

Testimony of the

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Submitted to the

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

***Written Testimony* for the Hearing Record on
“The State of Religious Liberty in the United States”**

June 10, 2014

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for this opportunity to present testimony on the “State of Religious Liberty in the United States.”

As both an ordained minister in the United Church of Christ and an attorney, I take matters of religious liberty very seriously. And I have appreciated serving as the Executive Director of Americans United for Separation of Church and State for the last 22 years.

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, or not, as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

The good news is 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. Nonetheless, we still face threats to religious liberty in our country every day.

The largest threats as I see them today can be placed into two broad categories: threats to religious minorities and non-believers, and efforts to radically redefine religious liberty. Threats to the Christian majority are few, far between, and sometimes, frankly, untrue.

Non-believers and adherents to less popular faiths are still denied the basic rights that many of us practicing a majority faith take for granted every day. They face religious coercion, harassment, exclusion, and overt religious employment discrimination.

Another threat is the mounting attempts to radically redefine religious liberty. To me, religious freedom means having the right to practice your religion free of harassment and undue influence from governments at any level. Categorical religious or “faith specific” exemptions to law and other generally applicable rules and regulations should be granted only where they will not unduly burden the legitimate rights of others. But what are often described as threats to religious freedom today are really attempts to obtain sweeping exemptions that could deny others fundamental rights to make lawful moral choices and exercise their own individual conscience; efforts to seek privileges reserved for religious entities by organizations that are engaged in commercial enterprises or that serve as a government provider of services; and attempts to use the machinery of government to promote particular religious beliefs, often resulting in the coercion of others to follow those doctrines. Ironically, under these circumstances, the accommodations and privileges sought in the name of religion become a real threat to religious freedom overall.

I. Threats to the Religious Liberty of Members of Minority Faiths

A. Prevention of the Right to Assemble and Worship

In America today, some religious minorities are denied the right to even construct houses of worship and other buildings for their congregations. They face not just the difficulties that some majority faiths must overcome, such as zoning roadblocks. They also face community—and sometimes national—protests, intimidation, and threats of violence.

For example, when a Muslim congregation in Murfreesboro, TN sought to build a new mosque to replace their overcrowded building, they encountered “public protests, vandalism, arson of a construction vehicle and a bomb threat.”¹ 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.² The intimidation influenced construction companies, which became too afraid to even work on the project, delaying the construction.³ And, the threats led to new costs for expensive security measures, such as cameras.⁴ In August 2012, the new mosque finally opened,⁵ but the lawsuit to challenge their use of the property continued for another two years. In fact, the case came to an end just last week when the Supreme Court denied certiorari.

Unfortunately, these problems are not unique to Murfreesboro. Muslim congregations elsewhere have faced similar pushback, including, to name a few: a petition of 300 signatures to stop the construction of a mosque in Madison, MS;⁶ community outrage over the construction of a mosque in Lilburn, GA, leading to DOJ intervention;⁷ and a lawsuit to halt the construction of a mosque in Boynton Beach, FL, alleging it would lead to terrorist activities.⁸ And, minority religious groups in communities all across the country continue to encounter threats to their ability to congregate and worship. In Glendale, AZ, a Muslim mosque was attacked with an acid bomb.⁹ In Oak Creek, WI, a

¹ Travis Loller, *Islamic Center of Murfreesboro: After Long Fight, Opening Day For Tennessee Mosque*, HUFFINGTON POST (Aug. 11, 2012), http://www.huffingtonpost.com/2012/08/11/after-long-fight-opening-day_n_1768915.html.

² *Id.*

³ *Id.*

⁴ Scott Broden, *Murfreesboro Mosque Members Celebrate Groundbreaking*, TENNESSEAN (Sept. 29, 2011), <http://www.tennessean.com/article/20110929/NEWS06/309290061/Murfreesboro-mosque-members-celebrate-groundbreaking>.

⁵ Loller, *supra*, note 1.

⁶ Adam Lynch, *Mosque Construction Planned in April*, JACKSON FREE PRESS (Mar. 22, 2010), <http://www.jacksonfreepress.com/news/2010/mar/22/mosque-construction-planned-in-april/>.

⁷ Joel Anderson, *Mosque Dispute Divides Lilburn*, ATLANTA J.-CONST. (Oct. 5, 2011), <http://www.ajc.com/news/news/local/mosque-dispute-divides-lilburn/nQMK9/>.

⁸ Matt Sedensky, *Suit Seeks to Stop Building Mosque*, LEDGER (May 2, 2007), <http://www.theledger.com/article/20070502/NEWS/705020464>.

⁹ *Arizona Mosque Targeted in “Acid Bomb” Attack*, REUTERS (Aug. 8, 2007), <http://www.reuters.com/article/2007/08/08/us-crime-usa-mosque-idUSN0833871920070808>

gunman killed six people during Sunday services at a Sikh gurdwara.¹⁰ Most recently, in Overland Park, KS a man opened fire on a Jewish Community Center.¹¹

B. Coercion and Intimidation in our Public Schools

Students of minority faiths sadly face harassment, bullying, and coercion in our public schools on the basis of their religion, not just from students but also from school administrators. Given the incredible diversity of American society and the fact that school attendance is mandatory, it is especially important that our public schools respect the beliefs of every student. As explained by the U.S. Supreme Court: “Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.”¹² There are, unfortunately, a significant number of reported examples of non-compliance with this principle.

