



**TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE**

THE STATE OF RELIGIOUS FREEDOM IN AMERICA

BY

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ALLIANCE DEFENDING FREEDOM

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Dear Mr. Chairman and Members of the Committee:

America enjoys a rich heritage of protecting fundamental human rights and civil liberties. The lifeblood of our nation has been our ability to speak freely and civilly and to act consistent with our beliefs even when those beliefs are politically unpopular. Notably, protecting the inalienable, pre-political right of religious freedom safeguards freedom for the religious and nonreligious alike. It allows each of us to engage and explore the meaning and purpose in life and to order our lives consistent with the answers we find. It is of the utmost priority that the 115th Congress continue to protect our core First Amendment freedoms.

Regardless of what one thinks about religion, we know that civil liberties travel together. Countries that protect religious freedom also enjoy vibrant democracies, gender empowerment, robust freedom of the press, and economic freedom. Countries without religious freedom more often face poverty, war, suppression of minorities, coercion of speech, and violent extremism. This is because the freedoms protected by the First Amendment serve as a linchpin to other civil liberties and human rights. The loss of one signals the loss of others.

Failure to safeguard religious freedom particularly jeopardizes the hope and support brought by organizations who live out their faith by serving the poor and vulnerable. A recent study revealed that religious nonprofits provide over one trillion dollars in services to Americans' health and welfare every year.¹ From the faith-based homeless shelter—just blocks from Congress—whose directors live out their faith by serving those in need, to the religiously-affiliated hospitals that make up one-fifth of all hospital beds, to charities like Lutheran Services in America that cares for six million people annually, America's commitment to religious freedom has ensured that the most vulnerable amongst us continue to be cared for and served.

But today in America, the right to peacefully live out one's beliefs without fear of government punishment or compulsion is under increasing attack. And as explained below, the declining commitment to First Amendment freedoms in our society is mirrored—and perhaps engendered—by an ignorance of and disdain for constitutional freedoms incubated and fostered on our university campuses.

Yet, while many argue today that certain citizens should be compelled by the government to violate their moral or religious convictions, a cursory review of even recent history reveals broad, bipartisan support for ensuring every American is free to live consistent with her beliefs, even when those beliefs are politically unpopular.

America's common ground of religious liberty.

Americans disagree about many constitutional questions. But despite those differences, our commitment to preserving religious freedom itself, even where it calls us to different convictions on any number of important issues, has remained.

This is perhaps most evident in the area of abortion, one of the most contentious issues of the past half century, where, until recently, bipartisan commitment to protecting every person's

¹See <http://www.religjournal.com/pdf/ijrr12003.pdf> (last visited Feb. 14, 2017).

conscience prevailed.

Even as the Supreme Court created a right to abortion in *Roe v. Wade*, it acknowledged the importance of protecting conscience, both religious and the professional Hippocratic refusal to participate in abortion. Allaying fears that creating a right to abortion would compel participation in abortion, the Court affirmed the American Medical Association's recognition that:

[N]o physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.²

Few supporters of *Roe* opposed this respect for the right of conscience for those medical professionals and religious hospitals whose moral principles compelled them not to participate in abortion. Just weeks after *Roe*, the House considered the Church Amendments, named for their Democratic sponsor, introduced in part to stop the American Civil Liberties Union's lawsuits to force Catholic hospitals to either perform abortions or stop serving Medicaid patients. The bill passed 372-1 in the House and 92-1 in the Senate – a vote almost incomprehensible on any legislation today. The junior Senator from Massachusetts, Edward Kennedy, not only voted for this critical affirmation of conscience for Catholic hospitals, but spoke in support of the bill's "full protection to the religious freedom of physicians and others."³

This consensus on conscience remained, resulting in additions to the Church Amendments and to the Coats-Snowe Amendment to the Public Health Services Act, protecting the beliefs of pro-life healthcare workers and medical students. These measures enjoyed bipartisan support and were signed by Presidents Carter and Clinton.

