Testimony of the

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***Written Testimony* for the Hearing Record on**

"The State of Religious Liberty in the United States"

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Mr. Chairman, Ranking Member Nadler, and Members of the Subcommittee, thank you for this opportunity to present testimony on behalf of Americans United for Separation of Church and State (Americans United) on the "State of Religious Liberty in the United States."

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

Religious freedom issues are of particular importance to me personally, as I am both an ordained minister in the United Church of Christ and an attorney. I recognize that the United States is one of the most religiously diverse countries in the world and our constitution grants us some of the strongest religious liberty protections in the world, yet we still face threats to religious liberty in our country.

But, with all due respect to my colleagues on this panel, the real and imminent threats we face today are not of the sort they espouse. Indeed, what they see as threats can easily be characterized as attempts to obtain sweeping exemptions that harm the rights of innocent third parties; attempts to seek privileges reserved for religious entities even though they are engaged in commerce, acting as a traditional business, or serving as a government provider of services; and attempts to obtain religious exemptions even when such exemptions could deny others their fundamental rights, health, or even life. And, the religious freedom issues we see in public schools today are not that students are prevented from praying or practicing religion, but that there are strong institutional pressures that force them to participate in religious activities.

What I, and Americans United, see as the most imminent and egregious threats to religious freedom today are those that are suffered by members of minority faiths and non-believers in this country. It is these Americans who are being denied the basic rights that many of us practicing a majority faith take for granted every day. Of course, the religious majority in one community in this country may be the religious minority in another, making it even more important for all faiths to fight for the rights of the less popular religions in our nation.

In my day-to-day work, I see that adherents to less popular faiths and non-believers are increasingly being denied the right to gather and to engage in personal religious expression granted to other faiths. They face religious coercion and overt religious employment discrimination.

The Right To Worship and Congregate

In America today, some religious minorities are denied the right to even construct houses of worship and other buildings for their congregations. They face not just the difficulties that some majority faiths must overcome, such as zoning roadblocks.[1] They also face community—and sometimes national—protests, intimidation, and threats of violence.

For example, when a Muslim congregation in Murfreesboro, TN sought to build a mosque, their signs were vandalized and destroyed,[2] their construction equipment was torched,[3] and their worship services in other locations were stopped by bomb threats.[4] Even though the local zoning board approved the project, members of the community sued to stop construction, arguing that Islam is not a true religion[5]—a claim backed by the Tennessee Lt. Governor.[6] The intimidation influenced construction companies, which became too afraid to even work on the project, delaying the construction.[7] And, the threats led to new costs for expensive security measures, such as cameras.[8]

In New York City, the proposed Park 51 Muslim community center prompted national backlash. The project had satisfied all zoning requirements and was legally authorized to move forward with construction. Nonetheless, groups that usually argue that zoning and historic landmark laws may not be used to stop the building of religious structures[9]

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[1] This is not to say that minority faiths don't also suffer from such roadblocks. In fact, The Justice Department has launched probes under the Religious Land Use and Institutionalized Persons Act (RLUIPA)—a law supported by Americans United—into 16 contested mosque sites in the U.S. since May 2010. Mike Esterl, "Georgia Mosque Gets Approval From Lilburn City Council," *Wall Street Journal*, Aug. 17, 2011. Retrieved Oct. 21, 2011, from <http://online.wsj.com/article/SB10001424053111903480904576513171323195258.html>.

[2] Jamie Gumbrecht, "Embattled Tennessee mosque to move forward with construction," *CNN*, Sept. 2, 2011. Retrieved Oct. 21, 2011, from <http://religion.blogs.cnn.com/2011/09/02/embattled-tennessee-mosque-to-move-forward-with-construction/>.

[3] *Id.*

[4] Scott Broden, "Murfreesboro mosque members celebrate groundbreaking," *Tennessean*, Sept. 29, 2011. Retrieved Oct. 21, 2011, from <http://www.tennessean.com/article/20110929/NEWS06/309290061/Murfreesboro-mosque-members-celebrate-groundbreaking>.

[5] *Id.*

[6] Elisabeth Kauffman, "In Murfreesboro, Tenn.: Church 'Yes,' Mosque 'No'," *Time*, Aug. 19, 2010. Retrieved Oct. 21, 2011, from <http://www.time.com/time/nation/article/0,8599,2011847,00.html>.

