division, said, "We must continue to have this critical dialogue." He said in another place, "I sat there the entire time taking notes and I have some concrete thoughts in the aftermath of this."

My concern is it sounds like the first steps in implementing blasphemy laws, as you see in India and other places, where if someone expresses a different faith perspective, that it is called blasphemy, and something in this country has fought against, obviously, all

over the world, with the exception, of course, in this case of Mr. Obama's sponsorship of a resolution at the United Nations with a member of the Organization of Islamic Conference, which urged exactly these kinds of anti-free speech measures.

So my question is this: Does the First Amendment permit our government to abridge the free speech rights of everyone by permitting a blasphemy law that is the banning of all speech critical to a particular religion, and why or why not? What are the implications?

Mr. MAY. Yeah, I think the answer's pretty simple, no. And, in fact, I'd be shocked if the Department of Justice held a different point of view. If they did, I think they probably ought to be before this Committee to explain that particular point of view.

Let's not overlook the obvious. It seems to me that when people come together in their religious communities, it is an affirmation of positive things, worthwhile things for society. It is also true that those communities believe that some things are better than others, and when they articulate that they believe, for example, that all are created in the image of God and all are worthy of his love and respect, including women in that context, you've got to wonder where a proposal where you equate, if I heard you right, the criticism of Islam is equal to racial discrimination?

Mr. FRANKS. Asking—let me repeat the quote, "a legal declaration that U.S. citizens' criticism of Islam constitutes racial discrimination." They are asking the Department of Justice for this.

Mr. MAY. Yeah. I mean, it's rather shocking that that could be the kind of proposal in the face of our First Amendment because, remember, there is discussion all the time among diverse groups in America. That's known as pluralism, and it's actually a very healthy and a good thing. Sometimes it gets a little robust. Sometimes maybe there's smoke rather than light. But the reality is that's what we need the First Amendment for, to be able to figure out ways to be able to work together and build a consensus that makes the kind of country we have today.

Mr. FRANKS. Well, obviously, if we ban critical speech of any religion, then wouldn't that law, by definition, muzzle the proponents of all other religions whose basic tenets may be in conflict with that religion? It is one of those things where free speech sometimes requires that people like me that have a religious faith are going to have that faith challenged.

With that, I am out of time. It always gets away quicker than I like. I would like to now yield to the Ranking Member for 5 minutes.

Mr. NADLER. I thank the Chairman for yielding.

Bishop Lori, 2 years ago, a justice of the peace in Louisiana refused to marry an interracial couple. When he resigned he said, "I would probably do the same thing again. I found out I can't be a justice of the peace and have a conscience." Do you support his right to do that and keep his job, to refuse to marry an interracial couple?

Bishop LORI. I believe that first of all, we have to make a very careful distinction between same-sex marriage, which is based upon the difference of——

Mr. NADLER. We will get to that in a minute.

Bishop LORI. All right.

Mr. NADLER. Let me just—answer the first question first, please.

Bishop LORI. All right. The answer is no. I believe that marriage between people of two different races is an entirely different matter than same-sex marriage, and so I would——

Mr. NADLER. But you would say that the state has the right to expect its employees to enforce its law, which says that interracial couples may marry by issuing a license?

Bishop LORI. I would say, in the case of interracial marriage, yes.

Mr. NADLER. Yes. Okay. Now let me get to the second half.

Bishop LORI. All right.

Mr. NADLER. Why, then, given what you just said, is it not legitimate for public employers to require their employees to fulfill their job duties in other contexts, including providing a license to a same-sex couple if the law of the state or the jurisdiction provides for marriages of same-sex couples?

Bishop LORI. For example, in the State of New York, there are county clerks I know that are getting penalized for their refusal to go along with this.

Marriage is a unique relationship. It takes a man and a woman. That is what a lot of people, a lot of Americans believe, what a lot of people of faith and reason believe. It is a unique relationship of husband and wife, the only relationship capable of producing children.

Mr. NADLER. Okay. But that——

Bishop LORI. We believe that——

Mr. NADLER. I am not going to—I have a very limited amount of time. We understand that view. We have heard it many times.

Bishop LORI. Okay. It is, then, a religious conviction.

Mr. NADLER. Yes.

Bishop LORI. And it is very troubling when this religious conviction——

Mr. NADLER. But the question is——

Bishop LORI [continuing]. Born of faith and reason is portrayed as bigotry.

Mr. NADLER. I am not portraying it as bigotry. I am not suggesting that. I haven't mentioned the word. I am asking a different question.

People have various different religions. You stated that it is the right, in your opinion, of the state, having passed a law that allows interracial marriages, to say that the religious belief or the conscientious belief of a state employee cannot trump that, that either he issues a license or he can't hold that job, and that is a legitimate thing for the state to do.

The question is, given that, why does the same reasoning not hold with respect to a county clerk or whatever, with respect to same-sex marriage? We understand that he has a religious belief which I am not going to debate the validity of, obviously. It is his religious belief. He is entitled to it, and it is protected, but it prevents him from doing a ministerial duty which the state has requires him to perform. Why is that situation different from the first situation, other than someone's opinion as to the validity of one religious belief and not the other?

Bishop LORI. Well, by asking the question as you did, I think you're drawing a parallel between racial discrimination and same-gender marriage, so-called marriage.

Mr. NADLER. Well, no, I am not drawing a parallel. The State of New York or some other state made a decision. Why is it religious discrimination to hold its employee in one case——

Bishop LORI. We believe religious liberty is an individual right and that a person has a right to bring his religious convictions into the workplace, and that he has a right not only to believe them privately but also to act upon them, and that religious conviction should be broadly accommodated.

Mr. NADLER. But then why can that person not refuse to perform the interracial marriage if that is his religious belief?

Bishop LORI. Because marriage, the relationship between a man and a woman, is different——

Mr. NADLER. All right. So, in other words, because one religious belief——

Bishop LORI [continuing]. Is different than relationship of a man and a woman who happen to be of different races.

Mr. NADLER. Thank you. In other words, because one religious belief is more valid than the other is what you are saying.

Let me ask you this. Does an insurance company, a for-profit entity incorporated for the purpose of engaging in commerce, have the same religious liberty right as a not-for-profit religion?

Bishop LORI. I think that an insurance company that wishes to serve entities that have reservations about what should be covered in its health care plans ought to be accommodated.

Mr. NADLER. All right. Let me ask you—my time is running out. I have one question for Reverend Lynn. You are an ordained minister who is obviously committed to religious liberty and free exercise. You are also an attorney with expertise in constitutional law. Tell me why you oppose allowing a religious organization to apply religious criteria to Federally-funded jobs and why you think this is a threat to religious liberty, please.

Reverend LYNN. I think it's a threat, Congressman Nadler, because once you enter into a relationship where the government funds your religious ministry, that in that part of the ministry that is funded by tax dollars, there cannot be an assumption that, or a policy that, dictates that those persons are exempt from other civil rights statutes.

When you get the money from the Federal or state government, then I think you're obligated to follow the precepts not of your own denomination or your own faith community but the requirements of, in most instances, Federal law, which does not permit discrimination based on religion, creed, color, and several other well-known factors.

So I see this as not in any way inhibiting the power of ministries to do what they want to do with their own dollars, with the money that they collect in the collection plate. But I think the equation changes dramatically when Federal funds enter the picture. You cannot simply then say I'll take the money but I won't take any restrictions, I won't take any adherence to the core civil rights principles of our country. That is a stretch of anyone's imagination to find that as a matter of religious freedom. That's pure and simple

discrimination with the tax dollars that come from all of us, including some of those job applicants, for example, who may fall outside of the favored community from which they choose to hire.

Mr. NADLER. I thank you. My time has expired. I yield back.

Mr. FRANKS. I thank the gentleman.

And I now recognize the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I thank all the witnesses for your testimony.

And I would first remark what goes through my mind when I hear the advocacy from the gentleman from New York about conscience protection, and I would think that if it is the position of anybody in this country that one would be compelled to carry out a marriage of same-sex couples if that violates your religious convictions, if it violates a sacrament of the church, for example, or if one is compelled as a pharmacist to distribute birth control against one's religious beliefs, if that is the position, and I am hearing that position consistently in this Committee, then I would suggest that when you put the shoe on the other foot, if you have a prison warden whose job it is to carry out an execution, would the advocates for the elimination of conscience protection also argue that that prison warden should be compelled to carry out the execution if it violated his conscience? And I would turn that question to Bishop Lori.

Bishop LORI. I would agree with your observation, Congressman. It seems to me that conscience protection has always been a part of our way of life. The idea is that because one works for the government, one has to check one's conscience at the door, whether those are conscientious objections to abortion or to same-sex marriage or to capital punishment, or even the service of the undocumented. It seems to me that these things have always been broadly accommodated and they should continue to be broadly accommodated. That's one of the things that has made our country great.

To paint conscientious objections to things like abortion or contraception or same-sex marriage as discriminatory really flies in the face of what religious liberty is. It means the right to bring our convictions into the public square, a right to act upon them, a right not to be compelled to do things which we consider to be inherently wrong. And anybody in a repressive society can believe what he wants privately, but in a free society you can bring your convictions out into public.

Mr. KING. Bishop, if an individual or a group of individuals actively engaged in or promoted the idea of desecrating the eucharist, would that be a direct affront to the church?

Bishop LORI. It would indeed, of the most serious nature.

Mr. KING. And of the sacraments of the church, would you name the seven sacraments first, please?

Bishop LORI. Sure. Just like my confirmation classes. Baptism, confirmation, eucharist, penance, anointing of the sick, marriage, and holy orders.

Mr. KING. And you learned it as last rites and had to change that——

Bishop LORI. Yes, and it used to be called extreme unction. It's called——

Mr. KING. Even further back. I just wanted to make that point, that when there is an active effort to desecrate a sacrament of the church, that is a direct insult and affront to the Catholic Church.

Bishop LORI. Absolutely.

Mr. KING. And marriage, of course, clearly is one of the seven sacraments——

Bishop LORI. Marriage is recognized as a sacrament. First of all, it's recognized as something of a natural relationship, inscribed in our nature by the Creator, that has served the common good and is a pillar of civilization. It's a unique relationship of a man and woman. The Church has also recognized it as a sacrament because the love of husband and wife expresses the love of Christ for the Church.

Mr. KING. Let's explore another principle, and that is as I am hearing this blurred approach to the implication that civil rights extend to same-sex marriage, for example, and I would like to explore a little bit the concept of immutable characteristics that were the foundation of the Title VII of the Civil Rights Act. These are the protection for race, color, religion, sex, national origin, religion being the only one of those in the list that is specifically constitutionally protected. The balance of them are immutable characteristics that can be independently identified and cannot be willfully changed.

When we go beyond the definition of immutable characteristics, then could you talk to us a little bit about what that does to this concept of civil rights and equal protection?

Bishop LORI. Sure. It seems to me that when you take an institution such as marriage and you redefine it arbitrarily, then you are taking something that is not only long established but unique and for the common good of society, and you are cutting it loose from its moorings. Marriage is not simply—it's not as if you could make one change and that is it. The notion of what marriage is appears throughout Federal law. It appears in state law. It appears in regulations. It affects how church and state relate in a broad variety of ways, and by arbitrarily redefining it, you're cueing up church/state conflict for years to come, because marriage is so broadly referred to throughout American law.

Mr. KING. Thank you, Bishop. I thank all the witnesses. I regret I was not able to ask questions of the balance of the panel and I yield back.

Mr. FRANKS. Thank you, Mr. King.

Mr. Quigley, you are now recognized for 5 minutes, sir.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Bishop, I respect and truly appreciate your—and the term you used was "religious conviction." You can recognize the same sort of religious conviction worked the other way for a long time. I mean, it wasn't until the '60's that the Loving case was decided about interracial marriage in the United States. And for, let's just say, a chaplain in the military whose religious beliefs are different, and they have the same religious conviction you have, that a same-sex marriage is part of their faith, don't you see the similarities? Don't you see that their passion and their beliefs, however strongly you disagree with them—the Constitution doesn't say because the majority faith or the majority public—I think you used "a lot of peo-

ple" were the actual words you used—believe this is what marriage is, but that is not what the Constitution protects. The whole point of the Constitution was to protect minorities, those who disagree. I don't think you need to protect popular belief.

Don't you respect their faith, their religion, that they believe that this is the right thing to do? Inasmuch as you want me to protect those who can say no to marrying a same-sex couple, don't you want to defend those who have the opposite belief? I know you can't put aside your faith and your position, but if you are in this seat, don't you understand that difference?

Bishop LORI. I respect individuals, and I respect their dignity, and I certainly assume good will. At the same time, one of the primary reasons why the state has an interest in marriage is because of its contribution to the common good. It's unique. In other words, I respect individuals who might hold a differing view, but I would also maintain stoutly as a matter of faith and reason that marriage is something not subject to redefinition.

It is a unique relationship of a man and a woman, the only one capable of producing children, and there is a great interest on the part of the state in stable homes where children learn to relate to male and female role models and are invested with the virtues of citizenship. And I would also recognize that marriage, as understood as a man and a woman, is an essential building block for the Church as well. It's always been recognized as the fundamental——

Mr. QUIGLEY. Well, look, I respect we will have that difference. I apologize because we have the time limit situation.

Bishop LORI. All right.

Mr. QUIGLEY. Same-sex couples I know are in long-term relationships. They love their kids. They are also involved with the orderly distribution of property, which has a lot to do with marriage, and we still allow sterile couples to get married, and they can't have kids.

But aside from that, we talk a lot too about Islam. It was interesting that the first aspect of that had to do with laws equating criticizing Islam with bigotry. But I want to ask all three of you, if you have time, what would you say to young Muslims in America, in a country where, unfortunately, I think the number is about 30 percent of the American public doesn't think Muslims should be able to become president of the United States, the last surveys I saw, and that they should have to wear identification, and that their hate crimes are wildly high, disproportionate to their population. Respecting their faith, Bishop, if you were us, what would you say to those people?

Bishop LORI. Well, the Roman Catholic Church nationally and internationally conducts dialogues with the Muslim community and its inter-religious relationships seek to promote understanding and peace and respect for various religions and cultures. It would not condone any use of religion to promote violence, as sometimes happens, but that would be true across the board.

Mr. QUIGLEY. Reverend May, Mr. May—I'm sorry. Mr. May, what would you say to young Muslims who are experiencing this in our country?

Mr. MAY. I would tell them work hard, become president of the United States. There's no reason you can't otherwise do so. Certainly, discrimination in the senses of——

Mr. QUIGLEY. Do you feel bad for them? Do you want to apologize for what they are going through, kids who are abused because of their hair coverings or denied jobs?

Mr. MAY. Well, I suppose if you'd be willing or others would be willing to apologize for the kind of affront that goes on to religious values in the public schools, Hot, Safer and Sexy. I mean, we're going to do this sort of like let's teach kids how to do these things, that's otherwise——

Mr. QUIGLEY. I am certainly not suggesting that two wrongs make a right, if you're equating that——

Mr. MAY. Oh, no, no. But in response to your question——

Mr. QUIGLEY. What do you say to American Muslim children who face discrimination? Do you apologize to them?

Mr. MAY. Sorry. We were talking a little bit——

Mr. QUIGLEY. I'm sorry. I apologize. Do you apologize to anybody whose faith, they are being discriminated against because of their faith?

Mr. MAY. If they're, in fact, being discriminated by the government, absolutely. We abhor that.

Mr. QUIGLEY. How about by anybody?

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

Mr. MAY. Well, it depends on what you mean by discrimination, because the idea that people are different is not a form of discrimination. But certainly I think everybody should be treated with dignity and respect and kindness. That's exactly the way I think we get along and make a better world.

Mr. FRANKS. The gentleman from Ohio, Mr. Chabot, is now recognized for 5 minutes.

Mr. CHABOT. Yeah, I am going to give half of my 5 minutes to Mr. Jordan because I know we have got votes on the floor here, I believe. Is that right? Or no? All right. Excellent. I will still give you half of it.

All right. You know, some interesting points made down there, and certainly everybody, all religions, ought to be treated appropriately here in the United States. And as Chairman of the Middle East and South Asia Committee, I would make the point that if there are any apologies that are owed, perhaps the way the Coptics are being treated in Egypt right now on this very day, Coptic Christians, it is unbelievable what is happening over there, and the world has virtually ignored it.

Bishop Lori, you had mentioned about conscientious objection, and it certainly brought to mind that we allow people who conscientiously object to war to not have to go over and fight in the battles of this country as long as they object to all wars, and that has been ingrained in the way we do business in this country for a long, long time.

Mr. May, let me ask you quickly. In your written testimony you discuss university speech codes and the threat they pose to religious groups on college campuses. Have university speech codes often gone from protecting non-religious students from discrimina-

tion to actually discriminating against religious students and religious student groups? And if so, do you have any examples of that?

Mr. MAY. Sure. The 9th Circuit reached a decision called *Truth v.*—I can't remember the school district's name now, but a school district. And that would essentially disqualify a religious club simply because they used the word "truth." It was felt that using the word "truth" in the context of this Christian club would offend all of the other student groups, and therefore they couldn't have it. There wasn't any further explanation than the idea of affront or this lack of communalism, if you will. And so the 9th Circuit said, well, that's perfectly appropriate because their job is to make sure that the environment is as free as possible of harassment.

Mr. CHABOT. Thank you. And Bishop Lori, I know you got into your arguments relative to marriage with Mr. Nadler over there, and he sort of cut you off, not that he intended to cut you off but he only had a limited amount of time. He would never cut anybody off. But did you need any additional time to advise us on that?

Bishop LORI. I think I'd simply just like to make it clear that support for traditional marriage between a man and a woman has nothing to do with, has no resemblance to, racial discrimination, and it is a great injustice to people who believe in traditional marriage as a matter of faith and reason to paint it as such. That's exactly what the Department of Justice has done in its attack on DOMA.

What we are finding, then, is that those convictions about marriage are beginning to creep into regs, bureaucratic regs, and these things are beginning to hamper our ability to function and to serve. And I think that at the very least, the Church as individual people and churches that believe in traditional marriage should be very broadly accommodated. But I also believe that for the common good of our country, we would do well to support traditional marriage, and the stronger these traditional homes are, the more social problems we cut off at the pass.

There are a lot of data that children in homes of divorced and single-parent homes have a lot of problems, and that one of the best things we can do for our kids is to give them a stable home with a mom and a dad. That does not disrespect anybody. It just goes to the unique nature of what marriage always has been and always will be.

Mr. CHABOT. Thank you very much, Bishop.

I will yield, although it is not a lot of time, Jim.

