

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ 546 U.S. 418 (2006).

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

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

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

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

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

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

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

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

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

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

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

What RFRA Does:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁰ *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Has the Freedom of Religion Become the “Freedom to Recant”?

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

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

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

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

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

Exclusion of religious groups by some colleges: It is common sense, not discrimination, for a religious group to require its leaders to agree with its religious beliefs. But in 2012, Vanderbilt University administrators excluded fourteen Catholic and evangelical Christian groups from campus because they required their leaders to share the groups' religious beliefs. Vanderbilt administrators told a Christian student group that it could remain a recognized student organization only if it deleted five words from its constitution: "personal commitment to Jesus Christ."³⁸ Students in that group left campus rather than recant their belief in Jesus Christ. Vanderbilt administrators informed the Christian Legal Society student chapter that its expectation that its leaders would lead its Bible studies, prayer, and worship was religious discrimination, as was its requirement that its leaders agree with its core religious beliefs.³⁹ Vanderbilt is just one example. Other recent threats to exclude religious student groups have included California State University⁴⁰ and Boise State University.⁴¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dismay at the hostility they are experiencing.⁴⁶

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

III. Current Religious Liberty Issues involving the Federal Executive Branch

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

Actions that have positive ramifications for religious liberty: Certain actions of the executive branch should be commended. The Department of Justice filed a strong *amicus curiae* brief⁵⁰ in support of prisoners’ religious liberty as protected by the Religious Land Use and Institutionalized Persons Act of 2000⁵¹ on

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

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

⁴⁸ 132 S. Ct. 694 (2012).

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

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

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

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

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

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

⁵² 134 S. Ct. 1811 (2014).

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

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

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

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

Actions with negative ramifications for religious liberty:

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

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

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

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

⁵⁷ 132 S. Ct. at 697; *id.* at 706.

⁵⁸ *Id.* at 706.

⁵⁹ *Id.* at 710.

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

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

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

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

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

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

⁶² 45 C.F.R. § 147.130(a)(1)(iv)(B).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Before the ink had dried on *Roe v. Wade*,⁷⁰ a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from forced participation in abortion or sterilization, as well as to protect doctors and nurses who refuse to participate in abortion.⁷¹ The Senate vote was 92-1.⁷²

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

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

⁷⁰ 410 U.S. 113 (1973).

⁷¹ 42 U.S.C. § 300a-7.

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

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

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

⁷⁵ 42 U.S.C. § 238n.

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

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

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

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

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

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

⁷⁸ 42 U.S.C. § 18023(c)(2).

⁷⁹ *Id.* § 18023(b)(1)(A)(i).

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

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

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

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

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

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