[7] *Id.*

[8] Scott Broden, "Murfreesboro mosque members celebrate groundbreaking," *supra* note 4.

[9] The ACLJ has filed numerous cases in favor of religious organizations, arguing that zoning and historical landmark laws do not trump the rights of religious organizations to construct buildings. Indeed, a memorandum on its website explains that "RLUIPA is a law designed to protect religious assemblies and institutions from zoning and historic landmark laws that substantially interfere with the assemblies' and institutions' religious exercise." "ACLJ Memorandum: An Overview of the Religious Land Use and Institutionalized Persons Act ('RLUIPA')-2004," *ACLJ Website*, Oct. 8, 2004. Retrieved Oct. 24, 2011, from <http://aclj.org/us-constitution/aclj-memorandum-an-overview-of-the-religious-land-use-and-institutionalized-persons-act-rluipa-2004>. And, in an amicus brief filed in *Barr v. City of Sinton*, the ACLJ argued that "zoning, nuisance, and historic preservation laws directly affect religious organizations more than most other kinds of laws; consequently, . . . [the] promise of restored religious liberty would become largely meaningless . . . if localities could substantially burden their religious free exercise through the application of these laws without having to undergo strict scrutiny." Brief for The American Center for

actually filed suit under those very laws to stop the construction of the community center.[10] Indeed, the American Center for Law and Justice (ACLJ) argued that the city should have granted the property landmark status, which would have prevented the construction of the community center.[11] Of course, attorneys on the case also admitted that they would not be challenging the building project if a church were to be built in that spot instead.[12]

These challenges to building projects are not isolated incidents. Those protesting the construction of a mosque in Brooklyn, New York, threatened to bomb the mosque, saying "[i]t's hot today, but things are going to get a lot hotter for people in this illegal structure."[13] In Katy, Texas, community members voiced their opposition to Muslims building a house of worship by staging pig races on the land next door to the proposed project, hoping to offend congregants because they do not eat pork for religious reasons.[14] In Lilburn, Georgia, protesters were honest when they tried to block construction of a mosque. One admitted: "I just don't like Muslims" and "I don't want them taking over our neighborhood."[15]

Mosques that have been serving their communities for years have also faced vandalism and actual violence. In Seattle, Washington, for example, a man attempted to set fire to several cars located in the mosque's parking lot and then fired a gun at worshipers as they were leaving prayer services.[16] As part of a pattern of harassment against the Dar El-Eman Islamic Center in Arlington, Texas, an individual set fire to the center's

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Law and Justice, et al. as Amici Curiae Supporting Petitioners at 13, *Barr v. City of Sinton*, 295 S.W.3d 287 (2009) (No. 06-0074).

[10] *Brown v. N.Y.C. Landmarks Pres. Comm'n*, No. 110334 (N.Y. Sup. Ct. July 7, 2011).

[11] *Id.*

[12] ACLJ attorney Brett Joshpe admitted that he would not be pursuing the case if a Christian church were being built on the same site: "Would I be personally involved in this matter if this were a church? No." Chris Moody, "Legal Advocacy Group Files Suit to Keep Muslim Community Center Away from Ground Zero," *The Daily Caller*, Aug. 6, 2010. Retrieved Oct. 24, 2011, from <http://dailycaller.com/2010/08/06/legal-advocacy-group-files-suit-to-keep-muslim-community-center-away-from-ground-zero-region/>.

[13] Thomas Tracy, "'What kind of America?' Hate-filled rally to stop mosque," *Brooklyn Paper*, June 28, 2010. Retrieved Oct. 24, 2011, from <http://www.brooklynpaper.com/stories/33/27/bn_tt_baypeoplemosquerally_2010_07_02_bk.html>.

[14] Cindy Horswell, "Not Ground Zero, but Katy mosque also stirs passions," *Houston Chronicle*, Sept. 7, 2010. Retrieved Oct. 21, 2011, from <http://www.chron.com/life/houston-belief/article/Not-Ground-Zero-but-Katy-mosque-also-stirs-1717134.php>.

[15] "Georgia Mosque Opponent: 'I Don't Like Muslims,'" *Council on American-Islamic Relations*, Oct. 27, 2009. Retrieved Oct. 24, 2011, from <http://sun.cair.com/ArticleDetails.aspx?mid1=676&&ArticleID=26112&&name=n&&currPage=1>.