Support for conscience did not only cross the political spectrum, but also the ideological. When testifying in support of the Religious Freedom Restoration Act ("RFRA") in 1992, American Civil Liberties Union President Nadine Strossen explained the law would safeguard "such familiar practices as . . . permitting religiously sponsored hospitals (note: incorporated entities) to decline to provide abortion or contraception services."⁴

The broad support for RFRA further reveals our nation's commitment to ensuring no person is unjustly punished by the government for seeking to peacefully live and work according to her conscience. Groups supporting RFRA ranged from the National Association of Evangelicals to the U.S. Conference of Catholic Bishops to the ACLU to the American Jewish Congress.⁵ RFRA had bipartisan sponsorship – including from the current Senate Minority Leader – and it was signed into law by President Clinton, who noted at the signing ceremony the "miracle" of so many crossing political, religious, and ideological lines to "protect perhaps the most precious of all

² *Roe v. Wade*, 410 U.S. 113, 144 n38 (1973).

³ Cong. Rec. 9602 (March 27, 1973).

⁴ *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. On the Judiciary, 102d Cong., 174, 192 (1992) (Statement of Nadine Strossen, President, Am. Civ. Liberties Union)*

⁵ Public Papers of the Presidents of the United States: William J. Clinton, Book 2 August 1 to December 31, 1994 (1996).

American liberties – religious freedom,” adding “[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 faith.”⁶

As deep as our disagreements may have run before, respect for conscience was our cultural and constitutional common ground. But sadly, we are losing our cultural consensus on the value of protecting the religious convictions of the few against the demands of those powerful enough to claim a governmental majority.

“An Ominous Sign.”

The decade long legal battle endured by a family-owned grocery store and pharmacy in Olympia, Washington exemplifies the growing hostility toward religious freedom. Washington State targeted Ralph’s Thriftway, owned by the Stormans family, becoming the only state in the country to compel pharmacists to violate their conscience and dispense abortion-inducing drugs. A Washington federal court stopped the state from violating the family’s rights under the free exercise clause of the First Amendment.⁷ But the Ninth Circuit disagreed. The Supreme Court, missing the recently deceased Justice Scalia, lacked the necessary fourth vote to hear the case. Justice Alito, writing for two other Justices who would have heard the case, expressed sobering words about the state of religious freedom in America.

This case is an ominous sign.

At issue are Washington State regulations that are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications. There are strong reasons to doubt whether the regulations were adopted for—or that they actually serve—any legitimate purpose. And there is much evidence that the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State. Yet the Ninth Circuit held that the regulations do not violate the First Amendment, and this Court does not deem the case worthy of our time. If this is the sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.⁸

Justice Alito is correct. If our constitutionally-protected freedoms hinge on the opinion of those currently in political power, we fail to preserve freedom, justice, and equality.

Sadly, the Stormans’ experience is not unique. Today, governments increasingly prevent doctors, nurses, pharmacists, and faith-based hospitals from serving the public consistent with their conscience and ethical obligations if these beliefs are in conflict with the reigning government or cultural ideology.

- Despite its testimony in support of RFRA, the ACLU has relaunched its assault on Catholic

⁶ *Id.*

⁷ “*Stormans v. Weisman*,” <http://www.adfmedia.org/news/prdetail/4118> (last visited July 5, 2016).

⁸ *Stormans, Inc. v. Wiesman*, 579 U.S. ___, 132 S.Ct. 2433 (2016) (Alito, J., dissenting from denial of certiorari).

hospitals and aid agencies, once rejected by virtually every member of Congress, renewing its campaign to force them to either perform abortions or stop serving the poor.⁹

- Despite decades of bipartisan laws protecting healthcare conscience and despite the assurances in *Roe* itself, medical professionals increasingly risk losing their jobs if they will not perform or be trained to perform abortions.¹⁰
- Despite promises when it was signed, Obamacare not only forces nuns, Christian colleges, and religious employers to pay for abortion-inducing drugs and devices that violate their faith, but it also requires some Americans to either pay for others' elective surgical abortions or go without their own healthcare insurance and pay fines to the government.¹¹
- Despite clear First Amendment protections, nonprofit faith-based pregnancy centers are being ordered to counsel and refer for abortions in violation of their conscience – or stop meeting the needs of the primarily low income women that they serve.¹²
- Despite assertions by the previous Administration that abortion insurance mandates were unlikely to soon occur, and after years of failed attempts to compel abortion mandates through even Democratic-controlled state legislatures, some states are now imposing these mandates bureaucratically – with California forcing **even churches** to cover abortions from the offering plate.¹³

As even the most ardent abortion supporters historically have agreed, no American should be compelled by their government to participate in an abortion if this violates the person's conscience.

