RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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Laycock Amicus Brief:

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RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

FRIDAY, FEBRUARY 13, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 9:37 a.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, DeSantis, Gohmert, Jordan, Cohen, Conyers, Nadler and Deutch.

Staff Present: (Majority) John Coleman, Counsel; Tricia White, Clerk; (Minority) James Park, Subcommittee Chief Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Good morning. The quest for true religious freedom is one of humanity's greatest and most enduring dreams. Indeed, America's forebears fled the tyrannies of religious oppression abroad in the longing hope that America would be the place where they would find that freedom yearned for in every human heart to live according to the convictions of their faith.

Our Founding Fathers recognized and protected this foundational human right by enshrining it forever in the very first amendment to the United States Constitution. It states very simply and clearly that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Those noble, straightforward words, because of their enormous meaning and implication, have often been the target of distortion and attack. In 1990, the Supreme Court handed down the *Employment Division v. Smith* decision. It set the bar so low in allowing for the Government's infringing on religious freedom, that in many cases individuals could not successfully challenge overreaching laws that contradicted their faith. The Smith decision was widely regarded as one of the most radical departures from this long-settled Constitutional doctrine in American history.

In response to the Smith decision, with incredibly broad bipartisan support, Congress passed the Religious Freedom Restoration Act in 1993. That law restored the pre-Smith compelling interest standard, and along with it, religious liberty in America.

And in 2000, in direct response to another Supreme Court decision that threatened religious liberty, Congress passed the Religious Land Use and Institutionalized Persons Act, which prohibits the application of neutral and generally applicable laws in ways that substantially burden religion related to zoning, land marking, and prisons.

In his written testimony before the Senate Judiciary Committee on September 18th, 1992, Professor Douglas Laycock stated, "there is a simple reason why formerly neutral laws sometimes lead to religious persecution: because once government demands that religious minorities conform their behavior to secular standards, there is no logical stopping point. Sometimes the government will back off and create an exemption, but often the bureaucracy will grind forward, and persecution will be the result."

These critical statutes exist today because a broad group of lawmakers, organizations and Americans from both sides of the aisle believe that religious freedom was and is far more vital than that afforded by those profoundly flawed Supreme Court decisions. Support for religious freedom remains one of the very strongest commitments of the American people. According to a December 2012 Gallup Poll, nearly 70 percent of American adults are very religious or moderately religious, based on self-reports of the importance of religion in their daily lives and attendance at religious services.

Despite its critical importance to our Republic and a clear message from Congress and the American people, this current Administration's attitude toward religious freedom is nothing short of alarming. The Obama administration has consistently failed to recognize that religious liberty involves much more than the freedom to believe in any religion or none at all, rather, that religious liberty is exercised both in private and in public, informing all areas of an individual's life.

Religion in the United States has never been forcibly confined to one's church or one's home. In spite of the Constitution's clear provisions for the accommodation of religion, this Administration has repeatedly failed to create and honor needed religious exemptions from otherwise neutral laws.

In the last 3 years, the United States Supreme Court has ruled in favor of religious plaintiffs and against this Administration five times. Indeed, three of those five cases have been unanimous. This is stunning evidence of the Obama administration's failure to honor religious freedom in America.

My friends, the central phrase, the central phrase of America's Declaration of Independence is itself a statement of religious conviction. It states clearly that we are all created, and that is what makes us equal, and further, that each of us is endowed by our creator with the unalienable rights of life, liberty and the pursuit of happiness. It is so unfortunate that we must repeatedly remind the Obama administration that religious freedom is the very cornerstone of all other freedoms and that if it is lost, all other freedoms will ultimately be lost with it.

I look forward to today's examination of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. And I would like to thank our witnesses for being here.

And I will now yield to the distinguished Ranking Member of the full Committee for an opening statement.

Mr. CONYERS. Thank you, Chairman.

Members of the Committee, religious freedom, of course, was one of the core principles upon which our Nation was founded. This freedom was important enough that protections against unwarranted government intrusion into religious practice was enshrined in the First Amendment to our Constitution, and that is also why, after the Supreme Court in *Employment Division v. Smith* eliminated the compelling interest test for scrutinizing free exercise clause claims, a bipartisan coalition helped to shepherd the Religious Freedom Restoration Act of 1993 into law to restore those earlier protections.

The act has successfully helped to protect religious liberty over the last generation, yet recent developments have been troubling for those of us who believe that exemptions from generally applicable laws shouldn't be used to undermine women's health or the guarantee of equal treatment under the law. Unfortunately, in my view, the Supreme Court subverted congressional intent and undermined the act's purpose in *Burwell v. Hobby Lobby*. In that decision, the court held that for-profit corporations were entitled to an exemption under the Religious Freedom Restoration Act from the Affordable Care Act's contraception mandate because of the corporate owner's religious objection to the mandate.

To reach that holding, the court had to conclude that the precedents governing the Free Exercise Clause prior to Smith no longer governed interpretations of the Religious Freedom Restoration Act. That conclusion, to me, is contrary to what Congress intended when it passed the act. Indeed, the statute itself unambiguously made clear that its purpose was to restore the compelling interest test that applied to governmental burdens on the free exercise of religion prior to Smith.

Pre-Smith law was clear that commercial enterprises were not entitled to religious exemptions under the Free Exercise Clause. Also, as Justice Ginsburg noted in her strong dissent, no Constitutional tradition nor any prior decision interpreting this act allowed religious exemptions when such an accommodation harmed third parties. Yet that is exactly what happened in Hobby Lobby when the court denied contraceptive coverage to the company's women employees and shifted the costs of Hobby Lobby's religious accommodation onto those women.

A particularly troubling implication of the court's broad and unsupported interpretation of the Religious Freedom Restoration Act is that for-profit commercial entities can now seek exemptions from other generally applicable laws, including anti-discrimination laws. This clear threat to anti-discrimination laws could include efforts by businesses to exempt themselves under State versions of the Religious Freedom Restoration Act from State and local laws prohibiting discrimination on the basis of sexual orientation or gender.

It could also manifest itself in efforts by for-profit businesses to exempt themselves from any Federal efforts to combat discrimination against members of the lesbian, gay, bisexual and transgender communities, such as President Obama's executive order prohibiting discrimination against such individuals who are employees of Federal contractors.

And notwithstanding the assurances of the court's Hobby Lobby majority, it is entirely possible that a business claiming a sincerely held religious belief, for example, in White supremacy, could justify exemptions from Federal civil rights laws.

At the very least, we in Congress must examine how the Religious Freedom Restoration Act can be amended to address the very problematic reasoning of the Hobby Lobby decision.

While there is broad bipartisan support for the Religious Freedom Restoration Act and for strong protection of religious liberty, we have to acknowledge that we live in a pluralistic and religiously diverse society.

The act was meant to protect all, not to favor some at others' expense, and so at a minimum, we here should amend the act to address third-party harm to make clear that pre-Smith Free Exercise Clause precedents apply and limit the act's interpretation.

I thank you, Mr. Chairman.

I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman.

And I now yield to the Chairman of the full Committee, Mr. Goodlatte, from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

In 1777, Thomas Jefferson drafted a bill for establishing religious freedom. Introduced in the Virginia General Assembly in 1779, it was enacted into law on January 16, 1786, as the Virginia Statute for Religious Freedom. Last month we honored the Virginia Statute for Religious Freedom's 229th anniversary.

This Virginia law remains relevant today. In addition to being a model for the Free Exercise Clause of the First Amendment, its language continues to provide wisdom. The statute, for example, states in part, the opinions of men are not the object of civil government, nor under its jurisdiction.

This morning the Subcommittee on the Constitution and Civil Justice will examine the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. These two laws are vitally important means of protecting religious liberty in the United States and individuals' opinions from an interceding government.

The Religious Freedom Restoration Act prohibits the Federal Government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability. The exception is that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person, one, furthers a compelling governmental interest, and two, is the least restrictive means of furthering that compelling governmental interest.

I cosponsored this legislation when the Religious Freedom Restoration Act passed the House and Senate and was signed by the President in the 103rd Congress, and I was amazed at the incred-

ible bipartisan support the bill generated. Senator Charles Schumer, who was then representing the Ninth District of New York in the House and a Member of this Committee, introduced the bill. By the time the bill passed by a voice vote, it had the support of 170 cosponsors from both sides of the aisle.

A diverse array of organizations formed a bipartisan coalition to support this bill. This coalition included over 50 organizations, including the American Civil Liberties Union, Americans United for the Separation of Church and State, the Home School Legal Defense Association, the Traditional Values Coalition, Concerned Women for America, and the Christian Life Commission of the Southern Baptist Convention. It was incredible to see all sides come together for such an important piece of legislation.

Reflecting the same language as the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act prohibits any government from imposing or implementing a land use regulation in a manner that places a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates the burden, one, is in furtherance of a compelling governmental interest, and two, is the least restrictive means of furthering that compelling governmental interest.

It provides a similar religious protection for institutionalized persons, including prisoners. Congress made it clear that the Federal Government must provide religious accommodations in our laws, and any laws passed that infringe upon religious freedom must be subject to the strictest scrutiny in our courts.

And while religious liberty remains threatened, I am nevertheless encouraged by recent Supreme Court decisions in favor of religious plaintiffs. These cases indicate the religious protections passed by Congress are working. While not determining the outcome of any case, these crucial statutes provide individuals with practical and meaningful ways to challenge government infringements on their religious beliefs in court.

I want to thank all of our witnesses for coming today and I look forward to their testimony.

Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman.

And I now yield to the Ranking Member of the Subcommittee, Mr. Cohen, from Tennessee.

Mr. COHEN. Thank you, Mr. Chairman.

Today is the first hearing of this particular Subcommittee, and I am the Ranking Member again, and I appreciate that opportunity to serve, and I appreciate serving with Chairman Franks. We have served together as Chair and Ranking Member, and this is a Committee that gets some very emotional issues where people have strong opinions on each side, and yet Mr. Franks has always remained civil and respectful toward the—our side, despite the fact that his opinions are light years away. It is a large universe and we encompass it, but we do it in a good manner, and I appreciate that.

The freedom to practice one's religious free from undue governmental influences is particularly special in American history, and the First Amendment guarantees the right to freedom of religion,

along with speech and petition, and our First Amendment protections. And Thomas Jefferson, as Mr. Goodlatte mentioned, he is a big fan of Jefferson's, as am I, has on his resting place in Virginia three things: that he was the father of the Constitution, that he was the founder of the University of Virginia, and that he was the author of the declaration of religious independence or freedoms; nothing about being President or Secretary of State or any of those things, they were mundane, because it was values and ideas and education and liberty and freedom that was so important to him.

He has on the Jefferson Memorial, of course, he doesn't have this, the descendants have this, one of his particular quotes is that, "I swear upon the altar of God eternal hostility toward all forms of tyranny over the mind of man."

It is important that we understand that as our Founding Father's legacy and that we adhere to it, and we did in passing the Religious Freedom Restoration Act here. I was not here at the time. Mr. Goodlatte was.

But I was in the Tennessee State Senate, and I passed the Tennessee RFRA law and I was proud to do it. And there was that great coalition, as he mentioned here, of the ACLU to the Southern Baptist Convention, or something associated therewith, and all kind of diverse religious groups and folks about the First Amendment were all for it. And that was wonderful. And it was about, really, *Employment Division v. Smith*, and it was a direct reaction to that case that RFRA was passed with this broad bipartisan support and that we passed it in Tennessee as well.

Unfortunately, our Supreme Court, in its corporatization of America, which of course has also been part of the work of this Congress, took religious freedom from the ideas that were really held by Jefferson and others about individuals being oppressed by the government and gave it to corporations, and nobody had ever envisioned that, like nobody had envisioned corporations having the right to have free speech, free speech in the thousands and hundreds of thousands and millions of dollars to influence legislation and who gets elected and how the laws are made so that the tax rates are appropriate for those who have much so they could have much more and do much more trickle-down.

So the corporatization of America has taken place, and the courts did it in this case, and that is what happened and what broke apart that great bipartisan coalition that we were so proud of in passing RFRA.

To be concerned about the Hobby Lobby case, which is part of a whole series of cases with the Supreme Court and legislative actions that nobody would have envisioned, giving corporations rights and worshiping to the altar of the corporate god does not mean you are against religion. You can still be for religion.

And I am for religion and I'm for the separation of church and state and I'm for the First Amendment and I'm for RFRA as it was envisioned when it was passed and restore those pre-Smith laws, but the Hobby Lobby decision was aberrant, and that's why I and many other people who have deep—thought and felt commitments to religious liberty oppose Hobby Lobby decision, they still believe in RFRA, and they just think RFRA went too long.

It was an activist court, activist in the worst way, activists that gave powers to people that we never envisioned; not activists that went far to give minorities opportunity and minorities rights. It went far to give corporations rights. That's the wrong type of activism, in my opinion.

But I look forward to this hearing and listening to all of the witnesses and working with Mr. Franks as we go forward.

Mr. GOODLATTE. Would the gentleman yield?

Mr. COHEN. Yes, sir.

Mr. GOODLATTE. I thank the gentleman for yielding.

I appreciate his admiration of Thomas Jefferson, as I have.

I do want to get his tombstone correct, though. He did—he is identified on his tombstone as the author of the Declaration of Independence and the Virginia Statute for Religious Freedom, but he did not have any involvement in the writing of our Constitution. He was our ambassador to France. Instead, the third item is the establishment——

Mr. COHEN. University of Virginia.

Mr. GOODLATTE [continuing]. Of the University of Virginia.

Mr. COHEN. I thought I said that. Let's take a vote. How many of you think I said University of Virginia? Raise your hand. You're right. Vote's over.

Thank you, though.

Mr. GOODLATTE. I thank the gentleman.

Mr. FRANKS. The man is from Virginia.

Let me now introduce our witnesses. Our first witness is Lori Windham, senior counsel at the Becket Fund For Religious Freedom—for Religious Liberty. Ms. Windham has represented a variety of religious groups at every level, from the district courts to the Supreme Court. Her work includes the cases under the Free Exercise Clause, Establishment Clause, RFRA, and RLUIPA. We're glad you're here.

Our second witness is Gregory Baylor, senior counsel with Alliance Defending Freedom. Mr. Baylor litigates cases to protect the rights of religious students, faculty and staff at public colleges and universities across the Nation. Prior to joining Alliance Defending Freedom in 2009, he served as director with the Christian Legal Society Center for Law and Religious Freedom, where he defended religious liberty since 1994.

Our third witness, Professor Nelson Tebbe, teaches courses on Constitutional law, religious freedom, legal theory, and professional responsibility at Brooklyn Law School. Professor Tebbe is a co-organizer of the annual Law and Religion Roundtable and has previously served as the chair of the Law and Religion section of the Association of American Law Schools.

Our fourth and final witness, Craig Parshall, is special counsel to the American Center for Law and Justice. In addition to being a senior law and policy advisor to Washington, D.C.-based groups, Mr. Parshall writes and speaks about trends in Constitutional issues, culture, religion and media technology. He previously served as senior vice-president and general counsel at National Religious Broadcasters and was the founding director of the John Milton Project for Free Speech. Welcome, sir.

Now, each of the witness' written statements will be entered into the record in its entirety, and I would ask each witness to summarize his or her testimony within 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The lights will switch from green to yellow in concluding, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

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

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

You may be seated.

Let the record reflect that the witnesses answered in the affirmative.

I now recognize our first witness, Ms. Windham. And, Ms. Windham, if you want to make sure we turn on that microphone before you start. Yes, ma'am.

TESTIMONY OF LORI WINDHAM, SENIOR COUNSEL, THE BECKET FUND FOR RELIGIOUS LIBERTY

Ms. WINDHAM. Thank you, Chairman Franks, vice-chairman DeSantis, and other distinguished Members of the Subcommittee. Good morning.

Thank you for the invitation and opportunity to testify on the importance of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.

I represent the Becket Fund for Religious Liberty, where I serve as senior counsel. The Becket Fund is a non-profit public interest law firm dedicated to protecting the free expression of all religious traditions. For over 20 years, it has defended clients of all faiths, including Buddhists, Christians, Jews, Hindus, Muslims, Native Americans, Sikhs and other faith groups.

Its recent cases include three major Supreme Court victories: a unanimous ruling in a RLUIPA case, *Holt v. Hobbs*; the RFRA case of *Burwell v. Hobby Lobby*; and another unanimous ruling in *Hosanna-Tabor v. EEOC*.

Today I'd like to highlight the positive impacts of RFRA and RLUIPA for protecting the rights of Americans of all faiths, well known and little known, large and small. One example. According to documents released by the Department of the Interior, the department had an operation called Operation Pow-Wow.

Under Operation Pow-Wow, the department sent an undercover Federal agent to covertly enter a sacred Native American religious ceremony. While there, he questioned the participants, observed the ceremony, refused to leave after being asked to do so. The reason for this, the department was looking to see if the Native Americans in their religious ceremony were using permitted or non-permitted eagle feathers. The Becket Fund now represents Robert Soto, a renowned feather dancer and ordained religious leader in the Lipan Apache tribe, a tribe that has used eagle feathers as sacred emblems for centuries.

Federal law grants eagle feather permits to museums, scientists, zoos, farmers and other interests. It even allows wind farms to kill

eagles. The Federal Government grants permits for some religious uses, but only if the person is a member of a federally-recognized tribe. Mr. Soto's tribe is recognized by historians, sociologists and the State of Texas, but not by the Federal Government. He is not even allowed to use loose eagle feathers picked up off the ground.

Applying RFRA and Hobby Lobby precedent, the Fifth Circuit ruled against Operation Pow-Wow and for Mr. Soto. Mr. Soto is currently continuing his case in Federal court. As this case shows, RLUIPA's protections, RFRA's protections are still vital today.

When RFRA was passed in 1993, the bill was supported by one of the broadest coalitions in recent political history, with 66 religious and civil liberties groups, including Christians, Jews, Muslims, Sikhs, humanists, and secular civil liberties organizations. RFRA passed with unanimous support in the House and virtually unanimous support in the Senate.

RLUIPA, like RFRA, was enacted with overwhelming bipartisan support. It passed both the House and Senate by unanimous consent. In his signing statement, President Clinton noted that RLUIPA once again demonstrates that people of all political bents and faiths can work together for a common purpose that benefits all Americans.

RLUIPA has provided critical protections for religious exercise. The Supreme Court's recent decision in *Holt v. Hobbs*, another Becket Fund case, is an excellent example. There, the Supreme Court used RLUIPA to protect a Muslim prison inmate who sought to grow a religiously mandated half-inch beard. The Court recognized that government bureaucrats cannot use arbitrary double standards granting secular exemptions but not similar religious exemptions.

The unanimous Supreme Court explained that RLUIPA affords prison officials ample ability to maintain security. At the same time, RLUIPA requires government officials to scrutinize the asserted harm of granting specific exemptions to particular religious claimants. This is consistent with the statement made by RLUIPA's sponsors, Senators Hatch and Kennedy, who emphasized that inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post hoc rationalizations will not suffice to meet the act's requirements.

RLUIPA's land use provisions have allowed houses of worship across the Nation to escape discriminatory or substantially burdensome land use restrictions. RLUIPA protected a Muslim congregation in New Jersey after the City labeled the proposed mosque a public nuisance and tried to seize its land.

One of the earliest RLUIPA victories was for a Christian church in California when the City attempted to seize its land and build a Costco in its place. RLUIPA also protected a Sikh temple when a local government repeatedly gave contradictory reasons for denying its land use applications.

Protection for religious freedom, even when religious practices conflict with otherwise applicable law, is an important part of our Nation's history. We applaud Congress' commitment to the principle that religious freedom is fundamental human freedom and human dignity.

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

Mr. FRANKS. Well, thank you, Ms. Windham.

[The prepared statement of Ms. Windham follows:]

Written Statement of Lori Windham

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

Hearing on "Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act"

February 13, 2015

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Chairman Franks, Vice-Chairman DeSantis, and other distinguished Members of the Subcommittee: Good morning. I am here today representing The Becket Fund for Religious Liberty, where I serve as Senior Counsel. Thank you for the invitation and opportunity to offer testimony on the importance of the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA). At the Becket Fund, we work to defend the religious liberty rights of people of all faiths. Becket has significant experience with both RFRA and RLUIPA. We have clients across the nation under these statutes, including Catholics, Jews, Muslims, Protestants, and other faith groups. In the last seven months, the Becket Fund won cases under both RFRA and RLUIPA at the U.S. Supreme Court. Today, we'd like to highlight the positive impacts and special importance of RFRA and RLUIPA, particularly for those who adhere to minority faith traditions.

I'll first briefly discuss the history of RFRA and RLUIPA, which shows that bipartisan supporters of both statutes correctly anticipated that these laws would be critical for protecting the rights of Americans of all faiths, well-known and unknown, large and small. Second, I'll discuss case examples illustrating how RFRA and RLUIPA serve as a necessary bulwark for foundational American liberties.

I. Bipartisan Recognition of the Importance of RFRA and RLUIPA

In the wake of the Supreme Court's 1990 decision in *Employment Division v. Smith*, which cut back traditional constitutional protections for religious liberty, elected officials, scholars, and advocacy groups all along the political spectrum united to restore broader protections for religious freedom. They understood that such heightened protection was necessary to protect this fundamental American liberty. When RFRA was passed in 1993, the bill "was supported by one of the broadest coalitions in recent political history," with sixty-six religious and civil liberties groups, "including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations."[1] RFRA was introduced in the House by then-Representative Charles Schumer and it attracted no less than 170 co-sponsors from both political parties. The bill was unanimously approved in committee, and, after years of congressional hearings, the full House subsequently passed the bill by a

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[1] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210, 244 (1994); *see also id.* at 201 n.9 ("The Coalition for the Free Exercise of Religion included: Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference on Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League; Association of Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Christian Science Committee on Publication; Church of the Brethren; Church of Jesus Christ of Latter-day Saints; Church of Scientology International; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Episcopal Church; Evangelical Lutheran Church in America; Federation of Reconstructionist Congregations and Havurot; First Liberty Institute; Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation; Hadassah, The Women's Zionist Organization of America, Inc.; Home School Legal Defense Association; House of Bishops of the Episcopal Church; International Institute for Religious Freedom; Japanese American Citizens League; Jesuit Social Ministries, National Office; Justice Fellowship; Mennonite Central Committee U.S.; NA'AMAT USA; National Association of Evangelicals; National Council of Churches; National Council of Jewish Women; National Drug Strategy Network; National Federation of Temple Sisterhoods; National Islamic Prison Foundation; National Jewish Commission on Law and Public Affairs; National Jewish Community Relations Advisory Council; National Sikh Center; Native American Church of North America; North American Council for Muslim Women; People for the American Way Action Fund; Presbyterian Church (USA), Social Justice and Peacemaking Unit; Rabbinical Council of America; Traditional Values Coalition; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association of Congregations; United Church of Christ, Office for Church in Society; United Methodist Church, Board of Church and Society; United Synagogue of Conservative Judaism. . . . The American Bar Association did not formally join the Coalition, but repeatedly endorsed the bill."); American Bar Association, Statement of Support for the Religious Freedom Restoration Act of 1993 (Mar. 11, 1993).

unanimous vote.[2] The Senate's companion bill was jointly presented by Senators Orrin Hatch and Edward Kennedy. It garnered a bipartisan group of 58 co-sponsors and passed the full Senate by a vote of 97-3.[3]

Indeed, in his signing remarks, President Clinton noted "what a broad coalition of Americans came together to make this bill a reality," and that "many of the people in the coalition worked together across ideological and religious lines."[4] The President praised "the shared desire . . . to protect perhaps the most precious of all American liberties, religious freedom," even joked that "the power of God is such that even in legislative process miracles can happen."[5]

After the Supreme Court struck down the portion of RFRA that applied to the states,[6] Congress investigated state- and local-level burdens on religious freedom. It amassed evidence in nine congressional hearings that took place over the course of three years. Congress determined it was necessary to pass an additional law "to address 'those areas of law where the congressional record of religious discrimination and discretionary burden was the strongest': laws governing institutionalized persons (i.e., prisoners and persons in mental institutions) and land use laws."[7] Thus, RLUIPA was proposed and, like RFRA, it was enacted with overwhelming bipartisan support. It passed both the House and Senate by unanimous consent[8] and it was signed into law by President Clinton on September 22, 2000.[9] In his signing statement, President Clinton expressly applauded "Senators Kennedy, Hatch, Reid, and Schumer, and Representatives Canady and Nadler for their hard work in passing this legislation," and noted that RLUIPA "once again demonstrates that people of all political bents and faiths can work together for a common purpose that benefits all Americans."[10]

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

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

[4] Statement by President on Signing the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993).

[5] *Id.*

[6] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[7] Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Policy 501, 510 (2005) (quoting Roman P. Storzer and Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 944 (2001)).

[8] *See* S.2869, Bill Summary and Status for 106th Congress, (2000).

[9] Pub. L. No. 106-274, 114 Stat. 803 (2000).

[10] Statement by President on Signing of Law S. 2869 (Sept. 22, 2000), 2000 WL 1371281, at *1.

Proponents of both statutes recognized that these laws would protect religious expression that is unpopular, poorly understood, or otherwise unable to receive protection through the political process. A few examples are illustrative:

- Representative Nadler noted that Congress's "experience in the 3 years since *Smith* . . . demonstrated that religious minorities—and even majority religions—have been placed at a tremendous disadvantage. . . .What has made the American experiment work—what has saved us from the poisonous hatreds that are consuming other nations—has been a tolerance and a respect for diversity enshrined in the freedom of religion clauses of our Bill of Rights. It was no accident that the Framers of our Bill of Rights chose to place the free exercise of religion first among our fundamental freedoms. This House should do no less."[11]
- The American Jewish Congress offered testimony that "[a]ll religious minorities must be alarmed when the courts are stripped of the power to require government to accommodate those religious practices, to use Justice Scalia's phrase, 'not widely engaged in.' The Religious [Freedom] Restoration Act returns that power to the courts and, with it, ensures that government does not arbitrarily interfere with religious freedom."[12]
- Elder Oaks from the LDS Church testified that "political power or impact must not be the measure of which religious practices can be forbidden by law. The Bill of Rights protects principles, not constituencies."[13]
- The President of the ACLU testified that "members of minority religious groups, should not have to depend on accidents of political process to protect their fundamental freedoms," and that without the passage of RFRA, religious liberty would be "[g]ravely [t]hreatened."[14]
- Similarly, the Senate Report accompanying RFRA stated: "State and local legislative bodies cannot be relied upon to craft exceptions from laws of

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[11] Cong. Rec. H.R. 1308, at 2359-60 (May 11, 1993).

[12] Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 101st Cong., 2d Sess., at Appendix 1 (1990) (statement of the American Jewish Congress).

[13] Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess., at 25 (1992).

[14] *Id.* at 64, 80.

> general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right."[15]

In hearings focused on the context of religious land use, both statistical and anecdotal evidence demonstrated widespread resistance to churches in the zoning context.[16] For example, Congress observed in a House Committee report that "an Orthodox Jewish rabbi was threatened with criminal prosecution for leading morning and evening prayers in a converted garage in one of Miami's single-family residential areas" and that the "Eleventh Circuit held that, in this post-Smith world, the city's interest in an exception-free zoning plan outweighed the rabbi's interest" in providing the services.[17]

In the penal setting, Congress also observed that "that 'frivolous or arbitrary' barriers impeded institutionalized persons" religious exercise.[18] A joint statement of Sen. Hatch and Sen. Kennedy noted that "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."[19] For example, Congress received testimony observing that in Michigan, prison officials refused to provide matzo, the unleavened bread required to be eaten by Jews on Passover, "essentially forcing all Jewish inmates to violate their sacred religious practices."[20] The prison's action was made even more arbitrary by the fact that a "Jewish organization ha[d] offered to donate and ship matzo to meet the prisoners' needs during Passover, but the officials ha[d] refused even the donated matzo."[21] Congress also noted a case where prison personnel deliberately intercepted confessional communications of prisoners, and noted that

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[15] Senate Comm. on the Judiciary, Religious Freedom Restoration Act of 1993, S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903.

[16] Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1022 (2012) (citing H.R. Rep. No. 106-219, at 18-24 (1999)); 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (noting "massive evidence" of widespread discrimination against churches)).

[17] H.R. Rep. No. 106-219, at 10-11 (1999).

[18] *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)).

[19] *Id.*

[20] H.R. Rep. No. 106-219, at 9-10 (1999).