Recently, a 6th grade student at a Louisiana public school was bullied so badly by teachers and students for being Buddhist “that he became physically sick every morning before going to class.”¹³ The student wasn’t trying to convert other students to Buddhism, proselytize his fellow students about his religion, disparage the religion of others, or require others to engage in his religious practices at each and every school event. He was just trying to get through the school day. But school employees and fellow students forced him to engage in their religious practices, required him to acknowledge their religion as true, and chastised him as “stupid” for having different beliefs.¹⁴ When his parents attempted to resolve the issue, a school official told them that the solution was to change the child’s religion.¹⁵

Harassment and threats also recently forced a 15-year old student to give up on her efforts to start a Secular Student Alliance at Pisgah High School in Canton, NC.¹⁶ At first, her school, which had already recognized the Fellowship of Christian Athletes at the time she sought the secular club, refused to allow the club. School officials ignored her

¹⁰ Brendan O’Brien, *Wisconsin Shooting: 7 People Killed at Sikh Temple, Including Shooter*, HUFFINGTON POST (Aug. 5, 2012), http://www.huffingtonpost.com/2012/08/05/wisconsin-shooting-sikh-temple_n_1744256.html?utm_hp_ref=religion&ir=Religion.

¹¹ Saeed Ahmed et al., *Jewish Center Shooter ‘Knocked Family to Its Knees,’ Relative Says*, CNN (Apr. 15, 2014), <http://www.cnn.com/2014/04/14/us/kansas-jewish-center-shooting/>.

¹² *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

¹³ Carol Kuruville, *ACLU sues Bible Belt school for allegedly bullying Buddhist student*, N. Y. DAILY NEWS (Jan. 24, 2014), <http://www.nydailynews.com/news/national/aclu-sues-bible-belt-school-allegedly-bullying-buddhist-student-article-1.1590578#ixzz33ix0otzw>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Kimberly Winston, *Student Reverses Course on Secular Club*, WASH. POST (Feb. 28, 2014), http://www.washingtonpost.com/national/religion/student-reverses-course-on-secular-club-citing-threats/2014/02/28/2555d50e-a0c1-11e3-878c-65222df220eb_story.html

requests and then claimed that such a club “didn’t fit in” at the school.¹⁷ Eventually she forced the school to comply with the Equal Access Act and recognize the club. But shortly after, community backlash and harassment forced her to abandon her efforts altogether.¹⁸

C. Exclusion of Minority Faiths at Public Meetings

Just last month, the Supreme Court decided *Town of Greece v. Galloway*,¹⁹ which held that local governments may open their meetings with ceremonial prayers and that those prayers may include religion-specific references. We served as counsel for the plaintiffs in this case, so it is no surprise that we were greatly disappointed with this decision. Sectarian prayers do not represent the traditions of many people who subscribe to non-Judeo-Christian beliefs or practice no religion, and the prayers send a message to these residents that their government does not represent their interests or welcome their participation in debates over matters of concern to the community. As explained by retired U.S. Supreme Court Justice Sandra Day O’Connor in a 2008-opinion written for the Fourth Circuit: “The restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith.”²⁰ Local governments should work to encourage their citizens to participate in government rather than create policies that discourage such engagement.

The Court did make clear in its decision, however, that the First Amendment still imposes important limits on legislative prayer practices, including that the government cannot exclude potential speakers from giving the opening message on the basis of religion. The Court explained that the government must “maintain[] a policy of nondiscrimination”²¹ and “must welcome a prayer by any minister or layman who wished to give one.”²² Nonetheless, the very day the decision was issued, Roanoke County (VA) Board of Supervisors member, Al Bedrosian, declared his intent to adopt a county policy that would allow *only* Christians to give prayers at Supervisor meetings.²³ A few days later he doubled-down on his plan. When asked “how he would respond to a non-Christian’s request to offer the invocation at the Roanoke County Board of Supervisors meetings,” he said: “I would say no.”²⁴ Why would he do this? Because

¹⁷ Letter from The ACLU of North Carolina and the Freedom From Religion Foundation to Dr. Anne Garrett, Superintendent of Haywood County Schools (Feb. 11, 2014), *available at* <https://www.secularstudents.org/sites/default/files/LetterToHaywoodCountySchools.pdf>

¹⁸ *Student Reverses Course on Secular Club*, *supra*, note 16.

¹⁹ 134 S. Ct. 1811 (2014).

²⁰ *Turner v. City Council of City of Fredricksburg*, 534 F.3d 352, 356 (4th Cir. 2008).

²¹ *Greece*, 134 S.Ct. at 1824.

²² *Id.*

²³ Chase Purdy, *Group Warns About Legal Risks of Bedrosian-Proposed Prayer Policy*, ROANOKE TIMES (May 9, 2014), http://www.roanoke.com/news/local/roanoke_county/civil-liberties-group-decries-bedrosian-proposal-on-prayers/article_99b2a9bc-d7ae-11e3-80e0-0017a43b2370.html

²⁴ *Id.*

non-Christians giving prayers at the meetings would be “trying to infringe on [his] right, because [he] doesn’t believe that.”²⁵

Although this policy would clearly run afoul of the decision in *Greece*, it represents yet another battle that members of minority faiths and non-believers must fight simply for equal treatment. In order to conduct public business, these members of our communities are subjected to prayers of faiths other than their own and their faith community is often excluded from even having the opportunity to participate in the practice.