Mr. FRANKS. The gentleman is recognized.

Mr. JORDAN. If we go to the other side and back——

Mr. FRANKS. Certainly.

Mr. JORDAN [continuing]. We may have enough time.

Mr. FRANKS. Certainly, certainly.

Mr. JORDAN. Thank you. I will yield back to my colleague if he wants his remaining time.

Mr. FRANKS. Recognize——

Mr. CHABOT. Okay, I will yield back.

Mr. FRANKS. Recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Bishop Lori, I am not sure I quite understood. I am from Virginia, where traditional marriage was same-race marriage until

those lifetime-appointed liberal activist Federal judges violated the will of the people and said that you couldn't do that anymore, you had to allow different-race marriages.

Now, we redefined marriage at that point. Was that a bad thing?

Bishop LORI. You did not redefine marriage. You simply recognized the natural right of a man and a woman who happened to be of two different races to marry.

Mr. SCOTT. There was some very devoutly religious people that felt that traditional marriage did not include mixed-race marriages.

Bishop LORI. Yes, but it was not a redefinition of marriage.

Mr. SCOTT. Reverend Lynn, was that a redefinition of marriage?

Reverend LYNN. That was a redefinition of marriage, and it could happen again. And as we talk about marriage, I find myself in an interesting position. People talk about these theories. I am an ordained minister in the United Church of Christ, and Mr. King, we only have two sacraments. That would be communion and baptism. We have three, and matrimony.

As a United Church of Christ minister, I cannot perform marriages that I happen to want to perform. I have a list of people, literally, who would love to have me perform their weddings, but they can't because state law prohibits that. They cannot be married.

I think a redefinition of this would, among other things, allow the clergy, like myself, of whom there are many in this country who would like to and feel it important to perform same-sex marriages, we would finally have the right to do so.

So my conscience is violated when I am denied by the power of the state to perform the very marriages that people want in order to form the kind of unity, and families with adopted children in many instances, that do serve this community and this country very well.

Mr. SCOTT. Now, Reverend Lynn, if the congregation gets together and raises money to advance their religion, would employment discrimination in favor of people of their religion that understand the religion that they are trying to advance, does employment discrimination based on religion make sense?

Reverend LYNN. Yeah, I would oppose the idea. I believe that you hire the best people for the job that you're seeking to hire for. But on the other hand, if this is all private money, if this is the money from the collection plate, I think the courts are pretty clear they can then hire in many, if not all, positions for—on the basis of religion. The calculus changes when it comes to cash coming from all the taxpayers.

Mr. SCOTT. And if they are using it for congregational purposes to advance their religion, it makes sense that people would understand the religion they are trying to advance. How does the calculation change if you are using Federal money?

Reverend LYNN. Well, because I think that the great strength of American religion is that it has been voluntary. We depend upon the contributions that are made by like-minded people. We have not until recently assumed that we deserve as churches or religious institutions to somehow go to the same trough to receive Federal money that some other organization does.

I think the great strength of religion in this country is that it does seek its funding from private sources. When it goes to the government and asks for its dollars, then I think collateral to it is a recognition that it must obey its laws, including its civil rights standards, which oppose making decisions in employment based on religion.

Mr. SCOTT. And if a devoutly religious businessman wanted to discriminate, why should he not be able to discriminate in violation of civil rights laws with his personal money?

Reverend LYNN. Well, I think, first of all, he can make contributions to anybody, including entities that might discriminate someplace down the road. But I think this whole idea of individuals being able to exercise their religious conscience on third parties is a very dangerous trap. That's why I don't think we should be talking about the so-called "right of conscience" of receptionists in a hospital to refuse to schedule someone to have an abortion, even if he or she doesn't approve of it. I think that pharmacies should not allow every pharmacist to decide they will not dispense certain drugs which may or may not be used, as the Bishop mentioned, as abortifacients, which is the way to characterize almost all contraception, as abortion-inducing, expanding the exemptions that already exist in law.

So I think it's a dangerous track, Congressman Scott, to go down to assume that judgments based on religion can be made by individuals, any individual who claims I have a religious basis for doing so. We have to be very careful about that standard.

Mr. FRANKS. And I thank the gentleman.

And I now recognize the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. Thank you, and I apologize—I walked in late—if this question has already been asked. But Mr. May, what is the biggest current threat to religious freedom in the country? Is it speech codes? Is it employment law? Is it employment discrimination? Is it the redefining of marriage? What would you say, if you had to rank order, which is the most important? Which is the biggest threat?

Mr. MAY. Well, obviously it's a wide horizon, I'm sorry to say, but I think the first is in the area of conscience, and I think it is something that is so important that it's been not only respected at times of war in our country when soldiers can't move forward and in contravention of their faith kill, as it were, we respect it there, and yet we somehow don't want to do so when we find individuals in other circumstances that present the exact same kind of moral dilemma for them.

I also think that it is in the context of what we do as a society about same-sex marriage. I mean, there are almost 40 states in this country already have constitutional amendments or laws essentially defining marriage and limiting it because of the benefits of that specific kind of marriage, one man, one woman, and the hope of children. It's good for society, it's good for ordered liberty, it's good for freedom. That's why states recognize it. And if we turn it on its head and now say these 40 states are engaging in a kind of discrimination, it really misses the point.

Mr. JORDAN. Let me pick up right where you were there. Is it true that some organizations are now defining groups who want to

make sure marriage remains what marriage has always been, want to define those groups as hate groups? Is that happening out there right now?

Mr. MAY. Oh, absolutely.

Mr. JORDAN. And can you give me some specific organizations who are now saying if you want to keep marriage the way marriage has always been, somehow you are a hate group?

Mr. MAY. Well, I think that the Catholic Church is probably the first example of being criticized for it. But groups like the American Civil Liberties Union, for example. I'd have to ask Barry whether or not his group has taken that point of view. But the stridency of the very idea——

Mr. JORDAN. I have been told the Southern Poverty Law Center has said the same thing. And when they do that, would you argue that that is a chilling effect on religious expression?

Mr. MAY. Oh, without question, because what it does is it essentially, it cuts off any kind of dialogue. I mean, we care about in this country discrimination that's invidious. The idea is to say you can't do this because of who you are or what you represent, not the idea that we segregate ourselves because of the values and the morals that we hold, and certainly religious expression is the first among them.

Mr. JORDAN. Let me ask you about one other idea, and then I know we have got to go vote. But one other question: In our state, back when I first got involved in public service, we actually passed a school choice law, and we said, in the City of Cleveland, that we would allow kids, at that time kindergarten through 2nd grade, to get a scholarship. It was amazing. It was worth $2,000, and we were spending at the time in Cleveland Public Schools about $7,000 per pupil, and we allowed kids to get that scholarship to go to the school that their parents thought they would get the best education. The vast majority, almost all of them, went to Catholic schools in the Greater Cleveland area. It was challenged, as you would expect, every step, every court, state-level court, Federal-level court. It went all the way up, and it was challenged on the Establishment Clause. It was ultimately held to be constitutional.

Now, I just want your thoughts on it. Do you think that that school choice program, as the courts did, meets the Establishment Clause requirements, and is something that would be—something that is constitutional?

Mr. MAY. Well, yes. I think the Supreme Court got it right 10 years ago when it evaluated the case and upheld it, recognizing that, look, if we go through a Lemon type of evaluation, we'll recognize first off that this is to accomplish a secular purpose. The secular purpose is to provide the best education possible.

The second is we're not intending this to otherwise advantage faith over non-faith. It's rather send your kid where they can learn the ABC's and how to add, et cetera.

And last, it doesn't otherwise invite the entanglement of the government into the decisions that parents are making for their children.

So I think that voucher cases in that context make perfect sense and are constitutionally protected.

Mr. JORDAN. I think it is always interesting to point out that specific situation.

Reverend LYNN. If the Congressman would——

Mr. JORDAN. Just 1 second. The initial sign-up day, there were 2,000 spots worth $2,150, and again they were having spent on them in the Cleveland Public Schools approximately $7,000. But thousands of parents, much more than the available spots, lined up to get a chance to get one of those scholarships and get some freedom to get to a school where they could get an education. I mean, the power of that I think is—that example is just pretty powerful.

Mr. Lynn, I have got a few seconds, but go ahead.

Reverend LYNN. Yeah. I just—it's kind of like a Mitt Romney-Rick Perry moment. I have to say we don't make lists of hate groups. We're not involved in that whatsoever.

Mr. MAY. I'm glad to hear that.

Reverend LYNN. And I'm—but I am really shocked by some of the comments that my friend, Colby May, has made. We've had many debates over the years. Of all the things that have come up today, in my testimony I talked about the ACLJ's opposition, filing a lawsuit to stop the construction of a mosque on property owned by this—it's actually a community center, owned by a Muslim group in New York City. I thought we passed the Religious Land Use Act, among other things, to make sure that we couldn't overstate, for example, historical significance and use that to trump the construction of property to be used for a religious purpose. But when Mr. May and his group filed a lawsuit, I truly was shocked. I mean, I usually don't agree with him, but I was shocked by this one because it seems to be so inconsistent with his whole rhetoric of we believe in religious freedom for everyone, we support everybody's right. Apparently not if you're a Muslim in New York.

Mr. FRANKS. Mr. May, would you like to respond?

Mr. MAY. Oh, yes, sir, I would. I'll direct my comments to the Committee because I know I'm not supposed to direct it to a fellow witness. But the reality is that I wish Barry would get it right, and he just doesn't seem willing to do so, and I don't know if it's purposeful on his part or not.

But our case in New York, *Brown v. The Landmark Preservation Commission*, does not involve the Religious Land Use Institutionalized Persons Act. He should know that.

What we are talking about is whether or not, under the unique circumstances of Ground Zero, this particular facility should be designated as a monument to the 9/11 catastrophe. And, in fact, the people that are involved were first responders. Mr. Brown was a first responder, and he is very passionate about making sure that we don't forget and that, in fact, those buildings that are in the area can otherwise be properly landmarked and kept as such.

We have never argued that the current mosque activity that goes on there should be stopped under any circumstances. It is rather to determine whether or not, in the unique circumstances here, this should be a landmark. It is not about religion. He knows it, and why he continues to say that baffles me.

Mr. FRANKS. Well, it sounds like you are going to get the last word here today, Mr. May. And I want to thank all of the people who attended, and all of the witnesses, and all of the Members

here. The subject is one of profound consequence. Nearly every law that we have is based on some religious precept, so we had better get it right.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will also have 5 legislative days with which to submit any additional materials for inclusion in the record.

And with that, again, I thank the witnesses, and I thank the Members and observers, and this hearing is now adjourned.

[Whereupon, at 3:58 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response to Post-Hearing Questions from William C. Lori, Bishop of Bridgeport, CT

Questions from Representative Trent Franks
Judiciary Committee's Subcommittee on the Constitution
The State of Religious Liberty, October 26, 2011
Answers Submitted by Bishop William Lori
November 21, 2011

1. **In his testimony, Reverend Lynn asserts that the Church is free to worship as it likes, but when it takes part in public programs it should have to follow the same rules as everyone else. Do you agree with this assertion?**

Bishop Lori: I agree with it in general, but much depends on whether the rules themselves are fair, or are skewed toward a particular ideology or extraneous goal.

For many years, Catholic institutions have been following the rules, which have allowed both religious and secular groups to serve the needy without violating their own fundamental moral convictions. But now, the rules are being radically changed to serve one narrow set of interests, and to expel Catholic organizations from these programs.

For example: For twelve years there has been a mandate for contraceptive coverage in federal employees' health benefits plans; but insurers with a religious objection could offer a plan without contraception, and federal employees could freely choose to purchase such a plan if they wish. Even within health plans that do choose to offer contraceptive coverage, individual health professionals with moral or religious objections are protected from being discriminated against when they decline to participate in this activity. No one objected to this, and everyone's freedom was respected.

Now the rules have been changed so radically that Catholic organizations will not even be able to offer a plan consistent with their teaching to their own employees, let alone to the broader public. Who is served by this rule, except ideologues at Planned Parenthood and its allies? Obviously the new policy does not expand individuals' access to the health care they prefer, but threatens to reduce it. If the Church can no longer in conscience provide insurance plans for hundreds of thousands of employees, then the cause of affordable healthcare will not be served.

My testimony also discusses the recent effort by the Department of Health and Human Services to require grantees in its program for victims of human trafficking to provide or refer for abortions. To put such a mandate in context, studies suggest that 86% of ob/gyns do not perform abortions and over 80% of hospitals do not provide them. The federal government itself denies funding for abortions in about 99% of cases. Nonetheless, the government bureaucracies are attempting to force the Catholic Church-whose teaching on the sanctity of life is well known- to ensure access to abortion in order to compete for government grants. That rule is not fair or consistent. It simply doesn't make any sense.

2. **Is there hard evidence that faith-based service organizations provide better or more effective care than others?**

Bishop Lori: Yes, there is. For example, a recent study of 255 health systems by Thomson Reuters found that "Catholic and other church-owned systems are significantly more likely to provide higher quality performance and efficiency to the communities served than investor-owned systems. Catholic health systems are also significantly more likely to provide higher quality performance to the communities served than secular not-for-profit health systems."[1]

The same is true in education. Andrew Greeley's groundbreaking findings in 1966 on the effectiveness of Catholic schools has been confirmed and extended many times since, for example by the 1993 Harvard study titled *Catholic Schools and the Common Good*. More recent findings emphasize that faith-based schools improve student achievement in the inner city, with a greater impact on the achievement of minority students.[2]

This excellent record is not unrelated to the Church's convictions about the dignity of each human person and the need to show ultimate respect for every human life. The same conviction about the equal worth of every human being that drives our organizations to care for every person in need, beginning with those who are most vulnerable, also drives our convictions about the dignity of human sexuality and about the moral wrong of any direct taking of human life from conception onward. If government works to undermine the latter, it will undermine the foundation for our resolve to provide optimum care for all.

More broadly, if Congress wants to maintain access to much-needed health care and education, particularly for the poor and underserved, it should be concerned about any threats to the rights of faith-based providers that would undermine their ability to continue to serve the common good.

3. **You mentioned in your testimony new requirements in cooperative agreements with HHS that the grantees must be willing to offer abortion and contraception for services provided to victims of human trafficking and refugees. I understand there was a situation recently where a contract was not renewed with the Catholic Church's program serving trafficking victims. Could you tell me a little about this?**

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[1] David Foster, Ph.D., M.P.H., *Research Brief: Differences in Health System Quality Performance by Ownership* (Thomson Reuters, August 9, 2010), at www.100tophospitals.com/assets/100TOPSystemOwnership.pdf.

[2] See studies cited in Leonard DeFiore et al., *Weathering the Storm: Moving Catholic Schools Forward* (National Catholic Educational Association 2009), pp. 3-4.

Does the Church have an opinion as to whether the new requirements violate the Religious Freedom Restoration Act?

Bishop Lori: The Migration and Refugee Services (MRS) division of USCCB has provided services to victims of human trafficking under a contract with HHS since 2006. That contract was scheduled to run its course in October of this year, so in May, HHS solicited bids for substantially the same work.

For the first time, however, HHS's solicitation indicated a preference for bidders willing to facilitate "the full range of legally permissible gynecological and obstetric care"—that is, abortion and contraception. Of course, as a Catholic organization, MRS cannot, in conscience, facilitate abortion or contraception. MRS had never been required to do so as a condition of participation in this program, and this limitation has not impaired its ability to serve trafficking victims exceptionally well.

In July, USCCB provided HHS with a legal memorandum explaining why this new preference was illegal, because it violated, among other things, the Religious Freedom Restoration Act. A copy of that memorandum is enclosed for your convenience.

MRS nonetheless applied for the grant, confident that its track record of success, and its strengths in the areas of greatest relevance to serving trafficking victims effectively, would far outweigh any penalty it would suffer because of its moral and religious commitments. At the end of September, MRS received notice that the grant had been denied, with no explanation.

On October 27th, USCCB submitted a FOIA request to HHS to obtain some explanation, in part so MRS could assess its legal rights and options. The statutory due date for receipt of responsive documents was November 28th, but as of the date of this writing, USCCB has yet to receive the requested documents.

On November 1, the *Washington Post* ran a front-page story on the denial of MRS's bid, providing some of the details that HHS has yet to provide voluntarily. The full version of that story, as it initially appeared, is attached for your convenience. (The *Post* later shortened the story, eliminating the quotes of HHS staffers who were upset at the unfairness of the process.)

Specifically, the story revealed that MRS placed second in objective scoring, even after it had been docked points for not fulfilling HHS's new preference, but was nonetheless denied any of the four grants slated for distribution. Instead, only three grants were given, one to the first-place bidder, and two to bidders whose scores were below MRS's—indeed, so much lower that they fell below the threshold of minimum qualification.

As I indicated in my live testimony, I believe this matter warrants further investigation by Congress. HHS's process lacks transparency, runs afoul of basic fairness, discriminates against MRS based on its sincerely held religious and moral convictions, and hurts trafficking victims by

providing them services through entities deemed unqualified. I am enclosing for your reference a recent summary of the situation that our staff has compiled, with the hope that it may aid in your own inquiry.

4. **The freedoms that Americans enjoy are rooted in moral responsibility. Could you explain the role of religion in developing the moral responsibility of American citizens and the threat that removing religion from public discourse poses to moral responsibility in America?**

Bishop Lori: The founders of our nation understood that the very legitimacy of our claim to independence depended on the existence of a source of moral guidance, and a foundation for basic human rights, that precedes and transcends the State. Even governments could be held accountable to standards of right and wrong, because fundamental human rights were inherent in being human—these rights came from our Creator, and the State was obliged simply to recognize and uphold them.

The other side of this coin can be seen in modern societies that officially reject religion and deny any power higher than the State, which have been responsible for the most appalling abuses of human rights in the world. Once government assumes the prerogatives of God, and claims the authority to coerce its citizens' consciences by forcing them to take part in what they believe to be intrinsically evil, it is on the way to totalitarianism.

In terms of maintaining a free and prosperous nation, our founders also understood that the American experiment was impossible without a morally responsible citizenry, and that maintaining this culture of moral responsibility would rely in large part on religion. John Adams said: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." George Washington sounded the same theme in his Farewell Address, adding: "And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." The coercive power of the law cannot hope to maintain people's rights or defend the innocent unless its goals are also supported by the mediating institutions, including religious institutions, that help citizens to form their consciences and act for the common good.

I think those who drafted and ratified our Bill of Rights, placing the freedom of religion first among those rights, understood these realities. In our time, as well, those who want to restrict or suppress the vibrant and positive role that religion plays in our public life, in the hope that this will lead to greater prosperity or freedom, are likely to produce the opposite result.