[21] *Id.* at 10; *see also* Yehuda M. Braunstein, *Will Jewish Prisoners Be Boerne Again? Legislative Responses to City of Boerne v. Flores*, 66 FORDHAM L. REV. 2333, 2358 (1998).

such interference with religious practice could continue absent the protections of a strict scrutiny test.[22]

At various times, Congress considered including within RFRA essentially a list of specific types of religious practices that would be allowable, along with those that could be prohibited or regulated.[23] However, implementing a single, universal standard was critical to holding the broad coalition together. Representative Solarz, a leading sponsor of the bill, clearly explained the problem that would have occurred had Congress allowed exceptions to proliferate:

> If Congress succumbs to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeed[ed] in codifying rather than reversing *Smith*. Under those circumstances, it would probably be better to do nothing and hope that subsequent Administrations will appoint more enlightened Justices.[24]

In sum, advocates of these statutes recognized that just as protecting free speech means occasionally tolerating speech we would prefer not to hear, so too would courts occasionally apply stringent religious protections to permit religious practices we would prefer not to accommodate. This is particularly important in a nation such as ours, which has a long tradition of protecting religious freedom. Religious groups, large and small, have existed in and served our nation throughout its history, and continue to do so today. "[V]irtually every religion in the world is represented in the population of the United States."[25] And most individual congregations are small—half the churches in America have fewer than 50 regularly participating adults.[26]

Thus, to avoid playing favorites, and to ensure the most robust protections of religious freedom, "Congress in 1993 did what the First Congress had done in 1789.

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[22] H.R. Rep. No. 106-219, at 9 (1999). Although an amendment to exempt prisons from heightened religious protections was introduced, it was easily defeated. *See* 139 Cong. Rec. S14,468 (daily ed. October 27, 1993); S. Rep. No. 103-111, reprinted in 1993 U.S.C.C.A.N. 1892.

[23] Laycock & Thomas, *supra* note 1 at 219.

[24] Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess., at 124 (1992).

[25] *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring).

[26] *See* Mark Chaves, *Congregations in America* 18 (2004).

It enacted a general principle of religious liberty, saying nothing about individual cases, and it authorized enforcement by the judiciary, leaving application of the principle to case-by-case determinations."[27]

II. Key Cases Where RFRA and RLUIPA Protected Important Religious Rights

In the years since their passage, both RFRA and RLUIPA have succeeded in providing critical protections for religious freedom. I would like to address a few examples that demonstrate (1) the success of this "case-by-base" determination, and (2) the way that RFRA and RLUIPA, as predicted, have been essential bulwarks in protecting a fundamental right.

A recent Becket Fund case illustrates the success of RFRA's case-by-case analysis. In *Tagore v. United States*, RFRA protected a Sikh woman's right to carry one of the five symbols of her faith—her kirpan, a small article of faith similar in shape but not in sharpness or function to a knife.[28] Ms. Tagore was fired from her accountant position with the IRS, banned from accessing federal buildings, and blackballed from future federal employment simply because her ceremonial kirpan had a 3-inch blade. Yet the federal government freely allows the public to access those same buildings with sharp 2.5-inch blade knives, metal canes, and other potentially dangerous items, and lets federal employees use far longer and sharper cake knives, box cutters, and other similar items inside the buildings. Because of the religious protections afforded by RFRA, the Fifth Circuit held that the government had substantially burdened Ms. Tagore's religious beliefs, and the case subsequently settled in Ms. Tagore's favor.

RLUIPA has likewise provided critical protections to religious exercise. The Supreme Court's recent decision in *Holt v. Hobbs*, another Becket Fund case, is an excellent example. There, the Supreme Court used RLUIPA to protect a Muslim prison inmate who sought to grow a religiously-mandated half-inch beard.[29] The Court took up the case after receiving an emergency *pro se* petition from the prisoner seeking to avoid having his beard forcibly shaved by prison officials. The Supreme Court reinforced the rule that "idiosyncratic" beliefs are just as protected

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[27] Laycock & Thomas, *supra* note 1 at 221.

[28] *Tagore v. U.S.*, 735 F.3d 324 (5th Cir. 2013); *see also Court of Appeals: Federal Government Burdened Sikh Religious Liberty*, Press Releases, http://www.becketfund.org/court-appeals-federal-government-burdened-sikh-religious-liberty/ (last visited Feb. 11, 2015).

[29] *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

as familiar ones.[30] The Court also reaffirmed the important principle that government bureaucrats cannot override sincere religious beliefs when they have failed to produce evidence that the government has compelling interests that would be otherwise undermined, or when they employ arbitrary double standards to grant exemptions to some groups and not others.[31] RLUIPA thus requires government officials to pursue their interests in a neutral manner, treating all religious groups evenhandedly, and ensuring that exceptions made for secular reasons may be applied to religious reasons, as well.

In a series of appellate court victories, RLUIPA has protected Jewish prison inmates seeking access to kosher meals. The Becket Fund has successfully litigated such cases in Florida[32] and Texas.[33] Courts have ruled, for example, that where prisons cannot demonstrate a compelling interest, inmates should not have to choose between sincerely held religious beliefs and receiving adequate nutrition. Other courts have relied upon RLUIPA to protect prison inmates engaging in diverse religious practices, including a Native American who could not cut his hair, a Santeria practitioner who needed access to consecrated religious items, and Muslim who sought a halal diet.[34]

Courts have encountered some confusion over how much deference is due to prison administrators under RLUIPA's standard. A prior Supreme Court decision, *Cutter v. Wilkinson*, indicated that prison officials are owed some deference. The unanimous Supreme Court explained in *Holt* that RLUIPA "affords prison officials ample ability to maintain security," and that "courts should not blind themselves to the fact that the analysis is conducted in the prison setting."[35] At the same time, RLUIPA requires government officials to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants" and "to look to the marginal

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[30] *Id.* at 862-63.

[31] *Id.* at 863-67.

[32] *See Rich v. Sec., Florida Dept. of Corrections*, 716 F.3d 525 (11th Cir. 2013); *see also Rich v. Buss* , http://www.becketfund.org/rich/ (last visited Feb. 11, 2015); *Cotton v. Florida Dept. of Corrections*, http://www.becketfund.org/rluipa_posts/cotton-v-florida-dept-of-corrections/ (last visited Feb. 11, 2015).

[33] *See Moussazadeh v. Texas Dept. of Crim. J.*, 703 F.3d 781 (5th Cir. 2012), *as corrected* (Feb. 20, 2013); *see also* Moussazadeh v. Texas Department of Criminal Justice, , http://www.becketfund.org/moussazadeh/ (last visited Feb. 11, 2015); Indiana Waves the White Flag, Becket Blog, http://www.becketfund.org/indiana-waves-the-white-flag/ (last visited Feb. 11, 2015).

[34] *See Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005); *Davila v. Gladden*, No. 13-10739, 2015 WL 127364 (11th Cir. Jan. 9, 2015); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010).

[35] *Holt,* 135 S. Ct. at 866.

interest in enforcing the challenged government action in that particular context."[36] This is consistent with the statement made by RLUIPA's sponsors, who emphasized that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."[37]

RLUIPA's land use provisions have allowed houses of worship across the nation to escape discriminatory or substantially burdensome land use restrictions. For example, the Becket Fund successfully represented a Muslim congregation in New Jersey after a municipality labeled the congregation's proposed mosque a "public nuisance" and sought to seize the property for "open space."[38] One of the earliest RLUIPA victories protected a church in California when a city attempted to seize its land in order to build a Costco.[39] RLUIPA also protected a Sikh *gurudwara*, or temple, when a local government repeatedly gave contradictory reasons for denying its land use applications.[40]

One of RLUIPA's most successful provisions is its Equal Terms requirement. This provision, which has no textual parallel in RFRA, requires governments to treat religious assemblies on equal terms with non-religious assemblies. This provision has protected a rabbi who held *minyans*, or prayer meetings, in his home; an evangelical church prohibited from operating in a district where private clubs were allowed; and a synagogue prohibited from locating in a district where clubs and lodges were allowed.[41]

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[36] *Id.* at 863 (emphasis added).

[37] 146 Cong. Rec. 16698, 16699 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (quotation omitted).

[38] *See Albanian Associated Fund v. Township of Wayne*, CIVA 06-CV-3217 PGS, 2007 WL 4232966, at *1 (D.N.J. Nov. 29, 2007); Albanian Associated Fund v. Township of Wayne, NJ, http://www.becketfund.org/albanian-associated-fund-v-township-of-wayne-nj/ (last visited Feb. 11, 2015).

[39] *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

[40] *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006).

[41] *Konikov v. Orange Cnty., Fla.*, 410 F.3d 1317 (11th Cir. 2005); *Elijah Grp., Inc. v. City of Leon Valley, Tex.*, 643 F.3d 419, 420 (5th Cir. 2011); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

The Supreme Court's recent decisions in *Hobby Lobby* and *Holt* have already led—and will likely continue to lead—to positive developments in the lower courts.[42] In one current case,[43] the Becket Fund represents Robert Soto, a renowned feather dancer and ordained American Indian religious leader in the Lipan Apache Tribe—a tribe that has used eagle feathers as sacred emblems in religious ceremonies for centuries. At a gathering of Native Americans, a federal agent invaded the ceremony, confiscated sacred property, and threatened to punish the Native Americans if they resisted. The federal employee claimed the be enforcing the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, which prohibit possession of eagle feathers without a permit. The laws grant permits to museums, scientists, zoos, farmers, and "other interests." They also grant permits for some American Indian religious uses—but only if the Indian is a member of a "federally recognized tribe." Mr. Soto's tribe is not recognized by the federal government, despite the fact that it is recognized by historians, sociologists, and the State of Texas. Applying RFRA and the *Hobby Lobby* precedent, the Fifth Circuit ruled against this arbitrary government action and allowed Mr. Soto to continue his case in district court.[44]

III. Conclusion

Protection for religious freedom, even when religious practices conflict with otherwise applicable law, is an important part of our nation's history.[45] Such protections help religious groups, including minority faiths, to thrive. Without such protections, the Amish could be forced to give up their way of life,[46] Jehovah's Witnesses could be forced to bear arms,[47] Seventh-Day Adventists and Jews could

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[42] *See, e.g.*, *Davila v. Gladden*, No. 13-10739, 2015 WL 127364 (11th Cir. Jan. 9, 2015) (applying *Hobby Lobby* and conducting analysis similar to that of *Holt*).

[43] *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014); *see also McAllen Grace Brethren Church v. Salazar*, http://www.becketfund.org/mcallen-grace-v-salazar/ (last visited Feb. 11, 2015).

[44] *Id.*.

[45] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[46] *See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[47] Conscientious objection to military service is protected by statues, the first of which was enacted during the Civil War. *See* Kevin Seamus Hasson, *The Right to Be Wrong* 51-52 (2005). During World War II, Jehovah's Witnesses faced mob violence for their religiously motivated refusal to bear arms and to salute the flag. Their struggles against general laws regulating speech have been responsible for a number of key First Amendment decisions. *See generally* Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (2000).

face a choice between their livelihood and keeping the Sabbath.[48] We applaud Congress's commitment to the principle that religious liberty is fundamental to freedom and to human dignity, and that protecting the religious rights of others—even the rights of those with whom we may disagree—ultimately leads to greater protections for all of our rights.

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

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[48] *See Sherbert v. Verner*, 374 U.S. 398 (1963) (protecting right of Seventh Day Adventist to refuse Saturday work); *Braunfeld v. Brown*, 366 U.S. 599 (1961). In *Braunfeld*, the Supreme Court upheld the law as justified by compelling interest, even though it placed heavy burdens on religious exercise. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006) (discussing *Braunfeld* in the exemption context).

Mr. FRANKS. And I would now recognize our second witness, Mr. Baylor. And, sir, please turn on your microphone. You got it.

TESTIMONY OF GREGORY S. BAYLOR, SENIOR COUNSEL, ALLIANCE DEFENDING FREEDOM

Mr. BAYLOR. Thank you. My name is Gregory Baylor and I serve as senior counsel with Alliance Defending Freedom, a non-profit legal organization that advocates for religious liberty, the sanctity of life, marriage and the family through strategy, funding, training and litigation.

I appreciate very much the opportunity to testify today regarding the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. I will focus my testimony on RFRA.

In response to a damaging and unexpected Supreme Court decision, Congress restored robust legal protection for religious exercise when it enacted the Religious Freedom Restoration Act in 1993. The coalition supporting RFRA and the foundational principles underlying it was remarkably broad and diverse.

Over 20 years later, support for those principles and perhaps for RFRA itself has notably waned in some quarters. Given this unfortunate development, I think, I believe that a look back at RFRA's enactment and the circumstances surrounding it is warranted.

Beginning in 1963, the United States Supreme Court held that government burdens on religious exercise violate the First Amendment's Free Exercise Clause unless those burdens are justified by interests of the highest order. Under this approach, the court protected, for example, the rights of a Seventh Day Adventist who declined work on her sabbath, and it protected the rights of Old Order Amish families to make religiously-based decisions about the schooling of their children.

In each case, the court understood that most government burdens on religious exercise come from facially neutral and generally applicable laws, ones that do not single out religion for especially disfavored treatment. The court acknowledged also that although important government interests were behind the laws in question in these cases, the State failed to prove that exempting these claimants would unacceptably danger what the court called paramount interests. The court also indicated that government could use other, less restrictive means to pursue its stated goals.

The Supreme Court, of course, unexpectedly abandoned this approach to free exercise in 1990 in *Employment Division v. Smith*, as has been said. The court concluded that facially neutral laws of general applicability burdening religious exercise generally require no special justifications to satisfy Free Exercise Clause scrutiny.

A large number of religious and civil rights organizations promptly formed the Coalition for the Free Exercise of Religion to urge Congress to restore strong legal protections for religious liberty. The 68-member, or 66- or 54-, I've heard different numbers, member coalition included the Baptist Joint Committee for Religious Liberty, the American Jewish Congress, Americans United for Separation of Church and State, Christian Legal Society, the American Civil Liberties Union, Agudath Israel of America, and the National Association of Evangelicals. The coalition drafted and

advocated for legislation designed to restore strict scrutiny to Free Exercise cases. Large numbers of Congressmen and Senators from both sides of the aisle co-sponsored RFRA.

Lawmakers and advocates for the bill emphasized a number of key themes. First, they observed that pervasive governmental regulation adversely affects adherents of all faiths, large or small.

Second, they stressed that RFRA merely set forth the relevant test that judges and other government officials should apply when examining claims of free exercise. RFRA didn't dictate the results in particular cases.

Third, and relatedly, and I think this goes to some of the comments that have already been made, Congress and RFRA's diverse supporters were well aware that the statute's protections might be relevant in cases involving emotionally charged, so-called culture war issues.

Congress subsequently voted overwhelmingly to enact RFRA. It passed the Senate, as has been said, by a vote of 97 to 3, and it passed the House by unanimous voice vote.

Now, recounting this history I hope will help serve as a corrective to the current impulse to doubt the wisdom of that Congress and of the very broad spectrum of individuals and organizations who labored to restore adequate legal protection of religious exercise.

That impulse is driven in no small part by the Supreme Court's relatively recent decision in *Burwell v. Hobby Lobby Stores*. In that case, of course, the court held that the Federal Government violated RFRA by threatening to impose crippling fines upon family business owners who refused, for reasons of conscience, to include abortion-inducing drugs and devices in their employee health plans.

Unhappiness with the outcome of that case has contributed to a growing skepticism, even hostility, toward RFRA and its underlying principles; indeed, those that have—that would have partially repealed RFRA were introduced last summer in the wake of the Hobby Lobby decision. Thankfully, RFRA survived.

I urge Congress to resist any further efforts to undermine the Religious Freedom Restoration's Act indispensable protection of our first freedom.

Thank you again for the opportunity to testify. I look forward to addressing any questions Members of the Subcommittee may have.

Mr. FRANKS. And thank you, Mr. Baylor.

[The prepared statement of Mr. Baylor follows:]

TESTIMONY

BEFORE THE SUBCOMMITTEE ON

THE CONSTITUTION AND CIVIL JUSTICE

OF THE

HOUSE COMMITTEE ON

THE JUDICIARY

ON

OVERSIGHT OF THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

BY

GREGORY S. BAYLOR

SENIOR COUNSEL, ALLIANCE DEFENDING FREEDOM

FEBRUARY 13, 2015

My name is Gregory Baylor, and I serve as Senior Counsel with Alliance Defending Freedom, a non-profit legal organization that advocates for religious liberty, the sanctity of life, and marriage and the family through strategy, funding, training, and litigation. I appreciate the opportunity to submit this testimony regarding the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.

In response to a damaging and unexpected Supreme Court decision, Congress restored robust legal protection for religious exercise when it enacted the Religious Freedom Restoration Act in 1993.[1] The coalition supporting RFRA—and the foundational principles underlying it—was remarkably broad and diverse. Over 20 years later, support for those principles (and perhaps for RFRA itself) has notably waned in some quarters. Given this unfortunate development, a look back at RFRA's enactment and the circumstances surrounding it is more than warranted.

In its 1963 decision in *Sherbert v. Verner*,[2] the United States Supreme Court held that government burdens on religious exercise violate the First Amendment's Free Exercise Clause unless justified by interests of the highest order. The case arose when Adell Sherbert, a Seventh-day Adventist, was fired from her job at a textile mill when she refused to work on her Sabbath. After her discharge, she sought unemployment compensation. The state of South Carolina denied her application pursuant to a state statute withholding benefits from those who "fail, without good cause, to accept suitable work when offered."[3] Sherbert sued, claiming that the state had violated the Free Exercise Clause. The state courts ruled against her, but she persuaded the U.S. Supreme Court to take her case.

[1] 42 U.S.C. § 2000bb *et seq.*
[2] 374 U.S. 398 (1963).
[3] *Id.* at 401 (internal quotation omitted).

In assessing Sherbert's claim, the Court utilized what came to be known as "strict scrutiny" or the "compelling governmental interest" test. In an opinion authored by Justice William Brennan, the Court first assessed whether the denial of benefits burdened her religious exercise. It answered that question in the affirmative, reasoning as follows:

> [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[4]

The Court then considered "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right."[5] The Court observed that "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[6] South Carolina alleged that conferring benefits upon Sherbert under the circumstances might motivate "unscrupulous claimants" to file fraudulent claims feigning religious objections to Saturday work and thereby diminish the unemployment compensation fund.[7] The Court found that the state had presented no evidence supporting this fear. Moreover, it declared "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[8] In other words, even if

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[4] *Id.* at 404.
[5] *Id.* at 406.
[6] *Id.* (quotation omitted).
[7] *Id.* at 407.
[8] *Id.*

the government identifies a compelling interest, it must prove that burdening the claimant's religious exercise is the least restrictive means of advancing that interest.

The Supreme Court applied *Sherbert*'s compelling interest test in *Wisconsin v. Yoder*,[9] a case involving Old Order Amish parents who declined, for religious reasons and in violation of state compulsory education laws, to send their children to school beyond the eighth grade. The Court found that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[10] That the burden on religious exercise resulted from a facially neutrally, generally applicable law—just as in *Sherbert*—did not warrant application of anything short of strict scrutiny.

As in *Sherbert*, the Court then examined whether "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[11] Wisconsin claimed that its interest in universal compulsory formal secondary education was sufficiently weighty to justify its infringement on the claimants' religious exercise. The state argued "that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society."[12] The Court accepted those propositions in general, but rejected the contention that two

[9] 406 U.S. 205 (1972).
[10] *Id.* at 218.
[11] *Id.* at 214.
[12] *Id.* at 221.

additional years of schooling was necessary with respect to the Amish children in question.[13] The Court thus held that Wisconsin violated the parents' rights under the Free Exercise Clause.

The Supreme Court unexpectedly abandoned the *Sherbert/Yoder* approach to free exercise in *Employment Division v. Smith*.[14] The case arose when two members of the Native American Church were fired from their jobs for ingesting peyote (an illegal drug) for sacramental purposes. The state of Oregon rejected their applications for unemployment compensation, concluding that they had been discharged for work-related "misconduct," and were thus statutorily ineligible for benefits.[15] Invoking (among other cases) *Sherbert v. Verner*, the claimants argued that Oregon violated the Free Exercise Clause by withholding benefits.[16]

Their case reached the U.S. Supreme Court, which shocked most observers by largely abandoning "strict scrutiny." The Court concluded that facially neutral laws of general applicability burdening religious exercise generally require no special justifications to satisfy Free Exercise scrutiny.[17] The majority declared that:

> the sounder approach [to challenges to generally applicable criminal prohibitions], and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense.[18]

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[13] *Id.* at 222.
[14] 494 U.S. 872 (1990).
[15] *Id.* at 874.
[16] *Id.* at 876.
[17] *Id.* at 876 *et seq.*
[18] *Id.* at 885 (citations and quotations omitted).

Justice O'Connor took strong exception to the majority's abandonment of strict scrutiny. Rejecting the Court's distinction between laws targeting religion and those "incidentally" burdening religion, she stated:

> few States would be so naïve as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.[19]

Disappointment with—even anger at—the majority's opinion was not limited to other Justices. A large number of religious and civil rights organizations promptly formed the Coalition for the Free Exercise of Religion to urge Congress to restore strong legal protection for religious liberty. The 68-member Coalition included the Baptist Joint Committee for Religious Liberty, the American Jewish Congress, Americans United for Separation of Church and State, Christian Legal Society, the American Civil Liberties Union, Agudath Israel of America, and the National Association of Evangelicals.[20]

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[19] 494 U.S. at 893 (O'Connor, J., concurring).

[20] Coalition members were: Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference on Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League; Association of Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Christian Science Committee on Publication; Church of the Brethren; Church of Jesus Christ of Latter-day Saints; Church of Scientology International; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Episcopal Church; Evangelical Lutheran 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

Legislation designed to restore strict scrutiny to free exercise cases was first introduced in the 101st Congress.[21] It was re-introduced in the 102d Congress, and the Senate Judiciary Committee held a hearing on September 18, 1992. Witnesses included Hmong practitioner William Nouyi Yang; Dallin H. Oaks, quorum of the twelve apostles, Church of Jesus Christ of Latter-Day Saints; Oliver S. Thomas, general counsel, Baptist Joint Committee on Public Affairs; Douglas Laycock, professor, University of Texas School of Law; Mark E. Chopko, general counsel, U.S. Catholic Conference; attorney Bruce Fein; Forest D. Montgomery, counsel, Office of Public Affairs, National Association of Evangelicals; Michael P. Farris, president, Home School Legal Defense Association; Nadine Strossen, president, American Civil Liberties Union; and James Bopp, Jr., general counsel, National Right to Life Committee, Inc.

In his opening statement, Senator Edward Kennedy (D-MA) observed that RFRA:

> is strongly supported by an extraordinary coalition of organizations with widely differing views on many issues. The National Association of Evangelicals, the American Civil Liberties Union, the Coalitions for America, People for the American Way, just to name a few support the legislation. They don't often agree on much, but they do agree on the

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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 groups).

[21] S. 3254.

> need to pass the Religious Freedom Restoration Act because religious freedom in America is damaged each day the *Smith* decision stands.[22]

Senator Orrin Hatch (R-UT) similarly remarked:

> I will conclude [my opening remarks] by observing that a broad spectrum of organizations support this bill. When the American Civil Liberties Union and the Coalitions for America see eye to eye on a major piece of legislation, I think it is certainly safe to say that someone has seen the light . . . .[23]

Oliver Thomas, general counsel of the Baptist Joint Committee and co-chair of the Coalition likewise observed:

> The support for this piece of legislation is, as Senator Kennedy has characterized it, extraordinary. Never have I seen a coalition quite like the Coalition for the Free Exercise of Religion—People for the American Way on the one hand; the Traditional Values Coalition and Concerned Women for America, on the other; the American Civil Liberties Union, the Southern Baptist Convention, Agudath Israel, and the American Muslim Council; 54 organizations, Mr. Chairman, 54 organizations willing to set aside their deep political and ideological differences in order to unite in a common vision for the common good—religious liberty for all Americans. Let us face it. What else can Nadine Strossen, Paul Weyrich, Norman Lear, and Beverly LaHaye agree on?[24]

Large numbers of both Democratic and Republican Congressmen and Senators co-sponsored RFRA. The version of RFRA ultimately passed by the 103d Congress was introduced by Senators Kennedy and Hatch, and was co-sponsored by Senators Akaka, Bennett, Bond, Boxer, Bradley, Breaux, Brown, Bumpers, Campbell, Coats, Cohen, Danforth, Daschle, DeConcini, Dodd, Dorgan, Durenberger, Exon, Feingold, Feinstein, Glenn, Graham, Gregg, Harkin, Hatfield, Inouye, Jeffords, Kassebaum, Kempthorne, Kerrey, Kerry, Kohl, Lautenberg, Levin, Lieberman, Lugar, Mack, McConnell, Metzenbaum, Mikulski, Moseley-Braun,

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[22] Hearing Before the Committee on the Judiciary, United States Senate, 102d Congress, 2d Sess., on S. 2969, A Bill to Protect the Free Exercise of Religion (Sep. 18, 1992), at 2 (hereinafter "Hearing").
[23] *Hearing* at 8.
[24] *Hearing* at 41.

Moynihan, Murray, Nickles, Packwood, Pell, Pryor, Reid, Riegle, Rockefeller, Sarbanes, Sasser, Specter, Wellstone, and Wofford.[25]

Lawmakers and hearing witnesses emphasized a number of key themes. First, they observed that pervasive governmental regulation adversely affects adherents of all faiths, large and small.[26] Prof. Laycock observed that *Smith*'s errors "affect not only minority or immigrant religions that are well outside the mainstream, but also mainstream faiths. In a pervasively regulated society, *Smith* means that churches and religious believers will be pervasively regulated because every generally applicable [law] that applies to anybody else applies to the churches."[27]

Second, they stressed that RFRA merely set forth the relevant test for assessing free exercise claims, without dictating results in particular disputes. For example, Oliver Thomas testified that RFRA "would restore the time-honored compelling interest test and ensure its application in all cases where free exercise of religion is burdened—nothing more, nothing less. The bill expresses no opinion on the merits of particular free exercise claims but rather leaves such decisions to the courts after consideration of all pertinent facts and circumstances. The beauty of [RFRA] is its commitment to a principle—religious liberty for <u>all</u> Americans."[28] ACLU President Nadine Strossen testified:

> [RFRA] merely returns judicial decision-making in the religious freedom area to the compelling interest standard that the courts apply to all fundamental rights. It does not decide how those claims will be evaluated when the courts balance those interests against legitimate compelling state

[25] S. Rep. No. 111, 103d Cong., 1st Sess. (Jul. 27, 1993).
[26] *See, e.g.*, *Hearing* at 63-64 (describing infringements experienced by Mormons, Catholics, Jehovah's Witnesses, Orthodox Jews, Evangelical Protestants, and the Hmong) (Statement of Prof. Laycock).
[27] *Id.* at 63.
[28] *Hearing* at 45-46. *See also id.* at 2 ("Not every free exercise claim will prevail.")(Statement of Sen. Kennedy).

> interests. The courts have had little difficulty in finding a compelling state interest to exist when the government has sought to protect health, safety, or even national security.[29]

Strossen also declared:

> It should be clear to this Committee that enactment of [RFRA] will not guarantee that claims of religious liberty will always prevail. We invest government with broad and important powers that sometimes override individual liberty.[30]

Third, and relatedly, Congress and RFRA's diverse supporters were well aware that the statute's protections might be relevant in cases involving emotionally charged "culture war" issues. After recounting how facially neutral, generally applicable laws had been used at certain points in American history to infringe the religious exercise of Mormons, Catholics, and Jehovah's Witnesses, Prof. Laycock (who is not a political or religious conservative) stated:

> The contemporary examples span the range of religious faiths and practices. Gay rights suits against Catholics, Orthodox Jews, and Conservative Protestants are going on all over the country, and the churches are often losing those cases. . . . *St. Agnes Hospital*, where a Catholic hospital loses its accreditation because it won't do abortions, is a real case. Pro-life doctors and nurses and residency programs forced out of ob-gyn are not imaginary. Catholic money supporting student gay rights groups at Georgetown is a real case. Unwed mothers suing the church for the right to teach in their elementary schools is a real case.
>
> . . .
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> Culturally conservative churches, including Catholics, conservative Protestants, Orthodox Jews, and Mormons, are under constant attack on issues related to abortion, homosexuality, ordination of women, and moral standards for sexual behavior. The most aggressive elements of the pro-choice, gay rights, and feminist movements are not content to prevail in larger society; they also want to impose their agenda on dissenting churches.[31]

Nadine Strossen, president of the ACLU, testified:

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[29] *Hearing* at 199.
[30] *Hearing* at 200.
[31] *Hearing* at 64-65, 72.

> In the aftermath of the Smith decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws. At risk were such familiar practices as . . . religious preferences in church hiring, . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services, . . . [and] a church's refusal to ordain women or homosexuals.[32]

And certain of the post-*Smith* reported adverse judicial decisions cited by witnesses supporting RFRA involved claims under non-discrimination laws.[33]

Of course, Congress subsequently voted overwhelming to enact RFRA. It passed the Senate by a vote of 97-3 and the House by unanimous voice vote.[34] In his remarks upon signing RFRA on November 16, 1993, President Bill Clinton rightly echoed earlier observations about the diverse coalition that supported RFRA:

> It is interesting to note . . . what a broad coalition of Americans came together to make this bill a reality . . . . I'm told that, as many of the people in the coalition worked together across ideological and religious lines, some new friendships were formed and some new trust was established, which shows, I suppose that the power of God is such that even in the legislative process miracles can happen.[35]

He concluded:

> [L]et us never believe that the freedom of religion imposes on any of us some responsibility to run from our convictions. Let us instead respect one another's faiths, fight to the death to preserve the rights of every American to practice whatever convictions he or she has, but bring our values back to the table of American discourse to heal our troubled land.[36]

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[32] *Hearing* at 192.

