

Testimony of
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Before the
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
on
The State of Religious Liberty in America
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My name is David Saperstein. I am a rabbi who served for decades as the director of public policy and social justice work for the national Reform Jewish Movement, the largest segment of American Jewry, in which there is overwhelming consensus on the issues I will discuss today. I am also an attorney, who, for several decades, taught, at Georgetown University Law Center, seminars in comparative Jewish and American law and, more importantly for our discussion today, in church-state law.¹

Over the past two years, I was honored to serve as the United States Ambassador at Large for International Religious Freedom and had the privilege to work closely with many of you on both sides of the aisle on this Committee as well as with many of the organizations testifying and submitting written testimony at this hearing. These were religious freedom issues that galvanize Americans across religious, political and ideological divides. We cherish religious freedom because it is a foundational right of conscience. Our founders believed that such freedom of religious conscience was indispensable to human dignity and integrity, to other freedoms enshrined in our Bill of Rights. Across the globe, we see Christians, Jews, Muslims, Hindus, Buddhists, atheists -- indeed every religious group is a minority somewhere-- as they face from too many governments discrimination, imprisonment, and torture, and from hostile societal forces and non-state actors, persecution, acts of violence, ethnic cleansing and death. All this simply for worshipping God in accordance with their conscience. On these issues, those here today have been part of a broad coalition within our nation and within our faith communities across the globe, working together to confront these threats to religious freedom.

It is therefore especially painful for me that in our own nation core issues of religious freedom so divide us. While I believe the issues we discuss here are of the utmost importance, at the same time, compared to other nations, the freedom we

¹ See David Saperstein, "Public Accountability and Faith Based Organizations: A Problem Best Avoided," 116/5 Har.L.Rev. 1353 (2003)

have to worship, to organize our religious institutions and communities as we see fit, to celebrate our festivals openly freely and safely; to proselytize, to teach and preach as we see fit, remains inspiring. The genius of the founders in setting forth the three constitutional clauses on religion: No religious test for office, no establishment of religion, and the guarantee of free exercise of religion created a nation where, for the first time in human history, one's rights as a citizen would not depend upon their religious identity, practices, or beliefs. For most religious minorities in America, including my own Jewish community, this system created more rights, more freedoms, more opportunities than we had ever known anywhere in our long history. And the Establishment Clause's so-called "wall" limiting not religion but keeping government out of religion, allowed religion to flourish with a diversity, robustness, and strength, with more people believing in God, attending worship regularly, holding religious values central to their lives than anywhere in the democratic world --including every one of those nations that have government established, preferred, or sponsored religion. Of other democratic countries, only India rivals us in this regard.

While I know we will respectfully discuss our differences on issues of core principle today, I do hope that this Committee, if not at this hearing, holds a special hearing to bring key thinkers on the various sides together to see where common ground can be identified and where compromise can be fashioned that will maximize the religious freedom AND civil rights protections of all parties involved.

Permit me to focus on three general areas this afternoon that are vitally important to the religious freedom agenda: The Executive Order on immigration and refugee policy, three pieces of likely legislation, and the purported draft of an Executive Order on Religious Freedom.

A. Muslim Ban

The widespread opposition regarding the so-called "Muslim ban" is set in the context of, and heard through the filter of, months of anti-Muslim rhetoric in the campaign, threats of a Muslim registry, the President's explicit statements even since the election of a Muslim refugee ban, and the significant increase in hate crimes against Muslims since the election. There are reports of children who are bullied at school; increased opposition to mosques being built in communities; desecration of mosques and other Muslim communal sites; harassment on the internet and by strangers on the street. Impingement on religious freedom includes the pressures and fears that emanate from perceived societal and governmental hostility, which chill open expression of religious identity and communal life. The executive order will also cut the number of refugees we will accept this year in half. This ban and these cuts negate the powerful threads of not only Christianity and Judaism's biblical call to welcome the stranger, to treat the stranger as ourselves is as ancient a call as we have – but similar calls in other religions. Abraham and his family, Moses and the children of Israel, Jesus and his family, Muhammad fleeing with his closest supporters and family Mecca for Medina – our

religions were founded by refugees. It is no coincidence that of the 9 major U.S. groups authorized to oversee settlement of new refugees, 6 are faith-based groups. One of them, HIAS, the preeminent refugee resettlement organization in the Jewish community, felt compelled, for its first ever, to go to court to contest the Executive Order. Indeed, Catholic, Jewish, Muslim, Protestant and Evangelical leaders have joined Muslim and other faith leaders in repudiating this policy, in calling for a rescission of it, and in manifesting publicly their welcoming spirit for refugees. As a recent letter from 100 prominent Evangelical leaders said:

“While we are eager to welcome persecuted Christians, we also welcome vulnerable Muslims and people of other faiths or no faith at all. The executive order drastically reduces the overall number of refugees allowed this year, robbing families of hope and a future. And it could well cost them their lives.”