D. Grooming and Appearance Requirements in the Military

Since the 1980’s, the Department of Defense policies regarding grooming and appearance in the military have preemptively excluded members of minority religious communities from serving because of their mandated religious articles of faith. Kamaljeet Kalsi, a Sikh American, grew up in New Jersey and came from a family with three generations of military service.²⁶ The U.S. Army recruited him while he was in medical school, as part of the Health Professionals Scholarship Program and assured him that his religiously required external articles of faith—unshorn hair and the turban—would be accommodated.²⁷ Kalsi spent several years as an Army reserve officer while attending medical school. In 2009, upon completion of his medical education he was called to active duty. At that time, the Army told him that, in fact, military policy did prohibit his religious articles of faith. Unless he shaved his beard, cut his hair and removed his turban, he could not attend basic training and continue his military duties.²⁸

It took two years of legal maneuvering before the Army finally granted Dr. Major Kalsi an accommodation to maintain his articles of faith. This was the first accommodation granted to a Sikh American in more than twenty-five years.²⁹ After receiving the accommodation, Dr. Major Kalsi was deployed to Afghanistan as Officer-in-Chief of a tented Emergency Room in Helmand province. During his tour in Afghanistan, Dr. Major Kalsi personally treated over 750 combat casualties and local nationals who suffered from IED blasts, gunshot wounds, and other emergent conditions. For his service in Afghanistan, Dr. Major Kalsi was awarded the Bronze Star.³⁰

In addition to Dr. Major Kalsi, there are only two other Sikh Americans, Captain Tejdeep Rattan and Specialist Simran Singh Lamba, who have fought for and successfully been

²⁵ *Id.*

²⁶ *Is the Federal Government Adequately Protecting the Civil Rights of Our Veterans and Service Members Who Have Fought for Our Rights?*: Briefing before the U.S. Comm’n on Civil Rights (2013) (personal statement of Major Kamaljeet Singh Kalsi to the U.S. Comm’n on Civil Rights) <http://sikhcoalition.org/images/kalsicivilrightstestimony.pdf>.

²⁷ Tony Lombardo, *Army Tells Sikh Officers to Change Appearance*, *ARMY TIMES* (Apr. 25, 2009), <http://www.armytimes.com/article/20090425/NEWS/904250308/Army-tells-Sikh-officers-change-appearance>.

²⁸ James Dao, *Taking On Rules to Ease Sikhs’ Path to the Army*, *N.Y. TIMES*, (Jul. 7, 2013), http://www.nytimes.com/2013/07/08/us/taking-on-rules-so-other-sikhs-join-the-army.html?_r=0.

²⁹ *Id.*

³⁰ Letter from U.S. Comm’n on Civil Rights to Chuck Hagel, U.S. Sec’y of Def. (Dec. 3 2013), *available at* http://www.usccr.gov/pubs/Letter_Sikh-Military-Service.pdf.

granted accommodations and are currently serving in the U.S. Army.³¹ These accommodations, however, are not permanent.

Although the Department of Defense recently released a revised version of its religious accommodation policy,³² the new policy does not go far enough and could continue to prevent adherents of minority faiths from joining or maintaining their military careers. First, current policy states that those who make the request must “refrain . . . from beginning unauthorized grooming and appearance practices, [or] wearing unauthorized apparel . . . until the request is approved.”³³ Second, service members must re-apply for an accommodation upon each new assignment, transfer of duty stations, or other significant change in circumstances, including deployment, making their military future uncertain.³⁴

We believe that an entire class of service members who can otherwise successfully perform their military duties, should not be denied the ability to serve their country simply because their religion requires them to wear a head covering or a beard. Current policy fails to properly and practically accommodate many service members who need an appearance and grooming accommodation. These concerns should be addressed so that Sikhs, and other adherents of minority faiths do not have to choose between their faith and their country.

It is important to note that in these cases the “accommodation” requested has no negative impact on the rights of any third parties whatsoever, a distinction sometimes lost by those seeking more sweeping exemptions from law or regulation.

E. Federally Funded Employment 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 memoranda 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. Those who are most likely to suffer under this scheme, of course, are non-believers and members of minority faiths.

³¹ McDermott Will & Emery, L.L.P. & The Sikh Coalition, *The Case for Ending the Presumptive Ban on Observant Sikhs in the U.S. Armed Forces*, Mar. 10, 2014, available at <http://www.mwe.com/files/Uploads/Documents/Pubs/Sikhs%20in%20Army%20White%20Paper%20and%20Exhibits.pdf>.

³² Department of Defense Instruction No. 1300.17: Accommodation of Religious Practices Within the Military Services, (Jan. 22, 2014), available at <http://www.dtic.mil/whs/directives/corres/pdf/130017p.pdf>.

³³ *Id.*

³⁴ *Id.*

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.³⁵ Title VII grants an exemption to religious organizations, however, allowing them to adopt hiring practices that favor fellow adherents to their particular faith.³⁶ Before the mid-90's, it had been generally accepted that this exemption applies only when the religious organization is using its own funds. Accordingly, 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.

Then came the Faith-Based Initiative. Ushered in by the Bush Administration, it 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 Barack Obama in a 2008 campaign address in Zanesville, OH: The federal government should never fund employment discrimination on the basis of religion.³⁷ Indeed, the government should *never* subsidize discrimination.

Unfortunately, the current Administration has not taken any steps to restore the decades-old federal ban on employment discrimination in publicly funded programs. Indeed, it still allows religious organizations “to receive federal funds and to continue considering religion when hiring staff even if the statute that authorizes the funding program generally forbids consideration of religion in employment decisions by grantees.”³⁸ The organization needs only to sign a form asserting it “sincerely believes that providing the services in question is an expression of its religious beliefs; that employing individuals of a particular religion is important to its religious exercise; and that having to abandon its religious hiring practice in order to receive the federal funding would substantially burden its religious exercise.”³⁹

This issue is not just an abstract policy issue. Real people are suffering actual religious discrimination as a result of the policy. For example, World Vision is “one of the largest

³⁵ 42 U.S.C. § 2000e-2 (1964).