[33] *Hearing* 50-58, citing *inter alia*, *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (N.D. Ill. 1990); *Black v. Snyder*, 471 N.W.2d 715 (Minn. App. 1991); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); and *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991).

[34] 139 Cong. Rec. 26,416 (cumulative ed. Oct. 27, 1993); 139 Cong. Rec. H8715 (daily ed. Nov. 3, 1993).

[35] 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

[36] *Id.*

Recounting this history will, I hope, serve as a corrective to the current impulse to doubt the wisdom of the 103d Congress and broad spectrum of individuals and organizations who labored to restore adequate legal protection of religious exercise. That impulse is driven in no small part by the Supreme Court's relatively recent decision in *Burwell v. Hobby Lobby Stores.*[37] In that case, the Court held the federal government violated RFRA by threatening to impose crippling fines upon family business owners who refused, for reasons of conscience, to include abortion-inducing drugs and devices in their employee health plans. Unhappiness with the outcome of the case has contributed to a growing skepticism—even hostility—towards RFRA and its underlying principles. Indeed, bills that would partially repeal RFRA were introduced last summer in the wake of the *Hobby Lobby* decision.[38] Thankfully, RFRA survived. I urge Congress to resist any further efforts to undermine the Religious Freedom Restoration Act's indispensable protection of our First Freedom.

Thank you.

[37] 134 S. Ct. 2751 (2014).
[38] S. 2578, 113th Cong., 2d Sess.; H.R. 5051, 113th Cong. , 2d Sess.

Mr. FRANKS. And I would now recognize our third witness, Mr. Tebbe.

Mr. Tebbe, please turn your microphone on.

TESTIMONY OF NELSON TEBBE, PROFESSOR OF LAW, BROOKLYN LAW SCHOOL

Mr. TEBBE. Good morning, Chairman Franks and distinguished Members of the Subcommittee.

Thank you for the opportunity, for allowing me to testify on these important questions of religious freedom and equality law. It's an honor to be here, and I look forward to answering your questions.

At least since the Supreme Court's recent decisions in *Hobby Lobby* and *Holt v. Hobbs*, debate has been intensifying concerning the two statutes that we are discussing today, the Religious Freedom Restoration Act, or RFRA, and the Religious Land Use and Institutionalized Persons Act, or RLUIPA.

In my testimony, I would like to highlight one problem with how RFRA has been applied, namely, the Hobby Lobby court shifted the cost of accommodating the employer's religious beliefs onto the employees, who may not share those beliefs. That violated a core principle of Constitutional law. While ordinarily the costs of accommodating religious citizens are borne by the government or by the public, here those costs were shifted onto the shoulders of other private citizens.

Protecting religious freedom is critically important, but it cannot come at the cost of meaningful harm to identifiable third parties. Not only should doing that be avoided as a policy matter, but it also violates the religion clauses of the Constitution.

There are at least three ways that the Congress could address this problem. First, it could amend RFRA and RLUIPA to make them inapplicable when accommodating religious actors shifts meaningful harm to identifiable private citizens.

Second, it could amend the statutes to make them inapplicable to commercial actors, which tend to have significant impact on individuals and on the public.

Third, Congress could clarify that it did not intend RFRA and RLUIPA to break completely with judicial precedence under the Free Exercise Clause, case law that embodies the Constitutional principle I have been describing.

Each of these changes would improve the statutes by ensuring that their application conforms with Constitutional principle against shifting costs of religious freedom for some private citizens onto the shoulders of other private citizens.

In its Establishment Clause cases, the Court has invalidated laws that accommodate religious people by shifting costs to others. For example, the court invalidated a Connecticut statute that required all employers to allow employees who observe a sabbath to take that holiday off. The court held that Connecticut law "contravenes a fundamental principle of the religion clauses, namely, that the First Amendment gives no one the right to insist that in pursuit of their own interests, others must conform their conduct to his own religious necessities."

In its Free Exercise cases, similarly, the court has denied relief that would mean harming other private citizens. For example, the

court refused to grant an exemption to an Amish employer who is theologically opposed to paying Social Security taxes on behalf of his employees. The court held that granting the exemption would impose an unacceptable cost on the third-party employees.

So this legal rule is grounded both in the Establishment Clause and in the Free Exercise Clause, and it's properly part of RFRA and RLUIPA.

The principal difficulty with the court's landmark decision in Hobby Lobby is that it did not do enough to protect the company's 13,000 employees and their dependents. Doctrinally, the court reaffirmed the principle I have been describing, but nothing in the decision made its ruling contingent on the employees not being harmed, and, in fact, those employees are being harmed right now as we hold this hearing.

Although the Obama administration is working on implementing the solution that the court suggested in its opinion, that solution has not yet been put in place. Not only employees at Hobby Lobby itself, but the employees at other companies affected by the decision are therefore currently without contraception coverage. These thousands of people have suffered harm that may well be irreparable, including unwanted pregnancies and other health problems that medical experts sought to address in the regulation.

Importantly, not every accommodation of religion imposes harm on third parties; therefore, this limitation will not frustrate religious freedom writ large. A good example is the court's recent decision in *Holt v. Hobbs*, which I applaud. There, a unanimous court held that RLUIPA required a prison to accommodate an inmate, who wished to grow a short beard for religious reasons. Allowing him to do that, despite the prison's grooming policies, shifted no security risks to other fellow inmates. Justice Ginsburg, joined by Justice Sotomayor, wrote separately in *Holt* to emphasize both that third parties were harmed in the Hobby Lobby decision and that no one would be harmed by the decision in *Holt v. Hobbs*.

As I mentioned, there are at least three ways that Congress could address this problem. The most direct way would be the one that Representative Conyers suggested: to amend RFRA and RLUIPA to clarify that religion accommodations are not available where extending them would shift meaningful harm to identifiable third parties. RFRA itself is in need of a restoration. This amendment would return its meaning to something that can claim much wider public and bipartisan support than the interpretation that the Supreme Court has given it in Hobby Lobby.

Thanks very much for your time.

Mr. FRANKS. And thank you, Mr. Tebbe.

[The prepared statement of Mr. Tebbe follows:]

Written Testimony for
"Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act"
February 13, 2015
2141 Rayburn House Office Building

For the
House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Submitted by Nelson Tebbe
Professor of Law
Brooklyn Law School*
February 10, 2015

* Institutional affiliation is given for identification purposes only. The views expressed here are those of the author, not Brooklyn Law School.

House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
Oversight Hearing on the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act
February 13, 2015

Testimony of Nelson Tebbe[*]

Thank you for giving me this opportunity to testify on these important questions of religious freedom and equality law.

Since the Court's recent decisions in *Burwell v. Hobby Lobby Stores, Inc.*[1] and *Holt v. Hobbs*,[2] debate has intensified concerning the Religious Freedom Restoration Act of 1993 (RFRA)[3] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[4] two statutes that accommodate religious actors in similar ways. In this testimony, I highlight one core problem with the Court's application of RFRA in *Hobby Lobby*, namely that it shifted the costs of accommodating a religious employer onto its employees, who may not share the company's beliefs. While ordinarily the costs of accommodating religious freedom are born by the government, or by the public, here those costs were placed on the shoulders of other private citizens. Imposing meaningful costs on identifiable third parties not only should be avoided as a policy matter, but it also violates the Constitution.[5]

Below, I offer three ways that Congress could ameliorate that problem. In short, Congress could: 1) amend the statutes to make them inapplicable where accommodating religious actors would shift meaningful harm to identifiable third parties, 2) amend the statutes to make them inapplicable to commercial actors, or 3) amend the statutes to clarify that Congress did not intend to effect a clean break with judicial precedent under the Free Exercise Clause. Each of these possibilities would improve the statutes by avoiding harm to third parties.

Background

RFRA provides that substantial burdens imposed by the federal government on religious practices are presumptively invalid, unless the government can show that it was pursuing a compelling interest and that it was doing so using the least restrictive means. That is the essence of the statute, putting to one side for the moment certain details. RLUIPA imposes a

[*] Professor of Law, Brooklyn Law School; Visiting Professor of Law, Cornell Law School.
[1] 134 S.Ct. 2751 (2014).
[2] 135 S.Ct. 853 (2015).
[3] 42 U.S.C. § 2000bb et seq.
[4] 42 U.S.C. § 2000cc- et seq.
[5] A similar risk of harm to third parties exists for RLUIPA, though no such harm resulted in *Holt v. Hobbs*, as I will explain.

similar standard, but it applies only in the specific contexts of land use and institutionalized persons, who usually are inmates.

RFRA was passed in reaction to the Supreme Court's 1990 decision in the case *Employment Division v. Smith*.[6] There, the Court announced that it would generally uphold laws that applied in the same way to everyone, instead of closely scrutinizing all laws that happened to burden religion.[7] Only laws that targeted religious actors would continue to trigger a presumption of unconstitutionality under the compelling interest test, with certain exceptions not relevant at the moment.[8] After that decision was criticized, Congress passed RFRA in order to "restore" the compelling interest test as set forth in the Court's previous decisions. Congress spelled this out in its statement of purposes in the text of the law, and it put the word "restore" in the title of the statute.[9] RFRA passed with strong bipartisan support and it was signed by President Clinton.

After RFRA was declared invalid as applied to the states,[10] it remained in force against the federal government.[11] Yet the Supreme Court did little with the statute until its decision in *Hobby Lobby*. The details of the facts and procedural history are complicated and mainly not relevant here -- they are set out in the majority opinion by Justice Alito and the main dissenting opinion by Justice Ginsburg. In essence, the Obama Administration used authority granted by Congress under the Affordable Care Act to implement regulations that required all employers that provided health insurance to their employees to include coverage of all approved forms of female contraception without cost sharing.[12] Acting on the advice of medical experts, the government concluded that providing full contraception coverage was crucial for protecting women's health.[13] Exceptions were made for houses of worship and for religiously-affiliated nonprofits, but not for business corporations.[14] Presumably, the Administration exempted houses of worship on the assumption that employees were likely to share the organization's beliefs about contraception. With respect to religiously affiliated nonprofits, however, the administration provided a mechanism for providing coverage to employees; namely, it required

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[6] 494 U.S. 872 (1990).

[7] In more technical terms, the Court said that it would no longer apply the compelling interest test to laws that incidentally burden religion, and that going forward it would treat such laws as presumptively constitutional and would only apply rational basis review. *Id.* at 888-89.

[8] *Id.* at 881 (discussing an exception where the Free Exercise Clause is implicated "in conjunction with" another constitutional provision), 884 (discussing an exception for individualized government assessments); *see also* Church of the Lukumi Babalu Aye. V. City of Hialeah, 508 U.S. 520, 531-32 (1993) (noting that laws targeting religion continue to draw the compelling interest test).

[9] 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are-- (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) . . .").

[10] City of Boerne v. Flores, 521 U.S. 507 (1997).

[11] The only important exception was Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[12] *Hobby Lobby*, 134 S.Ct. at 2762.

[13] *Id.* (noting that the Administration consulted with "Institute of Medicine, a nonprofit group of volunteer advisers").

[14] *Id.* at 2763.

health insurers or administrators to provide the coverage without cost sharing to employees of religiously affiliated nonprofits.[15]

Hobby Lobby brought a RFRA challenge to the requirement, arguing that it had a religious objection to providing the coverage, which it believed made it complicit in the use of forms of contraception that it believed could work as abortifacients.[16] The Supreme Court sided with Hobby Lobby in a five-to-four decision. Without denying that the government had a compelling interest in requiring coverage for contraception,[17] the Court held that a means for pursuing that interest was available to the government that would be less restrictive on Hobby Lobby's beliefs.[18] In particular, the government could adopt the same kind of arrangement for business corporations that it had constructed for religiously affiliated nonprofit employers, so that health insurers and administrators would provide the coverage to employees without cost sharing. The Court implied that the impact of its ruling on employees would be "precisely zero."[19]

Justice Kennedy, who provided a crucial fifth vote, signed the majority opinion but also wrote separately, emphasizing that the government did have a compelling interest in protecting women's health and stressing the importance of avoiding harm to Hobby Lobby's employees.[20]

The Constitutional Difficulty

The principal difficulty with the Court's decision in *Hobby Lobby* is that it did not sufficiently protect the company's employees. While reaffirming the principle that religious freedom cannot be protected when that means harming other private citizens, the Court in practice did protect Hobby Lobby only by shifting costs to its employees.

A longstanding constitutional principle holds that the government may not accommodate religious belief by lifting burdens on religious actors if that means shifting meaningful burdens to identifiable third parties. Grounded in both the Free Exercise Clause and in the Establishment Clause, this principle protects against the possibility that the government could impose the beliefs of some citizens on other citizens, thereby advantaging religious people over people of

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[15] *Id.* & n.8.
[16] *Id.* at 2722.
[17] *Id.* at 2780.
[18] *Id.* at 2782.
[19] *Id.* at 2760 ("[W]e certainly do not hold or suggest that 'RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on ... thousands of women employed by Hobby Lobby.' [Quoting the dissent, 134 S.Ct. at 2787.] The effect of the HHS-created accommodation on the women employed by Hobby Lobby
and the other companies involved in these cases would be precisely zero.").
[20] *Id.* at 1786 (Kennedy, J., concurring) ("[A] premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees."); *id.* at 2786-87 ("Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.").

other faiths or no faith at all. Avoiding that kind of official inequality on questions of religion, as highly charged as they are, is a core principle of the First Amendment.

Establishment Clause precedents have emphasized this principle. In *Estate of Thornton v. Caldor*,[21] the Court invalidated a Connecticut statute that required all employers to accommodate every employee who did not wish to work on the day he or she regarded as the Sabbath. The Court held that the law accommodated religious belief only by shifting serious costs to employers and to other employees.[22] The Court held that the state law "contravenes a fundamental principle of the Religion Clauses," namely that "'The First Amendment . . . gives no one the right to insist that, in pursuit of their own interests others must conform their conduct to his own religious necessities.'"[23] In other words, the Constitution allows special exemptions for religious actors, but not when they work to impose meaningful costs on others.

Later, the Court handed down *Cutter v. Wilkinson*, which turned away an Establishment Clause challenge to RLIUPA itself, one of the subjects of this hearing. There, the Court said in a unanimous opinion that in applying RLUIPA, courts must take "adequate account" of the burdens that could be imposed on third parties and it cited *Estate of Thornton v. Caldor*.[24] Thus, this principle against third party harms is grounded in the Establishment Clause.[25] Costs incurred by protecting religious liberty should be paid by the government or the public, not by other private citizens.

Free exercise cases likewise emphasize the constitutional importance of avoiding burden-shifting to third parties when considering accommodations for religion. In *United States v. Lee*, the Court refused to grant an exemption to an Amish employer who was theologically opposed to paying Social Security taxes on behalf of his employees. The Court held that granting the exemption would impose unacceptable costs on the third-party employees:

> 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.[26]

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[21] 472 U.S. 703 (1985).

[22] *Id.* at 709 (holding that under the Connecticut statute, "religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who not observe a Sabbath").

[23] *Id.* at 710 (quoting Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)).

[24] 544 U.S. 709, 720 (2004) ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, see Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) . . . .").

[25] *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Controception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 1 (2014); see also Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html.

[26] 455 U.S. 252, 261 (1982).

So here too, writing in the free exercise context, the Court found an important principle against "impos[ing] the employers religious faith on the employees."[27]

Tellingly, Congress endorsed this principle, too. When it enacted a religion accommodation to the payment of Social Security taxes after *Lee*, it limited the accommodation to situations where the employees would not be harmed.[28]

Importantly, not every accommodation of religion imposes harm on third parties. A good example is the Court's recent decision in *Holt v. Hobbs*. There, a unanimous Court held that RLUIPA required a prison to accommodate an inmate who wished to grow a short beard for religious reasons. Allowing him to do that, despite the prison's grooming policies, shifted no security risks or other harms to fellow inmates. As the Court explained, the government failed to show that a short beard posed any disproportionate safety risks, and it also failed to show that any common safety risks would not be addressed through existing procedures.

Justice Ginsburg, joined by Justice Sotomayor, wrote separately in *Holt* to emphasize *both* that third parties were harmed by the *Hobby Lobby* decision *and* that no one would be harmed by the decision in *Holt*:

> Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief.[29]

Let me now explain why Justices Ginsburg and Sotomayor are correct that Court's decision in *Hobby Lobby* did in fact violate the constitutional principle against shifting burdens to third parties. Instead of requiring the absence of harm to third parties as part of its holding, it held only that a solution was available that *could* avoid such harm.

And in fact, Hobby Lobby's employees have been harmed, and continue to be harmed, by the Court's decision. Although the Obama Administration is working on implementing the solution that the Court suggested in its opinion,[30] that solution has not yet been put in place. Because the mandate in the Court's decision has issued, and because we have to assume that Hobby Lobby has acted on the religious belief that it has been stressing in the litigation by ceasing to cover contraception as soon as possible, employees must currently be without coverage.[31] What is more, any rule the administration implements cannot be retroactive.[32] Therefore,

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[27] *Id.*
[28] 26 U.S.C.A. § 3127.
[29] *Holt*, 135 S.Ct. at 867 (Ginsburg, J., joined by Sotomayor, J., concurring).
[30] *See Notice of Proposed Rulemaking Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 FR 51118-01 (Aug. 27, 2014).
[31] *See* Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation*, BALKINIZATION (Oct. 16, 2014), http://balkin.blogspot.com/2014/10/update-on-establishment-clause-and.html.
[32] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

Hobby Lobby's employees have suffered harm that may well be irreparable, including heightened risk of unwanted pregnancies and other health problems. Moreover, they are paying for the religious views of their employers.

As a matter of legal doctrine, the decision in *Hobby Lobby* reaffirmed the principle against shifting costs from religious actors to third parties. If the majority opinion leaves any doubt,[33] Justice Kennedy endorsed the principle when he wrote that religion exemptions may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[34] Because Justice Kennedy cast the crucial fifth vote in Hobby Lobby, and because the four dissenters also endorsed the principle against shifting the costs of accommodating religious freedom to other private citizens, his opinion is law on this point.

Nevertheless, the decision contains troubling language concerning the relationship of RFRA to prior case law on free exercise. The Court attempted to avoid its precedent in *United States v. Lee* partly by saying that *Lee* concerned the Free Exercise Clause, not RFRA.[35] The Court argued that RFRA and RLUIPA marked a "complete separation from First Amendment case law."[36] That is, the Court seemed to be saying that its decisions prior to 1990 were not even *relevant* to interpretation of RFRA. Neither the text of RFRA, as amended, nor any legislative history supports that reading.[37] Although it is not clear at this time how far the Court will take this sweeping argument, it represents a danger to people in the position of Hobby Lobby's employees—citizens who stand to be harmed by government accommodation of religious beliefs and practices.

Three Solutions

There are at least three ways that Congress could address the deficiencies—statutory and constitutional—with how the courts have been interpreting RFRA. Of these, the first is the most promising, but each of them would do something to address the risk of harm to third parties.

First, Congress could amend the statutes to clarify that religion accommodations are not available where extending them would result in meaningful harm to identifiable third parties. Ideally, the religious actor would bear the burden of showing that granting relief would not result in such burden-shifting. That change would both implement the Establishment Clause

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[33] A footnote appears to question the principle before pulling back and declining to address the issue. *Hobby Lobby*, 134 S.Ct. at 2781 n.37. That footnote is dicta, as the Court indicates in the footnote itself. *Id.* ("In any event, our decision in these cases need not result in any detrimental effect on any third party."). Moreover, it is meaningless in light of Justice Kennedy's concurring opinion.

[34] *Id.* at 2786-87 (Kennedy, J., concurring).

[35] *Id.* at 2784 ("*Lee* was a free-exercise, not a RFRA, case").

[36] *Id.* at 2761-62.

[37] *See* Micah Schwartzman, *What Did RFRA Restore?*, CORNERSTONE (Sept. 11, 2014), http://berkleycenter.georgetown.edu/responses/what-did-rfra-restore ("Over multiple Congresses, drafters of the legislation never—not once—suggested that RFRA marked a 'complete separation' with the Court's free exercise jurisprudence prior to *Employment Division v. Smith*. On the contrary, the House and Senate Committee reports contain extensive statements supporting more moderate interpretations of the law.").

principle described above and it would bring the statutes into conformity with the way Free Exercise Clause doctrine works today and the way it worked before 1990.

Second, Congress could pass an amendment that makes RFRA inapplicable to commercial actors. This change would help to ameliorate harm to third parties because large commercial operations tend to have an outsized impact on other citizens, including employees, customers, investors, and others. Partly for that reason, the Supreme Court had never extended a religious freedom exemption from a general law to a business corporation before *Hobby Lobby*. That decision was entirely unprecedented. Of course, any such amendment to RFRA would have to make clear that it did not apply to religious nonprofit corporations, which should continue to be able to bring claims. In sum, amending RFRA and RLUIPA to exclude commercial actors would go a long way toward protecting private citizens from bearing the costs of accommodating other citizens' religious beliefs.

Third, Congress could amend RFRA and RLUIPA to clarify that these laws did not break with court precedents prior to 1990. Even though that ought to be clear already from the title of RFRA and from the legislative history, the Court in *Hobby Lobby* could be read to have mistakenly said that RFRA has been unmoored from case law like *United States v. Lee*. Nothing in such an amendment would cement those decisions in place for all time. Rather, it would require them to be treated like any other precedent of the Supreme Court—as binding unless distinguished or overruled. The "Restoration Act" itself now needs restoration. This amendment would return its meaning to something that can claim much wider support than the interpretation that the Supreme Court may have given it in *Hobby Lobby*.

Conclusion

RFRA and RLUIPA have drawn intense controversy since the Supreme Court's decision in *Hobby Lobby*. They should be amended to address the main constitutional difficulty with that ruling, namely the way it shifted real costs from religious citizens to other private citizens. Not only would amending the statute give needed guidance to federal courts, but it would also set a beneficial example for state courts, which are now increasingly implementing their own, state-level RFRAs (and state free exercise clauses) in the context of anti-discrimination law and reproductive freedom guarantees. Without such guidance from Congress, courts on all levels could be encouraged to carve out religious freedom exemptions that could involve the government in shifting real costs from religious citizens to other private citizens.

Mr. FRANKS. And I would now recognize our fourth and final witness, Mr. Parshall.

TESTIMONY OF CRAIG L. PARSHALL, SPECIAL COUNSEL, AMERICAN CENTER FOR LAW & JUSTICE

Mr. PARSHALL. And thank you, Mr. Chairman, and Ranking Member Mr. Cohen, and distinguished Members of the Subcommittee.

On behalf of the American Center for Law and Justice, thank you for allowing me to address this very important subject of religious freedom under the Religious Freedom Restoration Act, RFRA. Like my colleague, I will focus specifically on RFRA in my testimony.

I make three primary points. First of all, the language of RFRA must not be diminished. If anything, it ought to be expanded to apply to other situations, some of which I have mentioned in my written testimony. I believe, with all due respect, that all three of the suggestions of Professor Tebbe to amend RFRA would not only diminish, but probably substantially undermine the religious liberty rights recognized by RFRA. I'd be glad to address those in any questions that you've got.

Second of all, the success of RFRA itself is proven in a number of different ways; first of all, by the cases that have been mentioned by my colleagues at the dais today, but also, of course, by the Hobby Lobby decision by the Supreme Court, but the necessity, the necessity of RFRA is proven by the Olympian, near impossible legal hurdle that a person has to pass in order to vindicate their religious rights without RFRA, ever since the Smith decision of the Supreme Court. And I'd just mention one case to prove my point about how high that hurdle would be, but for RFRA. The case was *LeBlanc-Sternberg v. Fletcher*, a Second Circuit Court of Appeals decision.

Now, while RFRA was being debated in Congress, a village in New York state was being formed and a zoning code was being created, the evidence showed, for the specific purpose of keeping Orthodox Jewish citizens out of that area. Despite that, the U.S. District Court entered a judgment as a matter of law against the Orthodox Jewish plaintiffs. I was retained to argue the appeal in the Second Circuit Court of Appeals. We were fortunate to get that decision reversed and the religious rights of those Orthodox Jewish citizens were vindicated.

But it was decided on a Free Exercise claim, not RFRA, because RFRA was not applied in that case. But the only reason that we prevailed is because the village officials made the mistake tactically of having a flood tide of anti-Semitic evidence in the record and then corroborated by the way in which they gerrymandered their zoning code to make sure that Jewish citizens could not have in-home synagogue worship.

But that kind of a situation, individual specific targeting of religious groups, is very, very rare. Invidious anti-religious discrimination is usually much more covert than that, and without RFRA, religious rights in those situations would have absolutely no method of redress since the Smith case. In those cases, like the *Holt* case, the prison beard case, where there's no evidence that there was in-

tentional hostility against religious belief, more like a thoughtless bureaucratic decision-making that simply failed to understand the high value of religious freedom.

And that brings me to my third point. RFRA, under the rubric of the statute, as correctly interpreted by the Supreme Court, simply says this: if a Federal regulation, statute or action impinges or substantially burdens the sincerely held religious beliefs of individuals, then the burden shifts to the government to prove, number one, that it has a compelling government interest, a very high standard, of an interest, a compelling interest that must overcome that religious burden on the individuals, and then number two, that there are no lesser burdensome alternatives that are available.

Now, why is that burden-shifting appropriate? It's appropriate only if you take a high view of religious liberty. If you take a low view, then you will shift, as Professor Tebbe has suggested, you will shift the burden on the religious person to defend themselves. And I don't think that's what the founders intended, and certainly that's not what RFRA was all about.

I pointed out in my written testimony the research data that shows how Nations globally around the world that have a high value placed on religious liberty have flourished, not only in terms of their economies, but in terms of innovation. I've also cited some of the clear data that indicates that religious America supports an entire private sphere of charitable giving that benefits local communities as a result of the religious liberty climate thus far, as we have allowed it to flourish.

But, then, that should not come as any surprise. Our founders knew how preeminent religious freedom was and ought to be. They, in effect, have given us a sacred trust to protect it. Now the question is, will we honor that trust?

Thank you.

Mr. FRANKS. Well, thank you, Mr. Parshall.

[The prepared statement of Mr. Parshall follows:]

PREPARED WRITTEN TESTIMONY OF

Craig L. Parshall, J.D.

Special Counsel, American Center for Law and Justice

Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

February 13, 2015

"Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act"

Chairman Franks, Ranking Member Cohen, and distinguished Members of the Subcommittee, on behalf of the American Center for Law & Justice, thank you for allowing me to address the subject of religious freedom under the Religious Freedom Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). My testimony will focus primarily on RFRA, and only incidentally on RLUIPA. Other, highly capable witnesses today, will undoubtedly be addressing RLUIPA.

This hearing is about one of the most fundamental rights known to this constitutional Republic: the right to fully and freely exercise one's religious faith and one's rights of religious conscience, free of unreasonable government interference. If we fail to uphold those rights, the civil liberties of our nation, and in fact, the entire fabric of our Bill of Rights, could be deeply imperiled. On the other hand, a broad, healthy protection of religious freedom could, and likely would, advance America's future in substantial, even remarkable ways.

When our Founders signed the Declaration of Independence, risking all, and, in their words, pledging " our Lives, our Fortunes & our sacred Honor" in pursuit of freedom, they also declared something else: a "firm reliance on Divine Providence ..." Religious faith, and its free and full exercise, was for them a co-equal partner to political liberty. If our Republic is to remain healthy and strong, that must also be true for our generation as well. We have inherited a sacred trust. The question now is whether we will honor that trust.

Congressional Testimony, Craig Parshall, Special Counsel, ACLJ – RFRA & RLUIPA
February 13, 2015

The Important Role of Congress in Protecting Religious Freedom

Last year, the United States Supreme Court rendered its decision in *Burwell v. Hobby Lobby Stores, Inc.*, [1] vindicating the religious rights of conscience of closely-held, faith-based, businesses not to be forced to provide insurance coverage for abortion-inducing services or drugs to their employees under the HHS mandate of the Patient Protection and Affordable Care Act, 124 Stat. 119. That Supreme Court decision was made, not on the Free Exercise Clause of the First Amendment, but under the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. § 2000bb-1 (2006). [2] RFRA was enacted to remedy the extreme limitations placed on religious liberty rights under the Free Exercise Clause of the First Amendment as a result of the Court's decision in *Employment Div., Dept. of Human Relations of Ore. v. Smith.* [3]

Two ancillary benefits flow from the *Hobby* Lobby decision, which transcend the precise factual context regarding the private companies at issue in that case. First, the Court noted: "Congress enacted RFRA in 1993 in order to provide *broad protections* for religious liberty." [4] Second, the opinion of the Court is in perfect symmetry with the congressional record that amply illustrates regarding the bipartisan intent of both Congress and the witnesses who supported it from across a wide spectrum of religious, philosophical, and legal perspectives. For instance, during the congressional hearings on RFRA before its enactment, Nadine Strossen, prior president of the ACLU, an organization long known for an expansive view of abortion rights, testified:

> And going to the abortion issue, Congressman Hyde, of course this legislation is completely neutral on the abortion issue. All it does is restore religious liberty, freedom of conscience, and I think that is a liberty that can enhance the rights and in many situations will enhance the rights of those who conscientiously and religiously are opposed to abortion ... This law would give them a defense based on religious freedom. [5]

In other words, Congress "got it right" in 1993, with legislative language that was logical, clear, and fit to the religious liberty dilemma that it sought to remedy. We permit any lessening of the protections of RFRA at our peril. At the same time, Congress ought to look, proactively, to future threats to religious freedom. The time may have come for the fashioning of RFRA-like remedies against those threats as well. But whether

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[1] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. ___ (2014).