In singling out Muslim countries, while talking of a Muslim ban, and shaping the EO's implementation in a way that explicitly favors minority groups in these seven Muslim countries from which refugees are indefinitely barred, this action is seen throughout America and across the globe as favoring Christians at the expense of Muslims. We have never singled out groups because of their religious identity. This runs afoul of our nation's promise of religious freedom and equality (and in fact, was the basis of the federal district court decision in VA issued on Monday.²) We accept refugee and asylum applications based on the level of persecution they face regardless of religious identity. Let me remind the Committee that even the extraordinary Soviet Jewry campaign, had its greatest impact when the Helsinki process and the Jackson-Vanik amendment protected all persecuted by the USSR, not just Jews.

B. Likely Legislation

There are several likely pieces of legislation raising important religious freedom issues.

Johnson Amendment Repeal

President Trump has publicly stated that one key priority he has in the area of religion is to “totally destroy” the so-called “Johnson Amendment,” which is the federal law that prohibits houses of worship, like all tax-exempt organizations from endorsing or opposing political candidates and political parties. He has given different explanations for this policy. One is that churches “will lose their tax exempt status if they openly advocate their political views.” Not so. They may express their views on political issues as they see fit. They may even lobby on those views, albeit the amount of money they can spend on such activities is regulated in the same way it is regulated for secular tax-exempt organizations. The President has said: “I think maybe that will be my greatest contribution to Christianity – and

² *Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB) (E.D. Va. Feb. 13, 2017) (order granting preliminary injunction).

other religions—is to allow you, when you talk religious liberty, you have the right to do it. You don't have any religious freedom, if you think about it." Clearly a bit of an exaggeration in light of the restrictions on religious freedom that billions face across the globe.

The most recent poll (Sept 2016) on the subject of which I am aware, done by the Christian polling company Lifeway, found that 8 in 10 people said it is inappropriate for pastors to endorse candidates in church. Among clergy, 9 out of 10 oppose it. There are four reasons why the Johnson amendment should not be changed.

First, if houses of worship become involved in campaigning, they run the risk of extensive government regulation and monitoring of their religious activities. Right now, religious autonomy is protected in pervasively sectarian entities (houses of worship, parochial schools etc.) by a range of exemptions from various reporting requirements, including 990s and lobby disclosure requirements, as well as by tougher standards to trigger IRS audits etc. If we insist to be treated like every entity for electioneering purposes, then the government has two choices. It may say "yes, we will treat you like everyone else" and impose campaign finance rules, regulations and monitoring on houses of worship. Alternatively, it will continue exemptions and allow houses of worship to spend election funding without any transparency – thereby opening up a channel for more electoral funding abuses.

Second, the prohibition against electioneering by non-profits prevents undermining the structure of campaign finance regulations. If political donors can by-pass other restrictions by giving their campaign contributions through a church and getting a tax deduction for it, it will result in a major diversion of campaign funding into houses of worship, which will become slush funds for campaigns. Further, since churches do not report who their donors are, this too would greatly reduce transparency in election campaigns.

Third, repealing current law would almost certainly have a divisive impact on houses of worship. There are enough divisions over theology and music and liturgy and pastors, without importing America's explosively divisive electoral differences. Our houses of worship are among the few places that people of different cultural, political, ethnic divides can find the sense of unity and comity so desperately needed in our nation today. What is a pastor to do if a congregant who is major donor now makes his church gift contingent on an endorsement from the pulpit for his or her preferred candidate? What if two congregants are running against each other for the same office? Does the pastor have to choose between who will get her endorsement and who won't -- even as the pastor is trying to minister to the needs of the candidates and their families? This is not just bad public policy but bad religious policy as well.