5. How would elimination of the ministerial exception affect the Church's internal affairs in the United States?

Bishop Lori: The elimination of the "ministerial exception" would clear the way for an unprecedented intrusion by the State into the inner workings of the Church and other religious institutions across the country. This is because, without the exception, the State would be newly empowered—by way of antidiscrimination and other employment laws—to compel churches to choose ministers according to criteria other than those consistent with the teaching and practice of their own faith.

In the Catholic Church in particular, without the exception, Title VII's prohibition on employment discrimination based on sex would apply with equal force to the Catholic priesthood, thus compelling our Church to include women in the priesthood. But more broadly, eliminating the exception would unleash the full range of federal, state, and local employment regulations on a relationship which, in all candor, the State has no business whatsoever regulating—the relationship between the Church and its ministers.

In short, the ministerial exception is an indispensable element of the "separation of Church and State" in the best sense of that famous phrase—a separation that protects the Church from unwarranted intrusion by the State.

A longer explanation of the value of the exception—and of the consequences of its elimination—can be found in the *amicus curiae* brief that the U.S. Conference of Catholic Bishops filed in the *Hosanna-Tabor* case, in conjunction with the Church of Jesus Christ of Latter-Day Saints, the Presiding Bishop of the Episcopal Church, and the Union of Orthodox Jewish Congregations of America. The brief is available online at: http://www.usccb.org/about/general-counsel/amicus-briefs/upload/amicus-sct-hosanna-tabor-2011-06.pdf.

Letter from John C. Hagee, Cornerstone Church

July 25, 2011

VIA FACSIMILE
The Honorable Lamar S. Smith
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Recent Decision of Hon. Fred Biery of San Antonio, Chief U.S. District Judge for the Western District of Texas.

Dear Chairman Smith and Ranking Member Conyers:

Please accept this letter as a formal request that the erroneous decision of the above mentioned federal judge be examined as evidence of his failing to execute his duties of office, more specifically, failure to administer justice without respect to persons and failure to impartially discharge his duties agreeably to the Constitution, both of which are in contravention to his oath of office pursuant to Section 8 of the Judiciary Act of 1789.

As I am sure you are well aware, on June 1, 2011, Judge Biery ordered that praying at the Medina Valley High School graduation ceremony would violate the Establishment Clause of the First Amendment of the United States Constitution and enjoined the students from participating in the same.

In the order, a copy of which is attached hereto for you reference, the Judge expressly prohibited student speakers from saying the words "amen" or "in [in a deity's name] we pray" among others. As such, in an attempt to avoid the alleged infliction of "irreparable harm" upon one student, Judge Biery launched a preemptive strike on the free speech of others and enforced such order under the threat of incarceration, and other sanctions, if violated.

While the Establishment Clause mandates that "Congress shall make no law respecting an establishment of religion" it does not however, require that judicial activists violate the people's right to free exercise of religion in enforcing the same. Allowing a student to pray at a graduation is not akin to Congress making a law respecting religion and to rule that it does is a clear violation of the Constitution of the United States, the supreme law of our nation.

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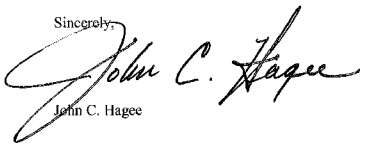
Although, gratefully, the Fifth Circuit Court reversed Judge Biery's ruling, Judge Biery is one of many federal activist judges, usurping powers not delegated to them, and instead legislating from the bench which is resulting in the curtailment of religious freedoms in this country. Accordingly, as Chairman and Ranking Member of the House Judiciary Committee, the guardian of the constitution, we respectfully request the Committee exercise its rightful jurisdiction over both the protection of civil liberties of the citizens of this nation and matters involving federal courts and judges, and inquire into Judge Biery's actions.

Thank you for giving your attention to this matter. Should you have any questions, please contact me at the telephone number or address listed above.

Sincerely,



John C. Hagee

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Letter from Rajdeep Singh, Director of Law and Policy, The Sikh Coalition

October 25, 2011

The Honorable Trent Franks
The Honorable Jerrold Nadler
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Re: Hearing on the State of Religious Liberty in the United States
October 26, 2011 | Subcommittee on the Constitution

Dear Chairman Franks and Ranking Member Nadler:

The Sikh Coalition submits this letter to the Subcommittee on the Constitution in the U.S. House of Representatives to highlight ongoing challenges to the civil rights and liberties of Sikh Americans. We request that this letter be incorporated into the official record of the above-referenced hearing.

By way of background, the Sikh Coalition is the largest Sikh American civil rights organization in the United States. We were constituted on the night of September 11, 2001 in response to a torrent of hate crimes against Sikh Americans throughout the United States. The Sikh religion was founded over five centuries ago in South Asia and is presently the fifth largest world religion, with more than 25 million adherents throughout the world. Sikhs are distinguished by visible religious articles, including uncut hair, which Sikh males are required to keep covered with a turban. Although the Sikh turban is a symbol of nobility and signifies a commitment to upholding freedom, justice, and dignity for all people, the physical appearance of a Sikh is often ignorantly conflated with images of foreign terrorists, some of whom also wear turbans and many of whom have received copious publicity in our mainstream media in the post-9/11 environment. As a consequence, Sikhs in the United States are ridiculed and stereotyped because of their appearance and subjected to bias crimes, racial profiling, employment discrimination, and school bullying.

The balance of this letter focuses on two loopholes in Title VII of the Civil Rights Act of 1964 ("Title VII"). These loopholes undermine religious liberty and the promise of equal employment opportunity for countless people of faith, including Sikhs, in the United States.

A. The Workplace Segregation Loophole Under Title VII of the Civil Rights Act of 1964

Title VII makes it unlawful for an employer to segregate employees or job applicants "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color,

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religion, sex, or national origin."[1] With a view toward protecting religious freedom, Title VII also requires employers to reasonably accommodate the religious practices of their employees unless doing so would impose an undue hardship on the conduct of the employer's business.[2]

Notwithstanding these provisions, at least one federal court has misinterpreted Title VII in a way that allows employers to segregate visibly religious employees and job applicants from customers and the general public—specifically by ruling that an employer satisfied its Title VII obligation to make a "reasonable" accommodation of a turbaned Sikh employee by offering him positions out of public view.[3]

We are troubled by this misinterpretation and the discriminatory impact that its wider adoption can have on individuals whose religious observance encompasses adherence to dress and grooming requirements. We believe that segregating such individuals in the workplace inherently constitutes an "adverse employment action" relating to the "terms, conditions, or privileges of employment"[4] and that segregating individuals from customers in the name of so-called "corporate image" policies is inherently discriminatory and unreasonable. Such policies reinforce bigoted stereotypes about what American workers should look like; prevent employees of faith from gaining customer service experience, thwarting their professional growth; and clearly undermine the integrative purpose of Title VII.

Recommendation: We urge Congress to amend Title VII of the Civil Rights Act of 1964 to clarify that religious accommodations requiring segregation from customers in the name of corporate image constitute adverse employment actions, are inherently discriminatory, and can never be deemed "reasonable" under Title VII.

B. The Undue Hardship Loophole Under Title VII of the Civil Rights Act of 1964

As noted above, Title VII requires employers to reasonably accommodate the religious practices of their employees unless doing so would impose an undue hardship on the conduct of the employer's business.[5]

According to some members of the U.S. Supreme Court, an "undue hardship" to an employer merely means anything more than a *de minimis* cost or inconvenience.[6] This is an unacceptably low standard because it allows employers to reject accommodations for religious employees without even showing that an accommodation would entail a significant difficulty or expense.

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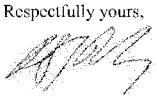
[1] 42 U.S.C. § 2000e-2(a)(2).
[2] *See* 42 U.S.C. § 2000e(j).
[3] *See* Birdh v. United Airlines, Corp. No. 99 C 5576, 2002 WL 471999, 2002 U.S. Dist. LEXIS 9864 (N.D. Ill. 2002)
[4] *See Local Union 12 v. NLRB*, 368 F.2d 12, 16-17 (5th Cir. 1966); *U.S. v. Frazer*, 317 F.Supp. 1079, 1088-1089 (M.D. Ala 1970); II EEOC COMPLIANCE MANUAL 618.2 (1983); II EEOC COMPLIANCE MANUAL 618.1 (1998).
[5] *See* 42 U.S.C. § 2000e(j).
[6] *See Trans World Airlines, Inc v. Hardison*, 432 U.S. 63, 84 (1977).

Recommendation: We urge Congress to amend Title VII of the Civil Rights Act of 1964 to clarify that an "undue hardship" is one that imposes a "significant difficulty or expense" on the conduct of an employer's business, consistent with the legal standard used under the Americans with Disabilities Act and proposed in the Workplace Religious Freedom Act.

We appreciate the opportunity to express our concerns. Please let us know if you require additional information, and please accept our gratitude for your consideration.

Respectfully yours,



Rajdeep Singh
Director of Law and Policy
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cc:

Members of the Subcommittee on the Constitution, U.S. House of Representatives

Prepared Statement of Rev. Dr. C. Weldon Gaddy,
President of Interfaith Alliance

Written Testimony of
Rev. Dr. C. Welton Gaddy, President of Interfaith Alliance
Submitted to
U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution
for the Hearing Record on
"The State of Religious Liberty in the United States."
October 26, 2011

As a Baptist minister, a patriotic American and the President of Interfaith Alliance, a national, non-partisan organization that celebrates religious freedom and is dedicated to protecting faith and freedom and whose 185,000 members nationwide belong to 75 faith traditions as well as those without a faith tradition, I submit this testimony to the House Committee on the Judiciary Subcommittee on the Constitution for the record of the hearing on "The State of Religious Liberty in the United States."

By building our nation upon the cornerstone of religious liberty, our Founders acknowledged this freedom is central to democracy. I am pleased that the Committee recognizes the importance of protecting and assessing the state of religious liberty in our nation. However, the lack of diversity among the faith traditions represented by the witnesses and the topics on which the hearing is expected to focus makes me fear that this hearing is based on a far too narrow and thus a misguided understanding of what this freedom means. Religious freedom provides liberty for people of all religions and people of no religion, not just freedom for some in our nation's religious community.

At a time when Muslim Americans must fight just to be able to build houses of worship in their communities, when visibly religious Americans are segregated from the rest of the workforce because of their religiously-mandated attire, when government dollars support discrimination in hiring based on religion, when a candidate's faith becomes a qualification or hindrance to his or her candidacy, and when laws are based on a single religious perspective, I can unequivocally say that the state of religious liberty in the United States is nowhere near as secure as it should be. Indeed, when I meet with various groups, I often say that it seems like we are backtracking, that we are headed toward a pre-First Amendment posture on religious freedom.

Religious liberty as guaranteed by the First Amendment protects the freedom of all Americans to believe in any religious faith, as they choose; all people and all faiths are equal with none favored over any other. Unfortunately, in today's America, it appears the religious freedoms that are protected in a court of law are not quite the same as those protected in the court of public opinion. In today's America, it appears that people of the

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Muslim faith are not entitled to the same freedoms as all other Americans. We have been through this before; waves of anti-Semitism, anti-Catholic sentiment and other periods of antagonism against one faith or another have left indelible blemishes on our country's past. Let us not allow history to repeat itself.

In far too many communities around the nation—from New York City to Murfreesboro, Tennessee—Muslim Americans are being told by their neighbors that they are not wanted and should not be allowed to build community centers and houses of worship. Fortunately, our laws continue to protect their right to build spaces to freely exercise their faith, yet they still have to contend with their building sites being vandalized, challenges finding willing contractors, and a climate of fear. The fact that a group of Americans, simply trying to avail themselves of their right to worship, is met with such a response is appalling.

Perhaps even more disturbing is the fact that several state legislatures are considering and passing laws to prohibit judges from using religious law or, in some cases, specifically *Sharia*, Islamic law, in deciding cases. But to put it bluntly: The Constitution of the United States is in absolutely no danger of being trumped by any religious law, and those who think that *Sharia* is a threat to the Constitution simply do not understand the Constitution. Furthermore, we must remember that if there is hostility toward one religion in this nation, there is the potential for hostility toward all religions in this nation, and in fact, to the fundamental principles behind the founding of our government, the nature of our democracy.

Religious freedom is also under fire in the workplace. The Civil Rights Act of 1964 requires employers to provide "reasonable accommodation" for their employees' religious beliefs, observances and practices, unless doing so would cause the employer "undue hardship." But since 1977, the courts have interpreted this provision by saying that "mere possibility of an adverse impact" on the employer is enough to create such a hardship. These rulings have made it nearly impossible for employees to receive the reasonable accommodations for their faith—wearing head coverings, maintaining beards, scheduling time off for religious worship—that are guaranteed them by the Free Exercise Clause of the Constitution.

The Workplace Religious Freedom Act, which would resolve this conflict, has been introduced on several occasions in the House and Senate, but has yet to become law. The passage of this legislation is long overdue. In a country that promises religious freedom as well as the right to the pursuit of happiness, at a time when finding gainful employment is already difficult enough, employees should be free to pursue successful and meaningful careers without compromising the core tenets of their faiths.

Under regulations set in place by the Bush Administration, religious charities or houses of worship can receive government grants to support their good works, and yet they are not held to the same standards as all other contractors or grantees when making hiring decisions. Thus, taxpayer dollars are currently funding discrimination. As I have said on numerous occasions, religious groups have every right to employ only those individuals who are committed to their religion and values—but if taxpayers are funding the organization, it should reflect our nation's historic commitment to civil rights or exist without government money. Government funds never

should be used to support discrimination—this is a violation of civil rights, just as it is of religious liberty.

At a time when our nation faces many challenges, it disappoints me that the media and the public continue to place such a strong emphasis on the faith of our candidates for public office. I have been a longtime advocate of reducing the disproportionate role that religion plays during the campaign season. It is an issue to which I pay particularly close attention, and from what I have seen, when religion and politics mix, it is for the benefit of the politicians and to the detriment of religion.

Furthermore, religious freedom does not simply mean the freedom to be religious—it also means, conversely, the freedom to *not* be religious. Our Constitution guarantees that "no religious test shall ever be required as a qualification to any office or public trust under the United States." And still, candidates must continue to validate, defend, and in some cases, prove they have faith in order to be successful in their bid to serve their country.

This is not merely a philosophical question. The current occupant of the White House has felt it necessary to defend himself against accusations that he is a "secret Muslim" by making clear that he is a "committed Christian," instead of just saying, "I am not a Muslim, but so what if I was?" The two Republican candidates for president who happen to be Mormon have had to defend their religion to those who would delegitimize it or try to paint it as a "cult," a response that simply feeds the growing anti-Mormon sentiment in America today.

Voters have the right to know whether candidates will respect the boundaries between institutions of religion and government, as well as the role a candidate's faith will play in creating public policy, and how a candidate will balance the principles of his or her faith with his or her pledge to defend the Constitution, particularly if the two conflict. But beyond this, our freedom of religion means that a candidate's faith should never be a determining factor in his or her qualification for public office.

Finally, I find it disappointing that so many Americans point to same-gender marriage as an example of their religious freedoms under attack, when in truth, marriage equality and religious freedom are not at odds. I offer this assertion not as a casual observer or a passive supporter of marriage equality. For many years, I personally struggled with this issue, a struggle which eventually brought me to a place at which arguments against gay marriage were no longer credible or sustainable when held up to the light of my faith commitment and my devotion to the Constitution.

Over the last few years, I have researched the issue of same-gender marriage thoroughly and written about it extensively. I have traveled across the United States speaking to people—gay and straight, Christians and atheists, liberals and conservatives. I have written a paper that could be of use in the debate over this legislation entitled, "Same-Gender Marriage and Religious Freedom: *A Call to Quiet Conversations and Public Debates," available at* www.interfaithalliance.org/equality. The conversation around and support of same-gender marriage is a large part of our work at Interfaith Alliance.

What has become undeniably apparent to me throughout this process is that the constitutional guarantee of religious freedom is the best perspective from which to view the subject of same-gender marriage. Law, not scripture, should be the foundation of government regulations related to marriage in our nation. In America's diverse religious landscape, there are many theological positions on same-gender marriage, some of which support the institution and some that oppose the institution. But the First Amendment's religious freedom provisions ensure that legalizing same-gender marriage will not result in a government imposition on religious institutions of a particular view of marriage or limit their speech as it relates to marriage.

I applaud the Committee for your concern about the state of religious freedom – our first freedom – in our country today. I only wish that this hearing would provide a place at the table and a voice on the microphone for those Americans whose freedoms are truly being eroded. Obviously, I hope you will assure that level of inclusion in future hearings on this precious and irreplaceable freedom.

Thank you for the opportunity to submit testimony on this important issue.

Prepared Statement of Suhag A. Shukla, Esq., Managing Director/Legal Counsel; Samir Kalra, Esq., Director and Senior Fellow, Human Rights; and Nikhil Joshi, Esq., Member, Board of Directors, the Hindu American Foundation

Written Testimony Statement of the Hindu American Foundation

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"The State of Religious Liberty in the United States"
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The Hindu American Foundation (HAF) is an advocacy group providing a voice for over two million Hindu Americans. The Foundation interacts with and educates leaders in public policy, academia and the media about Hinduism and issues concerning Hindus both domestically and internationally, including religious liberty; the portrayal of Hinduism; hate speech; hate crimes and human rights.

Since its inception, HAF has made religious liberty advocacy one of its main pillars and has participated in cases involving a range of issues. Both as litigant and amicus curiae, HAF has fought against religious discrimination, bias, and state endorsement of religion, and defended the fundamental right of free exercise. HAF subscribes to the view that all religions and adherents thereof as well as non-believers should be treated equally and with dignity by the state.

Through participation in the legal process, HAF has sought to educate Americans at large about various aspects of Hindu belief and practice in the context of religious liberty. For decades, a Hindu voice was missing amongst those of Jews, Christians, Buddhists, and non-believers, who have actively participated in defending religious freedom in the United States. HAF's advocacy has filled this void, providing a Hindu American voice where previously there was none.

We are a nation whose strength and unity derives from its diversity. As our Great Seal proclaims: *E Pluribus Unum* ("out of many, one"). This is a concept that mirrors beautifully one of Hinduism's core teachings, that Truth is One, but is manifested in many different ways. Hindu Americans constitute a growing and increasingly visible part of America's religious mosaic.