[2] The Court has held that the protections of RFRA, however, do not apply to the actions of *state* agencies or state regulations. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[3] *Employment Div., Dept. of Human* Relations *of Ore. v. Smith*, 494 U.S. 872 (1990).

[4] *Hobby Lobby*, at slip op. 4 (emphasis added).

[5] Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 before the Subcommittee on Civil and Constitutional Rights, of the House Committee on the Judiciary, 102nd Cong. 100 (1992) (testimony of Nadine Strossen, National Board of Directors, ACLU).

Congress chooses to address the risks posed by a dilution of RFRA, or chooses to expand the RFRA paradigm to meet other threats to religious freedom, or both, one thing is clear: American stands to benefit from a strong protection of religious liberty. Some of those benefits are outlined below.

A Broad Protection of Religious Liberty Grants Broad Benefits to America

Religious Liberty Increases Economic Growth and Innovation

As religious liberty flourishes, it can create an environment where citizen patterns of reliable work habits and industriousness, financial stability, and an entrepreneurial spirit can also flourish. On the other hand, there are competing forces at work in America: the drive for personal self-actualization, if not moderated by altruistic values, can lead to social myopia, selfishness, lack of motivation in the work place, dishonesty, and greed, traits which are detrimental to the common good. As religious liberty expands, faith-based values can act as a check against those excesses, and can reinforce personal responsibility and industriousness. As law professor and economist Harry Hutchison sees it, the current trend toward a secular restlessness of the American spirit, perhaps brought on by a hyper-individualism (not to mention the individual drive to meet individual desires) –

> "… gives rise to inconstancy that disables democratic man from understanding how his public and private work contribute to and sustain social and political life and how one's most important activities are reflections of deeper commitments of the soul that *contribute to the common good*. Religion and religious life exemplified by the Green family in Hobby Lobby thus operate as an antidote to a complete focus on individualism and [acts] as a *spur to human flourishing* …" [6]

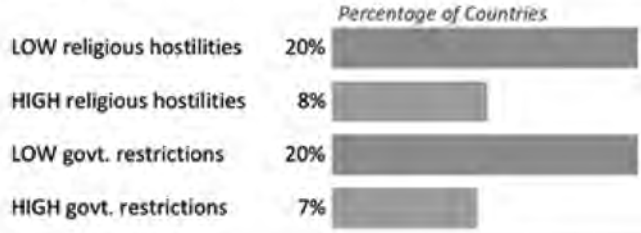
One kind of "human flourishing," the type that increases where there is an abundance of religious liberty, is that of economic growth. This is borne out by a May 29, 2014 report. There, Brian J. Grim of Georgetown University's Berkley Center for Religion, Peace & World Affairs, and Greg Clark and Robert Edward Snyder of Brigham Young University's International Center for Law and Religion Studies, reviewed the chief factors behind the financial success of nations. Their research determined that *religious freedom* is one of only three primary factors significantly associated with the global economic growth of nation-states. Their study looked at GDP growth for 173 countries in 2011, employing as a control, some two-dozen different financial, social, and regulatory influences. [7] Finding a positive relationship between religious freedom and ten of twelve pillars of the World Economic Forum's Global Competitiveness Index, they note that nations with *the lowest amounts of hostility toward religious freedom* experience *twice the degree of innovational strength in matters of business*. The chart below of the World

[6] Email dialogue, Professor Harry Hutchison, George Mason University School of Law, to Craig Parshall, ACLJ Special Counsel, November 23, 2014 (emphasis added).
[7] "Is Religious Freedom Good for Business? A Conceptual and Empirical Analysis," available on the website of the Interdisciplinary Journal of Research on Religion (IJRR).

Economic Forum, illustrates this religious freedom/ economic dynamic:

Innovative strength is more than twice as likely among countries with LOW religious restrictions and hostilities

Percentage of countries that are stronge in innovation among countries with LOW vs. HIGH** social hostilities involving religion or government rstrictions on religion*



* Strong is defined as 1.0 standard deviations above the mean of 148 countries on "Innovation," the World Economic Forum's Global Competitiveness Index's fourth pillar. This is a measure that takes into account new technological and non-technological knowledge. It also takes into account investment in research and development, especially by the private sector.

** High and Low categories of social hostilities involving religion or government restrictions on religion are as defined by the Pew Research Center's 2012 study, *Social Hostilities Reach Six-Year High*

Data: World Economic Forum Global Competitiveness Index (2013); Pew Research Center Government Restrictions on Religion Index and Social Hostilities Involving Religion Index (2012)

Source: Brian J Grim, Greg Clark & Robert Edward Snyder (2014). "Is Religious Freedom Good for Business?: A Conceptual and Empirical Analysis," *Interdisciplinary Journal of Research on Religion,* Volume 10, Number 4.

Source: https://agenda.weforum.org/2014/12/the-link-between-economic-and-religious-freedoms/

It is no wonder then, that here in America, where religious liberty has been historically given substantial protection we have, at the same time, experienced economic and innovational expansion. Further, one of the happy consequences of The *Hobby Lobby* case, and the publicity that followed it, was the public attention given to the vast network of faith-based businesses that have developed across America.

Hobby Lobby and Conestoga Wood Specialties where not the only faith-based, closely held businesses in America. As press coverage of the case demonstrated, included also in that category of national, religious businesses were Covenant Transportation, a trucking company, retail clothing stores Forever 21, fast-food chains Chick-fil-A and In-N-Out Burgers, as well as Tyson's Foods. [8] Other nationally known, faith-founded companies operating across America include Marriot Hotel, Curves (the weight loss and fitness franchise), burger fast food company Carl's Jr., Alaska Airlines, Jet Blue, eHarmony.com, Whole Foods Market, George Foreman grilling products, Timberland shoes, Tom's of Maine, Anschutz Entertainment Group, Interstate Batteries, Trijicon weapons manufacturer, and Mary Kay cosmetics.[9] If we fail to understand the true value of religious liberty, America will end up crippling the religious conscience and the moral operations of numerous U.S. companies that employ millions.

Religious Liberty Encourages the Charitable Impulse Among Americans

Research data indicates that religious-minded citizens give more to charitable causes than their secular counterparts. *Connected to Give: Faith Communities* is a 2013 research study, the third in a series of reports based upon the wealth of data drawn from the National Study of American Religious Giving (NSARG) and the National Study of American Jewish Giving (NSAJG).

That data shows that religious-minded citizens give more to charity, on average, than do secular Americans: 65% of those who assert religious affiliation give to charity, while only 56% of those citizens who have no religious affiliation give to non-profit, charitable causes; and among those who say they do not attend religious worship services regularly, less than half of them regularly support any charity, even secular ones. [10] The survey of more than 5000 households also showed basic uniformity of giving among the religiously-minded: among Americans affiliated with the five largest religious groups analyzed in this report—Black Protestants, Evangelical Protestants, Jews, Mainline Protestants, and Roman Catholics—there were no statistically significant differences in giving rates on a general basis. [11] Even more significant is this finding: "Among

[8] Mark Oppenheimer, "At Christian Companies, Religious Principals Compliment Business Practices," New York Times.com, August 2, 2013.

[9] Sarah Petersen, "20 Companies with religious roots," Deseret News.com, accessed at: http://www.deseretnews.com/top/1700/1/In-N-Out-Burger-20-companies-with-religious-roots.html.

[10] Alex Daniels, "Religious Americans Give More, New Study Finds," The Chronicle of Philanthropy, November 25, 2013.

[11] Report at: ConnectedToGive_FaithCommunities_Jumpstart2014_v1.3-3.pdf (page 8 of 32).

Americans who give, *more than half say their commitment to religion is an important or very important motivation for charitable giving* … [and] *motivations related to moral values are important to all groups*." [12]

When America allows religious liberty to flourish it also waters the landscape from which non-profit charitable organizations are grown, and that, in turn, will benefit the citizens, communities, states and regions where those charities perform their services.

The Continued Need for the RFRA Framework: Future Threats

International Terrorism and Global Threats to Religious Freedom

The threat to the freedom of religious belief from jihadist groups around the world is almost too obvious to require citation. Since 9/11, America already experienced the brutal affects of ISIS, the newest face of jihadist terror, with the horrific beheadings of American journalists James Wright Foley and Steven Sotloff and former Army Ranger-turned-humanitarian worker Peter Kassig. On American soil we have seen the terrible bombing at the Boston marathon, followed by the more recent beheadings and hatchet attacks on U.S. citizens by Islamic extremists. These events have been a wake-up call to those citizens who assumed wrongly that, since the 9/11 attacks and the wars in Afghanistan and Iraq, the threat to freedom by such jihadist groups was an "over there" problem. ACLJ Chief Counsel Jay Sekulow and his Law of War Team, Jordan Sekulow, Robert Ash, and David French, have documented this new threat in the recently published book, Rise of Isis - A Threat We Can't Ignore. [13]

Meanwhile, the parade of jihadist terror, focused against religious adherents of other faiths, continues unabated, including the slaughter of Jewish congregants in a synagogue in Jerusalem – three of them American-Israelis – in November of 2014. In January of 2015 a Paris magazine, Charlie Weekly, was raided by Islamic terrorists who shot and killed numerous people and injured others, in retaliation for satirical pieces that had been printed against Islam. [14]

In order to help influence the "hearts and minds" of peaceful Islamic adherents who must weigh the heavy risk of opposing and even exposing the violent elements in their midst, America must be able to demonstrate what true religious liberty truly looks like, and why it is worth fighting for, and perhaps even, regrettably, dying for.

The U.S. still remains the most effective, and compassionate voice to the rest of the world regarding religious liberty. When Saudi blogger Raif Badawi criticized Islamic

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[12] Ibid at page 9.

[13] Jay Sekulow, Jordan Sekulow, Robert Ash, and David French, Rise of Isis - A Threat We Can't Ignore. [13] (New York: Howard Books, a Div. of Simon Schuster, 2014).

[14] Nicholas Vinocur, Anthony Paone, "Suspected Islamists kill 12 in Paris attack on satirical magazine," Reuters.com, January 7, 2015.

clerics, and was sentenced by the government in Saudi Arabia to 1000 lashes as his punishment (50 per week for 20 consecutive weeks) he recently found a remarkable source of support from American religious leaders. Seven of the members of the U.S. Commission on International Religious Freedom, which included Christians, Jews and a Muslim, after pleading for the sentence to be dropped, offered to accept 700 of Badawi's lashes themselves. [15]

The American Center for Law and Justice (ACLJ) has fought a continuous battle for years to free American pastor Saeed Abedini from his inhumane, outrageous, and illegal imprisonment in Iran. When the pastor's wife, Naghmeh, recently met with President Obama, the President promised to make Saeed's release a "top priority," a result that a result that could not have happened without the support of millions of faith-minded Americans who have responded to the work of ACLJ and to the reports in the religious media, and as a result, who have been supporting this effort. [16]

It would be a tragic irony if, in pursuit of America's desire to authentically export the idea of liberty to the nations around the world, it ends up with its own credibility overshadowed by its failure to practice robust, vibrant religious liberty here at home.

Domestic Threats to Religious Liberty

The Executive Branch, the HHS Mandate, and the Supreme Court

Last month the Supreme Court rendered its opinion in *Holt v. Hobbs.* [17] The case involved the rights of a Muslim prisoner to maintain a one-half inch beard for faith-related reasons. The Court ruled, in light of the prison's history of allowing one-quarter inch beards for prisoners for medical reasons, and the total absence of any meaningful security threat to prison personnel, that the prohibition against short beards for religious purposes violated RLUIPA. Unlike *Hobby Lobby*, where Justice Ginsburg dissented, in *Holt* she joined the majority. However, she gave a short concurring opinion that explained the reasons for her different treatment of the two cases:

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[15] Lori L. Marcus, "Americans offer to take 100 lashes each for Saudi blogger," The Jewish Press, January 23, 2015. Accessed at: http://www.jewishpress.com/news/breaking-news/americans-offer-to-take-100-lashes-each-for-saudi-blogger/2015/01/23/

[16] "Obama to imprisoned pastor's wife: saving Saeed Abedini in Iran is 'a top priority,'" Christianity Today.com, January 21, 2015. Accessed at: http://www.christianitytoday.com/gleanings/2015/january/obama-to-imprisoned-pastors-wife-save-saeed-abedini-naghmeh.html?paging=off.

[17] *Holt v.* Hobbs, 574 U.S. ___ (2015).

> Unlike the exemption this Court approved in *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. ___ (2014), accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief. See *id.*, at ___, ___–___, and n. 8, ___ (slip op., at 2, 7–8, and n. 8, 27) (GINSBURG, J., dissenting). (slip op., at 2, 7–8, and n. 8, 27) (GINSBURG, J., dissenting). [18]

There is a central idea in that approach, suggesting that RFRA (or RLUIPA for that matter) can be emasculated whenever there is a real or perceived disadvantage caused to third parties. In an abstract sense, there is a necessary corollary that with the recognition of rights to one group, there will always be other parties with some interest in the matter who will be, however remotely, inconvenienced by that recognition. A prime example of how extreme, and illogical that kind of inquiry can become, is *Lee v. Weisman*. [19]

While that case was an Establishment Clause case under the First Amendment, and not a Free Exercise case, let alone a RFRA case, it illustrates how problematic it is when courts intuit vague, psychological "harm" or "offense" as a reason to prohibit religious speech; as was the case there, where the Supreme Court held that the Establishment Clause was violated by a public school inviting a private citizen, a Rabbi, to deliver an innocuous prayer at a graduation ceremony because the complainants might feel compelled to sit quietly and respectfully and listen to religious content that they do not agree with. Happily, the Supreme Court has rectified part of this problem of shutting down religious speech where there is a bare assertion of discomfort to others. In *Town of Greece, New York v. Galloway*, the Court held that, at least in the context of public government meetings, private religious expression in the form of prayer, in itself, would not constitute the kind of coercion of others that would trigger a violation of the Establishment Clause. [20]

The question remains, in the more Free Exercise-type of paradigm that characterizes RFRA, whether allegations of remote inconvenience or indirect disadvantage to the rights of others – whether it is women who wish to have completely unhindered access to abortion or it is secularists who want no exposure to religious expression – will be enough to result in a slow, steady diminution of the rights of religious persons under RFRA as courts continue to construe and apply *Hobby Lobby*.

The Executive Branch and EEOC Regulations

The current Solicitor General's Office represented the Equal Employment Opportunity Commission (EEOC) in the case of *Hosanna-Tabor Evangelical Lutheran*

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[18] *Holt v. Hobbs*, 574 U.S. ___ (2015) (Ginsburg, J. concurring), slip op. at 1.
[19] *Lee v. Weisman*, 505 U.S. 577 (1992).
[20] *Town of Greece, New York v. Galloway*, 572 U.S. ___ (2014).

Church and School v. EEOC.[21] Those lawyers likely did not anticipate the push-back from the Supreme Court in response to their astonishing argument that the Religion Clauses of the First Amendment *did not* protect the hiring decisions of private religious schools. But they should have. During oral arguments that amazing position of the Assistant Solicitor General, when articulated, met with immediate disbelief, even from Justices not known for their protection of religious freedom. When the decision of the Supreme Court came down in that case, it was unambiguous, and unanimous in holding that the First Amendment exempts a religious organization from federal regulations that conflict with its faith-based employment decisions regarding key staff, like the religiously "called" teacher in that case, who have important spiritual duties.

The court rebuffed the argument from the Solicitor General's office that the First Amendment Religion Clauses gave no guidance regarding the right of a religious school to hire or fire, free of government interference, members of its own faith to serve in leadership positions. Labeling "remarkable" the government's argument that the Religion Clauses really have "nothing to say" about the right of religious organizations to enjoy autonomy in making internal decisions, the entire Court noted:

> "The EEOC and [the complainant employee] thus see no need – and no basis – for a special rule for ministers grounded in the Religion Clauses themselves.
>
> We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's [and the complaining employee's] view that the First Amendment analysis should be the same whether the association in question is the Lutheran Church, a labor union, or a social club … That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[22]

While the victory in this case is gratifying, what is truly disturbing is the fact that the White House, and its Supreme Court advocates were willing to advance such a bizarre reading of the Religion Clauses. That kind of institutional hostility against religious freedom is a warning that needs to be headed. Congress, whenever possible, should mandate those legislative protections for religious liberty that are necessary and sufficient to counter any arbitrary decisions of the Executive Branch regarding the most basic freedoms of faith.

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[21] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. ___, 132 S. Ct. 694 (2012).

[22] *Hosanna-Tabor,* 565 U.S. ___, 132 S. Ct. 694, 706 (2012).

Harmonizing the Existing Religious Exemption in Title VII with RFRA

Although the Supreme Court has settled one issue in federal employment discrimination law regarding the fate of religious employers – namely, the ministerial exception" that applies under *Hosanna-Tabor* to adverse decisions on staff positions that have an important spiritual component – the legal landscape for faith-based organizations is still uncertain. One such question, still undetermined as a result of that Supreme Court decision, is how courts will determine that level of spiritual leadership in a given employment position that is sufficient to trigger *Hosanna-Tabor*.

A recent 2015 decision by the 6th Circuit Court of Appeals illustrates the point. In *Conlon v. InterVarsity Christian Fellowship/USA* the court held that a Christian ministry not controlled by a church or denomination could still qualify in order to assert the "ministerial exception" recognized in *Hosanna-Tabor*. [23] The court also ruled that the group was immune from the suit regarding its dismissal of one of its staff for violating its faith-based policy on divorce, finding, amidst some admitted uncertainty however, that under *Hosanna-Tabor* an employee's position is sufficiently spiritual enough to permit the employer to raise the ministerial exception as a defense when *two out of the four circumstantial factors* mentioned by the Supreme Court are present. However, the 6th Circuit judges noted the divergence among the Supreme Court justices on that point:

> Justice Thomas's concurring opinion in *Hosanna-Tabor* looks solely to a broad reading of the first factor, positing that whenever a religious employer identifies an individual as a minister, courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 710 (Thomas, J., concurring). Justice Alito—joined by Justice Kagan—instead posits that the ministerial exception "should apply to any 'employee' who [1] leads a religious organization, [2] conducts worship services or important religious ceremonies or rituals, or serves as a [3] messenger or [4] teacher of its faith." *Id.* at 712 (Alito, J., concurring).

Conlon, slip op. at page 8.

Congress should consider whether to codify the *Hosanna-Tabor* rule, and clarify its factual parameters within the framework of Title VII of the Civil Rights Act. [24] Beyond that, given the historical success of RFRA in creating a coherent and consistent protection of religious liberty, consideration could be given to a RFRA-like paradigm within Title VII's religious exemption section, as informed by *Hobby Lobby*, augmenting the existing, somewhat troublesome exemption for faith-based employers under Section

[23] *Conlon v. InterVarsity Christian Fellowship/USA*, appeal no. 14-1549 (6th Cir. Feb. 5, 2015). The American Center for Law & Justice filed a brief in that case as Amicus Curiae on behalf of InterVarsity.
[24] 42 U.S.C. 2000e et seq.

702, providing some needed clarity and protection for religious employers. [25] This *troublesome* history of the Title VII religious exemption is described below.

Under Section 702 of Title VII, the general mandate against religious discrimination in employment does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." [26] The intent was clearly to permit qualifying faith-based employers to making hiring and firing decisions on the basis of creed, religious doctrine, or other spiritual criteria, free of the threat of federal employment discrimination lawsuits.

However, the question regarding exactly which religious employers can qualify for the religious exemption, and which cannot, is still an unsettled question, leaving the field of employment law a complex, and uncertain one for religious groups. The statute does not define what constitutes "a religious corporation, association, educational institution, or society." Rather, "[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious." *EEOC v. Townley Eng. & Mfg. Co.* (denial of protection under the religious exemption of Title VII for a *for-profit*, thoroughly *faith-based* machine shop). [27]

As a result, there are inconsistent legal decisions regarding a wide variety of religious employers. In addition to the question of for-profit religious employers, as was the case in *Townley*, the courts have rendered opinions that seem to defy logic: *Fike v. United Methodist Children's Home of Virginia, Inc.* (Methodist orphan home dedicated to instilling Christian beliefs in its children held not to qualify as a "religious corporation …" etc. after it sought, following a period of more secular leadership, to return to its original spiritual mission); [28] *EEOC v. Kamehameha School/Bishop Estate*, (private protestant religious school denied religious exemption under Title VII despite various religious characteristics and activities); [29] *Pime v. Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984) (Catholic college not qualified for religious exemption regarding its preference for hiring Jesuit professors rather than professors from other

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[25] However, because Title VII deals with private, *non-federal* employers and employees, any use of an RFRA-type auxiliary to fortify the Section 702 religious exemption would have to satisfy the rule in *City of Boerne v. Flores*, 521 U.S. 507 (1997). See, note 1, *infra*. On the other hand, the Supreme Court there did note, generally, the broad powers of Congress under the Fourteenth Amendment to "enforce" fundamental liberties even it they has an effect on the states.

[26] 42 U.S.C. §2000e-1(a).

[27] *EEOC v. Townley Eng. & Mfg. Co.* 859 F.2d 610, 618 (9th Cir. 1988).

[28] *Fike v. United Methodist Children's Home of Virginia, Inc.* 547 F. Supp. 286 (E.D. Va. 1982).

[29] *EEOC v. Kamehameha School/Bishop Estate*, 990 F. 2d 458 (9th Cir. 1993), *cert. den.* 510 U.S. 963 (1993).

religions). [30] On appeal, *Pime* was reversed on other grounds. In his concurring opinion, Judge Posner noted that regarding the religious exemption question about what kind of religious entity can qualify under Title VII, "the statute does not answer it" and the "legislative history … is inconclusive." [31]

Lastly, a March 2013 employment discrimination settlement between the EEOC and a private, faith-based employer illustrates the continuing lack of clarity regarding what, if any, religious liberties are owed to for-profit companies under Title VII.

The case was *EEOC v. Voss Electric Co.*, commenced in the U.S. District Court of the Northern District of Oklahoma. [32] The EEOC charged the supplier of electric lighting products with religious discrimination because it posted a job position at a local church, inquired about a job applicant's church attendance and discussed a before-hours Bible study with the applicant that the employer conducted on its premises; as a result of the litigation, the employer agreed to a consent decree, requiring it to pay $82,500 to the non-hired applicant, and mandated to undertake specified company-wide actions designed to prevent future religious discrimination, which included the posting of an EEOC notice prohibiting employment discrimination on the basis of religion at all its locations, re-dissemination of anti-discrimination policies, periodic reporting to the EEOC of specified hiring information, religion-neutral job advertising and the training of management on religious discrimination. [33]

The regional EEOC attorney in the St. Louis District Office said of the settlement: "Refusing to hire a qualified job applicant because his religious beliefs do not comport with those of the employer's leadership is illegal, *even if the for-profit company purports to have a religious mission or purpose*." [34] While that case was litigated under Title VII, rather than RFRA, the question remains: what effect if any could, or should, *Hobby Lobby* and its construction of RFRA have on the religious freedom rights of private, faith-based companies in their hiring and firing? Certainly, the detractors will argue that it should have no effect; that Title VII occupies the field and should be unencumbered by RFRA; that that the decision of the Supreme Court in applying the protections under RFRA to religion-founded, for-profit businesses in *Hobby Lobby* was premised, at least in part, on the absence of *any harm* to the interest of third parties. [35]

It is interesting, however, in the case of Voss Electric Co, d/b/a Voss Lighting,

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[30] *Pime v. Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984), rev'd other grounds, 803 F. 2d 351 (7th Cir. 1986).
[31] *Pime*, 803 F. 2d at 357, Posner, J., concurring.
[32] *EEOC v. Voss Electric Co.*, civil case no. 4:12 -cv- 00330-JED-FHM, U.S. District Court, N. D. Oklahoma.
[33] EEOC Press Release, March 13, 2013, accessed at: http://www.eeoc.gov/eeoc/newsroom/release/3-19-13a.cfm.
[34] EEOC Press Release, ibid.
[35] See, my discussion of Justice Ginzburg's point in that regard, at pages 7-8, *infra*.

that its public mission statement [36] and the "personal statement" of its president [37] are forthright in their faith-based, Bible-oriented approach to business, and bear a close resemblance to the kind of faith-driven philosophy that guided *Hobby Lobby* and that influenced the decision of the Supreme Court in that case.

Conclusion

Those of us who have ever attended a religious liberty rally, or visited a church function, have benefited, of course, from freedom of religion protections under the First Amendment, as well as the congressionally enacted RFRA. But in truth, we have also benefited from the remaining provisions of the First Amendment at the same time: *free speech* for the opinions voiced at such a rally or gathering; the *free press* rights of publicity and media coverage for the event; and *freedom of assembly* and *freedom of association* protecting the rights of like-minded persons to gather together for a common cause.

The Bill of Rights may have enumerated those First Amendment rights separately, thus causing our Supreme Court to analyze them individually, but they all pour out of a common well of liberty. Law professor and former Watergate Special prosecutor Archibald Cox has noted that, at the Founding, in order "[f]or the genius of American constitutionalism to develop, the [Supreme] Court had first to assert, and then win, the people's support for the Court's power of interpretation 'according to law.'" [38]

Our task today is similar: to "win the people's support" for an understanding of the true value of fundamental rights, beginning with the cornerstone - religious liberty, whether the protection comes from Congress in the form of RFRA, or through the First Amendment decisions of the Supreme Court. If we accomplish that, our citizenry is bound to gain a greater understanding of the entire Bill of Rights as well as the principles of constitutional governance. Religious liberty was *at the very core* of the Bill of Rights, and bore a relationship to other rights. As Professor Cox goes on to write:

> "Concern for a broader spiritual liberty [at the Founding] expanded from the religious core. The thinking man or woman, the man or woman of feeling, the novelist, the poet or dramatist, the artist, like the evangelist, can experience no greater affront to his or her humanity than denial of freedom of expression." [39]

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[36] Accessed at: http://www.vosslighting.com/storefrontB2BWEB/showpage/missionstatement.html.

[37] Accessed at: http://www.vosslighting.com/storefrontB2BWEB/showpage/HistoricalHighlightsPersonalStatement.html.

[38] Archibald Cox, The Court and the Constitution (Boston: Houghton Mifflin Company, 1987) page 43.

[39] Ibid, page 187 (referring to English poet of Biblical and Christian themed works, John Milton, as a kind of seventeenth century religious inspiration for the later free speech ideas of the Founders).

Religious freedom should not only be viewed as a preeminent right; it must also be viewed as part of an organic whole with other liberties; the first ten Amendments to our Constitution were drafted at the same time by the same men who shared, despite a diversity of political leanings, a similar vision of America's new Republic, and of the various freedoms that needed to be secured to the people. Fortifying religious liberty, the "core" of America's founding, will help us today fortify the whole of all those other rights and privileges envisioned by the Founders, while also reaping to our nation the blessings that accompany a wise respect for freedom of religious conscience.

Mr. FRANKS. And thank you all for your testimony.

We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

Mr. Baylor, some have portrayed religious liberty recently as a conservative issue, and this was certainly the case after the Supreme Court's decision in Hobby Lobby, and much of the written testimony here conversely focuses on the bipartisan efforts that passed RFRA. And so I'm wondering what, if anything, has changed? I mean, isn't religious liberty a principle that every American should advocate for?

What is the reason for the shift since the Hobby Lobby case?

Mr. BAYLOR. Well, religious liberty absolutely is an issue that goes across the aisle and it goes across the ideological and religious spectrums. Professor Eugene Volokh recently published a piece in the Washington Post where he reminded us of the political history of religious exemptions, and he pointed out that in the 1960's, when Justice William Brennan wrote the *Sherbert v. Verner* decision, this was essentially a—what might be characterized as a liberal project to put exemptions, to interpret the Free Exercise Clause to provide for exemptions from facially neutral, generally applicable laws.

Second, and more fundamentally, as I said before, government regulation affects everybody. When you have a pervasive Federal Government, State government, local government, you can't say that this regulation disproportionately affects Republicans rather than Democrats, conservatives rather than liberals, Christians rather than Jews, Muslims, Sikhs or whoever. That is not true. And that is an empirical reality.

If you go and look at the cases in the reporters, it is simply not the case that most RFRA and RLUIPA cases are ones that are brought by people on one particular side of the spectrum. Just to give some examples, there was recently a law in Alabama that prohibited everyone, including churches, including the Archdiocese, in—the Catholic Archdiocese in Alabama from serving the needs of illegal immigrants. Well, they asserted a religious liberty defense to that law. And I don't think one would characterize it as a conservative or right-wing issue.