Finally, pastors and other clergy can speak right now on policy issues in the campaign under the current rules. In a personal capacity, without the use of church funding, clergy have the same citizen rights to endorse or oppose candidates or

parties as anyone else. They can run for public office and if elected serve in public office. Churches can hold candidate fora and educate their members and communities on the issues that arise in a campaign. Clergy even have the free speech right to endorse from the pulpit. The only restriction on any of these actions is that if the house of worship wishes to enjoy tax exempt status, the house of worship cannot engage in electioneering activity (opposing or supporting specific candidates or parties), cannot spend any funding for such activity nor can its clergy or other leaders engage in such activity in their official capacity.

I would point out that if the President intends to revoke the Johnson Amendment not in its entirety but only insofar as religious groups are concerned, then a slew of other constitutional issues arise in favoring religious over non-religious non-profits. – an issue discussed in my comments later on section 4(e)(1) of the purported draft Executive Order on Religious Freedom.,

First Amendment Defense Act (FADA)

This legislation would give many individuals, organizations, and corporations who claim a sincere religious belief that marriage is the union of one man and one woman and that sexual relations are properly reserved to such a marriage – the right to deny employment and service to anyone they believed violated those beliefs: individuals or families of LGBTQ people, unmarried mothers; divorced parents.

If this is passed, we could expect to see discrimination in a range of areas where now it is barred. A homeless shelter or food bank that receives federal dollars could refuse to serve a same sex couple or an unwed mother and her children. A landlord could refuse to rent to an unmarried couple. A business could refuse to provide Family and Medical Leave Act (FMLA) leave to LGBTQ employees to tend to a spouse. The Violence Against Women Act (VAWA) provides explicit protections for LGBTQ people. But an emergency shelter receiving VAWA monies could turn away someone fleeing abuse in a same-sex marriage. Exec order 11,246 prohibits federal contractors from discrimination on basis of sexual orientation. FADA would allow them to do so. We may see claims by federal employees to refuse to process papers from people in these categories.

Such a law allowing this kind of discrimination clearly violates the equal protection Clause.³ And by giving government contractors discretion to impose their religious views in deciding who will and will not receive government funded services it raises establishment problems.⁴ So too it raises free speech issues of content and viewpoint discrimination favoring one set of religious views over others.

³ *Romer v. Evans* 517 U.S. 620 (1996)

⁴ *See Larkin v Grendel's Den* 459 U.S. 116 ; *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

Russell Amendment

The Russell amendment to the House version of the FY17 National Defense Authorization Act would have required federal agencies to allow religiously affiliated contractors and grantees to use federal funds to discriminate in hiring. Although, the amendment was not included in the final bill, the sponsor has promised to bring it back this Congress. The broad wording would cover hiring not just by pervasively sectarian entities (houses of worship, parochial schools etc.) but large religiously affiliated employers such as hospitals and universities. It would apply to every grant by any federal agency, allowing them to discriminate on the grounds of anything that offends the religious sensibilities of the employer. They could discriminate against people of religions they don't like; against LGBTQ people; or an unmarried pregnant woman. It would functionally negate a range of anti-discrimination laws and executive orders including President Obama's 2014 EO barring discrimination against the LGBTQ community in federal contracting.

C. The Draft EO on Religious Freedom

Rather than going through a number of other pieces of legislation that have been proposed in recent years, allow me to focus on the language of the leaked draft Executive Order on Religious Freedom, which encompasses many of the issues I have discussed—the Johnson Amendment, FADA, and the Russell Amendment—and many others. I do so fully recognizing that we don't know if the published draft is an accurate portrayal of what the administration currently wishes to adopt or whether reaction to the draft has led to significant revisions.

In addressing the EO, it is helpful to look at the underlying issues that are involved in all of these bills: the issue of discrimination. The Religious Freedom Restoration Act (RFRA) restored the traditional first amendment test for government restriction on the free exercise of religion. Towards the goal of protecting religious liberty, it asserted that when a government action places a substantial burden on free exercise of religion, the government may do so only when it has a compelling interest and pursues that compelling interest in the manner that least restricts religious freedom. I was honored to serve as the co-chair of the legislative taskforce of the large RFRA coalition that helped spur passage of this bill. During the debates over RFRA, of all the examples of problems to be solved and goals to be reached offered, I remember none suggesting that RFRA should be used to claim exemptions from civil rights laws. And there were only passing references, which never were focused on by lawmakers or the RFRA coalition that corporations might to be able to claim RFRA protection. RFRA was, to use a now common image, intended to be a shield to protect religious freedom against government action; it was not intended as a sword to limit other people's core civil rights. Thus Justice Ruth Bader Ginsburg, in distinguishing her upholding of the religious liberty claims of a Muslim inmate

wanting to grow a beard in Holt v. Hobbs⁵ from her strong dissent in the Hobby Lobby case wrote: “Unlike the exemption this Court approved in Burwell v. Hobby Lobby Stores, Inc., accommodating petitioner’s religious belief in [Holt v. Hobbs] would not detrimentally affect others who do not share petitioner’s belief.”⁶