³⁶ 42 U.S.C. § 2000e-1(g) (1964).

³⁷ On July 1, 2008, in Zanesville, OH, 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.” Jeff Zeleny and Michael Luo, *Obama Seeks a Bigger Role for Religious Groups*, N.Y. TIMES (July 2, 2008), http://www.nytimes.com/2008/07/02/us/politics/02obama.html?pagewanted=all&_r=0.

³⁸ *Certificate of Exemption for Hiring Practices on the Basis of Religion*, OFFICE OF JUSTICE PROGRAMS, http://gb1.ojp.usdoj.gov/search?q=cache:iM-f0jYSmTwJ:www.ojp.usdoj.gov/funding/forms/fbo_sample.pdf+certificate+of+exemption&site=OJP&client=ojp_frontend_new&proxystylesheet=ojp_frontend_new&output=xml_no_dtd&ie=UTF-8&access=p&oe=UTF-8 (last visited June 8, 2014).

³⁹ *Id.*

recipients of development grants from the U.S. Agency for International Development, the federal government's foreign aid arm."⁴⁰ Government grants "amount to about a quarter of the organization's total U.S. budget."⁴¹ Nonetheless, "World Vision hire[s] only candidates who agree with World Vision's Statement of Faith and/or the Apostle's Creed."⁴² It is essentially a hiring practice that says: "No Muslim, Jews, Hindus, Atheists or even Unitarians need apply."

Thus, even in Mali, a predominantly Muslim country, World Vision hires non-Christians only when they cannot find a Christian for the position.⁴³ Bara Kassambara, a non-Christian, therefore, was only eligible for a temporary job. And, Lossi Djarra applied for a job as a driver, but a Protestant man was hired. Djarra said the 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."⁴⁴

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."⁴⁵ But, having a stated policy of discrimination hardly negates its discriminatory effects.

Government-funded religious discrimination strikes at the heart of the issue before us. Religious freedom must mean, at least, that the government can't make you pass a religious test administered by a third party before applying for a government-funded job.

II. The Radical Redefinition of Religious Liberty

The right to practice one's religion is conditioned on a collateral legal respect for the equal rights of others. Special religious accommodations and exemptions should only be granted when they ease a genuine and substantial burden on religious practice and when granting the accommodation would not impinge on the rights, or otherwise harm the interests, of others. Subordinating the rights of some to the religious choices of others risks fomenting the religious strife that the Establishment Clause was designed to forestall.

There is a strategic effort today, and I daresay from some of my co-panelists this afternoon, however, to dramatically redefine religious liberty as the right to an accommodation for even de minimus, highly attenuated burdens in disregard of how

⁴⁰ Krista J. Kapralos, Non-Christians Need Not Apply, GLOBALPOST (Jan. 11, 2010), <http://www.globalpost.com/dispatch/ngos/100110/world-vision-religion-foreign-aid>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

the accommodation would affect third parties. Today, for-profit corporations are using religion to deny women government-required health benefits; businesses are seeking the right to deny services to LGBT patrons in the name of religion; individuals are labeling religious neutrality and equality for all as religious oppression; and government employees are characterizing conduct as “religious freedom” for themselves that is, in fact, imposing their religion on others.

There are certainly situations where religion is deserving of reasonable and appropriately tailored accommodations. But, it is not a trump card that supersedes all other interests or that can justify imposing significant burdens on others. Efforts to make it so, threaten true religious liberty.

A. Attempts to Change the Intent and Effect of the Religious Freedom Restoration Act (RFRA)

In *Employment Division of Oregon v. Smith*,⁴⁶ the Supreme Court ruled that the Free Exercise Clause of the U.S. Constitution does not require the application of “strict scrutiny” to neutral and generally applicable laws. Many viewed *Smith* as a step backwards for religious freedom, as the Court previously had applied strict scrutiny in these cases: The government could not substantially burden religion unless the government had a compelling interest and the law was narrowly tailored.⁴⁷ In response, Congress passed RFRA to reinstate the pre-*Smith* standard. In passing RFRA, Congress quelled fears that, post-*Smith*, religious exercise would garner no protections. The examples of RFRA’s power often used by supporters then included that it would prevent dry communities from banning the use of wine in communion services, government meat inspectors from requiring changes in the preparation of kosher food, the government from regulating the selection of priests and ministers,⁴⁸ or a public school from forbidding a student to wear a yarmulke.⁴⁹

Noticeably absent from that list of examples: that RFRA would allow large secular corporations to deny employees and customers rights and protections to which they would otherwise be entitled; or, that RFRA would allow secular businesses to ignore non-discrimination laws. None of the exemptions contemplated by Congress would have required a third-party to forfeit federal protections or benefits otherwise available widely. Indeed, when Congress passed RFRA 20 years ago, supporters—including Americans United—intended for the bill to be a shield for religion and not a sword to harm others. No one imagined that today the bill would be manipulated in such a way. If they had, I, as a person there at the conception of this bill and following it through its three-year gestation, am reasonably confident the bill never could have passed.

⁴⁶ 494 U.S. 872 (1990).

⁴⁷ See, e.g., *Hernandez v. C.I.R.*, 490 U.S. 680 (1989); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

⁴⁸ 139 Cong. Rec. S. 2822 (Mar. 11, 1993) (floor statement of Sen. Edward Kennedy), available at http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/cr-s2822-24-1993.pdf

⁴⁹ 139 Cong. Rec. S. 9821 (July 2, 1992) (floor statement of Sen. Orrin Hatch), available at http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/cr-s9821-23-1992.pdf

1. *Denying Women Healthcare in the Name of Religious Freedom*

One of the most widely discussed religious freedom issues in the United States today involves the insurance coverage mandate for contraceptives under the Affordable Care Act. Opponents of the mandate argue that it violates the religious freedom rights of employers. In contrast, we believe that allowing employers to use religion as a reason to deny their employees rights and benefits is the real threat to religious freedom. Such overly broad exemptions quickly change from religious accommodation to religious privilege and compulsion.