The other RFRA case that reached the Supreme Court prior to Hobby Lobby was the O Centro case, which involved a minority religion and its use of a scheduled drug in its religious ceremonies.

And, finally, I think it's worth noting, as Professor Gregory Sisk has pointed out, that members of minority religions tend to do better in RFRA cases than the larger religions in this country. So I don't think that this is a right-left culture war kind of issue, and I think the bipartisan coalition that came together reflects that.

Now, what has changed? I think the short answer is that some folks who were back in the coalition in 1993 have simply subordinated religious liberty to other interests and objectives.

Mr. FRANKS. Well, thank you, sir.

Mr. Parshall, as we've heard today, both the RFRA and RLUIPA have received the overwhelming bipartisan support at the time that they were enacted, and I think it's important that we not lose sight of the reasons why. In your written testimony, you cite data

that shows a variety of economic benefits flowing to America, and that is if we protect religious freedom in a substantial way.

Now, you're not suggesting that recognizing religious freedom is a just a matter of dollar and cents, I know that, but is there a greater economic factor? Is this economic factor just part of really a bigger set of benefits that are recognized when a Nation defends religious freedom?

Mr. PARSHALL. Thank you, Mr. Chairman.

Yes. I think that you've—I think you've hit the nail on the head in the sense that while it isn't just a matter of dollars and cents in terms of protecting religious liberty, we need to know the downside consequences when we diminish year after year the rights of religious people and religious organizations. Likewise, if we support—with the original vision that our founders had the full gamut of religious liberties, there are tremendous blessings, tremendous benefits that are going to accrue to our Republic. One of them—and I've mentioned the economic aspect in my written testimony, but one of them is also the happy consequence to other civil liberties.

As a matter of fact, when you look at the speeches of the clergy who supported the move to independence in the 1700's, people like John Witherspoon and others, they were absolutely convinced that religious liberty and civil liberty were so intertwined intrinsically, that if you denied one, you were automatically going to deny the other.

So, as you look at the data about how unfortunately much of the American public has lost sight of the history and the meaning and the parameters of the Bill of Rights, I think there's also a blessing and a benefit to America, not just in fortifying religious liberty when we stand for that principle, but it will enlighten the fact that, as I've indicated by—Professor Cox once said, you look at it, the history of the Bill of Rights, it started with a spiritual core and moved out from there.

Mr. FRANKS. Well, thank you, Mr. Parshall.

And I would now recognize Mr. Cohen for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman.

Since, as I understand it, there's no legislation filed that's particularly relevant to the subjects on which we're talking, this is more of an academic, intellectual exercise rather than a legislative hearing for the purpose of producing legislation and changing the law, so I will pursue it in that manner.

First, I want to correct the record, if it needs to be corrected, because I think the record ought to be correct. If I said author of the Constitution, which if I check with my staff, I might have said that, he was obviously the author of the Declaration of Independence. And Mr. Goodlatte was in the right church, but the wrong pew when he corrected me. If I didn't say that, he was just in the wrong church. But I definitely had University of Virginia down.

I'd like to compliment Ms. Windham. You graduated Abilene Christian. Is that correct?

Ms. WINDHAM. Yes, that's correct.

Mr. COHEN. And then you went to Harvard Law School, right?

Ms. WINDHAM. Yes, that's correct.

Mr. COHEN. Is there any other person in the universe with that combination of degrees?

Ms. WINDHAM. Thank you, sir. There have been a few.

Mr. COHEN. Have there really? Well, great. I knew Abilene Christian, but I never knew it reached to Harvard, and you're a proud alumna. I'm sure they're very proud of you.

Mr. Baylor, you've got a lot of Texas history, but it didn't tell me where you went to undergraduate school. Where did you go to school?

Mr. BAYLOR. To Dartmouth College and Duke Law School.

Mr. COHEN. Duke. I was afraid you were going to say Baylor and you were right down——

Mr. BAYLOR. We claim we own it, even though we don't.

Mr. COHEN. But you're from Texas, I take it.

Mr. BAYLOR. I'm not, actually.

Mr. COHEN. You just practiced years there.

Mr. BAYLOR. I'm from New York.

Mr. COHEN. Okay. You practiced a lot there.

Your group is for the defense of marriage. Is that right?

Mr. BAYLOR. Yes.

Mr. COHEN. That is one of the things you do? The biggest—the biggest assault on marriage, from time immemorial has been adultery. What have—has your group done to attack adultery?

Mr. BAYLOR. What was my group done to attack adultery?

Mr. COHEN. Yeah, because adultery is the root problem with marriage. That's what breaks up more marriages than anything, is adultery. And if you want to protect marriage, you've really got to get to the core, and that's fight adultery.

Mr. BAYLOR. I——

Mr. COHEN. What have you all done to fight adultery?

Mr. BAYLOR. I would agree with you, sir, that adultery certainly undermines the institution of marriage.

Mr. COHEN. Right.

Mr. BAYLOR. I don't think it's the case that we're in a political environment right now where someone could seek to criminalize adultery, but ADF does support the family. We work with allied organizations that do all that they can to keep marriages together, to keep marriages together for the benefit of the children and for the folks who are in those marriages.

Now, ADF as a matter of its own institutional policies tries to encourage those who are married to have strong marriages.

Mr. COHEN. What do you think is—what do you think or your group thinks is the biggest threat to marriage?

Mr. BAYLOR. Well, we haven't published a list of all the threats to marriage and ranked them in any form or fashion.

Mr. COHEN. Well, would you——

Mr. BAYLOR. We're dealing—we're dealing with the cultural moment. I don't happen to be on the marriage team at ADF, but we protect the institution of marriage. We think it's important for the upbringing of children. That's why the institution exists, is to create an environment in which children can best be raised.

Mr. COHEN. So you're saying that since I'm—I'm 65, and I've never married. I've thought about it and I've thought about—even this morning, I thought about it, but I haven't thought about having children. And so are you suggesting to me I should—don't need to get married because I'm not going to have children?

Mr. BAYLOR. No, not at all. I think you—I encourage you to read a book that was published by Professor Robert George at Princeton, and his coauthors Ryan Anderson and Sherif Girgis where they lay out the case for marriage. And one of the points that they make is that sort of the template, the model, the ideal of marriage can be one thing, and it doesn't necessarily mean that every single marriage has to be geared toward procreation and toward protection of children. We're talking about setting an ideal setting, a model setting.

Mr. COHEN. Right. So it's sharing in life and getting through the senior years with somebody that you can—who can remember what you remembered and, you know, who knows who Steely Dan was and all those things.

Mr. BAYLOR. Well, I would—I would not agree, and I think the authors of that book and other advocates for marriage would say that that is not in and of itself the government's interest in regulating the institution of marriage. The government does not have a particular interest in relationships per se. It has an interest in how children are raised, and that's the reason why what they call conjugal marriage. I encourage you to read that resource. It's very useful.

Mr. COHEN. Well, life, liberty and the pursuit of happiness. The pursuit of happiness could be children, and a lot of people it is, I think for our parents hopefully it was, and I know a lot of others, but—but pursuit of happiness can be just knowing Steely Dan and kind of getting through it all.

Mr. BAYLOR. Well, there's been some interesting scholarship about what the framers meant when they said "happiness," and I suspect it meant something more profound than enjoying a Steely Dan concert.

Mr. COHEN. They certainly weren't like the Beatles, and thought happiness was a warm gun, like some people, my colleagues think.

Mr. BAYLOR. I doubt that.

Mr. COHEN. Yeah.

Mr. BAYLOR. But I think many of the clients that Craig and Lori and I represent pursue happiness through their religious exercise, and they want protection from the government to be able to do that without undue interference. And my concern is that without a statute like RFRA that protects us at least from the Federal Government, we won't be able, our clients won't be able to pursue happiness in the manner they deem fit.

Mr. COHEN. Mr. Baylor, I appreciate it and I appreciate your group.

And I don't know if you all have suggested that the expansion of the definition of marriage to people of the same gender would be something that is a threat to marriage, but if you have, I would suggest working on adultery, because I think there's more of a history there.

I yield back the balance of my time.

Mr. FRANKS. I now recognize the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I would like to correct the record. And no number of votes taken by the gallery will change the facts. But the gentleman from

Tennessee did say he attributed that one of the three things Jefferson wished to be remembered by, as part of his memorial or gravestone, was that he was the father of the Constitution. That was the gentleman's words. I didn't hear which two things he left out.

But I'm a bit surprised, since all of us are not immune from having slips of the tongue, that the gentleman would be so contemptuous of Mr. Goodlatte, because the gentleman did say that——

Mr. COHEN. Could I——

Mr. GOHMERT [continuing]. Attribute to Jefferson as being father of the Constitution. He wasn't there.

And I kind of like one of his suggestions when he wrote back and said, you know, if I'd been at the Constitution's writing, I would have liked to have seen a proposal that no law could be passed that had not been on file for a year. And I would suggest that might not be a bad rule.

Mr. COHEN. May I ask the gentleman to yield for a moment?

Mr. GOHMERT. So—and I will not. The gentleman has had over 10 minutes, and I have had about 2.

Mr. COHEN. Could I ask the Chair to correct a point?

Mr. GOHMERT. So, at this point——

Mr. COHEN. I was not contemptuous of Mr. Goodlatte.

Mr. GOHMERT. Mr.——

Mr. COHEN. I was expressing my fault and saying Mr. Goodlatte might have been right. I would not express any——

Mr. GOHMERT. The Chairman needs to get regular order going.

Mr. COHEN. Well, if we are going to——

Mr. GOHMERT. It is not enough to condemn Mr. Goodlatte or belittle him——

Mr. FRANKS. The gentleman from Texas is recognized.

Mr. GOHMERT [continuing]. Stealing my time.

In any event, let me go to what is panel three of the Jefferson memorial. "God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God? Indeed, I tremble for my country when I reflect that God is just and that his justice cannot sleep forever." He didn't use the word "and." I slipped that in.

Now, Mr. Parshall, you indicated a similar belief, so let me ask Mr. Tebbe.

Do you believe Jefferson and Mr. Parshall, that when you threaten religious liberty that you actually are threatening civil liberties as well?

Mr. TEBBE. Yes. I believe that religious freedom is an important civil liberty. I think that's common ground among many of us here in this room today.

What disturbs me slightly is the way the story has been told, though, of RFRA and RLUIPA by some of my colleagues on the——

Mr. GOHMERT. Well, that goes beyond the extent of my question. Thank you for wanting to get into that.

Mr. Baylor, do you have a succinct answer to whether or not the threat to religious liberty threatens everyone's civil liberty?

Mr. BAYLOR. Absolutely. As Chairman Franks said in his opening remarks, religious liberty is our first freedom and it is the foundation on which all of our freedoms rest. It presupposes that there is a God and that we have a duty——

Mr. GOHMERT. Well—and in the First Amendment, do you think one portion of the first two clauses is more important than the other?

Mr. BAYLOR. I do not. I think that the Framers of the First Amendment recognized the importance of all parts of the First Amendment. They had their own purposes——

Mr. GOHMERT. But you understand the two parts I'm talking about, the first two, that——

Mr. BAYLOR. Are you referring to Free Exercise and Establishment?

Mr. GOHMERT. Yes.

Mr. BAYLOR. Yes. Yeah, they are both important to protecting liberty——

Mr. GOHMERT. Is one more important than the other? Because it seems like the Supreme Court, in more recent times, has almost eliminated "or prohibiting the free exercise thereof." It seems like that has taken a second seat to this Supreme Court.

Mr. BAYLOR. Well, obviously, the *Employment Division v. Smith* case was a grave disappointment. And we are grateful that Congress responded with the Religious Freedom Restoration Act. And they have interpreted correctly, I believe, in the *O Centro* case, 8 to nothing; the *Hobby Lobby* case, 5–4, a little bit closer.

I would submit, if you're asking about this, that there are certain Establishment Clause cases, particularly in the '70s and the '80s, that were wrongly decided, and there are still some problems out there in Establishment Clause jurisprudence. But I think the Court has done some things to correct some of its prior errors from the '70s and the '80s.

Mr. GOHMERT. Yeah.

Ms. Windham, do you have thoughts about religious liberty and whether or not infringements on religious liability are a real threat to civil liberty?

Ms. WINDHAM. I believe they are a real threat to civil liberty. Religious liberty is a critical component of human dignity. It also promotes both diversity and peace in our large Nation made up of many faiths.

Mr. GOHMERT. Okay. Thank you.

My time has expired.

Mr. FRANKS. I now recognize the Ranking Member of the full Committee, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Attorney Tebbe, do you agree that the Religious Freedom Restoration Act should not be used to carve out exemptions to our Nation's nondiscrimination laws?

Mr. TEBBE. I do think that's correct, on the whole.

As I was saying a moment ago, what disturbs me a little bit about the way that the story of RFRA and RLUIPA has been told by other members of the panel today is that it has not been simply a story of unanimous support for those two statutes over time, and it is not the case that dissent over how RFRA has been applied is a new thing or originated with the Hobby Lobby decision.

Rather, as they well know, the coalition supporting RFRA disintegrated in the mid and late 1990's precisely because of concerns over civil liberties. Civil rights groups became aware that RFRA

and RLUIPA, or RFRA in particular, could be used to chip away at important civil rights protections, and, at that time, particularly concerning housing discrimination. And attempts to repass RFRA after it was struck down as applied to the States in City of Boerne failed in Congress. It's not that the votes weren't unanimous; it's that those attempts failed because of these concerns about civil liberties.

So I think telling the story—it's at least important to acknowledge that that happened. Right? If the point of this hearing is to build up bipartisan support for these statutes, I think it does not help to tell the story in a way that doesn't even acknowledge the fact that there was serious concern about the impact of these statutes on civil liberties in the 1990's.

Mr. CONYERS. Uh-huh.

Let me turn to the three ways that were suggested to address deficiencies. "Make RFRA inapplicable to commercial action" is one of them.

Could you explain if it would help to ameliorate harm to third parties but acknowledge that this may be an incomplete solution?

Mr. TEBBE. Sure. I'd be happy to do that.

One of the unprecedented aspects of the Hobby Lobby decision was that it granted an exemption to a corporate actor on religious grounds. That had never been done before by the United States Supreme Court. It was entirely unprecedented.

The reason it had never been done before was not because the Free Exercise Clause didn't apply to corporate actors or to business actors. It did. But the Supreme Court was worried, in case after case, in specific circumstances, that the impact of exempting corporate actors and commercial actors on third parties would be very grave. Those third parties are chiefly often employees but could also be customers, investors, and a host of other constituents that corporations affect in their daily operations.

Mr. CONYERS. Thank you.

Mr. Baylor, I wanted to ask you about whether a domestic violence shelter funded by taxpayer dollars and run by a religious institution would be permitted to deny services to a lesbian woman.

Mr. BAYLOR. You know, your question raises precisely the analysis that RFRA was designed for.

Now, I don't know. Your premise is that this clinic, or this shelter, would for some reason refuse to provide services to lesbians. That has not been what we have seen in the United States in recent history.

What we have seen is individuals who are operating in commerce not refuse to serve gays and lesbians but rather to be coerced by the government to participate in the celebration of a marriage ceremony that they object to. So I think the premise does not really reflect what is happening in reality.

But the next questions would be: What burden is the operator of the shelter articulating, and is it sufficiently substantial? Then, if they proved that, it would turn to the government to prove that it's necessary to force this shelter to provide those services, and a judge would decide that.

Mr. CONYERS. Thank you very much. That was a very insightful response.

And I yield back the balance of my time.

Mr. FRANKS. I thank the gentleman.

And I now yield to the distinguished Vice-Chairman of the Constitution Subcommittee, Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

Thank you, for the witnesses, for your testimony.

Mr. Tebbe, if I understand you correctly, your objection to Hobby Lobby was that the price of giving Hobby Lobby an exemption from the regulatory mandate was that the employees of Hobby Lobby were made worse off as a result?

Mr. TEBBE. That's right. And I think the Supreme Court didn't do enough in its opinion to make sure that wouldn't happen.

Mr. DESANTIS. But here's the problem I have with that point, is that, wouldn't the outcome have been, if that regulatory edict was upheld, that Hobby Lobby, per the advice of Justice Kagan and Sotomayor during the early arguments, Hobby Lobby would have simply gotten out of the health insurance business, perhaps, and ended up paying the tax, which Justice Kagan correctly pointed out was actually cheaper than offering the insurance?

So Hobby Lobby still would have maintained its religious commitment. Those employees would have ended up in exchanges, which would have been more costly and given them, actually, worse coverage, in many respects.

So wouldn't they have been made worse off had the case gone the other way?

Mr. TEBBE. Yeah, that's an interesting point. And I want to acknowledge Professor Marty Lederman, who started to raise that argument, that Hobby Lobby could simply get out of the business, if it didn't want to be burdened, of providing health insurance at all.

Unfortunately, that argument was raised late in the litigation, and there was not a record on how much it would actually cost. So whether that——

Mr. DESANTIS. Well, let's just assume that the tax penalty for not providing insurance is substantially cheaper. And, obviously, Hobby Lobby would be in a position where they wouldn't be complicit in something that violates their conscience. I think it's questionable whether the employees would—I think they would have been a lot worse off under that situation.

Let me ask you this, though. I'm trying to figure out, kind of, where the boundaries are here in terms of how you understand religious liberty. Could Congress enact a statute to require churches, like a Catholic parish, to pay for late-term abortions for its employees?

Mr. TEBBE. I think that would be a difficult question I'm not prepared to answer right now, but——

Mr. DESANTIS. But, I mean, if under the analysis, I think, that you're proposing, if that parish were to go and ask for, hey, RFRA, this is a burden on my faith, not least restrictive means, under your analysis, those employees who happen to work for that parish would be worse off because they would not be getting a regulatory benefit, or maybe even Congress would do a statutory benefit.

And so wouldn't you have to then say that that regulation would have to be imposed on the church?

Mr. TEBBE. I see where you're going with this. No. And I believe——

Mr. DESANTIS. Why?

Mr. TEBBE. The reason is because churches and their relationships with their employees are a special case, and the Supreme Court has recognized——

Mr. DESANTIS. Okay. What about Catholic Charities? So this is a big organization. It's not a church. It's based on Catholic principles. Would that mandate apply to Catholic Charities? Would they have to fund late-term abortion coverage for their employees?

Mr. TEBBE. I'm reluctant to speak on that question because I haven't thought it through carefully enough. But I do think that Catholic Charities would be required by general laws, for example, to provide adoption services to all couples in——

Mr. DESANTIS. Well, that's a different—so what do you think, Mr. Baylor? I mean, in this situation, under that analysis—well, let's even go further, more into the commercial realm. EWTN, a Catholic station, it's commercial, but clearly they have a religious mission that's core.

Would that analysis mean that EWTN would have to provide the late-term abortion coverage, which is obviously something that the people who are participating in running that organization very much would disagree with?

Mr. BAYLOR. I think it does. And that's what's really disturbing about some of these arguments that are being made about Hobby Lobby, is, you know, we tend to think it's about contraception, but, actually, the objection that was made by Hobby Lobby and by Conestoga and by many of the over 300 plaintiffs that have challenged the mandate is that they don't want to facilitate access to abortion.

And this hypothetical that you have spun out is not a hypothetical. It is a reality. The District of Columbia now has adopted a law that will require all employers, including the Catholic Archdiocese, including Catholic University, including Alliance Defending Freedom, to pay for all elective abortions. California has done the same thing. So we need protection from it.

Mr. DESANTIS. Let me—my time is about to expire. There are sometimes distinctions drawn between a corporate actor or a commercial actor versus a non-. I mean, I think if you had a sole proprietor who was running an orthodox Jewish deli, there would be religious protections for that sole proprietor. I mean, do people dispute that?

And if they don't, then simply the fact that he decides to incorporate his business, he would essentially be forfeiting his right to run his business as a—I just—I'm trying to figure out where this would go. So can you speak to that issue?

Mr. BAYLOR. Well, there was a lot of difficult line-drawing that folks on the other side of the Hobby Lobby case were trying to engage in during that litigation. And it was pointed out that corporations—I think everyone agrees that at least some corporations have religious liberty. Many churches are incorporated. The Christian school that my daughters go to is incorporated. So you can't say that all corporations don't have religious liberty.

And then you have this prospect, as you talked about, of sole proprietorships. And is it really the case that we're going to say that

someone who incorporates or has a sole proprietorship as a Kosher deli can be forced by the government to do things that violate their religious convictions?

The lines just don't hold up. We should keep it as it is.

There was an amicus brief in Hobby Lobby that explained that when RLUIPA—I'm sorry—when RLPA, the predecessor statute, was considered, Congress understood that RFRA protected commercial entities. They tried to change that and failed.

Mr. DESANTIS. Thank you.

My time has expired.

Mr. FRANKS. And I thank the gentleman.

And I now recognize Mr. Nadler from New York for 5 minutes.

Mr. NADLER. I thank the Chairman.

I want to go into a little of the history here, first of all. I was one of the leaders in the fight for RFRA back in 1993. And along with former Congressman, now Florida Supreme Court Justice Charles Canaday, I was the principal author, along with Charles, of RLUIPA. And the congressional intent at that time—and we did pass it by UC on the floor, with only Charles and I being on the floor at the time, as the last act before we adjourned in 2000.

The U.S. Supreme Court's ruling in Hobby Lobby essentially punched a hole in the Constitution, in my opinion. It took the principle of religious liberty, enshrined in our First Amendment and in RFRA and RLUIPA, and turned it on its head.

The Religious Freedom Restoration Act was intended to be used as a shield, not a sword. It was designed to protect individuals' ability to exercise their religion. It was not intended to allow any of us to impose our religious beliefs on someone else or to use our religion to harm other people.

And I think Mr. Tebbe's distinction between who pays the price, the government or a third-party individual, is exactly apropos.

When we passed RFRA in 1993, it was not intended to excuse for-profit businesses from complying with our laws. Religious belief was not understood to excuse restaurants or hotels from following our civil rights laws enacted in the 1960's or an Amish employer from having to pay into the Social Security system in the 1980's, and I think Ms. Windham mentioned that case.

No matter how sincerely held the religious belief, employers should not be allowed to use their beliefs as a reason to refuse to hire people of the "wrong," in quotes, race or religion or to deny employees access to critical preventative healthcare services required to be provided by law.

Now, let me ask a couple of questions here.

By the way, let me mention that all the cases mentioned by Ms. Windham as RLUIPA cases—the prison beard case, the eagle feather case, the land use cases that were mentioned—all of them, I certainly agree with the outcome. And all of them were well within the purpose—they were exactly why we passed RFRA and why we passed RLUIPA.

The Hobby Lobby case, which is the first case that imposes a burden on third parties, is the exception—not the exception. It's the new—it's an extension of the law, because we never intended that third parties should bear the burden. And Mr. Tebbe made that distinction.

Let me ask you this. We generally provide exemptions in the law. We say that a church—you can't discriminate on religion in hiring, for example. But if you're a church, you can discriminate in hiring as long as the person has to do with the ministry. In other words, you can say, "We insist on Catholics to be priests." You can't say, "We insist on Catholics to be the janitor."

Where does that end?

Mr. TEBBE. I think it ends at the church walls. That is, in the Amos case, the United States Supreme Court addressed that question. And that very exemption that you are mentioning to Title 7 that allows religious employers, churches in particular, to discriminate in employment in favor of co-religionists—right? It allows a church to hire only people of the same faith for all positions within the church. As applied in that case, it did impose a harm on a third party, namely the janitor—right?—who was not of the same faith as the church.

But that's a very special situation. You know, the Supreme Court has recognized, and I think a lot of people have, that churches have special ability to——

Mr. NADLER. And the statute recognizes that. If the statute did not recognize that, would that be a constitutional requirement?

Mr. TEBBE. Well, there's debate about that. I'm not sure I would want to take a position on it here. But the statute requires it, and the Supreme Court has acknowledged it in the *Hosanna-Tabor* case, I think rightly, although maybe that case goes a little bit further than it should.

Mr. NADLER. Now, let me ask you a different question.

Mr. TEBBE. Yeah.

Mr. NADLER. We would certainly say that the corner bakery or—let's be bigger—the large bakery could not refuse to hire a Black person or a Jewish person or anybody on the basis of race, color, religion, creed, faith, et cetera.

Could they refuse—the bakery—could they refuse to sell a wedding cake to a couple of whose marriage they disapprove, let's say a same-sex couple? If so, why? If not, how do you distinguish that from—or, if so, how do you distinguish that from the refusal to hire the wrong person?

Mr. TEBBE. So State and local antidiscrimination laws would prohibit that kind of discrimination even on the basis of religion, and there would not be a religion exception.

There was recently a New Mexico Supreme Court decision that held as much in a case to do with a wedding photographer that declined to photograph the civil union ceremony of a gay couple. And the Supreme Court of that State said that the antidiscrimination law could be applied against the wedding photographer.

And there are cases pending now in different parts of the country concerning bakeries, and they're coming out the same way.

Mr. NADLER. And would the Hobby Lobby doctrine, if Hobby Lobby were applied, would you think that would change that result?

Mr. TEBBE. It could be a problem, right? So there are State-level RFRAs. One of the dangers with Hobby Lobby and the way it eviscerated the principle against shifting harms to third parties is that it could be mimicked by State-level religious freedom restoration

acts by State courts. And if that started to happen—it didn't happen in New Mexico, but if it starts to happen, that could be a problem for State and local laws that protect LGBT people against discrimination.

Mr. NADLER. That's another problem.

My last question: Mr. Baylor, I don't remember if it was you or Ms. Windham or somebody cited a number of the zoning cases designed to exclude orthodox Jewish institutions from certain areas and that they were rejected on the basis of RLUIPA, quite properly. Maybe it was Mr. Parshall who cited those cases and Ms. Windham.

And those kinds of cases were one of the reasons we passed RLUIPA in advance. And I think the Court decisions saying you can't do that were quite proper and correct. And I congratulate any of you sitting here who had anything to do with those cases.

Now, Mr. Parshall, several years ago, a developer announced plans to build a Muslim community center named Park51 in New York City near Ground Zero in my district. The project satisfied all zoning requirements and was legally authorized to move forward with construction, but there was significant backlash to the project, specifically because it was a building to be used by Muslims, and some people said that's a terrible thing. You know, given its proximity to Ground Zero, it is terrible because, after all, it was Muslims who destroyed the World Trade Center, and it's bad to have a Muslim mosque or whatever close to it.

Although your organization usually argues that zoning and historic landmark laws may not be used to stop the building of religious structures, in that case it filed a lawsuit arguing that zoning and landmark laws should be used to bar the construction of the Muslim community center. In fact, you filed a lawsuit to prevent the structure from being built.

Now, this is the very scenario that RLUIPA was meant to protect. A building project was being contested simply because of the religious belief of those who would use it. What was unusual in this case is that, usually, when someone opposes a religious building project, they're not honest enough to admit the reason is that it's religious. They find some other excuse, density or whatever. Here they were very clear about it; we don't want a Muslim——

Mr. FRANKS. The gentleman's time has expired here, but go ahead and finish the question, and let him answer.

Mr. NADLER. We don't want a Muslim structure nearby.

RLUIPA is there to ensure that this minority religious group is not treated differently because of what they believe, et cetera. But the ACLJ not only refused to——

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

Mr. NADLER. I'm almost finished. I have one more sentence to the question—but actively sought to prevent their use of the property.

How is blocking the building of a Muslim community center supporting religious freedom? And why would you think that RLUIPA did not protect the religious group in this case?

Mr. PARSHALL. Well, first of all, as you know, the Court ruled in a way that affirmed the ACLJ's legal position that we had argued in that case.

Zoning codes—and I've done zoning work. I'm not a specialist in it, but those of us who do religious liberty work run into these zoning cases quite a bit. Zoning codes and zoning authorities have the right to use a number of criteria that are religion-neutral.

And, in this case, the reason that the Court ruled and the reason that ACLJ argued was not because of public outcry. This wasn't a mob effort. This was a reasoned effort in line with the criteria that zoning boards and zoning ordinances and zoning laws can apply—things like aesthetics and history, legacy. And, in this case, we all have to admit that there was a particular history surrounding the 9/11 tragedy in that part of New York City, very much like the landmarking laws that are often—in fact, the Flores case addressed the competing interests between religious liberty and landmarking.

So, in a sense, I look at this as a landmarking issue and not a targeting-of-religion issue.

Mr. FRANKS. I want to thank all of you today for this very important discussion.

You know, I am reminded of a—if I can paraphrase and sort of condense a quote from a great statesman some years ago when he said that, out of fervent, religious, and committed faith arises—you know, from bondage sometimes arises great, fervent faith, and that faith often leads to great courage, and the courage leads to freedom, and freedom leads to abundance, and abundance leads to apathy, and apathy leads to dependence, and dependence can lead back to bondage.

And I think it's a great admonition on the part of all of us that, when we are in times of abundance, to make sure we protect our foundational freedoms, none of which is more foundational than the freedom of religion.

And I thank all of you and——

Mr. COHEN. Mr. Chair, before you close, I have a statement to enter in the record, without objection.