All of these proposed policies suggest that there is such a free exercise claim allowing discrimination. To my colleagues here and to the distinguished members of this Committee, help me understand what are the limits of this right being asserted to discriminate? If an employer—a small business owner or head of a religiously affiliated non-profit, asserts a sincere religious belief that Blacks are inferior to whites; Catholics, Muslims, Jews, Hindus etc. to Protestants; differently abled to non-disabled, Latinos to Anglos—if they assert a sincere belief that the religious quality of their business or their non-profit requires that they can only serve or hire those of the same religion – do they have the right to bar customers and employees who are members of these protected groups? Even if we agree that racial discrimination needs to be treated differently – albeit the language of the EO does not affirm such a distinction --if religious claims to discriminate must be accommodated, does not the schema of religious exemptions threaten to shatter the entire structure of civil rights protections, thereby legitimizing the painful racism and religious, ethnic, gender, disability discrimination that plagued our nation over the past three centuries? Anyone could make such a religious claim to discriminate (and courts rightfully are reluctant to judge the sincerity of the claims). And if this type of discrimination is not allowed, then how do you distinguish between this kind of repugnant discrimination and the discrimination allowed in these bills that we are discussing this afternoon?

Furthermore, the bedrock principle of accommodating religious liberty claims is not the only bedrock principle involved in the analysis of these situations. Another is the concept that government should not aid or support discrimination, that tax dollars should not be used to discriminate.. The notion that a Catholic, Jew, Buddhist, or atheist; a pregnant unmarried woman, Latino, or LGBTQ person should pay his or her taxes and then see those monies assigned through government contracts and programs to service providers that could post a sign outside that provider saying; “ no Jews, Buddhists, Catholics, atheists, unwed mother, LGBTQ person (or other protected category) need apply for a government funded job nor ask for government funded services here” is deeply troubling, legally and morally. But the draft executive order—like the Russell Amendment and FADA—ignores this principle entirely.

Section 3(c) of the proposed EO is actually one section that affirms explicitly the recognition of such competing moral principles. It uses the traditional analysis for claims of fundamental rights:

⁵ Holt v. Hobbs, 135 S. Ct. 853 (2015).

⁶ Holt 135 S. Ct. at 867.

As required by religious freedom laws such as the Religious Freedom Restoration Act 42 U.S.C. 2000bb et seq) and the religion provisions of Title VII of the Civil Rights Act of 1964 42 U.S.C.2000e et seq., agencies shall faithfully discharge their duty to accommodate the religion of the federal employees and shall not promulgate regulation, take actions or enact policies that substantially burden a person’s or religious organization’s religious exercise unless the imposition represents the least restrictive means of furthering a compelling governmental interest.”

The reference that religious claims of employees should be accommodated under Title VII standards suggests a limitation when it creates an “undue hardship” on the employer.”

The major problem with the executive order is that it is not at all clear that the instructions to government agencies in Section (3)(c) apply to Section 4, which is the meat of the executive order. The plain language of Section 4 simply says all religious claims should be honored in general and religious beliefs accommodated. It does not require a substantial burden to trigger the analysis nor does it allow for competing interests applied in the least restrictive means to balance other essential government interests against religious freedom claims. The simple assertion of a religious belief by a contractor or federal employee that their religious conscience requires them to discriminate against otherwise protected groups would seem to compel the government to allow them to discriminate -- even where clear anti-discrimination standards would have heretofore barred such discrimination. Since courts, after careful analysis, have repeatedly struck down similar religious claims on the basis that ensuring and enforcing civil rights protections for all Americans is a compelling interest and that uniform application is the least restrictive means of ensuring that compelling interest,⁷ the broad mandate to accommodate religious claims in the EO would alarmingly divide and reshape America into a nation that honored discrimination – and divide the country along lines of religion, ethnicity, gender, disability, sexual orientation etc.