HAF respectfully submits that the state of religious liberty in the United States is, on the whole, strong, however, there still remain serious concerns, especially for adherents of minority faiths and non-believers. In light of our nation's history of religious pluralism and its growing religious diversity, issues of the state endorsing or privileging a particular religious viewpoint over all others, lack of religious accommodation, and religious discrimination, institutional bias, and religious coercion, prove to be problematic.

I. State Endorsement of Religion

The Founding Fathers wisely articulated a two-fold conception of religious freedom. The first part prohibits government from regulating or endorsing religion and has been beneficial to both government and religion. As a nation of deeply religious people, the principle of separation of church and state has been the foundation upon which diverse religions have not only flourished, but thrived in the United States.

On occasion, governmental bodies or government office-bearers unable to set aside sectarian beliefs, have attempted to blur this separation despite acting in their official capacities. Issues have ranged from state-sponsored religious displays to Christian-themed license plates; school prayer to the inclusion of sectarian principles into K-12 curriculums. While many of these issues have been adjudicated by the courts in a manner which we believe uphold the proverbial wall, there are areas, such as public religious displays, where as a result of often conflicting court

decisions, the law and its application remain unclear. Some examples of relevant cases can be found below.

ACLU of Ohio v. DeWeese (U.S. Court of Appeals, 6th Cir., 2010)

In 2000, Judge DeWeese, a judge in Richland County, Ohio, hung posters of the Ten Commandments and Bill of Rights in his courtroom. The poster of the Ten Commandments was found to be an unconstitutional promotion of religion by a government official. Subsequently, in 2006, he hung another poster entitled the "Philosophies of Law in Conflict" in his Richland County courtroom. The poster was presented as a secular philosophical and legal theory, but made several references to Judeo-Christian religious concepts, including the Ten Commandments, and mentioned "God Almighty."

The American Civil Liberties Union (ACLU) of Ohio filed a lawsuit in 2009 against Judge DeWeese in the U.S. District Court for the District of Northern Ohio, alleging that the display was an endorsement of religion, and thus a violation of the Establishment Clause of the Constitution. The District Court ruled in favor of the ACLU, and Judge DeWeese appealed the decision.

HAF filed an amicus (friend of court) brief in 2010, along with a number of other organizations, supporting the ACLU's position that Judge Deweese's display of the "Philosophies of Law in Conflict" poster in his courtroom was a religious display, and therefore a violation of the Establishment Clause of the Constitution. In particular, the poster made explicit reference to "Almighty God" and mentioned the Ten Commandments as "moral absolutes," invoking Judeo-Christian concepts. Consequently, it cannot be considered a secular display, as Judge Deweese argued.

The brief further pointed out that Judge DeWeese made earlier attempts to display the Ten Commandments next to the Bill of Rights in his courtroom, but they were found to be an unconstitutional endorsement of religion. And given that history, the "Philosophies of Law in Conflict" poster was a poor attempt to disguise a religious display in the form of a supposedly secular exhibit on philosophical and legal theory.

Outcome

On February 2, 2011, the Sixth Circuit Court of Appeals ruled in favor of the plaintiff, ACLU of Ohio, and found that the "Philosophies of Law in Conflict" poster was a violation of the Establishment Clause of the U.S. Constitution. The Court's written judgment specifically noted that the poster contained overtly religious messages in a state courtroom, thereby indicating the Judge's endorsement of religion. This was consistent with HAF's position, as articulated in the amicus brief.

Summers, et al v. Adams (U.S. District Court, District of South Carolina, 2008)

The South Carolina state legislature passed a statute that authorized issuance of license plates featuring the words "I Believe" along with the image of a cross superimposed on a stained glass window. The legislature, however, did not propose or make available a similar specialty plate for any other faith. Furthermore, state legislators proposed the legislation to generally recognize Christianity, rather than on behalf of a particular organization as required by South Caroline state law.

HAF, along with several Christian and Jewish leaders and the American Arab Anti-Discrimination Committee sued South Carolina state officials, alleging that the license plates gave preferential governmental treatment to one particular faith community (Christianity), in contravention of the First Amendment's promise of equal treatment of all faiths. The lawsuit further alleged that the license plates violated the separation of church and state under the Establishment Clause of the U.S. Constitution. In the lawsuit, HAF and its coalition partners were represented by Americans United for the Separation of Church and State.

Outcome
HAF and its coalition prevailed in its lawsuit, after a federal court ruled that the Christian license plate mandated by the state legislature violated the separation of church and state. The ruling was hailed as a victory for religious liberty, and upheld the rights of non-Judeo-Christian religious communities, including Hindus.

American Atheists, Steven Walker, et al v. City of Detroit Development Authority and St. John's Episcopal Church (U.S. Court of Appeals, 6th Circ., 2008)
In preparation for the Super Bowl, the Detroit Development Authority (DDA) created a development program that provided government funds to properties that refurbished or repaired their buildings. Under this program, the DDA provided government grants to all eligible organizations, including three churches, one of which was St. John's Episcopal Church. American Atheists filed a lawsuit in U.S. District Court for the Eastern District of Michigan, claiming that the DDA, as a government agency, cannot provide grants to any religious entities, especially churches. The lawsuit alleged that DDA's program was in violation of the Establishment Clause of the U.S. Constitution, as it made government support available to religious places of worship.

The U.S. District Court ruled in favor of the DDA and St. John's Episcopal Church, and American Atheists filed an appeal with U.S. Sixth Circuit Court of Appeals.

HAF, along with a number of other organizations, filed an amicus (friend of court) brief in support of American Atheists et al. The brief argued that the Establishment Clause of the Constitution, which safeguards religious freedom, prohibits direct government aid to construct or repair places of worship. The brief further maintained that government aid cannot be used to repair or maintain even allegedly secular aspects of churches, because it would lead to excessive government involvement in determining what is secular and what is religious. And in this case where aid was offered to churches, which are religious institutions, it is impossible to separate secular aspects from religious ones.

Outcome
The Sixth Circuit Court of Appeals ruled against American Atheists, stating that the DDA program did not violate the Establishment Clause of the U.S. Constitution. The Court found that the program benefits were equally available to all organizations, regardless of whether religious or secular, and as a result, did not advance or endorse religion. Despite the Court's decision, HAF's brief represented a Hindu American voice, and articulated concerns of government support for religious institutions, such as churches.

Borden v. East Brunswick School District, East Brunswick (U.S. Court of Appeals, 3rd Cir., 2007)

For 23 years, East Brunswick football coach, Marcus Borden, led his team in an overtly Christian prayer prior to games. After receiving complaints from students, East Brunswick school officials issued guidelines indicating that students may engage in "voluntary team prayer," but teachers or coaches may not participate. Coach Borden, however, continued to participate in student prayers by kneeling and bowing his head with them. When the school district ordered him to cease these activities, Coach Borden filed a lawsuit, claiming that his First Amendment rights had been violated. The District Court held that Coach Borden's conduct of kneeling and bowing his head was not an endorsement of any religion. The School District filed an appeal with the Third Circuit Court of Appeals.

HAF filed an amicus (friend of court) brief with other religious and civil rights organizations, including American Atheists, the American Civil Liberties Union (ACLU), and the American Jewish Committee (AJC), in support of the School District's policies. The brief stressed the Coach's actions in kneeling and bowing his head in prayer with his students prior to a game, was religious in nature, and thus an endorsement of a particular religious practice, in violation of the Establishment Clause of the Constitution. Moreover, rather than fostering team unity, as Coach Borden argued, the team prayer had a coercive impact on players of minority religions. Therefore, the School District was correct in prohibiting him from engaging in such activities.

Outcome

The Third Circuit Court of Appeals ruled in favor of the high school's guidelines prohibiting Coach Borden or any other teacher from participating in or leading student prayers. The Court's opinion found that given the Coach's history of overtly religious conduct in leading team prayers, his act of kneeling and bowing his head with his team, was an endorsement of religion, in violation of the Establishment Clause of the Constitution. Specifically, it stated that, "a reasonable observer would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion." As a result, the judgment vindicated HAF's position, and a victory for religious liberty.

American Atheists, et al v. Utah Highway Patrol Assoc. (U.S. Court of Appeals, 10th Cir., 2006)

In honor of deceased highway patrol officers, the Utah Highway Patrol Association (UHPA) decided to erect roadside monuments in the form of Christian crosses. American Atheists, an organization dedicated to maintaining the separation of church and state, filed a lawsuit, claiming that such monuments violated the Establishment Clause of the Constitution, which prohibits government endorsement of one particular religion over another. A U.S. District Court for the District of Utah trial rejected the American Atheists' claims, and the case was subsequently appealed.

HAF filed an amicus (friend of court) brief along with a number of diverse religious and secular organizations, in support of the plaintiff, American Atheists. The brief argued that the state-sponsored roadside display of the cross used to honor fallen highway patrolmen, was religious in nature, and not merely a "secular symbol of death." It specifically noted that the cross has always been seen as a distinctly Christian religious symbol, and its placement on public land sends an exclusionary message that the government favors Christians over non-Christians. Additionally, the brief stated that the State's characterization of the cross as a secular symbol offends Christians, who attribute a deeply religious meaning to it, as well as non-Christians. As

a result, the use of the cross as a memorial violated the separation of church and state, as protected under the Establishment Clause of the Constitution.

Outcome
The 10th Circuit Court of Appeals ruled in favor of the plaintiff, American Atheists, and issued a judgment consistent with HAF's position. In particular, the Court stated that the crosses conveyed a message of government endorsement of Christianity to a reasonable observer, in violation of the Establishment Clause of the Constitution. The U.S. Supreme Court recently denied a petition for Writ of Certiorari.

Simpson v. Chesterfield County (Writ of Cert to U.S. Supreme Court, 2005)
This case involved the practice of legislative prayer to open sessions of Board of Supervisors meetings in Chesterfield County, Virginia. The practice began after the Supreme Court ruled in the 1980s that legislative bodies could open sessions with a non-sectarian prayer or invocation, without violating the Establishment Clause of the U.S. Constitution. However, Cynthia Simpson, a member of the Wiccan faith, was denied the opportunity to lead the prayer at a Chesterfield County Board of Supervisors meeting because she did not practice a religion "within the Judeo-Christian tradition."

Ms. Simpson filed suit and the lower court ruled in her favor ordering the County to change the policy to, "include all faiths or to stop using the policy altogether." The county appealed, however, and the Fourth Circuit Court reversed the lower court holding that such discrimination was permissible under current case law. Following the Fourth Circuit Court's decision, Ms. Simpson filed a petition for rehearing with the same court, which was denied. Subsequently, she filed a petition for Writ of Certiorari, or a request to review the case, with the U.S. Supreme Court.

HAF filed an amicus brief, co-signed by the Buddhist Peace Fellowship, Association of American Indian Affairs, as well as the Interfaith Alliance, in support of Ms. Simpson's petition with the Supreme Court. The amicus brief argued that the Circuit Court's ruling contradicts the Establishment Clause of the U.S. Constitution by allowing the government to discriminate among religions, and make arbitrary theological conclusions about non-Judeo-Christian traditions. HAF further noted that Chesterfield County's policy gave selective privileges to members of the Judeo-Christian faiths, while excluding all others, including Hindus and Buddhists, among others.

HAF was represented by the Washington, D.C. law firm of Mayer, Brown, Rowe and Maw, LLP, and was supported by a number of Hindu and Jain organizations.

Outcome
Despite affirmative predictions from legal experts on the U.S. Supreme Court granting Writ of Certiorari, the Court denied Ms. Simpson's petition, and refused to hear her case. Consequently, the decision of the Fourth Circuit Appeals Court remains in effect, and thereby allows Chesterfield County to continue discriminating against non-Judeo-Christian faiths in legislative prayer. The case, however, provided HAF with another opportunity to present a Hindu American perspective on issues involving religious discrimination and the government's endorsement of one particular faith over others.

Van Orden v. Perry (U.S Supreme Court, 2005)

The case was originally brought by Thomas Van Orden against Rick Perry, the Governor of Texas, in 2003. In his lawsuit, Van Orden asked for the removal of a Ten Commandments monument from the Texas State Capitol grounds, alleging that the monument was a government endorsement of one particular religious faith, and thus violated the separation of church and state under the First Amendment of the Constitution. The Supreme Court decided to hear the case after the Fifth Circuit Federal Court of Appeals ruled that the monument could remain in place.

HAF file an amicus (friend of court) brief on behalf of a group of Hindu, Buddhist, and Jain organizations, to present a non-Judeo Christian perspective on the placement of the Ten Commandments monument on government property. The brief argued that the public display of the Ten Commandments on State Capitol grounds indicates an unconstitutional government preference for Judeo-Christian theology, and violates the separation of church and state, guaranteed by the First Amendment of the U.S. Constitution. It went on to assert that the religious precepts contained on the monument vary significantly from the non-Judeo-Christian concepts regarding the nature of God and the relationship between man and God. And as a result any public display of the Ten Commandments on government property would imply the political and social exclusion of non-Judeo-Christian religions, including Hindus, Buddhists, and Jains.

In filing the amicus brief, HAF was represented on a pro bono basis by the law firm of Goodwin Procter LLP.

Outcome

The Supreme Court issued concurrent rulings in two similar Ten Commandments cases, Van Orden v. Perry and McCreary County v. ACLU. In McCreary County, the Court ruled that a framed display of the Ten Commandments in a Kentucky courthouse was unconstitutional as it has the express purpose of promoting the Judeo-Christian faith. This ruling was consistent with HAF's position that the public display of the Ten Commandments endorses one particular religious faith over another. On the other hand, in Van Orden, the Court ruled that the monument on the Texas Capitol grounds did not violate the Constitution because, when considered in context, it conveyed a historic and social meaning rather than a religious endorsement. Despite the Court's judgment, a dissenting opinion by Justice John Paul Stevens cited HAF's amicus brief. Specifically, Justice Stevens wrote that the monument violates the Establishment Clause of the Constitution by, "prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by Hinduism, as well as nontheistic religions, such as Buddhism."

II. Free Exercise and Religious Accommodation

The second pillar of religious freedom, that of free exercise, is a right that is essential as an American right, but also a fundamental universal human right. Hindu Americans have enjoyed this right, as demonstrated by the vibrant communities that have emerged over the past several decades. With over 700 temples across the United States, Hindu Americans have been able to establish houses of worship for practice and continuation of the traditions to future traditions. As individuals, Hindu Americans and Hinduism

have, for the most part, thrived -- especially given the shared Hindu and American ideals of pluralism.

Yet, some Hindu American institutions and individuals have faced obstacles, such as majorities in particular community settings discriminating against them under the guise of "zoning laws." Furthermore, the Foundation has assisted institutionalized persons in vegetarian meal accommodations after their requests have fallen on deaf ears, or been denied as a result of either discrimination or unfamiliarity with Hinduism or Hindu practice.

The Hindu American Foundation has participated in several religious accommodation cases for adherents of other faiths, because denial of even one individual's rights sets a dangerous precedent for all. Examples of pertinent cases can be found below.

A.A. v. Needville Independent School District (U.S. Court of Appeals, 5th Cir., 2009)
Case Summary
In keeping with his Native American religious beliefs, Adriel Arocha (A.A.) kept his hair uncut and braided. The Needville school district in Texas's Fort Bend County, however, prohibited A.A. from keeping his hair uncut under the terms of the School District's dress code and grooming policy. A.A., through his parents, filed a lawsuit in U.S. District Court, claiming that the School District policy violated his religious rights under the U.S. Constitution and Texas state law. The District Court ruled in favor of the plaintiff, A.A., finding that the School District policy violated a sincerely held religious belief, and thus was invalid. The School District subsequently appealed the case to the Fifth Circuit Court of Appeals.

HAF, along with a number of religious and interfaith organizations, filed an amicus (friend of court) brief in support of the plaintiff, A.A. The brief expressed concerns about the Needville School District's conclusion that the plaintiff's religious practice of keeping their hair uncut and braided was not based on a sincerely held religious belief. And that a religious belief may be sincerely held even if not commonly practiced or compelled by a religious authority or central document. Consequently, the brief argued that the plaintiff's free exercise of religion should have been protected under the U.S. Constitution and Texas state law.

In the amicus brief, HAF specifically expressed concerns about the ability of civil court judges to decide what constitutes a sincerely held religious belief, since in Hinduism, many practices are very personal, not commonly practiced, or compelled by any religious authority.

Outcome
The Court of Appeals ruled in favor of the plaintiff's right to keep his hair in accordance with his religious beliefs. Moreover, the Court held that the School District's policy offended a sincerely held religious belief, and was invalid under Texas law. The decision was also consistent with HAF's position, as laid out in its amicus brief.

Town of Foxfield v. Archdiocese of Denver (Colorado Supreme Court, 2007)
In 1998, the Archdiocese of Denver opened a church rectory and small chapel in the town of Foxfield, Colorado. After complaints from a few neighbors living on nearby properties, the town's Board of Trustees adopted a zoning ordinance effectively restricting religious activities at the church rectory and chapel. The unusual ordinance declared it unlawful to have more than five

motor vehicles parked more than fifteen minutes within one thousand feet of any private residential property on more than two occasions during any 30 day period.

The ordinance further required written complaints from at least three neighbors. Shortly after the ordinance was enacted, the Town of Foxfield filed a lawsuit in District Court against the Archdiocese claiming it had the requisite number of complaint. The lawsuit requested a permanent injunction and a declaratory judgment against the Archdiocese, seeking to halt its activities at the rectory and chapel. In response, the Archdiocese alleged that the ordinance violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), Colorado's "Freedom to Gather for Worship Act," and the U.S. and Colorado Constitutions.

HAF, along with sixteen diverse religious and civil rights organizations, submitted an amicus curiae (friend of court) brief to the Colorado State Supreme Court defending the constitutionality of the federal RLUIPA, which provides stronger protections for religious freedom and accommodations for an individual's religious beliefs. The brief argued that zoning ordinances in general, similar to Foxfield's, impose a heavy and unnecessary burden on religious exercise, and discriminate based on religion or a particular denomination. This reflected a view shared by HAF along with organizations representing the Christian, Jewish, and Sikh faiths.

HAF and their coalition partners were represented by the Beckett Fund for Religious Liberty in writing and presenting the amicus brief.

Outcome
After the District Court initially ruled in favor of the Town of Foxfield, a Colorado Appeals Court handed a major victory to the Archdiocese. Specifically, the Appeals Court issued a judgment allowing the Archdiocese to proceed on its claims that the ordinance violated religious freedom under the RLUIPA. And the Colorado Supreme Court then denied a petition for review by Foxfield, thereby upholding the Appeals Court decision in favor of the Archdiocese. The Supreme Court and Appeals Court rulings were a victory for religious freedom, and consistent with HAF's position.