Regulations promulgated under the Affordable Care Act require that most group insurance plans provide coverage for preventative health care, including contraceptives. Houses of worship and other similar organizations are *fully exempt* from this coverage mandate. Their insurance plans *do not* have to include coverage for contraceptives. Women working for these organizations will have to pay for or find coverage for contraceptives on their own. A broader set of religious organizations that are *not exempt* from the mandate, are provided an *accommodation*. Organizations that qualify for the *accommodation* also are not required to provide, pay for, or inform employees about how to access other insurance coverage for contraceptives. Their employees, however, will still be provided contraceptive coverage at no additional cost.

But, the exemption for houses of worship and the accommodation for religious organizations have not appeased opponents of the contraception mandate. They argue that all employers—religious and secular, non-profit and for-profit—are entitled to a full exemption, regardless of the effects those exemptions would have on employees.

a. For-Profit Secular Businesses

The Supreme Court will soon issue an opinion in *Hobby Lobby Stores v. Sebelius*.⁵⁰ Hobby Lobby is a for profit corporation. Its 567 stores around the country⁵¹ employ over 10,000 people and sell crafts.⁵² Hobby Lobby does not predominantly sell religious items or items used for religious practice. It is not owned by a church or similar entity. And, it is not run as a non-profit to perform a religious obligation. Nonetheless, its owners, the Green family, have argued that, in accordance with RFRA, the corporation is entitled to an exemption from the insurance mandate.

Hobby Lobby entered into commercial activity as a matter of choice and as a way to earn money. It should not be allowed to reap the benefits, protections, and profits of a commercial enterprise and also be exempted from the rules, restrictions, and regulations placed on all other for-profit entities. In short, “voluntary commercial activity” should not receive the same treatment as “directly religious activity.”⁵³ In

⁵⁰ 723 F.3d 1114 (10th Cir. 2013) *cert. granted* 2013 WL 3869832 (Nov. 26, 2013) (No. 13-354).

⁵¹ *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/ (last visited June 8, 2014).

⁵² Roy Edroso, *Rightbloggers Go to Holy War for Hobby Lobby, Against Abortion Pills, Lady Judges*, VILLAGE VOICE (Mar. 30, 2014), http://blogs.villagevoice.com/runninscared/2014/03/rightbloggers_g_5.php.

⁵³ *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994).

United States v. Lee,⁵⁴ the Supreme Court denied an exemption to an Amish employer who objected to the payment of Social Security taxes for his employees. The Court explained:

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.⁵⁵

Even if corporate entities like Hobby Lobby deserve protection under RFRA, it is hard to understand how providing insurance coverage to employees creates a substantial burden. The connection between an employer who objects to the use of contraceptives and an employee's usage of contraceptives that are covered by insurance is highly attenuated. The employer does have to include contraceptive coverage, but it does not have to buy the contraceptives or support their use. It is the individual employee who will make the independent private choice whether to avail herself of prescription contraception as one of the many services under the group insurance plan. In fact, under the regulation, an employer may even formally communicate that it disapproves of the usage of contraceptives, whether to the public or to the 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. Employers have the right to make moral decisions for themselves, but not force these decisions upon their employees.

Even making the leap that Hobby Lobby and similar corporations do suffer a religious burden, one still must ask why it should trump the rights and interests of their employees. Granting Hobby Lobby an exemption is far different from allowing exemptions for religious garb, or for the use of communion wine in dry towns. Whereas those kind of exclusions don't cause harm to others, the exemption sought by Hobby Lobby causes great harm to women, who are denied coverage for critical medical care.

⁵⁴ 455 U.S. 252 (1982).

⁵⁵ *Id.* at 261.

Exempting Hobby Lobby from the insurance-coverage requirements would make it difficult and sometimes impossible for its employees to obtain and use several forms of contraception. Access to contraception is important to women for many reasons, including that it decreases unwanted pregnancies⁵⁶ and allows women to control the “birth spacing” of their children to decrease premature births.⁵⁷ Hobby Lobby, however, would deny coverage for some of the most effective contraception, including the intrauterine device (IUD), which is significantly more effective than some of the alternatives.⁵⁸ Furthermore, some of the very drugs vetoed by Hobby Lobby for coverage are also used for non-contraceptive coverage of serious medical conditions. This cannot be trivialized.

The logical conclusion of those urging a more expansive exemption is that *any employer*—whether an individual or corporation—could refuse to cover *any* procedure to which they objected on religious grounds regardless of the harms it causes to the employees. Such an astonishingly broad and far sweeping exemption would endanger patient health and threaten to overturn the important medical decisions of employees: an employer who believes the Bible proscribes blood transfusions could deny employees coverage for emergency care; an employer who opposes psychiatric services could deny employees mental health care coverage; and an employer who opposes traditional medicine for religious reasons could deny any service or item beyond prayer therapy. The consequences reach even beyond medical situations, too. For example, a religious group opposed to “equal pay” requirements could quote (or in my view, misconstrue) Christian scripture to justify paying men more than women.

b. Non-Profit Entities

Some employers at non-profit religious organizations are arguing for a slightly different, yet equally unprecedented view of “religious freedom.” As explained above, non-profit religious organizations do not have to contract, pay, refer, or arrange for coverage of contraceptives at all. All the religious organization must do is condemn the usage of contraceptives by signing a 635-word form and dropping it in a mailbox. It is difficult to imagine that these groups could argue that such an arrangement burdens their religion. Nonetheless, such groups have filed numerous lawsuits claiming that “religious freedom” means that the government cannot even require them to fill out a form indicating their refusal to provide contraception, and admittedly have obtained preliminary injunctions in some cases.