Mr. FRANKS. Without objection.

[The information referred to follows:]

Oversight of RFRA and RLUIPA

House Judiciary Committee
Subcommittee on the Constitution and Civil Justice
February 13, 2015

On behalf of its hundreds of thousands of members across the country, People For the American Way welcomes this opportunity to inform the Subcommittee about the current state of the Religious Freedom Restoration Act (RFRA) and the principle of religious freedom that RFRA was passed to protect.

Religious liberty has been a central part of our mission since our founding more than three decades ago. In the early 1990s, People For the American Way was proud to play a leading role in the large bipartisan coalition spanning the political spectrum that successfully pressed for the adoption of RFRA. More than 20 years later, our commitment to religious liberty is as strong as ever.

Unfortunately, RFRA has recently been extended far beyond its original intent in a manner that is already causing harm and which risks greater harm going forward. This is part of an effort we are seeing nationwide to transform the fundamental principle of religious liberty from a shield designed to protect individuals into a sword designed to harm others.

Hobby Lobby

On June 30, 2014, the U.S. Supreme Court issued a 5-4 decision in *Burwell v. Hobby Lobby* that could dramatically reshape the legal and political framework for religious liberty in America. In *Hobby Lobby*, the court misinterpreted RFRA, extending the right of religious conscience to for-profit corporations and radically altering the test that is used to balance claims that the law substantially burdens a person's exercise of religion against competing claims and interests. In the months since the decision, it has become clear just how far-reaching and damaging its consequences could be.

Bizarrely, the Court ruled that certain for-profit corporations exercise religion and can therefore invoke RFRA. Although the majority tried to minimize its holding by suggesting that only family or other closely-held corporations would be able to invoke RFRA in practice, most American employees work for closely-held corporations. In addition, the Court's rationale is equally applicable to publicly traded corporations.

The 5-4 majority essentially dismantled the requirement under RFRA that a person claiming an exemption must demonstrate that their "exercise of religion" would be substantially burdened. The Court created a dramatically new standard, allowing business owners to seek exemption for a law that merely offends their beliefs. While *Hobby Lobby* itself was about the "right" of employers to deny contraception coverage to their employees, the case could open a huge avenue for anti-gay discrimination by business owners who claim religion-based objections to homosexuality, as well as for other claims to be exempt from anti-discrimination and other laws for religious reasons.

Discrimination

Hobby Lobby's echoes are being heard across the nation. Forces that have for decades opposed every advance in LGBT equality are now latching on to specious "religious liberty" claims. That they are sincerely religiously offended by homosexuality no one questions. But even in situations where their actual exercise of religion is not substantially (or even moderately) burdened, they are claiming the right to exempt themselves from laws prohibiting discrimination against the people they find offensive.

Our state capitals are seeing a flurry of RFRA bills, some tracking the language in the federal version. But given the misinterpretation of the federal RFRA in *Hobby Lobby*, the chances are great that identical language would be similarly interpreted by state courts … especially since the bills' sponsors and supporters (quite unlike those of the federal RFRA) are making clear that among their mains goals is the "protection" of those who oppose LGBT equality generally, and marriage equality specifically. Much of the impetus for such legislation is the increasing right of same-sex couples to marry, and the expectation that the Supreme Court may make that right national when its term ends in June. A state court following the *Hobby Lobby* logic could easily equate a business owner's being religiously offended by a gay employee or customer's "lifestyle choice" with a significant burden on their religious liberty. Voila - religious liberty is transformed from a shield into a sword.

We are also seeing marriage-specific bills introduced in state legislatures around the country that rely on the same transformation of religious liberty that the Roberts Court performed. Such bills would allow government officials to opt out of granting marriage licenses to couples whose marriage offends the official's religious beliefs.

But why are we seeing these bills now? We do not let racist government officials opt out of granting marriage licenses to biracial couples, even when their racial animus is based on sincere religious beliefs. Nor do we allow Catholic officials to opt out of issuing licenses to couples where one or both of the people are divorced.

Now that gays can marry, however, far right conservatives are suddenly concerned about the religious beliefs of the officials who grant marriage licenses. But just as hypothetical racist and Catholic officials don't have their religious exercise burdened when they issue marriage licenses, neither do officials whose religious beliefs are offended by those marriages. The sudden concern for "religious liberty" in these cases suggests that this is not, in fact, about the principle of religious liberty at all, but is instead about targeting a particular group.

Conclusion

What we are seeing today could not possibly be further from the ideals that motivated Congress when it adopted RFRA nearly unanimously. That law was passed to protect people like Alfred Smith, who was fired and then denied unemployment insurance by the state of Oregon because he smoked peyote as part of a religious ceremony. The Supreme Court had upheld the state's action, saying it didn't violate the Constitution's Free Exercise Clause. So Congress adopted RFRA. It garnered near-universal support because it was designed to be a shield to protect individuals' ability to exercise their religion. There was no discussion of people using the law as a sword to deny *other* people their legal rights. Nor did it contemplate corporations having religious exercise rights to be protected.

For further background and exposition on these issues, please see the appendix, a People For the American Way report issued on February 10, 2015, entitled *Religious Liberty: Shield or Sword?*

Appendix

Religious Liberty: Shield or Sword?

Religious liberty is a treasured American value.
Unfortunately, laws originally designed to shield individuals' religious freedom have been turned into swords that, in the name of religion, harm other people and undermine measures to promote the common good.

Religious liberty is a fundamental American value and a promise that is enshrined in the U.S. Constitution. Protections for religious liberty have encouraged the development of peaceful pluralism and a vibrantly diverse religious landscape, including a fast-growing group of Americans who claim no religious affiliation. Today, however, "religious liberty" has also become an ideological rallying cry for a collection of culture warriors – and the linchpin of their legal and political strategies.

It hasn't always been this way. Two decades ago, an extraordinarily broad coalition came together to strengthen legal protections for religious liberty by limiting the government's authority to substantially burden an individual's ability to exercise his or her faith. That law was a response to a Supreme Court ruling that threatened to undermine protections for religious minorities, and it reflected a strong, interfaith, bipartisan consensus. Today, however, that consensus has been shattered because social conservatives are trying to turn laws meant to shield individuals' religious exercise into swords that individuals and corporations can use against anti-discrimination laws and other measures opposed by conservative religious groups.

With Religious Right groups crying "religious persecution" in response to the advance of marriage equality, and the Supreme Court's conservative majority granting for-profit corporations the right to claim religious exemptions to laws that offend the owners' religious beliefs, even when that comes at the expense of their employees' interests, it is a good time to affirm some basic truths:

- Religious freedom and equality under the law are both core constitutional principles;
- Religious liberty, while fundamental, is not absolute, in the same way free speech and other constitutionally protected values are not absolute;
- The government has a compelling interest in promoting public health and preventing discrimination;
- Judges and other public officials regularly have to make difficult calls when constitutional and civil rights principles come into tension with each other;
- Having your positions criticized in public discourse is not the same as being subject to persecution; neither is being on a losing end of a legal or policy dispute.

The Persecution Myth: Political Posturing with a Purpose

For decades, Religious Right leaders have falsely portrayed liberals as anti-faith and anti-freedom. This is a cynical political strategy: it is easier to convince people to support discrimination against their gay neighbors if you have first convinced them that gay people are enemies of faith and family. Fortunately, those arguments have lost much of their power as people experience the real lives of LGBT family and friends. But that doesn't mean Religious Right leaders have abandoned their religious persecution claims. In fact they are doubling down.

In recent years, in response to the advance of women's reproductive health care rights and LGBT equality, conservative evangelicals and conservative Catholics have put religious liberty claims at the center of their political, legal, and public relations strategies. "Religious liberty" has been the focus of resistance to the requirement under the Affordable Care Act that employer-provided insurance include coverage for contraception. And it has become a primary argument against marriage equality as other arguments against basic equality for LGBT people have lost their effectiveness.

In this political context, Religious Right leaders leap at any chance to portray progressives in general, and supporters of LGBT equality in particular, as enemies of religious liberty. This strategy explains why the Alliance Defense Fund manufactured a controversy in 2014 by claiming that the owners of a commercial wedding chapel in Idabo, who had previously conducted Christian, other religious, and non-religious ceremonies and weddings, were about to be thrown in jail for refusing to marry gay couples. The supposed threat to religious freedom evaporated under closer scrutiny – the owners had already reincorporated as a religious corporation that was not even subject to the law they were complaining about – but it succeeded in generating a wave of alarmist stories in right-wing media.

In early 2015, Religious Right groups rallied around Kelvin Cochran, the former fire chief of Atlanta, who was fired by Mayor Kasim Reed after he distributed to some of his employees copies of a book he had written in which he called homosexuality a perversion and said homosexual acts are "vile, vulgar and inappropriate." When Religious Right leaders began portraying Cochran as the victim of religious persecution, Mayor Reed affirmed what was really at stake: "His religious (beliefs) are not the basis of the problem. His judgment is the basis of the problem." The *New York Times* editorial board noted that Georgia lawmakers are among those pushing for a "religious freedom" bill that "would do little more than provide legal cover for anti-gay discrimination."

The First Amendment already protects religious freedom. Nobody can tell Mr. Cochran what he can or cannot believe. If he wants to work as a public official, however, he may not foist his religious views on other city employees who have the right to a boss who does not speak of them as second-class citizens.

Religious Right leaders have argued recently that American Christians who are resisting LGBT equality are in the same position as German Christians who resisted the Nazis. That is a ridiculous and shameful assertion designed to inflame rather than inform the debate. The same is true for much of the Religious Right's rhetoric. Movement leaders like the Family Research

Council's Tony Perkins have made wild accusations of hostility to religious freedom against the Obama administration. Perkins has claimed in a fundraising letter, for example, "The government's top priority is to become the arbiter of values for America – and break the back of those who stand by traditional religious beliefs."

Reality: A Constitutional Balancing Act

The First Amendment's religious liberty clauses – the Establishment Clause and the Free Exercise Clause – work together to protect Americans' religious freedom. As noted in People For the American Way Foundation's *Twelve Rules for Mixing Religion and Politics*, these two principles can come into tension when they are applied to real-world situations, and the often challenging line-drawing has kept courts and legislatures busy for decades. In addition, religious liberty can come into friction with other constitutional principles, such as equal protection of the law, requiring efforts to reconcile and balance competing interests. People of good will can and do sometimes disagree about just where those lines should be drawn.

It is universally acknowledged (except in right-wing scare-mail) that churches and clergy are protected by the First Amendment from being required to give their religious blessing to same-sex couples. State marriage equality laws generally include language affirming that right. In addition, some state marriage equality laws permit religious organizations to refuse to facilitate same-sex weddings or in some cases recognize same-sex marriages. How much leeway, if any, religious organizations should be given in complying with laws on discrimination and access to reproductive health care is a question currently facing courts and legislatures. But conservative activists are pushing something far broader: the "right," in the name of religious liberty, of for-profit businesses to exempt themselves from laws, including civil rights laws, based on the religious beliefs of their owners.

Context: The Religious Freedom Restoration Act

In 1993, a politically and religiously diverse coalition of organizations pushed for passage of the federal Religious Freedom Restoration Act (RFRA). The goal of the coalition was to reverse the impact of a Supreme Court decision that made it easier for government to infringe on individuals' religious liberty. The case, *Employment Division v Smith*, involved Native Americans who were denied unemployment benefits under state law because they had been fired for using the illegal drug peyote as part of traditional religious ceremonies. The Court majority ruled that an individual whose exercise of religion was violated by a generally applicable government law or rule had no legal recourse under the First Amendment unless the law in question had specifically targeted the exercise of religion. This ruling, as Justice O'Connor pointed out, contradicted thirty years of Supreme Court precedent. With broad agreement that the Supreme Court ruling threatened the free exercise rights of religious minorities, RFRA passed with now-unimaginable bipartisan support: 97-3 in the Senate and unanimously by voice vote in the House.

RFRA was intended to establish a statutory civil right to religious liberty to replace the constitutional protection that had been offered by the Free Exercise Clause before the Court's ruling in *Smith*. RFRA requires that if a law or rule places a *substantial* burden on a person's *exercise* of religion, the government must demonstrate that the law serves a compelling

government interest in the least restrictive way. The Court later ruled that Congress could only apply RFRA to the federal government and the District of Columbia, not to the states. Some states passed their own versions of RFRA, but efforts to re-mobilize the broad coalition failed as civil rights advocates began to worry, with good reason, that state-level RFRAs could be misused to undermine anti-discrimination laws passed by states and localities.

The coalition did come together for a more limited purpose to support the Religious Land Use and Institutionalized Persons Act (RLUIPA), which essentially provides the same protection as RFRA with respect to state and local prison rules and zoning decisions that sometimes substantially burden religious liberty interests of prisoners, churches, mosques, and others. Today, however, the RFRA coalition is in tatters as conservatives seek to use religious liberty claims not as a shield to protect free exercise of religion from government control, but as a sword to hack away at legal protections for others' rights and interests.

The *Hobby Lobby* Case

On June 30, 2014, the U.S. Supreme Court issued a 5-4 decision in *Burwell v. Hobby Lobby* that could dramatically reshape the legal and political framework for religious liberty in America. In *Hobby Lobby*, the court misinterpreted the Religious Freedom Restoration Act, extending the right of religious conscience to for-profit corporations and radically altering the test that is used to balance claims that the law substantially burdens a person's exercise of religion against competing claims and interests. In the months since the decision, it has become clear just how far-reaching and damaging its consequences could be.

The *Hobby Lobby* decision concerned two lower court rulings involving for-profit corporations arguing that the mandate under the Affordable Care Act that insurance coverage include contraception violates the religious freedom of the corporations and their owners. In one case, *Hobby Lobby v. Sebelius*, the 10th Circuit ruled in favor of the company; in the other, *Conestoga Wood Specialties Corp. v. Sebelius,* the Third Circuit sided with the federal government against the corporation and its human owners. By a 5-4 vote, with Justice Kennedy siding with Chief Justice Roberts and Justices Alito, Scalia, and Thomas, the Court ruled in favor of the corporations.

Misinterpreting the Religious Freedom Restoration Act

The premise of Justice Alito's opinion in *Hobby Lobby* was a major misinterpretation of RFRA, whose purpose was, as mentioned above, to restore the state of the law that existed before the Supreme Court's *Smith* ruling. As Justice Ginsburg wrote in dissent, the majority construed RFRA "as a bold initiative departing from, rather than restoring, pre-Smith jurisprudence."

This fundamental misinterpretation was crucial to the majority's holding that for-profit corporations could invoke RFRA. As Justice Ginsburg explained, no previous Court decision under either RFRA or the Free Exercise clause had ever "recognized a for-profit corporation's qualification for a religious exemption." Although the majority tried to minimize its holding by suggesting that only family or other closely-held corporations would be able to invoke RFRA in

practice, most American employees work for closely-held corporations. Besides, as Justice Ginsburg explained, the majority's rationale is equally applicable to publicly traded corporations.

There is another major problem with the majority opinion, one that upends the balancing of interests intended by RFRA's authors. The 5-4 majority essentially dismantled the requirement under RFRA that a person claiming an exemption must demonstrate that their "exercise of religion" would be substantially burdened. In several pre-*Smith* cases, the Court had ruled that there was no "substantial burden" created by, for example, the government's use of Social Security numbers to administer benefit programs or the requirement that employers pay Social Security taxes, despite the sincere offense that these requirements caused to some religious beliefs. Indeed, as a unanimous Supreme Court concluded in rejecting an Amish farmer's claim that paying social security taxes violated his religious conscience, 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 that are binding on others in that activity."

Without proving that the government requirement actually interferes with what a religious adherent can actually believe or do, Justice Ginsburg explained, such religious "beliefs, however deeply held, do not suffice" to demonstrate a "substantial burden" under pre-*Smith* case law or under RFRA as properly interpreted. But Alito's majority opinion created a dramatically new standard, allowing business owners to seek exemption for a law that merely offends their beliefs. This could open a huge avenue for anti-gay discrimination by business owners who claim religion-based objections to homosexuality, as well as for other claims to be exempt from anti-discrimination and other laws for religious reasons.

Having determined that the corporations in *Hobby Lobby* met the "substantial burden" requirement, the 5-4 majority went on to rule that, even assuming that guaranteeing cost-free access to contraceptives is a compelling government interest, the government had not shown that the contraceptive mandate was the least restrictive means of furthering that interest. Alternatively, the majority suggested, the government could itself assume the cost of providing the contraceptives or it could extend to for-profit corporations the accommodation that the government already provides to religious nonprofit corporations, in which an insurer would provide the coverage without imposing any costs on the objecting organization.

Hobby Lobby's Aftermath

Just three days after the *Hobby Lobby* ruling, the Court granted an emergency injunction to Wheaton College, a religious non-profit college that has filed suit claiming that the existing accommodation for non-profits violates its rights under RFRA. Under the accommodation, the college only has to notify the government of its objections to providing coverage, and the government will notify the insurer that it must provide the coverage at no cost to the College. That is the very accommodation that the Court's conservatives pointed to in *Hobby Lobby* as evidence that there were less restrictive ways to provide contraception coverage to Hobby Lobby's employees. To have the Court, in the same week, grant an extraordinary injunction based on Wheaton College's claims that the same accommodation was a substantial burden in its exercise of religion, was astonishing. "Those who are bound by our decisions

usually believe they can take us at our word," wrote Justice Sonya Sotomayor. "Not so today." Sotomayor was joined by Justices Ginsburg and Kagan in her dissent.

In both the *Wheaton College* and *Hobby Lobby* decisions, Justice Alito and the conservative Court majority went out of their way to claim that the Court's rulings were narrow. Justice Ginsburg, on the other hand, called *Hobby* Lobby a ruling of "startling breadth," and many critics agree.

It is not clear how far the Court will extend the logic of *Hobby Lobby*. If corporations can exempt themselves from generally applicable laws based on the religious beliefs of their owners, and do so at the expense of others, what will happen when a conservative evangelical business owner refuses to abide by labor laws because he believes the Bible is opposed to unions, or to the minimum wage, or for that matter to certain kinds of taxes? Those are all positions argued by prominent Religious Right figures such as David Barton.

Using 'Religious Freedom' to Undermine Equality

One particular concern raised by *Hobby Lobby* involves the potential use of RFRA to seek exemptions from current or future federal measures to ban anti-LGBT discrimination. Indeed, Religious Right legal groups are actively asserting such claims against state-level anti-discrimination laws and are seeking to have such exemptions enshrined in federal legislation.

A few weeks after *Hobby Lobby*, President Obama issued an executive order that extended existing executive orders against racial and other discrimination by federal government contractors to also prohibit discrimination against LGBT people. A number of religious leaders called on the President to exempt religious organizations from the new order, but many other religious and civil rights organizations argued against such exemptions. The new order applied an existing rule that allows religiously affiliated contractors to favor individuals of their own particular religion when making employment decisions, but does not allow them to discriminate on the basis of race, sex, etc., and now also sexual orientation or gender identity.

But after H*obby Lobby*, a for-profit or non-profit group contracting with the government could claim that the order's application to them violates RFRA – and this would not be limited to sexual orientation and gender identity but could also include other categories covered by the executive order. Similarly, the District of Columbia's Human Rights Act bans anti-LGBT discrimination, and since RFRA applies to DC as a federal enclave, a RFRA claim for an exemption could well be brought in that context as well. Although Justice Alito's opinion appeared to specifically reject the application of RFRA to laws banning racial discrimination, he pointedly did not mention gender, LGBT, or other grounds under which discrimination is banned by various federal laws and regulations.

State RFRA Legislation

A number of states have recently considered legislation to grant a religion-based freedom to discriminate against LGBT people, laws which could also have other far-reaching consequences. Many of these laws were written more broadly than the federal RFRA, with looser standards

such as eliminating the crucial word "substantial" modifying religious burden, although after *Hobby Lobby*, whether or not "substantial" is contained in such a law may not make much difference.

Authors of these new state RFRA bills generally want to create the broadest exemptions possible, which could lead to widespread harm, saddle states with litigation, and weaken the ability of anti-discrimination laws to achieve their purpose. The Religious Right's overreach has created some opportunities for effective coalition-building in opposition. In 2012, for example, a coalition of civil rights, religious, law enforcement, and child welfare groups successfully urged voters in North Dakota to defeat a ballot measure that would have put overly broad RFRA language into the state constitution. Coalition members argued that the provisions could undermine child protection and law enforcement and could cause expensive chaos in the state's courts.

In 2014, intensive organizing and education helped stall bills in a number of states, including Kansas, Oklahoma, Tennessee, and Georgia. Arizona Gov. Jan Brewer vetoed a bill after national attention focused on the state. Among those who had urged her to veto the bill were Arizona business leaders, GOP Sens. John McCain and Jeff Flake, and at least three Republican legislators who had originally voted for the bill. But in April of that year, Mississippi Gov. Phil Bryant signed the Mississippi Religious Freedom Restoration Act. The bill, originally modeled on the extremely expansive Arizona legislation, was modified in the wake of the Arizona controversy. Mississippi's new law mirrors the federal legislation in some ways, but activists note that Mississippi law defines "person" to include businesses, so the new state law will apply to corporations as well as private citizens. In 2013, Bryant signed another "religious liberty" bill – one that could give religious cover for anti-gay bullying in public schools.

At the end of 2014, Michigan Republicans pushed "religious liberty" legislation through the state House, but it did not pass the Senate. The bill was reintroduced in Michigan in early 2015; similar RFRA bills and marriage-focused variations are expected to move in a number of states in 2015.

Small Business Owners and the Right's Martyr-Making Machine

While many states and localities have passed laws against discrimination in public accommodations on the basis of sexual orientation, and in some cases gender identity, most have not. Arizona, for example, provides no legal protection against discrimination based on sexual orientation, which led many to argue that its proposed RFRA legislation was "unnecessary."

Many of the cases that Religious Right groups cite as evidence that marriage equality undermines religious liberty concern small business owners – bakers, florists, and photographers – who have long been covered by state anti-discrimination laws regarding race, sex, and religion. But in states where those protections have been expanded to include sexual orientation, some businesses now run afoul of the law by refusing on religious grounds to provide services to gay groups or those related to same-sex couples' commitment ceremonies or weddings.

Small business owners who want to run a business that reflects their values can be sympathetic figures. But what Religious Right groups defending owners who refuse to do business with same-sex couples are seeking to establish is a legal framework in which a business covered by an anti-discrimination law could ignore it on the basis of the owner's religious beliefs on sex and marriage. Would such a principle also apply to religious beliefs on racial or gender equality?

Fifty years ago, Americans decided that a private business owner who serves the public can be required to abide by laws prohibiting discrimination on the basis of race, color, religion, sex, or national origin. Since then, many states and municipalities have added prohibitions on discrimination based on other characteristics like disability, sexual orientation, and gender identity. It is those laws that some religious conservatives are objecting to, arguing that they should be free to refuse to provide services to same-sex couples even when states have decided as a matter of public policy to ban anti-gay discrimination.

The tension between the rights of a business owner and the authority of a state to ban discrimination as a matter of public policy finds eloquent expression in New Mexico Supreme Court Justice Richard C. Bosson's concurrence in a case decided in 2013. The state Court unanimously upheld a finding by the state's Human Rights Commission that a couple who owned a wedding photography business that refused to provide services to a same-sex couple's commitment ceremony had violated anti-discrimination law.

"On a larger scale, this case provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice," Bosson wrote. "At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less."

Bosson also made it clear that upholding the state's anti-discrimination law was not a rejection of the business owners' religious freedom:

The Huguenins are free to think, to say, to believe, as they wish, they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life…In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs , so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.

Bosson's opinion recognizes that there are competing interests at play while upholding the compelling public policy interest in prohibiting discrimination. But Religious Right leaders see the ruling as nothing short of tyranny. A lawyer for the Alliance Defending Freedom called the decision "a blow to our client and every American's right to live free." Cases in Colorado and

Oregon involving bakery owners that declined to make a wedding cake for a same-sex couple and faced punishment for violating anti-discrimination laws have generated similar rhetoric. Lawyers for the New Mexico photography business unsuccessfully asked the U.S. Supreme Court to review the case, arguing that requiring the photographer to participate in a same-sex wedding is a violation of First Amendment Free Speech rights.

A proposed federal law introduced in 2013 in both houses of Congress, the Marriage and Religious Freedom Act, would forbid the federal government from taking "adverse action" against any person who "acts in accordance with a religious belief that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage." Human Rights Campaign has warned that the law would permit federal workers, contractors, and grantees to refuse to serve married same-sex couples. A legally married gay couple or unmarried heterosexual couple would have no recourse, for example, if they were barred from the hospital of a dying spouse or partner. We expect that some version of the legislation will be re-introduced in 2015.

In 2014, in the weeks after marriage equality reached North Carolina, several magistrates quit their jobs rather than register the civil marriages of same-sex couples. Religious Right legal group Liberty Counsel urged others with religious objections not to quit their jobs, but to fight for their "right" not to register couples whose marriages violated their own personal religious beliefs. In fact, legislation that would provide a "religious exemption" for such clerks has been introduced in a number of states.

Broad Principles

What happens when core constitutional principles like religious liberty and legal equality come into tension? What should happen is an honest recognition that these tensions are inevitable and that reasonable people can disagree about where lines are drawn; a careful weighing of the principles and interests at stake; and a good-faith effort to find solutions that to the extent possible protect individual liberty and advance the common good. Religious liberty claims should not automatically trump others' rights and interests, particularly when there is no substantial burden on an individual's right to exercise their religion.

What actually happens is often quite different. Many conservative religious leaders insist that there is no common ground. Often implying that their position is the sole "religious" or "Christian" one, they portray religious freedom and marriage equality as inherently incompatible and declare that advocates of LGBT equality are by definition enemies of religious liberty and people of faith. They portray the contraception mandate, even after the Obama administration's efforts to accommodate objections from religious organizations, as tyranny, evidence of a liberal-led war on religious liberty itself. In the Manhattan Declaration, conservative Catholic and evangelical leaders vowed civil disobedience and postured as if they faced martyrdom in America for their anti-gay and anti-choice advocacy.

This rhetorical overkill does a disservice to public understanding and debate – and to the truth. An editorial from *America*, a Catholic magazine published by the Jesuits, criticized the campaign by the U.S. bishops against the revised contraception mandate, saying, "By stretching

the religious liberty strategy to cover the fine points of health care coverage, the campaign devalues the coinage of religious liberty.....It does a disservice to the victims of religious persecution everywhere to inflate policy differences into a struggle over religious freedom."

Americans Support Equality and Religious Liberty

Americans treasure the First Amendment and the way its religious liberty clauses work to shield every person's religious freedom. And Americans support the constitutional principle of equality under the law. The federal Religious Freedom Restoration Act was designed to protect individuals' exercise of religion. It was not meant to be a weapon, a sword wielded by culture warriors against policies and people that offend them.

http://www.pfaw.org/media-center/publications/religious-liberty-shield-or-sword

Mr. COHEN. And I would like to take the brief time to say I was wrong, Mr. Goodlatte was right. I think he was correcting me on the author of the Declaration of Independence.

Mr. Goodlatte is a gentleman. He is my friend. He is a scholar. I pre-anticipated his question incorrectly, and I would have been eliminated from a game show.

Thank you.

Mr. FRANKS. I thank the gentleman.

So, without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional written materials for the record.

Again, I thank all of you, and I thank the members in the audience.

And this hearing is adjourned.

[Whereupon, at 11 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Officers of the National Commission

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Samuel Connor
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Stacy Burdett
General Counsel
Steven C. Shainberg

Anti-Defamation League®

March 2, 2015

The Honorable Trent Franks
Chairman
House Judiciary Subcommittee on the Constitution and Civil Justice
Washington, D.C. 20515

The Honorable Steve Cohen
Ranking Member
House Judiciary Subcommittee on the Constitution and Civil Justice
Washington, D.C. 20515

Dear Chairman Franks and Ranking Member Cohen:

We write to provide the views of the Anti-Defamation League (ADL) for the Subcommittee's February 13 hearings entitled, "Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act" and ask that this statement be included as part of the official hearings record.

The Anti-Defamation League

For more than a century, the Anti-Defamation League has been an active advocate for religious freedom for all Americans – whether in the majority or minority. The League has been a leading national organization promoting interfaith cooperation and intergroup understanding. Among ADL's core beliefs is strict adherence to the separation of church and state effectuated through both the Establishment Clause and Free Exercise Clause of the First Amendment. We believe that a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America, and to the protection of all religions and their adherents.

To this end, ADL has filed an *amicus* brief in every major religious freedom case before the U.S. Supreme Court since 1947, as well as numerous briefs in lower appellate and trial courts. In Congress, we have played a lead role in working to enact significant religious freedom protection legislation, including the Religious Freedom Restoration Act (RFRA) in 1993 and the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000.