Village of Angelica v. Voith (NY Supreme Court, Appellate Division, 2006)
The Voiths, who live in the Village of Angelica, located in the Appalachian foothills, raised cows on their property consistent with their religious beliefs. The Village of Angelica, however, prohibited the Voiths from raising cows on their private property under a local ordinance barring cattle on lots smaller than 10 acres. The couple kept their cow, Chintamani, on a nearby farm but later moved her and her calves to their property. In addition, they also leased an additional twelve acres in an attempt to comply with the law, but village officials still denied their application for a permit.

The Voiths then took the Village of Angelica to court, alleging that their religious rights had been violated. The trial court, however, ruled against the Voiths, and refused to allow them to bring up religious rights issues. The Voiths appealed the decision to the Appellate Division of the New York Supreme Court.

On April 2, 2006, the Hindu American Foundation (HAF), along with other Hindu, Jain and religious freedom groups, filed an amicus (friend of the court) brief in support of the Voith family's right to keep cows on their property according to their religious beliefs. The brief argued that the Village of Angelica ordinance was being used to discriminate against the Voiths, and interfere with their ability to practice their religion.

The brief further stated that the Voiths kept the cows on their property consistent with the Hindu belief of goraksha (cow protection) and for the religious procession known as padayatra. It also described the role of cows in traditional Hindu society.

Outcome
The Appellate Division of the New York State Supreme Court ruled in favor of the Village of Angelica, and against the Voith family's right to keep their cows on their private property, despite their religious beliefs. The Court specifically ruled that Stephen and Linda Voith failed to comply with the Village of Angelica ordinance, and that the case "has nothing to do with religion." Although the judgment was a setback for religious freedom, the case provided HAF the opportunity to educate the court about Hindu beliefs and advocate on behalf of issues that may impact the broader Hindu American community.

Cutter v. Wilkinson (U.S. Supreme Court, 2005)
This case involved a group of Ohio prisoners with non-mainstream religious beliefs, who were denied access to religious literature and the opportunity to conduct religious services in prison. The prisoners filed a lawsuit, alleging violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA), which provides stronger protections for religious freedom and accommodations for an individual's religious beliefs in prison. A federal District Court dismissed their lawsuit, and the U.S. Sixth Circuit Court of Appeals ruled against them, finding that the RLUIPA was an unconstitutional Act.

The Becket Fund for Religious Liberty filed an amicus (friend of court) brief on behalf of HAF and a diverse coalition of religious and civil liberty organizations, in support of the constitutionality of RLUIPA. HAF and its coalition partners did not take a specific position on the actual case itself, and only argued that RLUIPA is a constitutional law. The amicus brief maintained that the Act does not favor or establish any particular religion, but rather prevents the government from interfering in an individual prisoner's ability to freely practice his/her religion. The brief further argued that the Act is only meant to accommodate religious beliefs, and does not inconvenience or burden the interests of others. And RLUIPA is no different than other laws meant to accommodate a person's religious beliefs, and is consistent with the country's long history of providing religious accommodations.

Outcome
The U.S. Supreme Court ruled in favor of the plaintiffs (Ohio prisoners), and their right to conduct religious services and access religious literature in prison. The Court also found that the RLUIPA provisions that apply to prisoners are constitutional, and do not establish or endorse a particular religion, in violation of the Establishment Clause of the Constitution. This was consistent with the position taken by HAF and the diverse coalition in their amicus brief.

The Supreme Court subsequently sent the case back down to the United States Court of Appeals for the Sixth Circuit to further decide the specifics of the case. The Appeals Court also ruled that the RLUIPA provisions, providing religious accommodations to prisoners was constitutional.

Gonzales v. O Esprito Centro Uniao Do Vegetal (U.S. Supreme Court, 2005)
O Centro Espirita Benficiente Uniao do Vegetal (UDV), is a religious organization merging aspects of Christianity and native South American belief systems. As part of their religious practices, members consume hoasca tea in guided religious ceremonies. Hoasca is a Brazilian plant based drug containing dimethyltryptamine, which is illegal under the Controlled

Substances Act (CSA). As a result, the government prohibited its use by the church's members in religious ceremonies. Subsequently, O Centro Espirito filed a lawsuit, claiming that the government infringed upon their rights of religious freedom under both the U.S. Constitution and the Religious Freedom Restoration Act (RFRA), a law intended to protect a person's ability to freely practice his/her religion without government interference.

A U.S. District Court sided with O Centro Espirito, and ruled that the government could not prohibit the use of hoasca in religious ceremonies under the RFRA, and the Tenth Circuit Court of Appeals affirmed the decision.

HAF joined a diverse coalition in filing an amicus (friend of court) brief with the U.S. Supreme Court, in support of the O Espirito church. The brief stated that providing religious accommodations to private persons in their religious practice is a key aspect of a democratic society. Specifically, the brief maintained that the RFRA requires the government to make exceptions to the Controlled Substances Act, and therefore the government should allow the use of hoasaca by O Espirito Church members during religious ceremonies. Moreover, the brief argued that making exceptions to laws in order to accommodate religious beliefs does not in any way endorse or establish a particular religion, and therefore does not violate the Establishment Clause of the U.S. Constitution.

Outcome
The U.S. Supreme Court ruled in favor of O Centro Espirito, and found that the government can grant a religious accommodation for the use of hoasaca in religious ceremonies. Furthermore, the Court stated that the government failed to show a compelling reason to place burdens on the church member's ability to freely practice their religion. The decision was consistent with the amicus brief submitted by HAF and other co-signatories.

III. Religious Discrimination, Institutional Bias, and Coercion

The Hindu American community is still primarily an immigrant community. Only after the lifting of the Asian Exclusion Act of 1924 in 1943 and the abolishment of quotas for immigrants based on national origin in 1965, have Hindus, primarily from India, adopted the United States as their home. In the past, religious discrimination has proven difficult to track due to overlapping identities of ethnicity, religion and national origin, as well as under-reporting. However, there are now second and third generations of Hindu Americans, as well as Hindus of European descent, and as such, familiarity with the law and changes in cultural attitudes towards reporting and litigation may now yield a clearer picture of discrimination on the basis of religion.

With regard to religious coercion, HAF has received confidential complaints from individuals facing proselytization and coercion to convert when they have accessed refugee assistance and social services from church-based agencies receiving faith-based government funding. The most recent cases come from the Bhutanese refugee community (the U.S. government agreed to resettle 60,000 over a period of five years). In the early 1990s, the royal regime evicted over 100,000 Hindu minority and Nyingmapa Buddhists from southern and eastern Bhutan strictly on the basis of their ethno-religious identity. A good majority of this community are practicing Hindus. Unfortunately, due to cultural and linguistic barriers and fear of losing benefits, data of such proselytization, and ultimately conversion, has been difficult to obtain. Some community

leaders, however, have cited a rise in suicide rates, especially for individuals who purportedly commit suicide out of guilt for abandoning their ancestral traditions. HAF is working to educate Bhutanese refugees and Hindu community at large about their rights to this end.

Lastly, there is the issue of institutional bias. One such example is found in the United State's immigration laws. The Hindu American community relies wholly on foreign workers to meet their religious worker needs, and thus utilizes the USCIS's R-1 Religious Worker program.

In response to the Hindu American Foundation and several other Hindu organizations submitting comments expressing concerns of the inherent Judeo-Christian bias in the list of religious workers and occupations in the R-1 visa program regulations, the U.S. Immigration and Citizenship Service (USCIS) removed a list of its proposed new regulations, leaving open the opportunity for individual temples to describe on their own such religious workers and occupations.

To best serve the needs of the community as well as provide the USCIS some standardized terminology, which will increase familiarity with Hindu practice and temple needs, the Hindu American Foundation has created a descriptive list of possible religious worker positions that a Hindu temple in the U.S. may need in order to meet its functions. HAF has received complaints from some temples of not having their R-1 visas approved and is actively working with the Citizen and Immigration Services Ombudsman's office to ascertain whether there are issues with USCIS understanding Hindu worker roles, processing errors or other errors on the part of temple petitioners.

IV. Other Cases Touching Upon Religion

The two cases listed below do not fall into the above categories, but have nonetheless raised significant issues for the Hindu American community.

Saraswati Mandiram v. G&G, LLC and G&G, Epping, LLC (New Hampshire Supreme Court, 2007)

This case surrounded eviction proceedings instituted against the Saraswati Mandiram, a New Hampshire based Hindu Ashram (monastery), and the ashram's head priest, Pandit Ramadheen Ramsamooj. In response to the eviction proceedings, Pandit Ramsamooj alleged that Virginia based lender, G&G, LLC engaged in fraudulent lending practices. He filed a lawsuit against G&G LLC, specifically arguing that G&G breached its contract with the ashram by violating and failing to abide by the terms of their mortgage agreement.

The Saraswati Mandiram serves Hindus living in New Hampshire, Vermont, Maine, and Massachusetts, and its ability to stay open is vital to its capacity to serve Hindus as a functional house of worship.

HAF filed an amicus (friend of court) brief in the Supreme Court of New Hampshire in support of the Saraswati Mandiram, to provide the Court with background information on Hinduism, the role of ashrams, and the significance of temple worship to Hindu practice Specifically, the brief laid out three major arguments: 1) A Hindu monastery is a spiritual sanctuary that plays a central role in the practice of Hinduism; 2) A temple is essential to the practice of Hinduism

because of its inherent sanctity and setting as a place of worship; and 3) The presence of the Saraswati Mandiram is crucial to the Hindu-American community's ability to practice its religion.

Outcome
The Supreme Court of New Hampshire partially ruled in the Saraswati Mandiram's favor by reversing the lower court's decision to completely dismiss the lawsuit. In particular, the Supreme Court stated that the Mandiram should be allowed to present its claim that G&G breached its fiduciary duties, and sent the case back to the Rockingham County Superior Court to rehear the case.

Hindu American Foundation, et al. v. California State Board of Education (California Superior Court, Sacramento, 2006)
In 2005, a number of concerned Hindu parents, along with two independent Hindu groups, the Vedic Foundation (VF) and the Hindu Education Foundation (HEF), participated in the California textbook review process by proposing several edits and corrections for sixth grade social studies textbooks that dealt with India and Hinduism. The SBE, however, began an ad hoc closed door process when considering textbooks edits concerning India and Hinduism. As a result, HAF filed a lawsuit against the California State Board of Education (SBE) in California Superior Court in Sacramento, alleging that the fair and open process required by law was not followed in adopting textbooks that introduce Hinduism to sixth grade students. Specifically, the SBE did not follow adopt its own regulations pursuant to the State's Administrative Procedures Act and contravened the Bagley-Keene Open Meeting Act. HAF also argued that because the adoption process was tainted, the resulting depiction of Hinduism was inaccurate and portrayed Hinduism as inferior to other faiths, namely Buddhism, and for that reason, the adoption process should be started anew. HAF was represented by the law firm of Olson, Hagel and Fishburn, LLP of Sacramento, California.

In 2006, HAF filed suit against the California State Board of Education (SBE) contending that the procedure through which the SBE had reviewed and approved revisions in sixth grade textbooks was not conducted in accordance with California law and the SBE's own internal administrative rules.

Outcome
The Court ruled partially in favor of HAF. While it held that the textbooks did not portray Hinduism innaccurately, therefore allaying any reason for reopening the textbook adoption process, it held that the SBE had been using illegal procedures to review and approve revisions in sixth grade textbooks under the State's Administrative Procedures Act and its actions contravened the Bagley-Keene Open Meeting Act. The decision required the SBE to revamp and readopt its entire curriculum frameworks and instructional materials adoption process. Moreover, as the prevailing party, the SBE was required to pay HAF's legal costs for the 2006 lawsuit.

Many education advocates have called HAF's lawsuit one of the most important cases in recent history, as it effectively halted the SBE's decade long ad hoc misuse of power.

Prepared Statement of Joe Solmonese, President, Human Rights Campaign

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution
"The State of Religious Liberty in the United States"
Written Testimony of Joe Solmonese
President, Human Rights Campaign
October 26, 2011

On behalf of the Human Rights Campaign (HRC) and our more than one million members and supporters nationwide, thank you for the opportunity to offer this statement on the subcommittee's hearing entitled "The State of Religious Liberty in the United States." HRC recognizes the important role religious organizations play in the lives of a broad cross-section of the American people, including many in the LGBT community, and deeply respects the guarantees of religious freedom enshrined in the U.S. Constitution. We believe the ability of individuals and groups to freely exercise their faiths and express their beliefs should be, and are, robustly protected. However, as the nation's largest lesbian, gay, bisexual and transgender advocacy group, we are keenly aware that those who oppose LGBT equality characterize our movement as a zero-sum game: every step forward for our community is step backward for religious liberty.

Such a description is both extraordinarily simplistic and deeply unfair. First, faith traditions are not uniformly opposed to the equality of LGBT people. In fact, many religious organizations have come to understand that the fair and equal treatment of our community is not only compatible with their beliefs, but is even mandated by them. Their liberty interest in holding and expressing pro-LGBT religious ideals is no less important. Second, safeguarding the freedom of all Americans to hold and express their religious beliefs does not equate to allowing religious individuals or groups to discriminate while using public funds, providing public services regulated by the government, or participating in the private marketplace. Respecting and protecting the right of every individual to hold and express contrary beliefs—religious or otherwise—does not prevent the government from enacting prohibitions against discrimination against lesbian, gay, bisexual and transgender people and their families. Many of our opponents do not simply seek to preserve their freedom of belief; they would exempt themselves from laws that protect everyone and impose their individual religious beliefs on their fellow citizens.

I would like to take this opportunity to highlight two areas where our opponents claim advancing LGBT equality threatens their religious liberty and to demonstrate why this is simply not the case.

Discrimination with Public Funds

HRC deeply respects the tremendous contribution that faith groups have made and continue to make in caring for the most vulnerable among us. They provide a wide range of critical social services, among them feeding and sheltering the homeless and helping place children in loving homes. Many do so with the support of significant amounts of local, state and federal taxpayer dollars. For example, as majority witness Bishop Lori noted in his "Truth in Testimony" disclosure to the Committee, the U.S. Conference of Catholic Bishops received nearly $85 million in federal grants and contracts for FY 2011 alone. This example only begins to demonstrate the tremendous investment of public dollars, and public trust, in faith-based organizations to provide critical services to all Americans. Yet many religious organizations argue that they should not be bound, even in using taxpayer dollars, by restrictions on their ability to discriminate in employment or refuse to provide certain services to individuals, because such limitations infringe on their religious liberty.

When a religious organization voluntarily enters into the role of providing a social service using public funds, it has an obligation to do so in a manner that serves the diversity of the American community and abides by the rules set out for any entity—religious or secular, public or private—that provides such a service. HRC strongly believes that any organization, religious or secular, that receives public funds to perform such services should not be permitted to discriminate in employment or with regard to beneficiaries. They must be required to abide by local, state and federal nondiscrimination protections, including those that prohibit discrimination based on religion, sexual orientation and gender identity. Abiding by these requirements in no way curtails the ability of a faith group to hold or express particular beliefs; rather, it ensures that such a group is treated the same as any other organization that chooses to partner with government to provide these critical services.

Marriage Equality

As more and more states permit same-sex couples to marry, and a growing majority of the American people supports the full equality of gay and lesbian couples and their families, religious organizations have begun to argue that these advances endanger their ability to practice their faiths. Such a proposition is unfounded and irresponsible. First, of course, the First Amendment guarantees that no faith group can be compelled to recognize or celebrate any marriage, be it between two people of the same sex, two people of different faiths, or two people who were previously married. Religious organizations and individuals continue to be free to express opposition to efforts to ensure gay and lesbian couples have the freedom to marry, and many groups have done so, turning out large numbers of voters and dollars. Second, most of the states that have moved to marriage equality have adopted additional legal protections for religious organizations, building on the protections of the U.S. and state constitutions to ensure that faith groups are not obligated to make their private facilities and services available to couples whose marriages conflict with their religious tenets.

However, these strong protections are simply not enough for some religious groups, who insist that essentially any advance for LGBT people is a threat to their ability to freely hold and express their beliefs. For example, in his testimony to the Subcommittee, Bishop Lori expresses grave concern about the Justice Department's decision to discontinue its defense of the Defense of Marriage Act (DOMA) and opposes legislative efforts to repeal that law. He contends that, "[i]f the label of 'bigot' sticks to our Church and many other churches—especially in court, under the Constitution—because of their teaching on marriage, the result will be church-state conflicts for many years to come." Yet, he provides no basis for this sweeping statement. Repealing DOMA would simply mean that the federal government would recognize the thousands of marriages between same-sex couples already legally sanctioned in six states and the District of Columbia. As I stated above, the U.S. Constitution and those jurisdictions' own laws robustly protect the rights of religious organizations in those states to refuse to recognize such marriages for the purposes of their faiths. DOMA repeal is simply about whether the federal government will pick and choose which lawful marriages it recognizes; it has nothing to do with faith groups and their beliefs about marriage equality. The real threat Bishop Lori identifies is that repeal of this discriminatory law is a reflection that his faith's tenets regarding gay and lesbian couples may no longer be the majority view, or the one reflected in public policy.

Bishop Lori also contends that protections for religious liberty in state marriage equality laws, like that adopted by the New York legislature this summer, fall short because they do not permit religious individuals serving in government positions to abdicate their duties as public officials. He cites the example of county clerks who wish to be excused from a part of their taxpayer-funded jobs—granting marriage licenses—because they express a religious objection to gay and lesbian couples marrying. It is simply not an attack on religious liberty to require a public official to do his or her sworn duty, even when that duty may be in conflict with strongly-held religious beliefs. As with religious organizations that choose to partner with government to provide public services, public officials enjoy the public trust and must perform their duties on behalf of everyone, even those of whom they may disapprove based on religious or other beliefs.

Conclusion

I thank the Subcommittee for the opportunity to provide this testimony and express HRC's concerns about the false conflict between LGBT equality and religious liberty being portrayed by many of our opponents. HRC greatly respects and supports the role of faith in our nation, the critical protections for religious freedom in the U.S. Constitution and the ability of all individuals to participate fully and equally in our society regardless of religion, as well as sexual orientation and gender identity. I urge the Subcommittee and the House of Representatives not to permit religious views against LGBT equality to crowd out other voices of faith, nor to let any religious belief override critical protections against discrimination that benefit all Americans.

Prepared Statement of Marc D. Stern, Esq., Associate General Counsel for Legal Advocacy, the American Jewish Committee (AJC)

Statement of

Marc D. Stern, Esq.