[16] Florangela Davila, "Typical Muslims With Jobs and Families Now Bear Burden of Suspicion," *Seattle Times*, Sept. 11, 2002. Retrieved Oct. 24, 2011, from <http://seattletimes.nwsource.com/news/nation-world/sept11anniversary/oneyearlater/suspicion.html>.

playground.[17] In Columbia, Tennessee, three men spray painted swastikas and the term "white power" on the Islamic Center of Columbia before firebombing the mosque.[18]

Members of certain faiths still face community intimidation, vandalism, and threats each day in this country. It is hard to fathom that this type of discrimination against religious minorities still takes place today. These examples demonstrate real threats to religious liberty and it is incidents like those above that this panel should be trying to alleviate.

The Right to Private Religious Expression

In America today, adherents to minority religions are still often denied the basic privileges to express and identify with their religion that are granted to more popular and common religions.

Take, for example, U.S. Army Sgt. Patrick Stewart, who was killed while fighting in Afghanistan.[19] He was awarded a Purple Heart and a Bronze Star, but the government refused to grant him the right to display his religious symbol on his gravestone at the Veterans cemetery in which he was buried.[20] At the time, the government recognized 38 other religious symbols, but it took 10 years and a federal lawsuit filed by Americans United to force the U.S. government to recognize Wicca,[21] which has approximately 750,000 adherents in the U.S., as a religion deserving a symbol of its own.[22] Perhaps it is no surprise considering Congressmen have tried to ban Wicca worship on military bases[23] and then-President George W. Bush once claimed that Wicca wasn't really a religion.[24]

Sgt. Stewart's grave is purely personal to him and the symbol he chose to display on it has a profound impact upon him and his family. The symbol does not convey a message on behalf of the military or other soldiers (except to the extent it demonstrates their respect for religious freedom). Yet, the government—for 10 years—refused to see his symbol as being equal to the 38 other religions it deemed worthy of recognition.

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[17] "Texan guilty in mosque playground fire," *United Press International*, Feb. 24, 2011. Retrieved Oct. 24, 2011, from <http://www.upi.com/Top_News/US/2011/02/24/Texan-guilty-in-mosque-playground-fire/UPI-11361298534817/>.

[18] Mike Scarcella, "Tennessee Man Sentenced to 14 Years for Mosque Fire," *Legal Times*, Nov. 24, 2009. Retrieved Oct. 24, 2011, from <http://legaltimes.typepad.com/blt/2009/11/tennessee-man-sentenced-to-14-years-for-mosque-fire.html>.

[19] Alan Cooperman, "Fallen Soldier Gets a Bronze Star but No Pagan Star," *Washington Post*, July 4, 2006. Retrieved Oct. 21, 2011, from <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/03/AR2006070300968.html>.

[20] *Id.*

[21] *Id.*

[22] "How Many Wiccans Are There?," *ReligiousTolerance.org*, 2008. Retrieved Oct. 24, 2011, from <http://www.religioustolerance.org/wic_nbr3.htm>.

[23] Clarence Page, "Bob Barr Isn't Bewitched By Military Wiccans," *Chicago Tribune*, June 16, 1999. Retrieved Oct. 24, 2011, from <http://articles.chicagotribune.com/1999-06-16/news/9906160031_1_hood-open-circle-christian-coalition-new-age-earth-worship>.

[24] Alan Cooperman, "Administration Yields on Wiccan Symbol," *Washington Post*, Apr. 24, 2007. Retrieved Oct. 24, 2011, from <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/23/AR2007042302073.html>.

Sgt. Stewart is not the only American whose private religious speech has been treated differently than that of adherents to more popular religions. In Johnson, County, Tennessee, the County Commission created a "public forum" in the Courthouse lobby for displays relating to the development of American law.[25] A display featuring the Ten Commandments, quotations from historical legal sources, and Biblical verses was then placed in the forum, along with a pamphlet titled "Johnson County Historical Display," which contains "essays from local preachers and the statement 'the United States of America was founded on Christian principles.'"[26] But the Commission refused to allow Ralph Stewart to post his display in the forum.[27] It rejected his proposed display, which documented the historical roots of church-state separation, even though it features quotations from many of the same historical legal sources as does the Ten Commandments display.[28] At the meeting when the decision was made to deny the display, Planning Commissioner Mike Tavalario said: "This is a good Christian community that welcomes people who move here. But if you want to attack God, you should leave."[29]

Americans United filed a case against the County Commission on behalf of Mr. Stewart and the litigation is still pending. But, it again demonstrates that often, the government creates a forum for expression of religious expression it supports, but closes it to those of other religious beliefs.[30]

Compulsory Worship

Governments and communities around the country engage in tactics that make individuals feel compelled to engage in religious worship services even if they don't coincide with their religious beliefs. Government-compelled religion is often targeted at the most vulnerable in our society, such as those in the criminal justice system or in need of government social services. Compelled religion strikes at the core of religious freedom—no person should be coerced by the government into worshipping in any manner, whether that worship coincides with his or her religious beliefs or not.