⁵⁶ *University of Notre Dame v. Sebelius*, 743 F. 3d 547, 548 (7th Cir. 2014).

⁵⁷ Rae Ellen Bichell, *Taking More Time Between Babies Reduces Risk of Premature Birth*, NPR (June 5, 2014), <http://www.npr.org/blogs/health/2014/06/05/319067247/taking-more-time-between-babies-reduces-risk-of-premature-birth>.

⁵⁸ Alice Park, *Which Birth Control Works Best? (Hint: It's Not the Pill)*, TIME (May 24, 2012), [http://www.nytimes.com/health/guides/specialtopic/birth-control-and-family-planning/intrauterine-devices-\(iuds\).html](http://www.nytimes.com/health/guides/specialtopic/birth-control-and-family-planning/intrauterine-devices-(iuds).html).

Judge Richard Posner, in *University of Notre Dame v. Sebelius*,⁵⁹ (the only case heard to date in which actual women are directly represented, in this case by Americans United) however, took issue with this redefinition of a religious burden:

The novelty of Notre Dame's claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis. United States law and public policy have a history of accommodating religious beliefs, as by allowing conscientious objection to the military draft—and now exempting churches and religious institutions from the Affordable Care Act's requirements of coverage of contraceptive services. What makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths.

The process, however, is not costly, difficult or time consuming. To the contrary, “the process of claiming one's exemption from the duty to provide contraceptive coverage is the opposite of cumbersome. It amounts to signing one's name and mailing the signed form”⁶⁰ Additionally, the argument is simply illogical: The government surely cannot grant an accommodation if the organization refuses to invoke it.

This claim of “religious freedom” is particularly frustrating when you consider its consequences. The relief sought by groups like Notre Dame is a full exemption, meaning that its employers and students would no longer have contraception coverage from a third party. The lifting of this inconsequential burden on these groups would impose a huge burden on the women they teach and employ—these women would lose needed medical coverage. This is fundamentally unfair and surely not “religious freedom.”

2. Using Religion to Justify *LGBT Discrimination*

As members of the LGBT community are making strides in the movement towards equality, opponents of equality are trying to strip away these rights in the name of religion.

In New Mexico, a photographer refused service to a gay couple in violation of the New Mexico public accommodations law.⁶¹ The photographer invoked the state's RFRA to argue that she could discriminate against the couple if motivated by her religion.⁶² In Colorado, a cake shop refused to bake a cake for a couple for use at a party celebrating their wedding ceremony, which would have taken place in Massachusetts several days

⁵⁹ 743 F. 3d 547, 557 (7th Cir. 2014).

⁶⁰ *Id.* at 558.

⁶¹ *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) *cert. denied*, 134 S. Ct. 1787 (Apr. 7, 2014).

⁶² *Id.*

earlier.⁶³ Again, the shop owner argued that he could violate the rights of the couple because he did so in the name of religion.⁶⁴ RFRA, however, wasn't intended to—and doesn't—provide religious adherents a trump card over any law to which an individual disapproves. Nor was it intended to—nor does it—shift burdens onto third parties. Yet, these businesses owners feel entitled to deny others their rights in the name of religion.

But this debate isn't just about cakes and photography. It is about the logical extension of those cases. It is about the right of LBGQTQ citizens to be served at the lunch counter, the pharmacy, the hospital, the police department, and the courthouse just like everyone else. Instead of recognizing the significant harm that would be caused to those who are LGBT under such an interpretation of RFRA, supporters define the matter as discrimination against the shop owner. It is difficult, however, to understand how the requirement that a coffee shop owner serve a cup of coffee to a gay patron in the same way he would serve a straight patron is a religious burden, let alone a burden that is greater than the harm to the opportunities and dignity caused to the gay customer who is denied service.

So far attempts to use RFRA to deny others their rights under public accommodations laws have failed. But this has not dissuaded others from trying to use RFRA in that same way. This distorted view of RFRA has led some states to try to adopt one of their own.⁶⁵ It has led others to try to pass more extreme renditions of RFRA.⁶⁶ And, it has led still others to try to pass bills that explicitly permit discrimination in the name of religion.⁶⁷

A Kansas bill, for example, sought to allow individuals, religious entities, government employees, and even privately held businesses to use religion to justify denying any man or woman of Kansas “services, accommodations, advantages, facilities, goods, or privileges” or even “social services.”⁶⁸ The bill, supported by the Kansas Catholic Conference and the conservative Kansas Family Policy Council,⁶⁹ would have allowed even state government employees to refuse gay couples services they are entitled to by law, in the name of religious freedom.

The good news, however, is that strong opposition is brewing in response to these bills as well. Arizona's SB 1062, for example, prompted opposition from a range of politicians and businesses: including, Senator Jeff Flake, the Arizona Chamber of Commerce and Industry, the Arizona Tech Council, AT&T, PetSmart, American Airlines, Delta Airlines,

⁶³ *Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (Colo. Civil Rights Comm'n June 2, 2014) (final agency order) available at https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf.