Associate General Counsel for Legal Advocacy

American Jewish Committee

Submitted on behalf of the American Jewish Committee to

The House Judiciary Committee

Subcommittee on the Constitution

Hearing on

The State of the Religious Liberty in the United States

November 4, 2011

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Statement of Marc D. Stern

Submitted on behalf of
American Jewish Committee
to the House Judiciary Committee
Subcommittee on the Constitution

Hearing on the State of Religious Liberty in the United States

November 4, 2011

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American Jewish Committee welcomes this opportunity to summarize for the Committee its perspective on the status of religious liberty. In brief, American religion remains free both of government control and involvement, and American government free of religious domination; and believers and religious institutions remain remarkably free to put faith (or lack of it) into practice. Nevertheless, there are dark clouds on the horizon. It's too early to tell if those portend changes for the worse, or are simply one of the periodic storm clouds that mean little.

It behooves us as a nation to consider whether—and if so, why—we would want to tamper with a policy which in both its broad outlines and implementing rules has worked so well for so long. Those policies have been assimilated into the American body politic in ways that transcend any particular law or lawsuit. By and large, they have spared the United States the ugly and often violent religious disputes that bedevil much of the rest of the world.

None of this is to say that there are not reasonable disputes about how the policy should be applied to particular circumstances; that principles do not collide; or that legal lines never can be moved or adjusted in one direction or another. We will suggest below that in several respects the courts have themselves gone astray, but that does not affect our broader judgment.

The American religious settlement has several components: the government does not meddle in religious affairs; is not the captive of any (or all) religious body/bodies; and, absent the most compelling of reasons, it does not interfere with private persons' (or institutions') observance of their religious tenets.

These understandings are, however, under assault today in the courts of law and, more crucially, in the court of public opinion. The challenges come from left and right. They come from those who would tolerate only those religions which are egalitarian and liberal in orientation, and those who, to one degree or another, would enlist the government for their own narrow sectarian religious purposes and have government spread their faith. There are those who seek to return to an imagined simple, more religiously homogenous, time. These challenges come from believers of various stripes—some of whom seem prepared to relegate non-believers to second

class status—and those who reject any and all religion, intent on cabining religion to the private realm. They come from those who would make certain religious beliefs the *sine qua non* of a successful run for public office.

The targets of these tendencies are sometimes Moslems, Christians, Jews, Mormons or atheists. Each group faces different challenges, originating from different points on the ideological or religious compass. The common denominator is a lack of tolerance for views or practices other than one's own.

The American religious settlement also means that the propagation of religious views are the responsibility of believers and the institutions they create, not that of government or the taxpayers that support it. By a parity of reasoning, neither is it the province of government to engage in a war at taxpayers' expense with religion to bring enlightenment to "benighted" believers.

It means most of all that members of a society must be prepared to tolerate believers and beliefs (and the absence of beliefs) that they find absurd or offensive; and that absent truly compelling justification, important policies will be enforced with less than complete uniformity in deference to the religious practices, sensibilities and beliefs of fellow citizens.

Of course, there will be close and hard cases. The state of religious liberty should not be judged by one or the other close call. With regard to religious liberty, as with regard to many other areas of policy and law, there are inevitably close, and therefore hard-fought, cases. The result in a single such case might say little about religious liberty. For example, we will below cite *Employment Division v. Smith* as a clear and present danger to religious liberty. In that case, the Supreme Court held that neutral laws of general applicability need no special justification even if they substantially interfere with core religious practices. But the case would have had relatively little significance if it had held only (as it easily could have) that a drug rehabilitation center had a compelling reason not to accommodate employees who were members of the Native American Church who ingested peyote, a controlled substance, as part of the church's sacrament.

Finally, in assessing the state of religious liberty, it is essential to avoid a "gotcha" mentality. Our country is blessed with over 15,000 school districts, and who knows how many local, state and federal offices and even more government officials. From time to time, some of these bodies and officials will act improperly, favoring or disfavoring religion, advancing or condemning religious beliefs, or acting as advocates for faith or its nemesis. Organizations and individuals pressing religious liberty claims of various sorts will occasionally make an absurd claim. Judges, too, are not immune from the occasional outrageous opinion. Such isolated events say little about the state of religious liberty beyond the obvious fact that advocates and government officials are occasionally fallible and need to be corrected.

FREE EXERCISE

We begin with the Free Exercise Clause, since it is easier to summarize.

It is now over twenty years since a divided Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990) ("*Smith*"), held wrongly—badly wrongly, in our view—that so-called neutral laws of general applicability may interfere with religious practices with what amounts to constitutional impunity. We believed then—and believe now—that the Free Exercise Clause demands more. So great was the change both from prior law and practice and public expectation that it in fact took courts and legislatures several years to assimilate the changes. But that assimilation is now largely complete in those *fora*, but not yet in the court of public opinion.

Congress has passed at least two acts to mitigate the harm worked by *Smith*: the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000b-1, *et seq.* and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, *et seq.* In simple terms, both require government to show compelling justification for intruding on religious practices. In our judgment, these are very valuable correctives to *Smith*.

The first of these (RFRA), which on its face applies to all government actors, has been, unfortunately, partially invalidated as it would have applied to state intrusion on religious practice, *City of Boerne v. Flores*, 521 U.S. 507 (1996). It remains in effect, and is quite successful, as applied to federal law. The second (RLUIPA), which applies

to land use decisions and inmates of state institutions, notably prisoners, remains in full force and effect.

As a general matter, these laws have functioned exactly as intended. The federal government, and, in cases covered by RLUIPA, state and local governments, have been prohibited from relying on broad, abstract, generalizations as a basis for wholesale (or even retail) suppression of religious practices. Only narrowly tailored compelling interests not satisfied by less restrictive means will do, *Gonzales v. O'Centro Espirita Benifcente*, 546 U.S. 418 (2006).

Despite Cassandra-like predictions, anarchy has not been the result of these laws. They have not protected pedophilia, violent child abuse, or other manifest evils, nor resulted in the building of mega houses of worship on cul-de-sacs with the most limited street access.

They have given real weight to religious liberty, which under prevailing constitutional law (*i.e., Smith*) has little or no valence, always being forced to yield to material interests of whatever weight. If anything, some courts have tended to read RLUIPA too grudgingly, often lending more credence than is appropriate to assertions of zoning or prison security that are speculative, ill-articulated and ill-founded. Still, overall, RLUIPA, like RFRA, is an important success for religious liberty.

One lesson of these acts is that where courts fail to protect religious liberty, there is room for carefully conceived legislative action—legislation like RFRA and RLUIPA—that scrupulously observe other constitutional limits but which effectively protect religious liberty. Although *Flores* limits Congress' ability to directly protect against state infringements on religious liberty under the Enforcement Clause of the Fourteenth Amendment, it does not preclude conditioning federal funds on relevant free exercise protections. Congress ought to consider doing so more often, as it did, in fact, in RLUIPA.

Employment Division v. Smith may be the product of legal reasoning, but its reduction of the Free Exercise Clause to a "neutral rules/general applicability" standard also reflects in part a bias of some in our society against religion, certainly in religion

that creeps past the confines of the home and house of worship. This is not an unheard of sentiment. It is the prevailing sentiment in France, and, indeed much of Europe.

People who reject religion, or seek to confine it to purely private arenas, are entitled to have their views heard on an equal basis with believers. They are entitled as of right to respect, not the contempt often heaped on them. They are entitled as of right not to have other citizens' faith forced upon them. But the interpretation of the religion clauses that they occasionally espouse—prohibiting accommodation of religious practice—is neither mandated by the First Amendment nor sanctioned by history. It is certain to breed resentment amongst believers.

The "neutral rule, general applicability" mantra has now become accepted enough that it is affecting legislation and public opinion, not just the courts, though legislatures as a whole still proceed carefully in regulating religious bodies. We are now seeing direct public assaults on central religious rituals, including the Jewish and Islamic rite of circumcision, such as took place in San Francisco over the last several months by way of an ostensibly neutral and generally applicable ballot proposition, though it did have a not-so-generally applicable medical exception.

A referendum was avoided only by virtue of a judicial decision that the referendum was preempted by state regulation of medical practice. The fact of the matter is that a federal constitutional challenge to this direct assault on a millennia-old, core religious practice of two faiths was far from certain of success, and might well have failed. What was unthinkable a few decades ago is now the constitutional baseline. That is cause for deep concern, even as in practice religion remains remarkably free.

ESTABLISHMENT CLAUSE

While free exercise issues flare up from time to time and briefly engage public attention, most of the public debates—unfortunately, strident debates—over the relationship between religion and state center around the Establishment (or, more correctly, the non-Establishment) Clause. The Supreme Court has held for over seven decades that the Establishment Clause applies to the states and the federal executive branch

Remarkably, we are beginning to hear isolated suggestions that the Establishment Clause should not apply, or at least not apply with full force, to the states, on the ground that only a national church would provide an opportunity for official oppression. It is surely true that an official national religion would be oppressive. But local majorities can be at least as oppressive, sometimes more so, than national ones. Indeed, in contemporary American society, where no one faith or denomination could possibly garner a majority, it is likely that local or state-wide religious majorities can be assembled. And these local majorities can enforce religious norms, or enlist government to spread a particular faith, far more effectively than Congress or the federal Executive Branch could across the country.

Citizens should not be forced to choose between suffering under official religious favoritism signaling that in their home state or town, their own religion is disfavored, on the one hand, and moving elsewhere, on the other, as if people can simply give up jobs, homes, family and friends so easily. In any event, that is not a choice any American may be put to by their government.

Space does not permit a detailed review of all the pending disputes about the meaning of the Establishment Clause. We note first that, in parallel with its vitiating of the Free Exercise Clause, the Court has moved analysis away from the traditional three-part test (secular purpose, secular effect and no undue entanglement, *Lemon v. Kurtzman*, 403 U.S. 621 (1971)). The three-prong test is sometimes streamlined to an inquiry whether a government practice has a purpose or effect of government endorsement of religion, *County of Allegheny v. ACLU*, 442 U.S. 573 1989), or to a very limited inquiry as to whether religion benefits by special rules, rules offering official advantage to those who engage in religious speech or activity, or preferential access or funding, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Put otherwise, the last test asks only whether government distributes benefits on the basis of religion-neutral and generally applicable criteria—and thus allows a wide variety of groups to share in government benefits not available under *Lemon* or the endorsement test.

We note, too, that, with the exception of former Justice John Paul Stevens, those Justices urging a weakened Free Exercise Clause are the same ones calling for a relaxation of the strictures of the Establishment Clause. We think this shift is, on the

whole, an unfortunate development, most especially with regard to funding. On the positive side, we note that by and large as a result of a variety of factors, religious battles over the content of public education are largely a thing of the past.

The prior near total ban on government funding of religious enterprises, that is, those enterprises which have as one of their purposes the spreading of religious faith, has meant that in this country funding religious enterprises has been the obligation of the private sector. That voluntary system has provided a religious sector far more vigorous than exists, for example, in Europe, where religion often enjoys government financial support. And, eschewing government funding frees religious institutions of the restraints that always accompany government funding—as, indeed, they have both in the U.S. and Europe.

The most visible dispute about funding of religious enterprises and the restrictions that might accompany it now arises from the faith-based initiative and employment discrimination on the basis of religion. The constitutional question is whether social service providers can both accept government money and retain the right to discriminate on the basis of religion. As a policy matter, AJC believes that government funds raised from taxpayers of all faiths or none should not be expended on programs in which they are excluded by virtue of their faith. We do think, however, that this rule must be administered in a fashion that is reasonable and consistent with the complexities of a world in which groups in the private sector, including religious bodies, interact with the government to a degree unimaginable at the time of the Framing. AJC believes, for example, that this rule must be modified in the case of higher ranking employees, a small portion of whose salaries may be allocated as overhead to government-funded programs that they supervise.

This dispute—which has festered for 15 years now—needs to be resolved. Each side to the debate cites various authorities, but can invoke little that can be described as binding authority. It is unfortunate that the Department of Justice has seen fit to avoid providing detailed guidance beyond one Office of Legal Counsel memo, dating to the prior administration, whose validity has been vigorously challenged, and which appears to grant a categorical exemption from anti-discrimination laws.

Another key area of dispute turns on schemes to fund religious education under the neutral principles-general applicability rubric. Such schemes, usually in the form of vouchers and tax credits, are a panacea neither for what ails public education (indeed, often come at the expense of public education), nor for the financial ills of private schools—and, as a general matter, have only the mildest of positive effects, at most, on the quality of the education afforded participating students. While the Supreme Court has, unfortunately, endorsed some of these schemes, there remain compelling policy reasons not to enact them. Budget limitations have restricted the ability of the states and federal government to implement many such programs. When enacted, it is only a matter of time, moreover, before such programs lead to clashes between religious schools and government, as the latter seeks to ensure that taxpayers are getting value for their subsidies in terms of what and how much students are learning.

RELIGIOUS SYMBOLS

Repeatedly across the nation, we are seeing ugly battles over religious displays on public property. These actually divide into two categories. First, religious symbols erected and displayed by government authorities themselves; and second, religious expressions, symbolic or otherwise, displayed by private parties with the official assent of government on public property that is open to one degree or another to various forms of secular speech. As to the latter, the rules are easily stated, but almost impossible to apply because some of the distinctions (between content-based and viewpoint-based limitations, for example) are not all that clear, and because the courts have not yet fully explained how much control government must retain in order to prevent the creation of a designated public forum in which content-based discrimination is forbidden.

In this latter category of cases, the major religious liberty issues are whether the suggestion of government support for religion by the passive presence of religious speech in symbolic form in a public space is sufficient reason to exclude some or all religious speech. AJC has said that the answer in some, but not all, cases is yes. It appears to us that in many of these cases, what is wrong is precisely that the speaker (that is, the sponsor of the symbol) is interested not so much in its own speech, but in blanketing the speech with an apparent government endorsement, for many viewers implicit in placement on government land. As Jews, we view these efforts as improper

efforts to claim the blessing of government for a specific religious message. We note in this regard that we are opposed to such displays even when they involve Jewish symbols.

Another troubling phenomenon has been aided and abetted by Congress: that of converting official, quite sectarian, religious symbols and declaring them with a wink and a nod to be something else—usually a war memorial. This is the case with two large Latin crosses, and now a large statue of Jesus in a national park. The claim that these symbols commemorate all of the nation's war dead—that the cross is a universal symbol of death—is not only not credible; it is offensive. Jews do not use crosses, let alone statutes of Jesus to commemorate their dead, and neither do Moslems or atheists. The contrary claims start with an unstated premise—unstated because it would not be feasible to say it directly—that the American norm is Christianity.[1]

Some Justices on the Supreme Court have expressed the view that there can be no violation of the Establishment Clause by the display of religious symbols about some compulsion directed toward acceptance of the symbols' religious significance. It is not always clear whether proponents of this theory would apply it only to non-sectarian religious symbols—if there are any—or all religious symbols. See, most recently, *Utah Highway Patrol Assn. v. American Atheists*, 565 U.S. ___ (2011) (Thomas, J., dissenting from denial of certiorari). At least since *School District of Abington Township v. Schempp*, 377 U.S. 203 (1963), the law has been otherwise; and with good reason.

The government departs from the neutrality required of it both by the Constitution and American tradition when it engages in a decidedly, if not formally compelled, tilt toward a particular faith. Those not within the consensus, and not only children, will know perfectly well that government is signaling their second class citizenship. Often, sending such a message is precisely the point of such displays. A reading of the Establishment Clause that claims it is violated only where there is a coercion doctrine will simply encourage the trend toward seeking to claim government for one faith by means falling just short of coercion.

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[1] That same assumption underlies the recurring dispute whether prayer offered to solemnize public meetings must be non-sectarian.

The fight over official religious symbols is not a reprise of French laïcité. Houses of worship and owners of private property are free to display whatever and as many religious symbols as they wish. In some public forums, religious displays and speech are entitled to equal access with secular speech. No one will miss the presence of Christianity in towns with churches if City Hall Square is kept free of official sectarian religious symbols. It is, instead, a battle over whether one religious group can claim government for itself

THREE SPECIAL CONCERNS

We would call attention to three special problems:

Standing – Beginning with *Valley Forge Christian College*, but especially with *Hein v. Freedom From Religion Foundation*, the Supreme Court has made it more difficult to challenge government subsidies arguably violating the Establishment Clause. In particular, it now appears that taxpayers do not have standing to challenge Executive Branch decisions to fund blatantly sectarian activities, and even where the decision process has been tainted by religious favoritism. Lower courts are beginning to apply these rules to challenges to state and local expenditures.

It is hard to see any social utility in this rule. The Supreme Court's self-justifying explanation—that other branches of government are bound to respect the Constitution—shows a disconnect with political reality. A combination of political pressures, convenience and ignorance of the Constitution—to say nothing of occasional deliberate defiance of constitutional norms, as when an office is controlled by a person with an announced aversion to existing judicial decisions—all cry out for outside and dispassionate judicial review.

Since the Court's *Hein* rule is largely a product of prudential consideration, not the cases and controversy requirement of Article III, Congress has at least some power to re-expand the judicial role. We think it should, as a matter of course, provide opportunities for challenges to debatable (or flat out illegal) expenditures.

Rights of Non-believers – Any number of recent studies show that non-believers of various sorts (atheists or agnostics, for example) are a growing segment of the American population. Several groups representing such persons have become

active, if not always successful, litigators, mostly in challenging government endorsement of religion whether through funding or other means. Space does not permit—and it is in any event unnecessary—to review all this litigation in detail.

It suffices for us to say now that too often the response to assertions by non-believers that some level of government has enlisted itself as an agent of religion has been an attack on the *bona fides* of non-believers. One well-known commentator on church and state matters several years ago commented—and he was not alone—that non-believers are not good citizens. That statement is wrong as a matter of law, as a matter of first principles, and is belied by the facts that should be apparent to all.

The narrow-mindedness that often characterizes the response to objections by groups like Freedom From Religion Foundation or American Atheists is manifest religious intolerance that must be rejected by all, no matter how profound their religious or constitutional differences with non-believers.

Civil Rights and Religious Liberty – One set of disputes repeatedly surfaces—and never seems to be resolved: the clash between civil rights laws and claims of religious liberty, especially in cases where no funding is involved. The Supreme Court will be heard on some aspects of this issue this term in *Hosanna-Tabor v. EEOC*.

As in most church-state or religious disputes, there are polar positions, each asserted with great certainty. One side argues civil rights laws apply with full vigor to the church and affiliated agencies[2] (perhaps with exceptions allowing religious institutions to make religion based employment decisions, though there is emerging talk of challenges to such laws as establishments of religion), while the other side argues for a virtually categorical exemption from civil rights laws (even for commercial actors) where the objection is based on religious belief.