Nonetheless, the City of Bay Minette, Alabama has adopted "Operation Restore Our Community," which allows misdemeanor offenders to avoid jail and fines if—and only

[25] Travis Loller, "Man Sues County over 10 Commandments Display in Johnson County," *Johnson City Press*, Jan, 14, 2011. Retrieved Oct. 24, 2011, from <http://www.johnsoncitypress.com/News/article.php?id=85391>.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Associated Press, "Man Sues Tenn. County Over Ten Commandments Display," *Fox News*, Jan. 13, 2011. Retrieved Oct. 24, 2011, from <http://www.foxnews.com/us/2011/01/13/man-sues-tenn-county-commandments-display/>.

if—they attend church services once a week for one year.[31] Participants will have to submit a signed statement proving attendance at church and answer questions about the services.[32] Of course, asking a person to choose between incarceration or church attendance is no choice at all. This program not only unconstitutionally coerces criminal defendants into attending religious services; it also endorses religion as the preferred method of rehabilitation.[33]

A case in which Americans United recently reached a settlement involved the District of Columbia's plan to provide $12 million dollars worth of cash and property to the Central Union Rescue Mission. The Mission provides food and shelter to the homeless in the District, but conditions those services upon attendance at Christian religious services. In order to stay overnight, guests must attend nightly services and, in order to stay for lunch, guests must attend morning services.[34] Indeed, all the social services provided at the Mission – including overnight shelter, meals, groceries, and counseling – require participation in religious activity.[35] Rather than provide services open to everyone—believers of all faiths and non-believers—the government had planned to support services that required individuals to attend Christian services. The government had unconstitutionally put its stamp of approval and its financial backing on services that required participation and conversion to Christianity.

These individuals seeking help at the shelter are forced to choose between food and shelter or religious services. The government has no place in coercing its citizens into such situations and government funding of such programs demonstrates a real and imminent threat to religious liberty.

Unfortunately, sometimes when the government steps up to protect our citizens from coercion, the community steps in to further ostracize or compel the individuals to comport with the majority religion. At Bastrop High School in Louisiana, the principal, in accordance with a student request and Constitutional mandates, replaced the graduation ceremony prayer with a moment of silence.[36] Rather than respect the religious freedom rights of the atheist student who requested that the prayer be removed or respect the rule of law, the student chosen to lead the moment of silence instead led the entire

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[31] Kelli Dugan, "Jail or church? Some Alabama offenders will get to choose," *Reuters*, Sept. 23, 2011. Retrieved Oct. 21, 2011, from <http://www.reuters.com/article/2011/09/23/us-alabama-crime-church-idUSTRE78M7FF20110923>.

[32] Connie Bagget, "Alabama court's church or jail sentencing option draws ACLU ire, national attention," *Mobile Press-Register*, Sept. 23, 2011. Retrieved Oct. 21, 2011, from <http://blog.al.com/live/2011/09/bay_minette_alternative_senten.html>.

[33] *Lee v. Wasserman*, 505 U.S. 577 (1992); *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068 (2d Cir. 1997), *judgment reinstated*, 173 F.3d 120 (2d Cir. 1999); *Everson v. Bd of Educ.* 330 U.S. 1 (1947).

[34] Complaint at 8-9, *Chane v. D.C.*, No. 1:08 cv 01604 (D.D.C. September 18, 2008).

[35] Complaint at 12, *Chane v. D.C.*, No. 1:08 cv 01604 (D.D.C. September 18, 2008).