⁶⁴ *Id.*

⁶⁵ Sarah Posner, *Wave of New State Bills: Religious Freedom or License to Discriminate*, ALJAZEERA AMERICA (Feb. 7, 2014), <http://america.aljazeera.com/articles/2014/2/7/wave-of-new-statebillsreligiousfreedomorlicensetodiscriminate.html>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ HB 2453 Section 1(a).

⁶⁹ The Associated Press, *Kansas House Committee Approves Gay Marriage Response*, LAWRENCE J.-WORLD (Feb. 6, 2014), <http://www2.ljworld.com/news/2014/feb/06/kansas-house-committee-approves-gay-marriage-respo/>.

Apple, the Arizona Super Bowl Host Committee, and the Arizona Cardinals. The political fate of this one piece of legislation is indicative of the growing sense of fundamental fairness in America: a rejection of old prejudices even if those discriminatory attitudes are the result of organized or idiosyncratic religious beliefs.

B. *The Use of Religion to Change School Curriculum*

Another venue in which we see attempts to redefine religious freedom is in public school classrooms. Proponents of one variation of the “academic freedom” movement maintain that public school teachers have the right to disregard standard curriculum where they believe that curriculum would violate their religious freedom. Public school teachers, however, do not have the right to develop or disregard classroom curriculum for secular reasons, let alone the right to preach their religious beliefs in the classroom. We also see students and their parents insisting that they have the right to dictate academic standards and curriculum in ways that support their own religious beliefs.

The Ohio Supreme Court addressed this issue last year, when it ruled that a public school science teacher was not entitled to his alleged “academic freedom” right to teach evolution “from a Christian perspective.”⁷⁰ Parents of students in Mr. John Freshwater’s class had begun to complain to the school that he was encouraging students to study a religiously-based creationism, rather than evolution. According to the court, Mr. Freshwater had routinely distributed pamphlets to students from “All About God Ministries” including one pamphlet entitled “Answers in Genesis”, which urged students to attend a free meeting on why the Genesis story of the Bible was factually correct, and how ““important issues in our troubled society (the breakdown of the family, abortion, lawlessness, etc.) are related to evolution!””⁷¹ The school eventually terminated Mr. Freshwater because he “injected his personal religious beliefs into his plan and pattern of instructing his students.”⁷² But, Mr. Freshwater still maintains “he was exercising his academic freedom to explore controversial ideas.”⁷³

Certainly teachers are entitled to hold whatever beliefs they wish. The problem is that incorporating those beliefs into curriculum conveys a message to students that ““that religion or a particular religious belief is favored or preferred.””⁷⁴ Teachers have no right to use their position as a teacher to proselytize their own personal beliefs.

We see similar arguments from students and parent groups. Recently, a group called Citizens for Objective Public Education filed a lawsuit claiming that the religious

⁷⁰ *Freshwater v. Mt. Vernon City School Dist. Bd. of Educ.*, 1 N.E.3d 335, 338 (Ohio 2013).

⁷¹ *Id.* at 340.

⁷² *Id.* at 346.

⁷³ Julie Carr Smyth and Andrew Welsh-Huggins, *Creationism Case Gets Day in Court*, PITTSBURGH POST-GAZETTE (Mar. 4, 2013), <http://www.post-gazette.com/business/legal/2013/03/04/Creationism-case-gets-day-in-court/stories/201303040230#ixzz340P2QG XU>.

⁷⁴ *Freshwater*, 1 N.E.3d at 354 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985)).

neutrality to which public schools adhere violates the religion of their members.⁷⁵ They argue that “Kansas public schools [have] establish[ed] and endorse [ed] a non-theistic religious worldview (the "Worldview") in violation of the Establishment, Free Exercise, and Speech Clauses of the First Amendment, and the Equal Protection Clauses of the 14th Amendment.”⁷⁶ In particular, the plaintiffs challenge the teaching of evolution.⁷⁷ Their vision of religious freedom is that the public school curriculum cannot teach science at all if it conflicts with the religious beliefs of some. This approach clearly flips academic standards and First Amendment jurisprudence on their head. Courts have repeatedly held that public schools may not teach creationism in the classroom because it is a religious theory, rather than a scientific one.⁷⁸ Requiring public schools to neither indoctrinate students nor refuse to teach science because some believe it conflicts with their religious beliefs is not a denial of religious freedom, but rather a means to ensure that students have the right to attend public schools free from religious coercion or indoctrination.

Similarly, college students are trying to circumvent established curriculum and professional standards by claiming burdens on their religious beliefs. Recently, an Augusta State University student declared that she would not counsel gay and lesbian clients because she would not “condone the propriety of homosexual relations or a homosexual identify in a counseling situation.”⁷⁹ But such a position conflicts with the American Counseling Association’s Code of ethics.⁸⁰ Although counselors are encouraged to be aware of their own values, attitudes, and beliefs, they are prohibited from imposing them on their clients.⁸¹ Therefore, the Code states: “counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law.”⁸² These rules exist for the health and benefit of the clients. A counselor’s refusal to serve a client can have a negative impact on the mental health of that client and could exacerbate the very issue for which he or she was seeking counseling.

The student challenged the University’s position that she must adhere to professional standards, arguing that “religious freedom” allowed her to ignore these standards and the harm that doing so might have on her clients. Such an interpretation of religious

⁷⁵ *COPE v. Kan. State Bd. of Educ.*, No. 13-4119 (D. Kan. filed Sept. 26, 2013) available at <http://www.copeinc.org/docs/legal-complaint.pdf>.

⁷⁶ *Id.*

⁷⁷ Brian Tashman, *Kansas Group Tries to Remove Evolution from Schools by Claiming Science Is a Religion*, RIGHT WING WATCH (Sept. 27, 2013), <http://www.rightwingwatch.org/content/kansas-group-tries-remove-evolution-schools-claiming-science-religion>.