The attack on Americans' freedoms, however, is not limited to beliefs about the dignity of human life. Increasingly, Americans who seek to live and work consistent with a belief about marriage that has been embraced throughout the world by diverse cultures and faiths for much of human history are facing government coercion and punishment. For example, the City of Atlanta fired decorated Atlanta Fire Chief Kelvin Cochran after he wrote a men's devotional book on his personal time. Despite the conclusion of an investigation that he always treated everyone fairly and never discriminated against anyone, the Mayor terminated Chief Cochran's career of service to the community because he expressed his faith's teaching about marriage.

⁹ "American Civil Liberties Union v. Trinity Health," <http://adflegal.org/detailspages/case-details/american-civil-liberties-union-v.-trinity-health> (last visited February 15, 2017).

¹⁰ See, e.g., "Cenzon-DeCarlo v. The Mount Sinai Hospital," <http://adflegal.org/detailspages/case-details/cenzon-decarlo-v.-the-mount-sinai-hospital> (last visited February 15, 2017); "Danquah v. University of Medicine and Dentistry of New Jersey," <http://adflegal.org/detailspages/case-details/danquah-v.-university-of-medicine-and-dentistry-of-new-jersey> (last visited February 15, 2017).

¹¹ "No treatment under Obamacare for HIV positive man because he won't pay for abortions." <http://www.adfmedia.org/News/PRDetail/9482> (last visited February 15, 2017); "ADF to Vt. Court: Paying for abortions should not be prerequisite for healthcare." <http://www.adfmedia.org/News/PRDetail/9594>; (last visited February 15, 2017) "Obamacare forcing pro-life family to pay for other people's abortions." <http://www.adfmedia.org/News/PRDetail/9056> (last visited February 15, 2017).

¹² "The Pregnancy Care Center of Rockford v. Rauner" <http://www.adfmedia.org/News/PRDetail/10039> (last visited February 15, 2017).

¹³ "Foothill Church v. Rouillard," <http://www.adfmedia.org/News/PRDetail/?CID=89974> (last visited February 15, 2017); "Skyline Wesleyan Church v. California Department of Managed Health Care," <http://www.adfmedia.org/News/PRDetail/9997> (last visited February 15, 2017).

Donald and Ellen Vander Boon own the West Michigan Beef Company, LLC, a meat processing facility near Grand Rapids, Michigan. This family-owned business employs over 45 hard-working Americans and helps put food on the table for countless families across the Midwest. Don and Ellen's faith guides them in how they operate their business, such as making sure that their employees are treated fairly and well. Unfortunately, the Vander Boons are at risk of having their plant shut down and their employees left jobless because a USDA inspector claimed that an article discussing marriage as the union of a man and a woman that Mr. Vander Boon left on a breakroom table was offensive and violated new USDA anti-harassment policies.

Don filed a formal complaint with the USDA eighteen months ago, but has not received any relief from this unjust and unlawful targeting by the federal government. He continues to face apprehension that something he says or does might result in the USDA censoring his religious beliefs, silencing his speech, or even forcing them to forego their only source of income that benefits both their family as well as the families of their 45 employees.

Government failing to respect citizens' First Amendment freedoms is even impacting something as basic as childrens' safety on a playground. In a case ADF anticipates arguing later this spring, *Trinity Lutheran v. Pauley*, the State of Missouri rejected a Missouri church preschool from a program supplying recycled rubber tires for children's playground surfaces.¹⁴ Although the state highly ranked the daycare center as qualified for the program, it denied the center's application solely because a church runs the daycare.