ADL Support for the Enactment of RFRA

ADL was one of the leaders in the Coalition for the Free Exercise of Religion, a broad-based group of civil rights and religious organizations which helped craft and then led advocacy efforts in support of remedial legislation after the United States Supreme Court sharply curtailed Free Exercise Clause protections in *Employment Div. v. Smith* in 1990.[1]

In 1992, ADL submitted a statement of support for RFRA to the House Judiciary Subcommittee on Civil and Constitutional Rights, calling the pending measure "essential in light of the U.S. Supreme Court's April 1990 decision in *Employment Division v. Smith*:"

> The Religious Freedom Restoration Act would simply restore the pre-*Smith* standard of analysis in free exercise cases. It would not favor any individual faith or religious practice. It would not prevent a state from enacting statutes promoting general welfare. Importantly, however, it would ensure that government will not interfere with

[1] 494 U.S. 872 (1990).

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> an individual's freedom to practice his or her religion unless a compelling interest is at stake which cannot be served in a less intrusive manner.

This effort culminated in 1993, when then-President Clinton signed RFRA into law.[2] RFRA was intended to provide robust protection of free exercise rights, restoring a standard of strict scrutiny to federal laws that substantially burden religion.[3]

The Misinterpretation of RFRA: Discrimination in the Name of Religious Freedom

RFRA requires the federal government to demonstrate a compelling interest where it "substantially burdens" a person's religious exercise. The 1993 statute was intended to be a shield against religious discrimination. But, in recent years, we have seen concerted efforts by some to use RFRA as a sword – in an attempt to escape from anti-discrimination, or public accommodation, or bullying prevention laws. Those challenging these laws seek a license or exemption to impose their religious beliefs on others.

ADL firmly believes that the "play in the joints" between the Establishment Clause and Free Exercise Clause allows and, in many instances, mandates government to accommodate the religious beliefs and observances of citizens. Religious accommodation, however, has its limitations. In a pluralistic society, religious accommodation cannot be used to trample the rights of others.[4]

Burwell v. Hobby Lobby Stores, Inc.

Over the past several years, ADL has written or joined several *amicus* briefs involving secular, for-profit businesses refusing to abide by the provisions of the Affordable Care Act's (ACA) contraceptive mandate – or challenging public accommodation or anti-discrimination laws based on religious objections to same-sex marriage.

The ACA requires covered employers to provide a full range of preventative health care and screening services, including contraceptives and birth control, in their employer-sponsored health care plans. Referring to the contraception coverage as a "mandate" is actually a misnomer because employers have the option of paying a modest tax instead of providing comprehensive health insurance. And that tax is often less expensive than provision of employee health insurance.

However, recognizing religious sensibilities surrounding contraception and abortion, the Obama Administration worked hard to accommodate differing religious views. The so-called ACA contraceptive mandate does not apply to non-profit religious organizations (like a church or synagogue) and religiously-affiliated organizations (like church-affiliated schools) can easily opt out of the requirement by signing and filing a one-page form.

Secular for-profit corporate entities, on the other hand, do not practice religion. And because separate and legally-distinct corporations would actually pay for and provide the comprehensive health insurance, any religious burden on the corporate owners is minimal. Moreover, owners still have the option of their corporations paying a modest tax instead of providing comprehensive insurance.

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[2] The Coalition for the Free Exercise of Religion, chaired by the Baptist Joint Committee for Religious Liberty, also led the effort to enact the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq* (2000).

[3] Although RFRA, as enacted, reached both federal and state law, the Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that application of RFRA to state and local laws was unconstitutional. The *Boerne* decision, however, did not render RFRA *per se* unconstitutional and subsequent cases demonstrate that, as applied to the federal government, RFRA remains good law. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal et al.*, 546 U.S. 418, 424 (2006).

[4] See ADL Press Release, entitled "ADL: Impact of New Mississippi Religious Freedom Bill 'A License to Discriminate'" (web-page last visited June 6, 2014).

In the last term of the Supreme Court, ADL joined a coalition brief[5] in *Burwell v. Hobby Lobby Stores, Inc.*[6] with a diverse group of more than two dozen faith-based organizations. In that case, the owners of Hobby Lobby, a large chain of arts and crafts stores that employs over 13,000 people at over 500 locations, brought suit against the ACA contraceptive mandate because they objected to certain forms of contraception.

Our brief, prepared by Americans United for Separation of Church and State, argued that applying the ACA contraception mandate to Hobby Lobby did not substantially burden religion. The brief clearly acknowledged that Americans do not lose their religious freedom when they establish for profit businesses. But the religious beliefs of these corporate owners should not be imposed on third parties – their employees – and the owners' rights cannot trump the religious rights of their employees or as a powerful legal defense to anti-discrimination laws.[7]

In its deeply-disappointing June, 2014 decision, the Supreme Court determined that private, closely-held corporations can rely on RFRA to refuse to include certain forms of contraception in the insurance coverage mandated by the ACA. The League expressed[8] broad concern over the "minefield" created by the Court's contentious 5-4 decision. While the majority opinion asserted that the ruling is limited solely to the contraception mandate, the opinion does not include limiting principles. We are troubled that it may be used by corporations seeking to impose religious beliefs on employees.

It would be hard to overstate the religious liberty and equality concerns raised by the Court's decision in *Hobby Lobby*. The American workforce is religiously pluralistic and highly diverse. Allowing secular corporate owners to restrict access to affordable contraceptives on the basis of religion discriminates against women and limits their equality and independence. The decision also opens the door to the specter of workplace discrimination and for-profit companies denying coverage for other essential medical services that some owners might deem religiously offensive, such as blood transfusions, psychiatric care, and vaccinations.

ADL would support properly-crafted legislation to limit the impact of *Hobby Lobby* and the harm to innocent third party employees.

The Faith-Based Initiative and the 2007 Office of Legal Counsel RFRA Memorandum

Upon taking office in 2001, the Bush Administration sought to significantly expand government funding to faith-based organizations, creating the White House Office of Faith-Based and Community Initiatives.

ADL deeply appreciates the vital role religious institutions have historically played in addressing many of our nation's most pressing social needs as a critical complement to government-funded programs. For decades, government-funded partnerships with religiously-affiliated organizations – such as Catholic Charities, Jewish Community Federations, and Lutheran Social Services – have helped to combat

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[5] http://www.adl.org/civil-rights/adl-in-the-courts/amicus-briefs/brief-pdfs/ab-2014-sebelius-v-hobby-lobby-scotus.pdf

[6] https://www.law.cornell.edu/supct/pdf/13-354.pdf

[7] In response to the argument that RFRA could be used to "... escape legal sanction ..." for "... discrimination in hiring, for example on the basis of race ...," the majority stated "[o]ur decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *See Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2783 (U.S. 2014). However, efforts to utilize RFRA and state analogs to avoid discrimination laws primarily focus on prohibitions against gender and LGBT discrimination. Therefore, the Court's narrow statement on the issue of discrimination opens the door to the federal and state RFRAs being used a defense to thwart many forms of discrimination other than race.

[8] http://www.adl.org/press-center/press-releases/supreme-court/adl-disappointed-by-supreme-court-decision-on-contraceptive-coverage.html.

poverty and provided housing, education, and health care services for those in need. These successful partnerships have provided excellent service to communities largely unburdened by concerns over bureaucratic entanglements between government and religion. Indeed, safeguards have protected beneficiaries from unwanted and unconstitutional proselytizing during the provision of government-funded services. They have also protected the integrity and sanctity of America's religious institutions whose traditional independence from government has contributed to the flourishing of religion in our country.

As the President examined ways to expand government funding for faith-based organizations providing social services, ADL urged the Administration to maintain essential constitutional safeguards for protecting both religious organizations and beneficiaries. Unfortunately, that is not what happened.

Failing to obtain congressional support or approval for these programs, the Administration advanced its initiative through a series of Executive Orders, which, unfortunately, did not contain adequate constitutional and anti-discrimination safeguards. By removing protections against proselytizing and discrimination in government-funded programs, the Administration dramatically transformed the relationship between government and faith-based organizations. The series of unilateral Executive Orders and agency rule changes opened the door to government-funded proselytizing of beneficiaries and, in many circumstances, explicitly allowed religious discrimination in hiring and firing within taxpayer-funded programs.

The Obama Administration has made some important improvements to the Faith-Based Initiative, including:

- A requirement that all federal agencies providing financial assistance for social service programs ensure that beneficiaries have access to non-religious providers of government-funded social services;
- An emphasis on greater transparency, requiring federal agencies to publicly post on-line entities receiving government funds to perform social services; and
- A firm commitment to monitor and enforce standards to avoid excessive entanglement between religious entities and government.

However, the Administration has failed to implement other necessary safeguards within the Faith-Based Initiative, including:

- Government-wide procedures to ensure that government money does not fund religious discrimination in the hiring and firing of people who deliver social services;
- A requirement that agencies receiving government funds establish accounting systems and procedures to separate government dollars from core religious activities. Referred to as "firewails," these procedures ensure that taxpayer dollars are not channeled into religious activities of religious organizations. As a practical matter, the best way to establish this division is through the creation of a separate corporate structure distinguishing the religious organization from its government-funded social services program; and
- A clarification that extremist, terrorist or hate mongering groups are not eligible for government funds.

2007 Office of Legal Counsel RFRA Memorandum

Most puzzling and disturbing, President Obama has failed to take action and withdraw another deeply-disturbing example of a misinterpretation of RFRA – a June 29, 2007 Office of Legal Counsel (OLC) Memorandum (OLC Memo)[9] which erroneously concluded that RFRA provides for a virtual blanket

[9] Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007).

override of statutory nondiscrimination provisions. The OLC Memo wrongly asserted that RFRA is "reasonably construed" to require that a federal agency categorically exempt a religious organization from an explicit federal nondiscrimination provision tied to a grant program. Although the OLC Memo's conclusion focused on one Justice Department program, its overly-broad and questionable interpretation of RFRA has been cited by other Federal agencies and extended to other programs and grants.

On September 17, 2009, a very broad coalition of religious, education, civil rights, labor, and health organizations committed to protecting religious liberty wrote to Attorney General Eric H. Holder, Jr. urging the Justice Department to review and withdraw the OLC Memo.[10]

RFRA's Impact on Non-Discrimination Provisions of the Violence Against Women Act
Another disturbing and destructive impact of the misinterpretation of RFRA in the 2007 OLC Memo involves the 2013 reauthorization of the Violence Against Women Act (VAWA).

In March, 2013, Congress enacted a reauthorization of the Violence Against Women Act which included strong non-discrimination provisions:

> No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in paragraph 249(c)(4) of title 18, United States Code), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [VAWA], and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.

Notwithstanding this explicit statutory provision, in an April 9, 2014 document, *Frequently Asked Questions about the Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013,*[11] DOJ announced that, on the basis of the 2007 OLC Memo, it would permit exemptions from the non-discrimination provisions for certain VAWA contractors who are religious organizations, allowing these grant recipients to discriminate against potential employees on the basis of religion.

On June 10, 2014 a coalition of 90 religious, educational, health, women's, LGBT, and civil rights groups called the OLC Memo interpretation of RFRA overly-broad and urged the Justice Department to review and withdraw the 2007 OLC Memo:[12]

> The OLC Memo ... stands as one of the most notable examples of the Bush Administration's attempt to impose a constitutionally erroneous and deeply harmful policy – RFRA should not be interpreted or employed as a tool for broadly overriding statutory protections against religious discrimination or to create a broad free exercise right to receive government grants without complying with applicable regulations that protect taxpayers. The use of the OLC Memo to trump the recently adopted non-discrimination provision in VAWA demonstrates that its harm is more than speculative. We accordingly request that the administration publicly announce its intention to review the OLC Memo and, at the end of that review, withdraw the OLC Memo and expressly disavow its erroneous interpretation of RFRA.

Conclusion
The Constitution's Free Exercise Clause and America's religious diversity are great strengths. For our pluralistic democracy to properly function, however, adherents of all faiths must be willing to accept

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[10] Request for Review and Withdrawal of June 29, 2007 Office of Legal Counsel Memorandum Re: RFRA.
http://archive.aclu.org/civil_rights/coalition-letter-to-ag-holder-on-olc-rfra.pdf
[11] FREQUENTLY ASKED QUESTIONS APRIL 9, 2014 Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013, available at
http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf
[12] https://www.au.org/files/VAWA%20OLC%20Sign-On%20FINAL.pdf

minimal intrusions on religious beliefs if necessary to protect the rights of fellow Americans. The Court's broad reading of RFRA in *Hobby Lobby* suggests that the invocation of faith can be used as a sword to opt out of federal laws and impose corporate owners' religious beliefs on others – no matter how trivial the burden.

There is no doubt that RFRA could not have been approved by Congress – and President Clinton would never have signed it into law – if it had been anticipated that it would later be used by corporate owners to thwart reproductive freedom, anti-discrimination laws, or the religious freedom of innocent third-party company employees. We strongly believe that such use undermines the purpose of the statute, misunderstands the intent of its drafters, and turns religious freedom on its head.

Safeguarding religious freedom requires constant vigilance, and it is especially important to guard against one group or sect seeking to impose its religious doctrine or views on others. As George Washington wrote in his famous letter to the Touro Synagogue in 1790, in this country "all possess alike liberty of conscience." He concluded: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support."

We appreciate the opportunity to provide our views on this issue of high priority to our organization. Please do not hesitate to contact us if we can provide additional information or if we can be of assistance to you in any way.

Sincerely,

Deborah M. Lauter
Director, Civil Rights

Christopher Wolf
Chair, National Civil Rights Committee

David Barkey
Southeastern Area & National Religious Freedom Counsel

Elizabeth A. Price
Chair, National Religious Freedom Task Force

Michael Lieberman
Washington Counsel

Written Statement of
Kimberlee Wood Colby
Director, Center for Law and Religious Freedom
Christian Legal Society

Submitted to
The Judiciary Committee of the
United States House of Representatives,
Subcommittee on the Constitution and Civil Justice

Written Statement for Hearing:
"Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act"
February 13, 2015

Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, thank you for the opportunity to submit this written statement for the hearing record on "*Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act*." The Christian Legal Society was instrumental in the passage of the two landmark federal laws that are the subject of this hearing: the Religious Freedom Restoration Act of 1993 (RFRA) that protects the religious liberty of all Americans,[1] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) that protects religious liberty for prisoners and for congregations of all faiths.[2] The Christian Legal Society believes that pluralism is essential to a free society and prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech or religious beliefs. Both RFRA and RLUIPA protect all Americans' religious liberty and reflect our Nation's commitment to pluralism.

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

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[1] 42 U.S.C. § 2000bb *et seq.* *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 Christian Legal Society's Center for Law and Religious Freedom, "one of the prime proponents of the Religious Freedom Restoration Act").

[2] 42 U.S.C. § 2000cc *et seq.* *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).

peaceably together.[3] Robust religious liberty avoids a political community divided 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."[4] Other respected scholars share the assessment that the future of religious liberty in America is imperiled.[5]

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 (RFRA)[6] was a singular achievement. For over two decades, RFRA has been *the* preeminent federal safeguard of all Americans' religious liberty. As heretical as it sounds, RFRA actually protects the average American's religious liberty more than the First Amendment protects her religious liberty. This is the direct result of the Supreme Court's dramatic narrowing, in 1990 in *Employment Division v. Smith,*[7] of the protection the First Amendment offers free exercise of religion.

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[3] Douglas Laycock, *Religious Liberty and the Culture Wars,* 2014 U. Ill. L. Rev. 839, 840-41 (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.")

[4] Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion,* 88 U. Det. Mercy L. Rev. 407, 407 (2011). *See generally,* Laycock, *supra* note 3.

[5] *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).

[6] 42 U.S.C. §§ 2000bb *et seq.*

[7] 494 U.S. 872 (1990).

A. The Initial Impetus for RFRA

RFRA was an urgent response to the Supreme Court's 1990 decision in *Employment Division v. Smith,*[8] which was authored by Justice Scalia and dealt a severe 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 a compelling 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.

B. The 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 the 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

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[8] *Id.*

[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 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

Congress to restore substantive 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]

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

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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 commemorating 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, leading participants in the RFRA coalition described the key events that led to RFRA's passage. The panel's discussion is available at https://www.youtube.com/watch?v=M_84dFFH8g0 (last visited February 11, 2015). *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 February 11, 2015).

[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 1.

[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

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]

II. RFRA creates a sensible balancing test that protects all Americans' religious liberty.

A. What RFRA Actually Does

1. RFRA creates a level playing field for Americans of all faiths: RFRA puts "minority" faiths on an equal footing with "majority" faiths.[16] 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

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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] 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 to their religious exercise. "*Faces of Free Exercise,*" The Becket Fund for Religious Liberty, *available at* http://www.youtube.com/watch?v=J3TbltCxWdk (last visited February 11, 2015).

law that infringes its religious practices, unless the government demonstrates that such an exemption would prevent the government from achieving a compelling interest and the government has no less restrictive means of achieving its interest.[17]

The default posture can be overridden if Congress chooses to do so,[18] or if a court determines the government's interest is compelling and unachievable by a

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[17] 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.").

[18] 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 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.

For a recent, detailed explication of RFRA's broad unitary standard of religious liberty protection, see Brief of Christian Legal Society, American Bible Society, Anglican Church in North America, Association of Christian Schools International, Association of Gospel Rescue Missions, The Church of Jesus Christ of Latter-day Saints, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, The Lutheran Church-Missouri Synod, Prison

less restrictive means. RFRA simply makes religious liberty the default position, which is as it should be for a country that values religious liberty.[19]

2. RFRA protects America's religious diversity: If all 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.[20] 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."[21] 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."[22]

For this reason, the oft-heard argument that America must *limit* religious freedom *because* it has become more religiously diverse has it precisely backwards. Robust religious liberty is the reason for America's dramatic diversity

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Fellowship Ministries, and World Vision, Inc. as Amici Curiae Supporting Hobby Lobby and Conestoga Wood, et al., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356), 2014 WL 411294.

[19] "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." Douglas Laycock, *The Religious Exemption Debate,* 11 Rutgers J.L. & Religion 139, 145 (2009).

[20] *See* Mark L. Rienzi, Why Tolerate Religion? By Brian Leiter. Princeton, N.J.: Princeton University Press. 2013. Pp. Xv, 187. 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.")).

[21] McConnell, *supra* note 17, 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.

[22] *Id.*

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."[23]

3. 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 changes significantly as it wends its way through the legislative process. Substantive language changes often are made long after the opportunity for hearings has passed.

4. RFRA protects against administrative abuses of delegated rulemaking authority: As we saw in *Burwell v. Hobby Lobby Stores, Inc.*,[24] RFRA protects against administrative abuses of agencies' rulemaking authority. As Chief Justice Roberts presciently observed in *Gonzales v. O Centro*, 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."[25] 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."[26]

5. 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'

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[23] 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.").

[24] 134 S. Ct. 2751 (2014).

[25] *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006). *See also, id.* at 438 ("under RFRA invocation of such general interests, standing alone, is not enough").

[26] Garnett and Dunlap, *supra* note 12, at 271.

religious exercise. By requiring government officials to explain their unwillingness to accommodate citizens' religious exercise, RFRA enhances government's transparency and accountability. 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.

6. RFRA reduces long-term social and political conflict: RFRA enables social stability in a religiously diverse society. In the long-term, it minimizes the likelihood 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."[27] In other words, RFRA implements the Golden Rule in the context of religious liberty: by 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.

7. 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. 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.[28] 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.

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[27] Laycock, *supra* note 3, at 842 (original emphasis).

[28] *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 19, at 139-153 (same).

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.[29]

8. RFRA protects the right of all women and men to seek truth: Perhaps most importantly, religious exemptions allow human beings to seek the truth. As Professor Garnett 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 therefore take affirmative steps to remove the obstacles to religion that even well-meaning regulations can create."[30]

9. RFRA reinforces America's foundational commitments to religious liberty as an inalienable right 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

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[29] McConnell, *supra* note 17, at 186 n.20 (*quoting* Resolution of July 18, 1775, *reprinted in* 2 Journals of the Continental Congress at 187, 189 (1905)).

[30] Garnett and Dunlap, *supra* note 12, at 281. *See also,* Laycock, *supra* note 3, 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.")

evenhandedly protecting religious freedom for all citizens, RFRA embodies American pluralism.

B. What RFRA Does Not Do

Contrary to its critics' claims, 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."[31] Instead, RFRA implements a *sensible balancing* test by which the *religious claimant* first must demonstrate that the government has substantially burdened a sincerely held religious belief.[32] 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 the Government to address the particular practice at issue."[33] As a RFRA scholar has explained, "[t]he compelling interest test is best understood as a balancing test with the thumb on the scale in favor of protecting constitutional rights."[34]

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

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[31] *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).

[32] 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).

[33] 546 U.S. at 439 (emphasis supplied). *See also id.* ("Congress . . . legislated 'the compelling interest test' as the means for the courts to 'strik[e] *sensible balances* between religious liberty and competing prior governmental interests.'") (emphasis supplied).

[34] Laycock, *supra* note 19, at 151-52.

In summary, RFRA gives all Americans a chance to live as they -- not government officials -- understand the demands of their religious consciences. RFRA is not a radical law, unless one believes that the concept of religious liberty is a radical notion rather than an inalienable right.

III. Because RFRA is the federal law that actually protects religious liberty, an attack on RFRA is an attack on religious liberty.

Yet RFRA recently has become a target for those who would deny robust protection to religious liberty. After this Subcommittee's hearing on religious liberty a mere eight months ago, in July 2014, a majority of Senators in the 113th Congress voted to weaken RFRA's protection of religious liberty. The attempt was unsuccessful because no vote was held in the House and the cloture vote failed by three votes in the Senate. But the fact that a majority of United States Senators would knowingly vote to diminish Americans' religious liberty is deeply troubling.

The Senate vote was in response to the Supreme Court's eminently logical ruling in *Hobby Lobby*[35] that RFRA protects Americans whose religious consciences will not allow them to comply with a government regulation requiring them to provide coverage for drugs that they believe destroy human life. The *Hobby Lobby* decision simply reaffirmed what the Supreme Court had unanimously held eight year earlier in *Gonzales v. O Centro,*[36] when it applied RFRA to protect a small sect's religious liberty, and what the Supreme Court unanimously held seven months later in *Holt v. Hobbs,*[37]when it applied RFRA's sister statute, RLUIPA, to protect a Muslim inmate's religious liberty.

Nine days after the Supreme Court's *Hobby Lobby* ruling, on July 9, 2014, Senator Murray introduced legislation, S. 2578, to undo the decision.[38] A companion bill, H.R. 5051, was introduced in the House by Congresswoman

[35] *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014).

[36] *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418 (2006).

[37] *Holt v. Hobbs,* 135 S. Ct. 853 (2015).

[38] "Protect Women's Health from Corporate Interference Act of 2014," S. 2578, 113th Cong. (2014). *See* https://www.congress.gov/bill/113th-congress/senate-bill/2578/all-actions-with-amendments (last visited Feb. 11, 2015).

Slaughter.[39] The purpose of the legislation, as set forth in § 2, was "to ensure that employers that provide health benefits to their employees cannot deny any specific health benefits, including contraception coverage, to any of their employees or the covered dependents of such employees entitled by Federal law to receive such coverage." That is, Hobby Lobby's owners would be required to provide coverage for the handful of drugs that they believe destroy human life.

In paragraph 19 of the bill's findings section, § 3 ¶ 19, S. 2578 asserted: "This Act is intended to be consistent with the Congressional intent in enacting the Religious Freedom and [sic] Restoration Act of 1993 (Public Law 103-141), and with the exemption for houses of worship, and an accommodation for religiously-affiliated nonprofit organizations with objections to contraceptive coverage." But two paragraphs later, in § 4(b), S. 2578 stated that the requirement "shall apply notwithstanding any other provision of Federal law, including Public Law 103-141." Public Law 103-141, of course, is RFRA. Thus, S. 2578 would eliminate RFRA's protection for employers with religious objections to drugs that destroy human life.

On July 16, 2014, by a vote of 56-43, cloture on the motion to proceed to S. 2578 was not invoked.[40] Because then-Majority Leader Reid voted in the minority for procedural reasons, the actual vote was 57 Senators against religious liberty to 42 Senators in favor of religious liberty. For 57 Senators to vote to limit RFRA's protections demonstrates a precipitous erosion of bipartisan support for religious liberty that in itself represents a severe threat to our First Freedom.

Fortunately for religious liberty, Congress is bicameral, and the July 2014 attempt to weaken RFRA failed. In 1993, by passing 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 2015, Congress must remain vigilant to ensure that RFRA remains

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[39] "Protect Women's Health from Corporate Interference Act of 2014," H.R. 5051, 113th Cong. (2014). *See* https://www.congress.gov/bill/113th-congress/house-bill/5051/cosponsors?pageSort=alphaByParty (last visited Feb. 11, 2015).

[40] 160 Cong. Rec. S4535 (daily ed. July 16, 2014) (vote).

strong so that our Nation, begun by immigrants seeking religious liberty, remains a refuge for persons of all faiths.[41]

[41] *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.).

BEFORE THE JUDICIARY COMMITTEE OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE
2141 RAYBURN HOUSE OFFICE BUILDING

HEARINGS ON OVERSIGHT OF THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

FEBRUARY 13, 2015

Third-Party Burdens, Congressional Accommodations for Religion, and the Establishment Clause

TESTIMONY OF
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THIRD-PARTY BURDENS, CONGRESSIONAL ACCOMMODATIONS FOR RELIGION, AND THE ESTABLISHMENT CLAUSE

QUESTION DISCUSSED

Justice Ginsburg, dissenting in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787, 2790 n.8, 2802 n.25 (2014), wrote that when a statute seeks to accommodate a claimant's religious beliefs or practices there must be no detrimental effects on third parties who do not share those beliefs. While it is unclear whether Justice Ginsburg was relying on the Establishment Clause as imposing this limitation on the power of Congress,[1] some commentators argue that her thinking does rest on the Establishment Clause.[2] It is of some importance whether these commentators are correct about the third-party burden rule being derived from the Establishment Clause. Although Justice Alito for the Court in *Hobby Lobby* squarely rejected the argument that third-party burdens categorically defeat requests for accommodations under RFRA (134 S. Ct. at 2781 n.37), he did not bring up the Establishment Clause (indeed, the government didn't argue it). So these commentators promoting the third-party burden rule are able to maintain that nothing in *Hobby Lobby* contradicts their Establishment Clause argument. These commentators would, of course, like to have Justice Ginsburg on their side. In her concurrence in *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015), Justice Ginsburg reiterated her view that third-party burdens were a limitation on religious accommodations, but she did not clarify if the rule was derived from the Establishment Clause or was subsumed in the statutorily prescribed interest balancing.

Is Congress's authority to accommodate a religious belief or practice constrained by the Establishment Clause, which is said by some commentators to require that the government refrain from granting a statutory exemption if it would cause significant harm to third parties who do not share that belief?

SUMMARY OF POINTS DISCUSSED

1. The Supreme Court has repeatedly held that when a government regulation or tax imposes a burden on a religious practice of an individual or organization, it is free to lift that burden by providing an exemption. This is what Congress has done in adopting the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. To exempt religious exercise from a regulatory or tax

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[1] *See* K. Walsh, Did Justice Ginsburg endorse the Establishment Clause third-party burdens argument in Holt v. Hobbs? :http://mirrorofjustice.blogs.com/mirrorofjustice/2015/01/did-justice-ginsburg-endorse-the-establishment-clause-third-party-burdens-argument-in-holt-v-hobbs-.html

[2] *See* M. Schwartzman, R. Schragger & N. Tebbe, Holt v. Hobbs and Third Party Harms http://balkin.blogspot.com/2015/01/holt-v-hobbs-and-third-party-harms.html

burden has the effect of leaving religion alone. And for the government to leave religion alone does not establish a religion.

In a long list of the Supreme Court's cases there has been a challenge to the constitutionality of a religious exemption. The Court has consistently rejected the argument that a religious exemption was violative the Establishment Clause. Only in one such case has the Establishment Clause found to be violated, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). The statute in *Caldor*, however, was quite singular in that it created an "unyielding" preference for a particular religious observance, Sabbath rest, and thereby disregarded the costs borne by others. RFRA and RLUIPA operate quite differently. These two statutes require officials to engage in case-specific interest balancing. Any costs falling on third parties are weighed in the balance, along with other relevant considerations, all as prescribed before a determination is made whether to allow the accommodation.

2. Prerequisite to the operation of any rule of third-party burden is a showing that the accommodation of a given religious observance or practice actually causes a burden to fall on others. For example, under the Affordable Care Act, effective January 1, 2013, the government imposed a regulatory burden on all employers of more than fifty persons, and it conferred a corresponding benefit on their employees. In *Hobby Lobby*, two of those employers invoked RFRA seeking an accommodation. RFRA removed the burden on the employers and took the benefit from certain employees. The net effect of the two governmental actions was no burden on anyone, economically or religiously. The employers and employees are back to where they started. To consider one of these actions without considering the other, as some commentators do,[3] is to ignore the context in which the dispute arose. This is the baseline problem of measuring burdens/benefits under the Establishment Clause. In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the proper baseline to measure burden/benefit is just before the regulatory burden was enacted. By that measure, in *Hobby Lobby* there was never a "benefit" vested in the employees that was "taken away" by the operation of RFRA.