What has been noticeably absent from the debate is any organized way of presenting and examining arguments seriously. Both Congress and the Executive seem mostly interested in ducking a serious confrontation with the issues; agencies charged

[2] We note that some of those arguing most strenuously for a non-discrimination rule with regard to funding are equally vigorous in seeking to narrow or eliminate religious exemptions. This suggests that the debate is about discrimination, not funding.

with civil rights enforcement are too often tone-deaf to religious liberty concerns; and advocates of a broad religious exemption are too often equally tone-deaf to the strong national commitment to equality. The debate also has an internal religious component: whether religious rules are primarily humanistic in orientation or not. It is surely inappropriate to ask government to referee that theological dispute, although one often hears in this context calls for it to do so.

CONCLUSION

Over all, religious liberty is alive and well, though, as always, it needs constant attention and defense. There are specific issues which we believe need to be addressed or corrected, but for the foreseeable future, there is no crisis of religious liberty.

At any given moment, there are pulls and tugs on religious liberty. Guessing whether the trends are good or otherwise is necessarily a difficult task. But we are given pause in our optimism because of the ugly way religion has begun to play out in the 2012 presidential race. AJC neither endorses nor opposes candidate for public office. At the same time we have long believed that a person's faith or lack of it is no credential for public office. We thought John F. Kennedy's justly well-known Address to the Houston Ministerial Association in the 1960 campaign had put that issue to rest once and for all. Evidently, we were wrong. We hope only that what has happened so far is an aberration and does not presage a major intrusion of Christian American politics into the campaign or American life generally. Government is not a prize that religious or anti-religious groups should be fighting to capture.

Letter from Paul J. Kurtz, Chairperson, and Normal Allen, Jr., Director of International Outreach, the Institute for Science and Human Values (ISHV)

Wednesday, October 26, 2011

Chairperson Franks
Constitution Subcommittee of House Judiciary Committee

Dear Chairperson Franks and Members of the Constitution Subcommittee of House Judiciary Committee

The State of Religious Liberty in the United States

The Institute for Science and Human Values is deeply concerned about genuine threats to religious liberty in the United States. These threats come in many forms and can be found in surprising places.

As recently as 2010, the Christian company Trijicon, Inc. was using references to biblical messages on the high-powered rifle scopes they were selling to the military. Soldiers used these scopes in Afghanistan and Iraq, and Trijicon was making millions of dollars as a result. Not only was such an action an affront to the non-Christian members of the military, it no doubt offended many Muslims and helped strengthen the notion that the U.S. is engaged in a holy war against Muslim lands.

Non-Christians are often made to feel uncomfortable in the military. Members of the Air Force Academy often feel besieged by Christians trying to force their faith upon them. In the army, in the fall of 2011, a young soldier was taunted and threatened with punishment at Fort Jackson, South Carolina, simply for opposing forced prayer during a chaplain-led ceremony.

Of course, the military is not the only area in which threats to religious liberty can be found. Some conservative Christians maintain that Islamic law is coming to the U.S., and that Muslims cannot be trusted to defend the Constitution. Opponents of the construction of the Islamic community center near Ground Zero in lower Manhattan resorted to legal and illegal means in attempts to stop it. There have been similar attempts to block the construction of mosques in other cities throughout the U.S.

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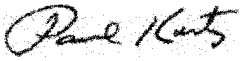
Religionists in the U.S. have used religion to oppose same-sex marriage, to segregate bus riders by sex, etc. However, we at the Institute for Science and Human Values maintain that no ideal—religious or otherwise—can ever trump human liberty. We must strive to consistently defend religious liberty, and to oppose attempts to thwart it wherever they may be found. For in the words of Martin Luther King, "Injustice anywhere is a threat to justice everywhere."

Sincerely yours,



Paul J. Kurtz
Chairperson

Norm Allen Jr.
Director of International Outreach

Letter from Jon O'Brien, President, Catholics for Choice

CATHOLICS
FOR
CHOICE

IN GOOD CONSCIENCE

October 26, 2011

Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
US House of Representatives
2141 Rayburn House Office Building
Washington, DC 20515

Members of the Committee:

Religious freedom in the United States is under threat. Luckily, those who support religious freedom have the Constitution on their side. The full weight of American history and tradition stands in the way of those who would undermine this foundational principle.

For most, 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 we put 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.

Catholics believe in the primacy of conscience—something everybody has, atheist or believer. We know that conflicts between church and state date back to the beginning of our nation. In today's pluralistic world, however, they can bring up hard questions: Does a given policy support the common good or privilege one tradition or section of society over another?

Religious organizations like Catholic hospitals and charities are woven into the social contract by virtue of their activities as charitable organizations and service providers, as well as by the tax benefits and other public funds they receive. As part of the public sphere, one would expect that these organizations would play by the rules of society at large, rather than requiring all of society to play by their rules.

For Catholics, the 1966 Vatican II document *Declaration on Religious Freedom* offers some advice. The document "declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits."

PRESIDENT

EXECUTIVE
VICE PRESIDENT

BOARD OF
DIRECTORS

INTERNATIONAL
PARTNERS

Today, the 98 percent of sexually active Catholic women in the US who have used a form of contraception banned by the Vatican have exercised their religious freedom and followed their consciences in making the decision to use contraception. Thus they are in line with the totality of Catholic teachings, if not with the views of the hierarchy. However, having failed to convince Catholics in the pews, the United States Conference of Catholic Bishops (USCCB) is trying to impose its religious views by fiat, and in the process impeding the religious freedom of millions of Americans, taking reproductive healthcare options away from everybody.

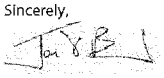
One way the bishops seek to do this is by advocating for expansive refusal clauses in healthcare provisions which would affect all patients at Catholic hospitals—whether those patients are Catholic or not. A more extreme move can be seen in its call for the reversal of the recent recommendation from the Department of Health and Human Services (HHS) that contraception be included as a preventive service for all under the Affordable Care Act. This would affect everybody seeking to access family planning in the new system. There is no justification to override a recommendation that has been made in the interests of public health. The USCCB wants Catholic organizations to receive taxpayer money while continuing to

- deny condoms as part of HIV outreach;
- ban employees and their dependents from getting the benefit of no-cost contraceptive coverage that other insured Americans enjoy;
- opt out of providing emergency contraception to victims of sexual violence who come to Catholic hospitals for help; and
- deny abortion care to everybody—even those women whose lives are threatened by their pregnancy.

The only people served by codifying these restrictive views into law are the nation's Catholic bishops. The majority of the country's millions of Catholics have rejected the hierarchy's teachings on reproductive options. And non-Catholics certainly do not benefit from having their reproductive health landscape narrowed to match this tiny minority's standpoint.

The threat we perceive is not to the religious freedom of the Catholic clergy, who have the benefit of a well-funded lobby to speak for them, but to the freedom of conscience of the rest of Americans—Catholic and non-Catholic alike. Protecting the right to exercise their conscience—for the atheist, for the employee of a Catholic institution, for the sexual assault victim who happens to end up at a Catholic hospital—is indeed the job of the government. Sacrificing these people's right to access a comprehensive selection of reproductive healthcare services so that a few bishops can see their religious beliefs cast upon the national stage is not a fair trade. Federal dollars should be used for the common good and to enable people to exercise their conscience-based healthcare decisions. The original vision of our founding fathers on religious freedom would have it no other way.

Sincerely,



Jon O'Brien
President
Catholics for Choice

Letter from the Most Reverend Timothy M. Dolan, Archbishop of New York

Office of the General Secretary

3211 FOURTH STREET NE · WASHINGTON DC 20017-1194 · 202-541-3100 · FAX 202-541-3166

Most Reverend Timothy M. Dolan
Archbishop of New York
President

Monsignor Ronny E. Jenkins, J.C.D.
General Secretary

Rev. J. Brian Bransfield, S.
Bruce E. Egnew, CP
Nancy E. Wiseo, J.C
Associate General Secretar

July 14, 2011

George Sheldon
Acting Assistant Secretary for the Administration for Children and Families
U.S. Department of Health and Human Services
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

Dear Assistant Secretary Sheldon:

As you may know, the Catholic Church's charitable outreach has been a mainstay of the federal government's efforts to provide support and services for many poor and vulnerable populations, including the victims of human trafficking and other refugees. The Church has also welcomed the Obama administration's efforts to ensure full participation by faith-based providers in government-funded programs helping those most in need.

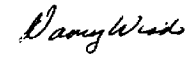
For that reason we have an especially grave concern about a recent public announcement regarding grant opportunities in the National Human Trafficking Victim Assistance Program (HHS-2011-ACF-ORR-ZV-0148). The announcement declares that "strong preference" will be given to applicants who guarantee they will send clients only to health care providers who provide or refer for all "legally permissible" obstetrical and gynecological services. On its face this seems to include abortions (even elective abortions), as well as forms of family planning that are contrary to the moral and religious convictions of Catholic institutions and of some health care providers. For the reasons stated fully in the enclosed legal analysis, we believe this is in direct contradiction to existing federal statutes barring discrimination regarding abortion and other health services, and in considerable tension with the longstanding federal policy of respecting rights of conscience in programs that fund family planning services.

The Catholic bishops' conference has publicly welcomed President Obama's oft-stated support for strong legal protection for conscience rights. We welcomed what we saw as positive signs in the Obama administration's recent regulation for enforcing conscience laws – including the designation of the HHS Office for Civil Rights to investigate complaints of discrimination, and the announcement that future documents for federal grantees will include new language instructing them to respect rights to decline involvement in abortion and other procedures that may violate conscience.

We have to conclude with regret that the recent announcement from the Office for Refugee Resettlement, telling grantees in the trafficking victims program that their application will be downgraded if they refer clients to pro-life health care providers, points in exactly the opposite direction.

We hope that this provision was inserted into the announcement without a full understanding of its serious legal and policy implications, and that the Administration will take prompt action to remove such provisions from this and other announcements for grant opportunities. Our staff would be most willing to discuss this issue further with the appropriate officials.

Sincerely,



Nancy Wisdo
Associate General Secretary
United States Conference of Catholic Bishops

Cc: Eskinder Negash, Director, HHS Office of Refugee Resettlement
Georgina C. Verdugo, Director, HHS Office for Civil Rights
Alexia Kelley, Director, HHS Center for Faith-Based and Neighborhood Partnerships

Office of the General Counsel

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To: Gregory Scott
Associate Director for Grants and Programs Administration, MRS

From: Michael F. Moses
Associate General Counsel

Subj: Human Trafficking Victim Assistance Program
HHS-2011-ACF-ORR-ZV-0148 (posted May 27, 2011)

Date: July 7, 2011

On May 27, HHS's Administration for Children and Families ("ACF") announced that it will be accepting bids for a cooperative agreement to fund comprehensive case management services for victims of human trafficking. The announcement states that "preference will be given to grantees … that will offer all victims referral to medical providers who can provide or refer for provision of treatment for … family planning services and the full range of legally permissible gynecological and obstetric care…." Announcement, p. 6. The agency "will give strong preference to applicants that are willing to offer all of [these] services and referrals… Applicants that are unwilling to provide the full range of services and referrals … must indicate this" in their application. *Id.*

You asked for an analysis of these provisions.

The quoted provisions are problematic for five independent reasons. *First*, the requirement that victims be referred to "medical providers who can provide or refer for … the full range of legally permissible gynecological and obstetric care" is unworkable because there are few, if any, ob-gyn providers that perform or refer for literally all legally permissible ob-gyn services. *Second*, insofar as the trafficking provisions discriminate against health care providers that do not participate in abortion, or in health care services to which individual providers have a religious or moral objection, they are in direct conflict with existing federal

statutes. This problem implicates the rights of the health care entities and professionals to whom referrals will be made by the grantee, as it creates a condition for their participation in this federal program that a federal agency is not permitted to create. *Third*, HHS is not only obligated to enforce these protective statutes, but has recently announced that it will amend new grant documents to make clear that recipients must comply with them. Here, ACF appears to have done precisely the opposite, by imposing a requirement that is in potential conflict with the relevant statutes. *Fourth*, the quoted provisions of the cooperative agreement fly in the face of a federal policy that, in the context of other federal programs involving health services, has consistently accommodated conscience. *Fifth*, insofar as the announcement may be construed to require a grantee with religious or moral objections to abortion and to certain forms of family planning services to act contrary to those convictions as a condition of participating in a federal program, it likely violates the Religious Freedom Restoration Act, because it substantially burdens religious exercise and does not appear to be narrowly tailored to advance a compelling government interest. This point focuses on the rights of the grantee.

A more detailed analysis follows.

Problem #1. In its announcement, ACF states that it will give a preference to grantees that offer clients "referral to medical providers who can provide or refer for … the full range of legally permissible gynecological and obstetric care." If by "the full range of legally permissible gynecological and obstetric care" ACF means literally every legally permissible ob-gyn service, then the requirement is plainly incapable of being satisfied because the set of ob-gyn providers who perform or refer for literally every legally permissible ob-gyn service is probably empty. Even if one could identify an ob-gyn or a class of ob-gyns who perform or refer for everything within that specialty, the effect would be to disqualify almost all other ob-gyns, *i.e.*, the vast majority. A literal reading of this requirement would, in other words, seriously undermine the availability and quality of ob-gyn services to which trafficking victims could be referred by severely shrinking the pool of eligible providers. Ob-gyns, including those with sub-specialties, who perform

many services with great skill and competence would be disqualified from the program because they do not literally perform or refer for every service that is not illegal.[1]

Insofar as the requirement, so construed, is (a) unworkable and (b) operates to the detriment of the client population it is meant to serve, thereby actually undermining the objective of the program, a colorable claim could be made that the requirement is arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706 (authorizing a court to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious and will be set aside under the APA if there is no "rational connection between the facts found and the choice made" by the agency, or if it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"); *Holloway & Company v. United States*, 87 Fed.Cl. 381, 389-90 (2009) (same).

A grant condition cannot pass muster under the standards articulated in *Motor Vehicles*, *supra*, if it is unworkable and actually undermines the objective of the program to which it applies, or, as discussed next, if it conflicts with Congress's intent as expressed in other federal statutes.

Problem #2. If construed to require that the grantee require all potential health care providers to participate in abortion, or in health care services to which individual providers have a religious or moral objection, then the ACF announcement would run afoul of at least three federal statutes, two dealing with abortion and a third with health care services generally.

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[1]Even if theoretically there were ob-gyns who literally performed every service that is not illegal, there would be insurmountable difficulties in identifying those physicians.

The ACF announcement does not refer to abortion. Nor does it say whether "the full range of legally permissible gynecological and obstetric care" includes abortion. Nonetheless, phrases such as "the full range of legally permissible gynecological and obstetric care" are often understood to include abortion, even abortions performed for purely elective reasons. If, indeed, ACF intends that the quoted language be construed to include abortion, then it violates both the Weldon amendment[2] and the Coats-Snowe amendment (42 U.S.C. § 238n).

The Weldon amendment, which has been included in every Labor/HHS appropriations law since 2004, states that "None of the funds made available in this Act [*i.e.*, the Labor/HHS appropriations bill from which HHS derives its funding] may be made available to a Federal agency or program … if such agency … [or] program … subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." The term "health care entity" includes "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."

By operation of the Weldon amendment, no Labor/HHS funds may be made available to HHS or the trafficking victim assistance program if the department or program subjects any health care professional or provider to discrimination on the basis that it does not provide or refer for abortions. ACF has stated its "preference" for grantees that will refer to providers who will provide or refer for the "full range" of ob-gyn services. If the "full range" of services is interpreted to include abortion, ACF will have subjected to discrimination those providers who do <u>not</u> provide or refer for abortions, and it will have accomplished that discrimination by preferring as grantees those applicants that will <u>exclude</u> such providers from the trafficking program. Such discrimination, of course, is precisely what the Weldon amendment forbids.

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[2]For the most recent enactment of the Weldon amendment, *see* Consolidated Appropriations Act, 2010, Pub. L. 111-117, Div. D, § 508(d) (Dec. 16, 2009).

The text of the Coats-Snowe amendment is to similar effect. The amendment states that "The Federal Government ... may not subject any health care entity to discrimination on the basis that—(1) the entity refuses to ... perform [induced] abortions, or to provide referrals for ... such abortions; [or] (2) the entity refuses to make arrangements for any of the activities specified in paragraph (1)." 42 U.S.C. § 238n(a). The term "health care entity" is defined to include individual physicians and others. 42 U.S.C. § 238n(c).

By virtue of the Coats-Snowe amendment, the Federal Government may not subject ob-gyns to discrimination on the basis that they do not provide or refer for abortions, or make arrangements for such abortions or such referrals. Again, if the "full range" of ob-gyn services is interpreted to include abortion, ACF will have subjected to discrimination those providers who do not provide or refer for abortion, or who do not make arrangements for such abortions or referrals, and it will have accomplished that discrimination by preferring as grantees those applicants that exclude such providers from the trafficking program. As in the case of the Weldon amendment, such discrimination is precisely what the Coats-Snowe amendment forbids.

One claiming the protection of the Weldon and Coats-Snowe amendments is not required to assert a religious or moral objection to abortion or abortion referral. This is clear from the statutory text; neither amendment says anything about religious or moral objections. The government simply may not create a mandate for involvement in abortion services that would discriminate against providers who decline such involvement for any reason. In other words, it may not establish such a mandate (or a strong preference) at all, for example as a condition for allowing such providers to take part in the provision of other health care services.

By contrast, a third and longstanding statute, known as the Church amendment (after its sponsor, Senator Frank Church), is predicated on the existence of a religious or moral objection. The Church amendment states in pertinent part: "No individual shall be required to perform or assist in the performance of any part of a health service program ... funded in whole or in part under a program administered by the Secretary of Health and Human Services if

his performance or assistance in the performance of such part of such program ... would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d).

The ACF announcement is explicit in calling for the grantee to make referrals only to providers who will provide or refer for "family planning services." The announcement therefore tends to exclude from the program those individual health care providers with a religious or moral objection to certain forms of family planning. One might make a counter-argument that ACF, by preferring those applicants who will exclude such providers from the program, has not "required" those providers to perform or assist in the services to which they object because they are not required to participate in the program in the first place. If this argument were sound, it would nullify the Church amendment – for if HHS could put providers to the Hobson's choice of either providing an objectionable service or being excluded from a federal program altogether, then section 300a-7(d) would be utterly ineffective.