[36] Mark Rainwater, "Student challenges prayer at Bastrop graduation," *Bastrop Daily Enterprise*, May 18, 2011. Retrieved Oct. 24, 2011, from <http://www.bastropenterprise.com/features/x2132687894/Student-challenges-prayer-at-Bastrop-graduation>.

audience and her fellow classmates in a recitation of the Lord's Prayer.[37] The student who led the prayer was not punished for violating the rules of the ceremony, infringing on the rights of other students, or disrespecting her fellow classmates. Instead, it was the student who held beliefs inconsistent with the majority who was punished: he was effectively forced to "participate" in a group prayer that he did not expect to hear when he entered his graduation ceremony.

After the graduation, Americans United joined other groups that sent a letter to the school, criticizing the fact that during the prayer, "school officials sat idly by" and "no apology has been delivered to the community by Bastrop High School officials or the Board of Trustees, for either past or recent events."[38]

Compulsory religion occurs at the hands of the government and sometimes irresponsibility of government promotes religious intolerance. It is true that there may not be a remedy for every act of religious coercion, but that does not mean the government should not attempt to preserve the rights of all in their community, regardless of faith of belief.

No Religious Test for Office

Surprisingly, persons of certain faiths and non-believers still face religious tests for office. The U.S. Constitution clearly states that there may be no religious test for public office.[39] Yet today, the rhetoric in the Presidential election declares some candidates as belonging to cults,[40] and designates persons of certain religions as unfit for cabinet positions.[41] It is no surprise, therefore, that local councils have also attempted to enforce religious tests on their citizens.

In Asheville, North Carolina, citizens fought to prevent a non-theist and member of the local Unitarian church, Cecil Bothwell, from being sworn in as a member of the City Council.[42] Bothwell "has called himself an atheist and post-theist, saying he believes in

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[37] Sandhya Bathija, "Bastrop Bullies: Damon's Classmates Show No Class At High School Graduation," *The Wall of Separation*, May 23, 2011. Retrieved Oct. 24, 2011, from <http://blog.au.org/2011/05/23/bastrop-bullies-damon%E2%80%99s-classmates-show-no-class-at-high-school-graduation/>.

[38] Press Release, "To Officials of the Bastrop High School and the Board Members of the Morehouse Parish Schools Regarding Prayer at Graduation Ceremonies," *ACLU Website*, May 26, 2011. Retrieved on Oct. 24, 2011 from < http://www.au.org/media/press-releases/archives/2011/05/bastrop.pdf>.

[39] U.S. CONST. art. XI, para. 3.

[40] Michael A. Memoli, "Vegas Debate: Perry defends pastor who called Mormonism a cult," *Los Angeles Times*, Oct. 18, 2011. Retrieved Oct. 24, 2011, from <http://articles.latimes.com/2011/oct/18/news/la-pn-perry-romney-mormon-20111018>.

[41] Justin Elliot, "GOP candidate: No Muslims in my Administration," *Salon*, Mar. 28, 2011. Retrieved Oct. 21, 2011, from <http://www.salon.com/2011/03/28/herman_cain_no_muslims/>.; Huma Khan and Amy Bingham, "GOP Debate: Newt Gingrich Comparison of Muslims and Nazis Sparks Outrage," *ABC News*, June 14, 2011. Retrieved Oct. 21, 2011, from <http://abcnews.go.com/Politics/gop-debate-newt-gingrichs-comparison-muslims-nazis-sparks/story?id=13838355>.

[42] Associated Press, "In North Carolina, Lawsuit Is Threatened Over Councilman's Lack of Belief in God," *New York Times*, Dec. 12, 2009. Retrieved Oct. 24, 2011, from <http://www.nytimes.com/2009/12/13/us/

the Golden Rule but thinks the question of whether there is a deity is irrelevant."[43] Citizens, believing non-believers should not hold office, relied upon a provision that still exists in the North Carolina State Constitution, which states: "The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God."[44] The fact that the state provision violates the United States Constitution[45] did not dissuade members of the community from trying to prove him unfit for office.