3. Proponents of a third-party burden rule concede that the Establishment Clause is structural in nature.[4] Rather than operating as an individual right which is subject to balancing, the Constitution's structural provisions operate to distribute and delimit the powers and duties of a government of limited, delegated powers. Most familiar are separation of powers and federalism. By its terms, the Establishment Clause acts as a denial of power otherwise vested in Congress to "make . . . law respecting an establishment of religion." Structural limits, when

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[3] *See* N. Tebbe, R. Schragger & M. Schwartzman, Hobby Lobby and the Establishment Clause, Part II: What Counts As A Burden on Employees? http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html

[4] *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 HARV. C.R.-C.L. L. REV. 343, 347 (2014).

applicable, are categorical, such as the limits on a federal court's subject matter jurisdiction. A federal court either has jurisdiction or it does not; there is no balancing between competing interests. In like manner, the Establishment Clause is regarded by the federal judiciary as categorical in its operation, separating church and government. Either the church-state boundary is violated or it is not. There is no such thing as a balancing test with the Establishment Clause. Yet a rule based on substantial third-party harms necessitates such talk. Such harms might be a little incurred or greatly incurred, small injuries or big injuries, substantial or trivial a burden. Such injuries are in the nature of those protected by an individual rights clause, not injuries safeguarded by a structural restraint.

DISCUSSION

Point One: For Government to leave religion alone is not an establishment.

The Supreme Court has repeatedly held that when a government regulation or tax imposes a burden on a religious practice of an individual or organization, it is free to lift that burden by providing a religious exemption. This is what Congress has done in adopting the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. To exempt religious exercise from a regulatory or tax burden has the effect of leaving religion alone. And for the government to leave religion alone is not to establish a religion.

The leading case is *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), in which the Court upheld a statutory exemption in Title VII, 42 U.S.C. § 2000e-1(a) (2006), that permits religious organizations to prefer employees of like-minded faith. 483 U.S. at 332 n.9. Mayson, a building custodian employed at a gymnasium operated by the Church of Jesus Christ of Latter-day Saints, was discharged when he ceased to be a church member in good standing. The Court began by reaffirming that the Establishment Clause did not mean that government must be indifferent to religion, but aims at government not "act[ing] with the intent of promoting a particular point of view in religious matters." *Id.* at 335. The Title VII exemption, however, was not an instance of government "abandoning neutrality," for "it is a permissible legislative purpose to alleviate" a regulatory burden leaving religious organizations free "to define and carry out their religious missions." *Id.* The organizing principle is that government does not establish religion by leaving it alone.

In addition to *Amos*, the Court has on five other occasions turned back an Establishment Clause challenge to a religious exemption. *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Religious Land Use and Institutionalized Persons Act, which accommodates religious observance by prison inmates, does not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437 (1971) (religious exemption from military draft for those opposing all war does not violate Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (property tax exemptions for religious organizations do not violate Establishment Clause); *Zorach*

v. Clauson, 343 U.S. 306 (1952) (local public school district's release of students from state compulsory education law to enable them to attend religion classes off the public school grounds does not violate Establishment Clause); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (military draft exemption for clergy, seminarians, and pacifists does not violate Establishment Clause).

A. Estate of Thornton v. Caldor *is Distinguishable.*

In only one of the Court's religious exemption cases has a shift in burden been a factor in determining that the Establishment Clause was violated. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), entailed a unique accommodation unlike RFRA or RLUIPA.

In *Caldor*, Connecticut had amended its laws to permit more retail stores to be open on Sunday. Out of concern for those who would now be pressured to work on their Sabbath, the state adopted a law to help employees who desired to remain observant. The statute read: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day." *Id.* at 706. Donald Thornton was an employee for Caldor, Inc., a department store. He was a Presbyterian and observed Sunday as his Sabbath. When Caldor Department Stores began opening on Sunday, Thornton worked Sundays once or twice a month. He later invoked the Connecticut statute. Caldor resisted and a lawsuit was filed on Thornton's behalf by the State Board of Mediation. *Id.* at 705-07. Caldor argued that the Connecticut statute violated the Establishment Clause, and this Court agreed. *Id.* at 707, 710-11.

The Court in *Caldor* noted that the "statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath." *Id.* at 709 (footnote omitted). The statute failed to account for what an employer was to do "if a high percentage of an employer's workforce asserts rights to the same Sabbath." *Id.* Hence, the law granted an "unyielding weighting in favor of Sabbath observers over all other interests." *Id.* at 710. For example, coworkers with more seniority may want weekends off because those are the same days a spouse is not working. *Id.* at 710 n.9. All this was problematic "[u]nder the Religion Clauses," the Court reasoned, not because of cost-shifting, but because "government . . . must take pains not to compel people to act in the name of any religion." *Id.* at 708. It was not the money as such, but that Caldor was being compelled to act in the name of Thornton's conviction about keeping the Sabbath holy.

The Court also noted that Thornton's religious burden was caused by the demands of the private retail sector. The Connecticut law, in response to the anticipated demands, empowered Thornton to call on the state's assistance to secure the observance of his Sabbath. *Id.* at 709. *Caldor* is thus unlike *Amos*, the latter an exemption that merely lifted a government burden that was imposed by that same government. The Connecticut statute, in contrast, spurred government into taking a side as between two disputants. It did so by arming Thornton with an affirmative legal right against others in the private sector.

It was in this context that the Court in *Caldor* said "a fundamental principle of the Religion Clauses" is that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 710 (internal citations and quotations omitted). Clarification concerning the reach of this "fundamental principle" was needed and quickly came in two cases decided in the next two years.[5]

The first was *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987). *Hobbie* was the third occasion for the Court to rule on the application of the Free Exercise Clause to an employee seeking benefits under a state's unemployment compensation law.[6] On each of these occasions, the state had denied benefits because the worker declined to take a job for which she was qualified. In *Hobbie*, the employee was discharged when she refused to work on Saturday, her Sabbath.

In reliance on *Caldor*'s "fundamental principle," the employer in *Hobbie* argued that to compel accommodation of an employee's Sabbath entailed a shift in burden to the employer and coworkers contrary to the Establishment Clause. *Id.* at 145. The Court not only rejected the employer's argument, but began to cabin *Caldor*'s so-called "fundamental principle":

> In *Thornton [v. Caldor]*, we . . . determined that the State's "unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly advance[d] a particular religious practice," . . . and placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation.

Hobbie, 480 U.S. at 145 n.11 (internal citations omitted; brackets in original). *Hobbie* thus showed how narrow *Caldor* was. In lifting a religious burden, the statutory accommodation in *Caldor* favored the religious claimant unyieldingly or was absolute, thus entirely disregarding the interests of the employer and coworkers. That is not the case with RFRA/RLUIPA, which entail a balancing test familiar to free exercise law that takes into account the interests of others.

A few months later, the *Amos* Court addressed the scope of the "fundamental principle" passage in *Caldor*. In *Amos*, a religious exemption in Title VII permitted religious organizations to prefer those of like-minded faith. Mayson, a building custodian, claimed the statutory exemption shifted a burden to him resulting in loss of employment. Tracking the *Caldor* passage, Mayson argued that the exemption

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[5] It is not even clear whether the *Caldor* Court was attributing this "fundamental principle" to the Free Exercise Clause or the Establishment Clause. If the attribution was to the Free Exercise Clause, then the passage is simply irrelevant to the argument here that no-establishment principles are implicated.

[6] *See* Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

pressured him to conform his conduct to the religious necessities of others contrary to the Establishment Clause. The High Court disagreed:

> This is a very different case than *Estate of Thornton v. Caldor, Inc.* . . . . In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. In effect, Connecticut had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees. *See Hobbie* . . . 480 U.S. [at] 145 n.11.

Amos, 483 U.S. at 337 n.15. The Court thus distinguished *Caldor* from *Amos*, and the issue raise by RFRA/RLUIPA is like *Amos*. The statute in *Caldor* favored the religious claimant absolutely, thus totally disregarding the interests of others. As said above in the context of *Hobbie*, RFRA/RLUIPA is not unyielding but requires interest balancing.

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the religious exemption was by operation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, at a state correctional facility. Justice Ginsburg writing for the Court said that given RLUIPA's "tak[ing] adequate account of the burdens [that] a requested accommodation may impose on nonbeneficiaries," the statute met the strictures of the Establishment Clause. *Id.* at 720. Because RLUIPA was not unyielding to third-party considerations, a unanimous Court upheld its constitutionality.

In the Supreme Court's penultimate encounter with RFRA, the government argued that it had satisfied its burden under the compelling interest test by claiming there was a need for uniform application of a controlled substances statute. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-36 (2006). That argument was rejected because that is not how RFRA operates. Rather, under RFRA the judiciary is charged with striking "sensible balances" that often lead to religious accommodations. RFRA assumes "the feasibility of case-by-case consideration of religious exemptions." *Id.* at 436 (referencing *Cutter*). And both RLUIPA in *Cutter* and RFRA in *O Centro* avoided implicating the Establishment Clause by their case-by-case interest balancing, as opposed to the "unyielding" preference statute struck down in *Caldor*.

From *Hobbie*, *Amos*, *Cutter*, and *O Centro* we have the factor that sets *Caldor* apart. The religious exemption in *Caldor* created an "unyielding" preference for a religious observance particular to only some religions, Sabbath rest. RFRA/RLUIPA creates no absolute preference for religion, but sets up the familiar interest-balancing calculus of free exercise law. Accordingly, the Establishment Clause is not remotely triggered by the appearance or reality of third-party burdens due to the operation RFRA or RLUIPA.

B. Hobby Lobby footnote 37 and the rule of third-party burdens.

In *Hobby Lobby*, the government did not argue that RFRA, as applied, violated the Establishment Clause because it imposed a third-party burden on some of the employees of Hobby Lobby Stores and Conestoga Wood. However, the government did make a parallel argument, to wit: That a burden on third parties, who did not share the religious beliefs of the RFRA claimants, categorically tipped the statute's prescribed interest balancing against the employers. The Court thoroughly rejected that argument:

> [I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.

134 S. Ct. at 2781 n.37. The Court went on to point out how easily the third-party burden argument is concocted:

> By framing any Government regulation as benefitting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.

Id. The government's categorical third-party burden argument, reject in *Hobby Lobby*, is nearly identical to the argument that the Establishment Clause is violated in the face of third-party harm. Having stiff-armed one such argument, we can safely predict the Court would do the same with the one under discussion here.

Point Two: The Baseline for Measuring Third-Party Burdens.

Before asking if RFRA/RLUIPA impose a burden on third parties who do not share the same religious beliefs as the one claiming an accommodation, a prerequisite is that these third parties have an interest to the status or entitlement which they claim is now being "taken away" or burdened.

Hobby Lobby provides a useful context. Under the Affordable Care Act, effective January 1, 2013, the government imposed a regulatory burden on all employers of more than fifty persons, and it conferred a corresponding health-care benefit on their employees. If Hobby Lobby Stores and Conestoga Wood now invoke RFRA seeking an accommodation, it removes the burden on these employers and takes the benefit from their employees. The net effect of the two governmental actions is no burden on anyone, economically or religiously. The employers and employees are back to where they started. To consider one of these actions without considering the other is to ignore the context in which the dispute arose. If the government in *Hobby Lobby* had argued the Establishment Clause, the baseline for measuring the relevant burdens/benefits is just before the effective date of the ACA mandate.

In *Hobby Lobby*, the government did not argue that imposing a "burden" on third-party employees violated the Establishment Clause. That was wise of the government because given the baseline there was no "burden." The government also did not argue that providing a RFRA accommodation to the employers was a religious preference violative of the Establishment Clause. That too was wise because given the baseline there was no employer "benefit." For the government to exempt religion while imposing regulation on others similarly situated is to leave religion alone. And to leave religion alone is not an establishment.

Gedicks & Van Tassell, *supra*, note 4, at 371, claim that the controlling baseline in *Hobby Lobby* should be 1993, which is just before RFRA was enacted by Congress. But that choice is contrary to *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In *Amos*, the baseline was on the eve of the effective date of Title VII of the Civil Rights Act of 1964. *Id.* at 337 ("[W]e find no persuasive evidence in the record before us that the Church's ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964."). This was the date just before a regulatory burden was imposed on religious employers like the LDS Church. Congress amended Title VII in 1972, thereby lifting the relevant burden from religious employers. *Id.* at 332 n.9. Accordingly, the 1972 amendment is the counterpart to RFRA in *Hobby Lobby*. Given the baseline used in *Amos*, the 1972 amendment was not a "benefit" but was merely returning the LDS Church to its prior unregulated status on the eve of the 1964 enactment.

In *Amos*, it was the 1972 amendment that was attacked as violative of the Establishment Clause (*id.* at 335-37), and in *Hobby Lobby* it was RFRA that would be subjected to an Establishment Clause challenge by Gedicks & Van Tassell. The ACA mandate of January 1, 2013, is the counterpart to Title VII when first enacted in 1964. Both legislative acts altered the *status quo ante* from no regulatory burden on employers to imposing such a burden. So in a "before and after" comparison, the circumstances on the eve of the ACA mandate and the 1964 Title VII are the "before," which is to say they are the baseline for comparing later burdens/benefits. That was the approach of the *Amos* Court, and the one that should be followed with RFRA/RLUIPA.

Other commentators argue that in setting the baseline the Court should assume that health-care is universally available.[7] (Universal coverage, of course, is not the actual state of affairs under the ACA.) If we are to assume a world where the default position is comprehensive health-care coverage, then it is a mere tautology that departure from that baseline because of a RFRA accommodation for Hobby Lobby Stores and Conestoga Wood is a "burden" for their employees. This assumption of universal health-care coverage for purposes of a baseline is, as explained in the prior paragraph, contrary to *Amos*.

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[7] *See* N. Tebbe, R. Schragger & M. Schwartzman, Hobby Lobby and the Establishment Clause, Part II: What Counts As A Burden on Employees? http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html

Why not assume a world where RFRA accommodations are universal? Then it is a mere tautology that that there is no "burden" on the employees because *status quo ante* is no health-care benefits. Indeed, we can make all sorts of assumptions and draw the baseline accordingly. What these commentators have forgotten is that the baseline is drawn to serve the principles of the Establishment Clause. That is what guided the Court in *Amos*, and that is what should guide us here. For government to leave religion alone is not to establish religion.

Point Three: The Establishment Clause operates categorically, not according to the interest-balancing invited by a rule of third-party burdens.

Gedicks & Van Tassell concede that the Establishment Clause is "a structural bar on government action rather than a guarantee of personal rights. [Thus, v]iolations cannot be waived by the parties or balanced away by weightier private or government interests, as can violations of the Free Exercise Clause." Gedicks & Tassell, *supra* note 4, at 347. They are right about that.[8] However, they seem not to realize that a structural Establishment Clause undermines their core thesis which is that at some point the cost-shifting becomes so great that "the scales tip" against a religious exemption's validity under that Clause. *Id.* at 363-71. As if the case law under the Establishment Clause was not complex enough, these commentators would turn the Clause into an occasion for *Lochner*-era balancing of economic interests. *Id.* at 375-78 (a little economic cost-shifting is constitutionally valid, but at some juncture a Federal judge is to somehow know when too many dollars tote up to the "tipping point" against RFRA).

In the few cases that have paid attention to burden shifting, such as *Caldor*, the Court did so because the law in question granted an "unyielding weighting in favor of [religious] observers over all other interests." 472 U.S. at 710. And such a shift in burden was problematic "[u]nder the Religion Clauses," not because of the total dollars involved in the shift, but because "government . . . must take pains not to compel people to act in the name of any religion." *Id.* at 708. So it was not the money as such that is the relevant offense, but that a private-sector employer, a department store, was being compelled by the state to act in the name of someone else's religion. The *Caldor* Court thought that set of facts had the "primary effect" of

[8] Unlike individual constitutional rights, such as free speech or free exercise which are not absolute but subject to balancing, the Establishment Clause has been applied like a structural clause and thus operates categorically. *See* C. Esbeck, The Establishment Clause as a Structural Restraint on governmental Power, 84 IOWA L. REV. 1 (1998); C. Esbeck, The Establishment Clause as a Structural Restraint: Validations and Ramifications, 18 J. LAW & POLITICS (UVA) 445 (2002). When structural in nature the Clause negates power that otherwise might be thought to have been delegated to government. By its terms, it denies to Congress power to "make . . . law respecting an establishment," thereby separating church and government. U.S. CONST. Amend. 1. As with power-delegating and power-negating clauses generally, when the restraint on power that is the Establishment Clause is exceeded there is no balancing. Either the government has exceeded its power or it has not, much as with a federal court's subject matter jurisdiction.

advancing "a particular religious practice." *Id.* at 710. A party being compelled by an unyielding law to act in the name of another's religious creed does actually have the ring of an Establishment Clause rule. It is something a categorical Establishment Clause can, in the right case, get its teeth into, unlike the balancing test engaged in by Gedicks & Van Tassell.

From the outset of the litigation over the contraceptive mandate, the government conceded that, due to their unassailable right to religious freedom, churches and their integrated auxiliaries should be exempt from the mandate. But a woman working for a church suffers the same burden-shifting "loss" as does a woman working for Conestoga Wood or Hobby Lobby Stores.[9] To avoid that comparison, commentators pressed their argument hardest when it came to business entities with many employees. *See* Gedicks & Van Tassell, *supra* note 4, at 380-82. But there is no principled basis for doing so. The issue is not how large is the total dollar amount of a given shift in the cost of contraceptives, for the Establishment Clause operates categorically rather than as a balancing test.

Under Point One, *supra*, there is collected five Supreme Court cases where a religious accommodation by the government was unsuccessfully attacked as a "religious preference" violative of the Establishment Clause.[10] Proponents of the third-party burden rule dismiss these cases because in their judgment the shift in burden is too small or diffused over an unidentifiable class. The commentators say that they are only concerned when the shift in burden is to an identifiable group of third parties, as in *Amos*, *Hobbie*, and *Hobby Lobby*. Diffusion of the injury among many might make a difference for legal doctrines like standing, but it is surely irrelevant to the Establishment Clause. The focus of the Clause is on whether the law in question has transgressed the boundary between church and government. If it has, it is unconstitutional. It is of no moment that the resulting burden falls on a known class or is spread over a wide and diffuse population. Once again, the

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[9] Gedicks & Van Tassell make the Establishment Clause claim that it would be unconstitutional to exempt religious nonprofit and for-profit organizations, except for churches and their integrated auxiliaries. *Id.* at 380-81. They want to avoid arguing that it is unconstitutional as to churches, for that is too improbable. So they indulge in speculation about the contraceptive use by employees of churches who teach that contraception, or emergency contraception, is morally prohibited. *Id.* (unfounded speculation that employees of such churches "are overwhelmingly likely to share their anti-contraception views"). *See also, id.* at 381 (unfounded speculation that many employees of nonprofit religious organizations that are not churches do not share their employer's views on contraception).

[10] For ease of reference, the cases are again collected here: *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Religious Land Use and Institutionalized Persons Act, which accommodates religious observance by prison inmates, does not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437 (1971) (religious exemption from military draft for those opposing all war does not violate Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (property tax exemptions for religious organizations do not violate Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306 (1952) (local public school district's release of students from state compulsory education law to enable them to attend religion classes off the public school grounds does not violate Establishment Clause); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (military draft exemption for clergy, seminarians, and pacifists does not violate Establishment Clause).

proponents of the rule of third-party burden seem unaware of the structural nature of the Establishment Clause.

CONCLUSION

In a half-dozen cases the Supreme Court has upheld the constitutionality of a religious exemption as not violative of the Establishment Clause: *Cutter, Amos, Gillette, Walz, Zorach, The Selective Draft Law Cases*. In some of these cases there was burden-shifting to identifiable third parties, but the shift made no difference in the Court's application of the Establishment Clause. In the one case where the Court did strike down a state statute accommodating religion, *Caldor*, the offending statute created an absolute right to be accommodated, thereby compelling a private-sector employer to act in conformity with a religious tenet of an employee. Within two years of that holding, the Court twice took special care that *Caldor* be confined to its facts. *Amos*, 483 U.S. at 337 n.15; *Hobbie*, 480 U.S. at 145 n.11. Neither RFRA nor RLUIPA suffers from being an "unyielding" preference for a religious practice specific to certain religious faiths.

RFRA/RLUIPA do not violate the Establishment Clause, either on their face or as applied.

Respectfully submitted,

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Testimony of Rachel Laser
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Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act
Friday, 02/13/2015
2141 Rayburn House Office Building
Committee on the Judiciary—Subcommittee on the Constitution and Civil Justice

On behalf of the Union for Reform Judaism, whose more than 900 congregations encompass over 1.5 million Reform Jews across North America, and the Central Conference of American Rabbis, which includes more than 2,000 Reform rabbis, I submit this statement on the importance of the passage and legacy of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

RFRA was enacted in 1993 largely in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* 494 U.S. 872 (1990). That case struck down the decades-long understanding that under the First Amendment's promise of free exercise of religion reasonable, religious exemptions existed to broad, neutrally-applied laws (the *Sherbert* Test from *Sherbert v. Verner*), as long as there was a not a compelling government interest that might outweigh the need for an exemption.

Justice Antonin Scalia's majority opinion in *Oregon v. Smith* raised concerns about religious practices that impact only the practitioner and their fulfillment of religious precepts ("nondiscriminatory religious practice"). Although the Court allowed for an exemption so that a person or a religious non-profit (particularly a house of worship) could live according to the teaching of their faith, Justice Scalia warned that if the right to an exemption was constitutionally protected under the First Amendment, it would create a chaos of loopholes from neutral, generally applied laws: "But to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs" (*Employment Division, Department of Human Resources of Oregon v. Smith* 494 U.S. 872 (1990)).

Despite the majority's concerns, preceding decades of First Amendment jurisprudence had allowed individuals and religious communities to live according to the teachings of their faith without undue government interference. After the *Smith* decision, Catholic priests who offered ritual communion wine to adolescents could have arguably faced criminal charges for providing a minor with alcohol, and individuals wearing religious garb – such as a *kippa* or other head

covering – could have been required to remove it to comply with government workplace regulations. Jewish tradition was also made vulnerable. The Jewish principle of *kavod hamet*, respect for the dead, mandates that a dead body is not left alone from the moment of death until burial and that we must not disturb the body in any manner. For this reason, autopsies, in all but the most serious situations, are forbidden. Following *Smith*, courts in both Michigan and Rhode Island forced Jewish families of accident victims to accept intrusive government-mandated autopsies, even though the practice directly violated Jewish law and there was no finding that the procedure served a compelling government purpose (e.g. suspicion of foul play or a contagious disease).

In response to the vacuum of religious expression protections that the *Smith* decision created, Congress passed RFRA to restore fundamental religious freedoms for individuals and religious non-profits, such as houses of worship, while creating a strict scrutiny test for judicial review to evaluate the competing interests of the individual's religious freedom and the government's compelling interest in not providing an exemption. We recognize that in some circumstances, there is a compelling government interest in not providing a religious exemption. One such (timely) example is vaccinations required for public school children. The central test of RFRA requires that this compelling government interest be furthered in the least restrictive means.

We remain to this day proud of the key role the Reform Movement played in helping lead the bipartisan, multi-faith RFRA coalition. If not for this law, Americans would not be able to live out the promises of our Constitution's First Freedoms: freedom from and freedom of religion. Thus, we were deeply troubled by the Supreme Court's response in *Boerne v. Flores* 521 U.S. 507 (1997), prohibiting RFRA's applicability to state and local governments. This weakened RFRA and led to various state-level religious freedom laws.

Following the *Boerne* decision, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which amended and added to the protections under RFRA. RLUIPA was created to ensure that religious institutions and institutionalized persons would not have their religious freedoms unjustly curtailed (these types of cases were and remain to be among the most common disputes about religious freedom rights and compelling government interests).

The *Boerne* decision put the onus on state governments to create their own version of a RFRA (although six laws of this ilk passed before 1997), and nineteen states today have existing RFRA-type laws, with many more states considering similar legislation.

We recognize these laws are outside the purview of Congress, yet we acknowledge that state RFRAs have become a central part of the contemporary colloquy on religious freedom and have attracted more attention in the wake of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores* 573 U.S. ___ (2014), which stretched the reach and scope of the federal RFRA.

The majority opinion in *Hobby Lobby* stated that their decision to allow closely held for-profit corporations to assert a religious exemption in order to access an accommodation under the Patient Protection and Affordable Care Act's contraception mandate would only apply to the limited circumstances at issue in the case. Many in the LGBT, women's, and health advocacy communities (amongst many others), however, have expressed concerns about how this decision could be applied. They contend that the *Hobby Lobby* decision is only the tipping point for

religious freedom to be used as an excuse from whatever law is distasteful to an individual, a religious non-profit or a large for-profit corporation at that time.

The legislative history of RFRA indicates that it was intended to restore the decades of jurisprudence that people and institutions of faith relied on to live out their religion, beliefs and conscience. The *Hobby Lobby* decision, however, effectively separated RFRA from the First Amendment jurisprudence it was based upon, transforming RFRA into a much broader law than we had ever anticipated, particularly by allowing RFRA to apply to for-profit entities.

The decision's impact has been to conflate individuals and closely-held for-profit corporations, despite the fact that a corporation cannot, as individuals can, hold religious beliefs, feel a spiritual connection to a higher power, and engage in religious practices that require protection. A for-profit corporation cannot pray, a corporation does not study sacred texts and a corporation does not participate in religious rituals. Individuals do all of these things, and it is their and our RFRA rights that need to be protected.

In her dissent, Justice Ruth Bader Ginsburg accurately stated that the majority's decision could widely reshape the religious liberty claims of corporations, meaning that if closely-held corporations can claim religious freedom rights, they will potentially be able to claim that any and all federal statutes constitute a substantial burden on the corporation's religious beliefs. As explained in the amicus brief that the Union for Reform Judaism, the Central Conference of American Rabbis and Women of Reform Judaism joined, the burden on the family that owns Hobby Lobby to provide contraceptive care is greatly attenuated, because the way the system is set up, the employers' obligation to insure their employees is many steps removed from an employees' access to contraceptive coverage under the health care plan. For the Court to consider that burden as substantial undermines the meaning of the word and its significance in the RFRA test.

The effect could be to permit discrimination on the basis of race, sex, disability or any other protected class, gutting the framework of minority and women's anti-discrimination safeguards that Americans now rely upon to ensure equal opportunity and access for all.

Although RFRA was created with the clear intent to ensure reasonable protections for individuals and religious non-profits (especially houses of worship), the *Hobby Lobby* decision has led us down the path towards a very different future for religious freedom. This case could allow a situation where the right of an individual to seek an exemption from a federal law to wear their religious garb would be treated the same as the right of a for-profit corporation – informed by the religious beliefs of its owners – to discriminate against its employees, and refuse to hire LGBT people, pay women equally to men for the same work or provide health insurance coverage for any and all procedures they deem religiously objectionable. This is not the intent of RFRA, nor should it be its reality.

The second recent Supreme Court decisions on these laws came last month in *Holt v. Hobbs* 574 U.S. ___ (2015). Under RLUIPA, the Court upheld an Arkansas inmate's claim that he has the right to grow a half-inch beard according to his interpretation of Salafist Islam. RLUIPA is based on RFRA and uses its compelling interest test to assess whether or not a religious exemption should be created for an institutionalized person. The unanimous decision from the justices reinforces RLUIPA's purpose and acknowledges its continuing role in safeguarding the

fundamental right of religious freedom for institutionalized persons in ways that do not undermine the security, discipline and order of their corrective institutions.

Although RLUIPA and RFRA are closely related, the Court was correct in affirming a religious exemption in *Holt* because, as Justice Ginsburg astutely pointed out, "Unlike the exemption this Court approved in *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. (2014), accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief." Mr. Holt's religious exemption did not cause significant harm to anyone else, and it certainly did not alter the rights or expression of anyone else. The strict scrutiny test might be the same between *Hobby Lobby* and *Holt*, but the results are drastically different, and that is where the ongoing problems lie.

The conversation today about religious freedom and the just place of religious expression in society has been amplified in the wake of *Hobby Lobby*, with the two apparent sides of this issue using RFRA as a partisan rallying point. Although we opposed the decision in *Hobby Lobby*, our outlook on RFRA and its future is not as stark as either side might make it out to be. If applied to individuals and religious non-profits, RFRA makes good on the promise of the Constitution that all people may live out their lives according to the teachings of their faith, beliefs and conscience. When RFRA is interpreted in such a way that it will more likely than not privilege any religious concern over the rights of individuals or the need for the government to use law to promote justice and equality in society, we are deeply concerned.

Only in America have people of all faiths (and no faith) been free to pursue their faith and to organize their communal lives, equal under law and in practice, without government interference. Thus America — through its Constitution — created a system of religious liberty that has proved to be generally fair and effective. As Jews, we have learned through history that both religion and the state flourish best when they are separate, and religious freedom is enhanced. The Reform Movement played a central role in the drafting and passage of RFRA and RLUIPA, and we look back on past 20 years with pride. We are eager to ensure that in future decades, the proper balance is struck between religious exemptions for individuals and religious non-profit entities and our nation's broad legal framework of rights and protections, ensuring equality and justice for all people.

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