This is the central problem of the proposed EO. But there are other serious ones as well.

⁷ *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) *cert. denied*, 134 S. Ct. 1787 (Apr. 7, 2014); *Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (Colo. Civil Rights Comm’n June 2, 2014) (final agency order) https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf; *Washington v. Arlene’s Flowers, Inc.*, No. 13-2-00871-5 (Jan. 7, 2015), https://www.aclu.org/sites/default/files/assets/2015-02-18--ord_denying_defs_msj_and_granting_pls_and_wa_states_msj.pdf. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) ; *EEOC v. Fremont Christian Sch.*, 781 F. 2d 1362 (9th Cir. 1986)

Section 4 (a) would result in a full exemption to any employer, thereby leaving employees without any contraception coverage or other basic reproductive health services. This would flout the reasoning of Hobby Lobby, which ruled for the employers only because:

“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. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives.⁸

Section 4 (c) raises serious concerns regarding government funded child welfare agencies by elevating the religious interests of the placement agency above the best interests of the child – abandoning what is as core a principle in current cases involving child placements as there is. This could mean that an agency could insist, based on their religious tenets, that they not place children with same sex married couples, with a previously divorced couple or with a couple of a faith that offends the sensibilities of the agency – even where these couples have an established track record as loving, caring, nurturing parents , even where the couple is part of the child’s extended family.

Section 4(e)(1) protects the tax exemption of a religious organization when it is engaged in speaking on political issues, with no limits suggested. (Encouragingly, the EO, as I read it, does not suggest overturning the Johnson Amendment). This would void the restriction on advocacy activity that applies to 501(c)(3) and 501 (h) and other tax exempt groups, which limit the amount of money that non-profits can use for advocacy purposes. Currently, “substantial” advocacy can result in penalties (or theoretically loss of tax exempt status). In singling out religious organizations as opposed to other similarly situated non-profits, this provision would seem to run afoul of Supreme Court holdings in the Texas Monthly and the Walz cases⁹ that argue you cannot single out religious non-profits for benefits denied other similarly situated non-profits. Further, as with the election finance issues, religious organizations are currently exempt from having to report activities under the Lobby Disclosure Act because they voluntarily abide by the lobbying limitations. With much of the budgets of houses of worship drawn from funds derived from tax-deductible contributions, if we insist on being able to engage in advocacy more robustly than currently allowed, Congress will be sorely tempted to impose greater transparency and onerous reporting requirements.

⁸ Burwell v. Hobby Lobby Stores Inc. 134 S. Ct. 2751, 2760 (2014).

⁹ Texas Monthly v. Bullock 489 U.S. 1, (1989); Walz v Tax Comsn. of City of New York, 397 U.S. 664 (1970)

Section 4(k) raises the core issues raised in the FADA legislation. In requiring agencies to “reasonably accommodate” employees, contractors, or grantees who seek to act in accordance with belief(s) defined in (4)(e)(2), this provision seems designed to create pressure on agencies to let federal grantees and contractors to (a) deny services to certain people, discriminating against, for example, LGBTQ youth or a single mother and her children or (b) deny certain services, most likely things like reproductive healthcare and HIV treatment, to anyone.

It creates as well pressure on agencies to let federal employees refuse to carry out their jobs or serve certain people who seek government services. For example, it could open the door to allowing an employee at the IRS to refuse to process the joint tax return of a same-sex couple, or an employee at FEMA to refuse to help an unmarried couple who lost their home in a natural disaster.

Finally, the language of 4 (K) would seem to require accommodation of religious speech, presumably including proselytization, when made within the course of their employment, contract or grant. This would appear to shift the mandate that such activities be separate in time or place from the provision of government funded services and opens up the door that recipients of government services might be forced to be subject to proselytization as a condition of receiving government services.

In the end, the most difficult public policy challenges our nation faces are those that pit valid moral principles in tension with each other. Our goal should be to find the fairest and most compassionate ways, within the constraints of the constitution, to balance out free exercise and civil rights claims.. I am here today precisely because the legislation and executive orders we have discussed do not provide such a balance. I urge that this Committee not endorse this kind of approach but use its authority to pull together respected scholars and stakeholders holding differing views with the express purpose of identifying common ground and exploring where acceptable compromise can be fashioned.