Pastors continue to face vague threats of IRS retribution if their sermons challenge government officials too directly. Government officials and advocacy groups have used the Johnson Amendment to dissuade pastors from speaking in their own pulpits - undermining a long American tradition of the church, as Rev. Martin Luther King Jr. put it, acting "not [as] the master or servant of the state, but rather the conscience of the state."¹⁵ In Houston, Texas, for example the mayor even subpoenaed the sermons and emails of a group of pastors - using the power of the government to try to silence the church.

These examples reveal the erosion of our nation's longstanding commitment to safeguarding every person's freedom to live consistent with their beliefs. Now is thus a time for choosing. Will America continue to prioritize the freedoms of all our citizens, or will we allow our freedoms to be further whittled away.

Congress must ensure that the American experiment can continue to flourish and to safeguard against government coercion or compulsion based upon the current politically popular belief. The 115th Congress and the new Administration can take important steps to restore needed protections for religious liberty. Legislation like the Conscience Protection Act, the Free Speech Fairness Act, and the First Amendment Defense Act all provide critical safeguards for freedom, ensuring all Americans are able to peacefully live and work consistent with their convictions.

¹⁴ See "Trinity Lutheran Church of Columbia v. Pauley." <http://www.adfmedia.org/News/PRDetail/8831> (last visited Feb. 14, 2017).

¹⁵ J. M. Washington, ed. *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King* (1986).

A failure of education.

But in addition to prioritizing specific legislative safeguards for First Amendment freedoms and restoring a bipartisan appreciation for and commitment to these principles, no examination of “The State of Religious Freedom in America” should ignore an assessment of the cultural trends against First Amendment rights in general and their causes.

There are many reasons for our diminished societal appreciation for First Amendment freedoms. Some of these symptoms may be beyond the power of this body to address. But one that should not be ignored is the impact of the anti-constitutional culture on our college campuses.

Only seventeen percent of Americans can even identify the free exercise of religion as a right protected by the First Amendment.¹⁶ Fifty percent of all Americans and twenty-seven percent of *college graduates* cannot identify *any* of the protections of the First Amendment.¹⁷

We can only protect the First Amendment if we understand it. Congress and the American people have every right to expect that our public universities will advance, not hinder, that understanding. But on this score our public universities are simply failing.

College is a shared cultural experience for most of us, with two-thirds of Americans attending. But most of these students will never take a class in civics – or any course addressing constitutional law – as part of their college education. Rather than learning about the robust protections of the First Amendment and the “marketplace of ideas” that their campus should foster, students are instructed on, unbeknownst to them, likely unconstitutional speech codes, speech zones, flyer distribution policies, “bias response teams,” mandatory student activity fees that require them to fund others’ ideological expression, and security fees that prevent them from bringing to campus any speakers the school deems “controversial.” Rarely do universities actually train students on the First Amendment rights they possess and the First Amendment obligations the administrators and faculty owe them.

These policies are often constitutionally suspect. The Foundation for Individual Rights in Education estimates that only about six percent of universities have written free speech policies that adequately protect student free speech.¹⁸ And students’ actual practical experiences on college campuses are often far worse.

In the last decade, ADF has assisted hundreds of students and student groups of varying religious and political beliefs facing violations of their First Amendment rights on campus. Our current and recent cases illustrate the breadth of the constitutional crisis students face on campus.

A Young Americans for Liberty student at Michigan’s Kellogg Community College was recently arrested for distributing copies of the Constitution on her campus.¹⁹ Administrators explained that

¹⁶ The Newseum Institute, “2016 State of the First Amendment.” http://www.newseuminstitute.org/wp-content/uploads/2016/06/FAC_SOFA16_report.pdf (last visited February 14, 2017).

¹⁷ *Id.*

¹⁸ FIRE, “Spotlight on Speech Codes 2017,” <https://www.thefire.org/spotlight-on-speech-codes-2017/> (last visited February 15, 2017).

¹⁹ “Student club supporters arrested for handing out US Constitution at Michigan college, ADF sues,” <http://www.adfmedia.org/News/PRDetail/10155>, (last visited February 15, 2017).

students could only speak freely by reserving a table in the student union and applying for a permit. The rest of the school's campus was off-limits for student speech.