⁷⁸ See, e.g., *Edwards*, 482 U.S. at 578; *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707, 736 (M.D. Pa. 2005); *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

⁷⁹ *Keeton v. Anderson-Wiley*, No. 110-099 (S.D. Ga. June 22, 2012) (order granting motion to dismiss), available at http://www.splc.org/pdf/keeton_district.pdf.

⁸⁰ *Keeton v. Anderson-Wiley*, 664 F. 3d 865 at 874 (11th Cir. 2011).

⁸¹ *Id.*

⁸² *Id.* at 869.

freedom, of course, is outrageous but, unfortunately, no longer unusual. Fortunately, the Eleventh Circuit ruled against her, finding that she did not have a First Amendment right to violate American Counseling Association standards and the school curriculum requirements.⁸³ The district court explained that the case was rooted in the plaintiff's "conflation of personal and professional values, or at least her difficulty in discerning the difference."⁸⁴ And, further ruled:

The policies which govern the ethical conduct of counselors, however, with their focus on client welfare and self-determination, make clear that the counselor's professional environs are not intended to be a crucible for counselors to test metaphysical or moral propositions. Plato's Academy or a seminary the Counselor Program is not; that Keeton's opinions were couched in absolute or ontological terms does not give her constitutional license to make it otherwise.⁸⁵

C. Attempts to Upset the Balance of Religious Liberty in the Military

The Armed Services have long had policies governing accommodations for the religious activities, expression, and practices of service members. These policies have generally been effective at balancing service members' right to exercise their religion or be free from exercising religion; the requirements of military readiness, military cohesion, and good order and discipline; and the right of service members to be free from the government endorsement of religion. They have allowed service members of different religious beliefs, and none at all, to serve together with respect and dignity. These policies also recognize the unique atmosphere of the military. The military teaches soldiers to respect their leaders and discourages challenging their orders.⁸⁶ By necessity, dissent and debate have a limited role in the military.⁸⁷ This atmosphere "presents particular dangers of coerced religious activities and the perception of religious endorsement."⁸⁸

Nonetheless, there are currently several calls to change these military policies. Many of the recent high profile reports used to justify these changes, however, are factually inaccurate or exaggerated. They range from debunked claims that the military plans to court martial service members who exercise their religion⁸⁹ to false claims that service

⁸³ *Id.* at 865.

⁸⁴ *Keeton*, No. 110-099 at 47.

⁸⁵ *Id.*

⁸⁶ William J Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplin-Led Prayers at Mandatory Army Events*, 2006 Wis. L. Rev. 1493, 1525.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1527-28.

⁸⁹ *Bloggers Say Pentagon May Court-Martial Christian Soldiers: Mostly False*, POLITIFACT.COM (May 6, 2013), <http://www.politifact.com/truth-o-meter/article/2013/may/06/pentagon-court-martialing-christian-soldiers/>; *Court-Martialed for Sharing Religious Faith?*, FACTCHECK.COM (May 10, 2013), <http://www.factcheck.org/2013/05/court-martialed-for-sharing-religious-faith/>.

members have been penalized for their views on marriage.⁹⁰ These false allegations are nothing more than political posturing and are both a disservice to the men and women who serve this country and a trivialization of their right to real religious accommodations. Indeed, Mark Welsh, the Air Force Chief of Staff, testified before Congress: “The single biggest frustration I've had in this job is the perception that somehow there is religious persecution inside the United States Air Force. It is not true. We have incidents like everybody has incidents.”⁹¹

These false accusations, however, are being used to try to redefine the notion of religious liberty in the military. Rather than protect services members from being subjected to coercive practices, advocates of these changes want to empower commanding officers and those in authority to have more opportunities to proselytize and pressure subordinates into engaging in religious activities.

Similarly, rather than celebrate that military chaplains for serving a religiously diverse military and faithfully facilitating the soldier’s voluntary and desired religious practices; there are efforts to change the role of the chaplain. Some seek to allow chaplains to refuse to serve service members of other faiths and to engage in sectarian prayers at official military events and ceremonies. But chaplains are there to serve service members, not for opportunities to proselytize and coerce others into practicing their own faith. Shifting the balance in this way transforms the purpose of chaplains and violates the constitutional rights of the service members who have the right to be free from unwanted proselytizing and coerced religious practices.

Conclusion

When it comes to debates about the meaning of religious freedom, it will be apparent today, as it is every week on cable television shows and internet blogs, that there are two dramatically differing worldviews about the topic. I believe that the position I articulated today is the one most consistent with both the historical intent and the future aspiration of most Americans. My view is not one of any demonstrated hostility to religion; it is a recognition of the value of the strictest government neutrality on religious matters. It grants no imprimatur on some or all religion over non-belief. It also requires the ministries and missions of all religious institutions to exist on the subsidies of believers in those programs and not in the largesse of taxpayers.

Thank you again for the opportunity to present this testimony.

⁹⁰ Oriana Pawlyk, *AF: Religious Intolerance Claim Unsubstantiated*, MILITARY TIMES (Oct. 11, 2013), <http://www.militarytimes.com/article/20131011/NEWS/310110013/AF-Religious-intolerance-claim-unsubstantiated>.

⁹¹ Fiscal Year 2015 National Defense Authorization Budget Request from the Department of the Air Force: Hearing on H.R. 4435 Before the H. Armed Serv.s Comm., 113th Cong. (2014) (statement of Gen. Mark A. Welsh III, Chief of Staff, U.S. Air Force).