Ultimately, Mr. Bothwell was sworn into office and currently serves on the Council. But, some are still threatening to remove him from office. According to *The New York Times*, *"*one opponent, H. K. Edgerton, is threatening to file suit against the city to challenge Mr. Bothwell's swearing in. 'My father was a Baptist minister,' Mr. Edgerton said. 'I'm a Christian man. I have problems with people who don't believe in God.'"[46]

In Jacksonville, Florida, the city council subjected a Muslim nominee to the Human Rights Commission to ridicule and a questionnaire not provided to any other nominee.[47] Even after the Council eventually approved of his nomination, one City Council member still stated that he was not sure whether Muslims should be allowed to hold public office.[48]

In January, Governor Chris Christie nominated Sohail Mohammed to serve as a judge on the New Jersey Superior Court.[49] Mr. Mohammed, a Muslim, was considered an outstanding attorney and had recently worked on building trust between the Muslim community and federal law enforcement.[50] Nonetheless, some who fear the threat of Sharia law criticized the nomination.[51] In this case, Governor Christie stood up for religious freedom. Incensed over the accusations, he shot back saying: "It's just unnecessary to be accusing this guy of things just because of his religious background."

13northcarolina.html>.

[43] Joel Burgess, "New City Council members seated; Newman vice mayor," *Citizen-Times*, Dec. 9, 2009. Retrieved Oct. 24, 2011, from <http://www.citizen-times.com/article/20091209/NEWS01/912090328/New-City-Council-members-seated-Newman-vice-mayor>.

[44] N.C. CONST. art. VI, § 8.

[45] *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[46] Associated Press, "In North Carolina, Lawsuit Is Threatened Over Councilman's Lack of Belief in God," *New York Times*, Dec. 12, 2009. Retrieved Oct. 24, 2011, from <http://www.nytimes.com/2009/12/13/us/13northcarolina.html>.

[47] Julie Ingersoll, "Pray to *Your* God For Us: Christians on Jacksonville City Council Stir Anti-Muslim Sentiments," *Religion Dispatches*, May 7, 2010. Retrieved Oct. 21, 2011, from <http://www.religiondispatches.org/archive/2523/pray_to_your_god_for_us:_christians_on_jacksonville_city_council_stir_anti-muslim_sentiments_>.

[48] *Id.*

[49] Associated Press, "Muslim Picked for New Jersey Bench," *New York Times*, Jan. 13, 2011. Retrieved Oct. 24, 2011, from <http://www.nytimes.com/2011/01/14/nyregion/14christie.html?scp=2&sq=Sohail%20Mohammed&st=cse%3E.>.

[50] Lisa Fleisher, "Christie Blasts Critics of New Judge," *Wall Street Journal*, July 27, 2011. Retrieved Oct. 24, 2011, from <http://online.wsj.com/article/SB10001424053111903999904576470680561590162.html>.

[51] Frances Martel, "Christie Defends Appointing Muslim Judge: 'This Sharia Law Business Is Crap'," *Fox Nation*, Aug. 4, 2011. Retrieved Oct. 24, 2011, from <http://nation.foxnews.com/chris-christie/2011/08/04/christie-defends-appointing-muslim-judge-sharia-law-business-crap>.

Mr. Christie added: "I'm happy that he's willing to serve after all this baloney."[52] A specific question on Sharia law allowed Christie to expound further:

> "Sharia Law has nothing to do with this at all, it's crazy!" he cried. "The guy is an American citizen!" He concluded that the "Sharia Law business is just crap… and I'm tried of dealing with the crazies," adding with disgust and frustration that "it's just unnecessary to be accusing this guy of things just because of his religious background."[53]

Federally Funded Religious Discrimination

Another affront to religious freedom in the United States is that qualified individuals can be denied government-funded jobs based on nothing more than their religious beliefs or lack thereof. In accordance with current statutes, executive orders, regulations, and memorandum on the books today, religious organizations can both perform government services with government money and claim an exemption to the general rule that government contractors and grantees hire without regard to religion.

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, national origin, color, religion, and sex.[54] Title VII grants an exemption to religious organizations, however, allowing them to adopt hiring practices that favor fellow adherents to their particular faith.[55] Before the passage of charitable choice, it had been generally accepted that this exemption applies only when the religious organization is using its own funds, because it had not been extended to government-funded positions. Accordingly, the religious organizations that had partnered with the government for generations did not engage in religion-based hiring for positions that were funded with taxpayer money.