One might also raise a counter-argument that none of the three statutes applies because only the *grantee* is a party to the cooperative agreement, and the grantee itself is not a health care entity or an individual. In addition, it might be argued, the three statutes operate as a restraint on *government*, but the grantee is a private (not governmental) entity. There are three answers to these arguments. First, the Weldon amendment prohibits discrimination not only by the federal government, but in federal "programs." As a federal program, the trafficking program may not discriminate against health care entities or individuals on the bases proscribed by the Weldon amendment. Second, and with respect to all three statutes, it is incorrect to assert that the government is not the discriminator. If, for example, ACF were to state a preference for applicants who promised to refer clients to physicians who are not African-American, no one would seriously contend that ACF itself is not practicing racial discrimination. Third, the statutory arguments offered above are meant to demonstrate discrimination against the health care providers and professionals to whom trafficking victims are referred,

not against the grantee. Whether the grantee itself is or is not a health care entity is irrelevant.

In conclusion, insofar as it may be construed to discriminate against health care providers that do not perform or refer for abortion, the ACF announcement violates at least three federal enactments. Insofar as the announcement requires individual health care professionals to provide family planning or other services to which they have a moral or religious objection upon pain of being excluded from the program altogether, it also likely violates the Church amendment.[3]

Problem #3. On February 23, 2011, HHS issued a final rule concerning enforcement of the Weldon, Coats-Snowe and Church amendments. 76 Fed. Reg. 9968. In its preamble to the final rule, HHS explained that it will no longer require certification of compliance with these statutes, but instead will be "amending its grant documents to make clear that recipients are required to comply" with them. *Id.* at 9972. HHS expressed its belief that "amending existing grant documents … will accomplish the same result [as a certification requirement] with far less administrative burden." *Id.* at 9974.

HHS also stated that it "is beginning an initiative designed to increase the awareness" of the Weldon, Coats-Snowe, and Church amendments, and the resources available to those whose rights under these amendments have been violated. *Id.* at 9969. HHS designated its Office of Civil Rights to receive

[3]Last year, the President acknowledged by executive order that the "longstanding Federal laws to protect conscience … such as the Church Amendment … and the Weldon Amendment … remain intact" following passage of the Patient Protection and Affordable Care Act ("PPACA"). Executive Order, *Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion*, § 1 (March 24, 2010). In the same order, the President also acknowledged that PPACA itself includes a provision "prohibit[]ing] discrimination [by health plans] against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." *Id.*; *see* 42 U.S.C. § 18023. Ironically, if construed to require the provision of, or referral for, abortions, the ACF announcement would seem to require grantees in the trafficking program to engage in the very sort of discrimination that is forbidden to health plans. As detailed in the next section, the ACF announcement also runs headlong into HHS's own stated promise to ensure enforcement of the Church, Weldon and Coats-Snowe amendments.

complaints about violations, and assured the public that OCR was "revising its complaint forms to make it easier for health care providers to understand how to utilize the complaint process." *Id.* at 9972. HHS said that OCR "will work with the funding components of the Department to determine how best to raise grantee and provider awareness of these longstanding statutory protections, and the newly created enforcement process." *Id.*

More recently, the Director of HHS's Office of Civil Rights wrote to concerned members of Congress to assure them that "The Administration fully supports these strong federal conscience laws." The Director here reaffirmed that "The Department is also in the process of amending existing grant documents to require federal grantees to explicitly confirm that they will comply with the federal conscience laws," specifically with the Coats-Snowe, Weldon and Church amendments.[4]

The contrast between these assurances, made just a few months ago, and ACF's announcement is abundantly clear. While HHS promised in February to "amend[ ]its grant documents to make clear that recipients are required to comply" with the Church, Coats-Snowe and Weldon amendments, here ACF has issued an announcement that affirmatively violates them. While HHS promised in February to "increase the awareness" of the amendments, the ACF announcement suggests that one of HHS's own agencies lacks the requisite awareness. While HHS promised in February to make it "easier" for health care providers to understand how to utilize the complaint process, here its own agency is enmeshed in a violation. While HHS promised in February that OCR would "work with the funding components of the Department to determine how best to raise grantee and provider awareness of these longstanding statutory protections," here ACF is violating the very protections of which it was to have been made aware by OCR. In short, if one takes the ACF announcement at face value, HHS is now violating the very amendments it promised just months ago to police.

[4]Letter of Georgina C. Verdugo, Director, HHS Office for Civil Rights, to Congressman Christopher H. Smith, March 9, 2011, pp. 1, 2.

Problem #4. In addition to the enactments discussed above, Congress has consistently favored conscience protection with respect to lawful health services. Family planning is just one illustration of this policy. For example, every year since 1986, Congress has prohibited discrimination against foreign aid grant applicants who offer only natural family planning on account of their religious or conscientious convictions.[5] Every year since 1999, Congress has exempted religious health plans from a contraceptive coverage mandate in the federal employees' health benefits program, and prohibited other health plans in this program from discriminating against individuals who object to prescribing or providing contraceptives on moral or religious grounds.[6] Every year since 2000, Congress has affirmed its intent that a conscience clause protecting religious beliefs and moral convictions be a part of any contraceptive mandate in the District of Columbia.[7]

Federal conscience protections are not limited to abortion and contraceptives. The Church amendment protects conscientious objection to sterilization (42 U.S.C. §§ 300a-7(b), 300a-7(c)(1), and 300a-7(e)) and, in programs funded or administered by HHS, any health service to which there is a moral or religious objection (42 U.S.C. §§ 300a-7(c)(2) and 300a-7(d)). Congress

[5] For the most recent enactment, *see* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, Div. F, tit. III ("Provided further, That in awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning").

[6] For the most recent enactment, *see id.*, Div. C, tit. VII, § 728 ("Nothing in this section shall apply to a contract with … any existing or future plan, if the carrier for the plan objects to such coverage on the basis of religious beliefs… In implementing this section, any plan that enters into or renews a contract under this section may not subject any individual to discrimination on the basis that the individual refuses to prescribe or otherwise provide for contraceptives because such activities would be contrary to the individual's religious beliefs or moral convictions").

[7] For the most recent enactment, *see id.*, Div. C, tit. VIII, § 811 ("Nothing in this Act may be construed to prevent the Council or Mayor of the District of Columbia from addressing the issue of the provision of contraceptive coverage by health insurance plans, but it is the intent of Congress that any legislation enacted on such issue should include a 'conscience clause' which provides exceptions for religious beliefs and moral convictions").

has required that the Medicare and Medicaid statutes not be construed to require Medicare +Choice or Medicaid managed care plans to provide counseling and referral services to which they have a moral or religious objection. 42 U.S.C. § 1395w-22(j)(3)(B) (Medicare); 42 U.S.C. § 1396u-2(b)(3) (Medicaid). Similar protections have been adopted by regulation. *E.g.*, 48 C.F.R. § 1609.7001(c)(7) (stating that in the federal employees' health benefit program, "[p]roviders, health care workers, or health care plan sponsoring organizations are not required to discuss treatment options that they would not ordinarily discuss in their customary course of practice because such options are inconsistent with their professional judgment or ethical, moral or religious beliefs").

These are only examples. A fuller compendium of federal conscience laws and regulations is available at www.usccb.org/prolife/issues/abortion/crmay08.pdf.

Even if these and similar provisions are not directly applicable to the ACF trafficking program, they underscore a consistent federal policy to protect the conscience rights of health care providers and professionals. The ACF announcement deviates from that policy by discriminating against providers and professionals with religious or moral objections to certain services.

Problem #5. The question comes up, here as elsewhere, whether the Religious Freedom Restoration Act ("RFRA") applies to government grants or other government funding. The actual text of the statute – the first place one would go to answer such a question – suggests that it does.

In general, RFRA forbids the federal government to substantially burden the exercise of religion, even if the burden results from a rule of general applicability, unless the application of that burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(c).

RFRA applies to government grants for three reasons. First, the statute "applies to all Federal law, and the implementation of that law, whether statutory or otherwise...." 42 U.S.C. § 2000bb-3. Second, the stated purpose of RFRA, as set forth in 42 U.S.C. § 2000bb(b)(1), is "to restore the compelling interest test set

forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)," a case that involved denial of government benefits. Third, and most importantly, RFRA makes specific reference to government funding. The relevant text (at 42 U.S.C. § 2000bb-4) states:

> Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause shall not constitute a violation of this chapter [*i.e.*, RFRA]. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions. [Emphasis added.]

Since "granting" funding is not a violation of RFRA, but "granting" does not include "the denial of funding," it is clear that the drafters of RFRA contemplated that the denial of government funding may be a violation of RFRA.[8] Whether denial of funding is a violation in a particular case depends on whether the statutory conditions set forth in section 2000bb-1(c) are met, *i.e.*, whether religious exercise is (1) substantially burdened by government action that is (2) not narrowly tailored to further a compelling government interest.

There is no question that a requirement to ensure the provision or referral for abortion or forms of family planning[9] to which the USCCB has a religious and moral objection would impose a "substantial burden" on its exercise of religion. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (Where a condition placed on the availability of benefits "forc[es] [an institution] to choose between following the

[8]The Department of Justice's Office of Legal Counsel has also concluded that RFRA applies to government funding. Office of Legal Counsel, 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, at http://www.justice.gov/olc/memoranda-opinions.html. Others have reached the same conclusion. *See* Letter of Douglas Laycock to Eric Holder, Nov. 13, 2009, at http://www.ecfa.org/Files/LaycockHolderReRFRA.pdf.

[9]The USCCB has no religious or moral objection to natural family planning ("NFP"), or to ensuring instruction in, or referral for, NFP.

precepts of [its] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [its] religion in order to [qualify for benefits], on the other hand," the government has "put[] the same kind of burden upon the free exercise of religion as would a fine imposed against [the institution] for [its exercise of religion]"), quoted in the OLC legal opinion, *supra* n.8, at 12. The first part of the section 2000bb-1(c) test is easily met.

In light of the relative novelty of the requirement, and the USCCB's history with the program, there is a good argument that the second part of the test is also met. That is, a requirement that the USCCB assure the provision or referral for abortion or forms of family planning to which it has a religious or moral objection, does *not* appear to be narrowly tailored to further a compelling government interest. The constraints imposed by the new cooperative agreement relating to family planning and the full range of ob-gyn services are entirely new. In the last five years, USCCB, operating without such constraints, has been the exclusive recipient of federal funds to provide comprehensive case management for both pre-certified and post-certified victims of human trafficking. Past USCCB trafficking contracts have provided that "[s]ubcontract funds shall not be used to provide referrals or reimbursement for abortion services or contraceptive materials pursuant to this contract." That provision, and the absence of the new trafficking requirements in past contracts, does not appear to have created any reported problem among clients. The new requirements therefore do not seem to remedy an actual problem or to address any actual past adverse impact on clients served. Even if such a problem could be identified, the fact that the announcement tries to fix that problem by transgressing other federal statutes is a strong indication that it is not narrowly tailored to address the problem.

Conclusion

The provisions of the ACF announcement pertaining to ob-gyn and family planning services (1) are unworkable if read literally, presenting a colorable claim that the APA has been violated, (2) may run afoul of at least three other federal statutes, (3) appears to renege on a promise made by HHS to enforce those three statutes, (4) conflicts with a consistent federal policy to protect rights of conscience

in other contexts involving the provision of health care, and, (5) as applied to the USCCB, likely conflicts with RFRA.

In sum, the new requirements pertaining to family planning and ob-gyn services implicate, and may violate, five federal statutes, appear to break a promise HHS made earlier this year to protect statutory conscience rights, and conflict with a consistent federal policy to protect conscience rights in other contexts involving health care services.

Article titled "Battle flare between White House. Catholic Groups," by Jerry Markon, The Washington Post

Battle flare between White House. Catholic groups

By Jerry Markon The Washington Post – Mon, Oct 31, 2011

A contentious battle between Catholic groups and the Obama administration has flared in recent days, fueled by the new health care law and ongoing divisions over access to abortion and birth control.

The latest dispute centers on the Department of Health and Human Service's decision in late September to end funding to the U.S. Conference of Catholic Bishops to help victims of human trafficking, or modern-day slavery. The church group had overseen nationwide services to victims since 2006 but was denied a new grant in favor of three other groups.

The bishops organization, in line with the church's teachings, had refused to refer trafficking victims for contraceptive or abortion services. The American Civil Liberties Union sued and HHS officials said they made a policy decision to award the grants to agencies that would refer women to those services.

The bishops conference is threatening legal action and accusing the administration of anti-Catholic bias, which HHS officials deny.

The fight escalates an already difficult relationship between the government and some Catholics over several issues. The bishops fiercely oppose the administration's decision in February to no longer defend the federal law barring the recognition of same-sex marriage. Dozens of Catholic groups also have objected in recent weeks to an HHS mandate — issued under the health care law — that requires private insurers to provide women with contraceptives without co-payments or other out-of-pocket charges.

In the case of the trafficking contract, senior political appointees at HHS stepped in to award the new grants to the bishops' competitors, overriding an independent review board and career staffers who had recommended that the bishops be funded again, according to federal officials and internal HHS documents. That happened as the ACLU suit is preceding before a federal judge in Boston.

The decision not to fund the bishops this time has caused controversy inside HHS. A number of career officials refused to sign documents connected to the grant, feeling that the process was unfair and politicized, individuals familiar with the matter said. Their concerns have been reported to the HHS inspector general's office.

HHS policies spell out that career officials usually oversee grant competitions and select the winners, giving priority consideration to the review board's judgment. The policies do not prohibit political appointees from getting involved, though current and former employees said it is unusual, especially for high-level officials.

"I think it's a sad manipulation of a process to promote a pro-abortion agenda," said Sister Mary Ann Walsh, a spokeswoman for the bishops conference. She has written on the organization's blog that the decision reflects an HHS philosophy of "ABC (Anybody But Catholics.'').

HHS officials denied any bias and pointed out that Catholic groups have received at least $800 million in HHS funding to provide social services since the mid-1990s, including $348 million to the bishops conference. One of those grants, $19 million to aid foreign refugees in America, was awarded to the bishops three days after the anti-trafficking contract expired on Oct. 10.

"There wasn't an intention to go out and target anybody,'' said George Sheldon, acting assistant secretary for HHS's Administration for Children and Families. "Nobody has ownership of a contract.''

HHS had said that at least four grants for trafficking victims would be awarded, but Sheldon said he decided that the $4.5 million for would be shared among three non-profits: Heartland Human Care Services Inc. Tapestri Inc., and the U.S. Committee for Refugees and Immigrants.

The applications of Tapestri and the U.S. committee were scored significantly below the Catholic bishops by the review panel, the individuals familiar with the matter said.

"I don't think there was any undue influence exerted to make this grant go one way or another,'' Sheldon said. "Ultimately, I felt it was my responsibility — and I'm not trying to get anyone off the hook here — to do what I thought was in the best interests of these victims.''

The dispute marks the latest chapter in HHS Secretary Kathleen Sebelius's complicated relationship with the church. Raised Roman Catholic in Ohio, she was fiercely criticized by Catholic and other groups as governor of Kansas because she vetoed bills that would impose new restrictions on abortion providers. At one point, the archbishop of Kansas City asked her to stop taking Communion.

On Aug. 1, HHS mandated that insurers provide contraceptives and other preventive health services for women in employee coverage, a decision hailed by Democrats and women's groups but opposed by Catholic groups and social conservatives. Catholics argue that a proposed exemption for some religious employers is far too narrow.

The trafficking contract was aimed at providing housing, counseling and other services to the victims of trafficking, who are held in a workplace through force or fraud. It was first awarded in 2006, amid a controversial Bush administration decision to direct more federal social service contracts to faith-based groups.

The contract ultimately provided the Catholic bishops more than $19 million to oversee those services.

At the time, several members of the federal review board assessing the bidders raised concerns that the Catholic group would not refer victims for abortions or contraceptives, according to

documents in the ACLU lawsuit. The documents said the board still ranked the Catholic group far above other applicants.

The ACLU, in its lawsuit filed in U.S. District Court in Boston in 2009, argues that many women are raped by their traffickers and don't speak English, making it hard for them to find reproductive services without help.

While the bishops' organization would not refer women directly, it allowed subcontractors to arrange for the services, but refused to reimburse the subcontractors with federal dollars.

"The principle of Church teaching is that all sexual encounters be open to life,'' said Walsh, of the bishops conference. "It's not a minor matter; this is intrinsic to our Catholic beliefs.''

The ACLU lawsuit argues that HHS allowed the Catholic group to impose its moral beliefs. But in defending the contract in court on behalf of HHS, Justice Department lawyers argue the contract was constitutional and that the bishops have been "resoundingly successful in increasing assistance to victims of human trafficking.''

As the contract approached its expiration, HHS political appointees this spring became involved in reshaping the request for proposals, adding a "strong preference" for applicants offering referrals for family planning and the "full range" of "gynecological and obstetric care.'' That would include abortions and birth control; federal funds cannot be used for abortions, except in cases of rape, incest or danger to the life of the mother.

Sharon Parrott, a top Sebelius aide, was closely involved in the process.

"When important issues that are a priority arise, it's common for senior policy advisers of the department to have a dialogue...to reach the best policy decision,'' said Parrott, counselor to Sebelius for human services policy. "The priority in this case was how to best meet the needs of victims of trafficking so they can take control of their own lives.''

But some HHS staffers objected to the involvement of the secretary's office, saying the goal was to exclude the Catholic bishops, individuals familiar with the matter said.

"It was so clearly and blatantly trying to come up with a certain outcome,'' said one official, who spoke on condition of anonymity because the official was not authorized to speak to the media. "That's very distasteful to people.''

The "strong preference" language now lies at the heart of the dispute. Sheldon, the HHS assistant secretary, said it played a role in selecting the new grantees and that "it's very important that these victims, who have experienced trauma ... be provided the full range of information.''

The bishops conference says the language essentially stacked the decked against them and violated federal laws barring discrimination based on religion. "This was a political decision,'' Walsh said.

Brigitte Amiri, a staff attorney with the ACLU's reproductive freedom project, said the organization is "very pleased" about the change in grantees but is continuing with the lawsuit.

The organization is also considering suing over another HHS grant to the Catholic bishops: $8 million annually to provide foster care and other services to children who are illegal immigrants.

A subcontractor working for the bishops, Catholic Charities in Virginia, several years ago fired four social workers after they helped a 16-year-old immigrant teenager obtain birth control and an abortion, Amiri said.

The Obama administration recently renewed that grant. Amiri said the ACLU is in "discussions" with HHS over "how the needs of these teenagers can be met.'' The bishops conference declined to comment.

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