At California State University—Los Angeles, faculty members actually linked arms to prevent students from entering an auditorium to hear a speech from a nationally known speaker Ben Shapiro on - ironically - freedom of speech, hosted by a Young Americans for Freedom student group.²⁰ The President of the University personally tried to prevent these students from hosting their free speech event, imposing burdensome security fees, trying to cancel the event, and then ordering the police to stand down, permitting faculty members and others to block students from entering.

At Georgia Gwinnett College in suburban Atlanta, Chike Uzuegbunam sought to peacefully discuss his faith with other students on his campus. The school ordered him not to speak outside of a tiny speech zone, representing .0015% of the campus, and even then only after he applied for permission. But after he had satisfied all of the school's demands and secured the permit to speak in this ludicrously small speech zone, an officer told him that he could no longer speak even there because others objected.²¹

Despite billing itself as America's most diverse campus, Queens College in New York City rejected a new Students for Life group, excluding the group from meeting space, the opportunity to bring in speakers, funding, and all of the benefits that allow a student organization to participate in the marketplace of ideas.²²

Michigan, California, Georgia, and New York. These violations of the First Amendment are not limited to red or blue states, or to any region of the country. College students are learning by example how government officials - university administrators - value the First Amendment. Today's students are tomorrow's Members of Congress, judges, teachers, and voters. Our university campuses are where the next generation should be learning how the Constitution works, what rights it protects, and why they are worth defending – even when you do not always agree with the views or the beliefs of those that it protects. But instead students are learning by example from public university administrators that the First Amendment means what government officials want it to mean.

Avoiding cultural stagnation.

I highlight these examples to underscore the significant need and opportunity for Congress to address this growing cultural and constitutional crisis facing our university students and impacting the future of our nation's commitment to the First Amendment freedoms that ensure the American experiment will continue.

These are campuses heavily funded by taxpayer dollars. Roughly half of the federal Department of Education's budget goes to higher education programs, and this does not even include student

²⁰ Young America's Foundation v. Covino, <http://www.adfmedia.org/News/PRDetail/10117> (last visited February 15, 2017).

²¹ "Georgia college sued for censoring student speech, restricting it to .0015% of campus," <http://www.adfmedia.org/News/PRDetail/?CID=92219> (last visited February 15, 2017).

²² "NYC college relegates pro-life student group to second class status," <http://www.adfmedia.org/News/PRDetail/10145> (last visited February 15, 2017).

loans.²³ Congress has a fiscal responsibility to ensure that these tens of billions in federal taxpayer funds are being used in a way that advances, not discourages, respect for the First Amendment rights of all Americans.

Campuses – as microcosms of society at large – are supposed to function as a marketplace of ideas and a model of civil discourse, without which the Supreme Court has said “our civilization will stagnate and die.”²⁴ But our colleges are instead dictating what speech and ideas are permissible. Students are learning that their rights – including their First Amendment freedoms – come from the Vice President of Student Affairs.

This is how we end up with a culture believing that the First Amendment ends where someone else’s feelings begin – especially if they express those feelings loudly or even violently.

This is how we end up with a culture believing that government is the author of our rights, not their steward.

This is, at least in part, how we are now developing a culture that would limit religious freedom to the confines of a place of worship for one hour on a weekend, not an inalienable right we possess at all times whether at home, work, or school.

History proves it is a mistake to think that what happens on our university campuses will stay there. But while it is a substantial task to remind the next generation what the First Amendment protects and why it matters, it is vital. And Congress can do something about it.

We do not – and will not – all agree on the important questions facing our nation. And that is to be expected in any thriving, pluralistic society. But America has always been unique in that our Constitution guarantees that we can order our lives consistent with our beliefs, even if they are in the minority. In order to sustain the unique American experiment and preserve freedom for the next generation, Congress should work to ensure every American can freely live and work consistent with their convictions in all aspects of their lives without fear of government censorship.

²³ See “Federal and State Funding of Higher Education,” <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/federal-and-state-funding-of-higher-education> (last visited Feb. 15, 2017).

²⁴ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion of C.J. Warren).