In contrast, the Faith-Based Initiative allows religious organizations to take government funds *and* use those funds to discriminate in hiring a qualified individual based on his or her religious beliefs or lack thereof. Because significant, direct government funding of religious organizations is of relatively recent vintage, neither the Supreme Court nor any court of appeals has directly addressed whether the Title VII exemption can constitutionally be interpreted to permit a religious organization to discriminate on the basis of religion for jobs that are funded with government dollars. We agree with the statement made by then-candidate Obama in his Zanesville speech: The federal government should never fund employment discrimination on the basis of religion.[56]

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[52] Lisa Fleisher, "Christie Blasts Critics of New Judge," *supra* note 51.
[53] Frances Martel, "Christie Defends Appointing Muslim Judge: 'This Sharia Law Business Is Crap'," *supra* note 52.
[54] 42 U.S.C. § 2000e-2.
[55] 42 U.S.C. § 2000e-1(g).
[56] On July 1, 2008, in Zanesville, Ohio, President Obama stated that: "If you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion."

Indeed, the government should *never* subsidize discrimination. Unfortunately, the Administration has not taken any steps to restore the decades-old federal ban on employment discrimination in publicly funded programs.

This issue is not just an abstract policy issue. Real people are suffering religious discrimination as a result of the policy. For example, World Relief, which receives about two-thirds of its funding from state and federal governments, claims to have had a longstanding policy of hiring only Christians but admits that such a policy "was never put in writing or enforced until this year."[57] Now, "[n]ew employees at World Relief have to prove they are Christians. They sign a statement of Christian faith and must get a letter of recommendation from their minister before being hired."[58]

Saad Mohammad Ali is an Iraqi refugee who had volunteered for six months at World Relief in Seattle, Washington.[59] A World Relief manager suggested that he apply for a permanent position as an Arabic-speaking caseworker position in the refugee resettlement program.[60] But, a few days after he applied for the job, the same manager called to tell him that he was not eligible for the position because he is a Muslim and not a Christian.[61]

Mohammed Zeitoun, also Muslim, worked for World Relief as an employment counselor, but is now looking for a new job because he refused to affirm the Christian mission of the organization.[62]

World Vision offers other recent examples of discrimination. According to *GlobalPost*, World Vision is "one of the largest recipients of development grants from the U.S. Agency for International Development, the federal government's foreign aid arm."[63] Government grants "amount to about a quarter of the organization's total U.S. budget."[64] Nonetheless, "World Vision hire[s] only candidates who agree with World Vision's Statement of Faith and/or the Apostle's Creed."[65]

Thus, even in Mali, a predominantly Muslim country, World Vision hires non-Christians only when they cannot find a Christian for the position.[66] Bara Kassambara, a non-Christian, therefore, was only eligible for a temporary job. And, Lossi Djarra applied for

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[57] Bob Smietana, "Charity Defends Christian Only Hiring," *Tennessean*, Mar. 31, 2010. Retrieved Oct. 21, 2011, from <http://www.knoxnews.com/news/2010/mar/31/charity-defends-christian-only-hiring/>.
[58] *Id.*
[59] Lornet Turnbull, "World Relief Rejects Job Applicant Over His Faith," *Seattle Times*, Mar. 10, 2010. Retrieved Oct. 21, 2011, from < http://seattletimes.nwsource.com/html/localnews/2011301098_ worldrelief10m.html>.
[60] *Id.*
[61] *Id.*
[62] Manya A. Brachear, "Charity's Christian-Only Hiring Policy Draws Fire," *Los Angeles Times*, Apr. 2, 2010. Retrieved Oct. 24, 2011, from <http://articles.latimes.com/2010/apr/02/nation/la-na-world-relief-hiring2-2010apr02>.
[63] Krista J. Kapralos, "Non-Christians Need Not Apply," *GlobalPost*, Jan. 11, 2010. Retrieved Oct. 21, 2011, from <http://www.globalpost.com/dispatch/ngos/100110/world-vision-religion-foreign-aid>.
[64] *Id.*
[65] *Id.*
[66] *Id.*

a job as a driver, but a Protestant man was hired. Djarra said World Vision policy of preferring Christians makes the locals "angry" because "if you're not in their church on Sunday, you won't get the job. People don't have a chance." It is particularly frustrating to locals because "positions with foreign aid agencies are often the most lucrative gigs available."[67]

Fabiano Franz, World Vision's national director for Mali, defended the policy, explaining: "We're very clear from the beginning about hiring Christians. It's not a surprise, so it's not discrimination."[68] But, having a policy of discrimination does not negate its discriminatory effects.

Of course, there are other, earlier examples of religious discrimination with government funds that were likely also spurred on by the atmosphere created by the Faith-Based Initiative's promotion of federally funded religious discrimination. Alan Yorker, for example, was denied a government-funded job because the social service agency to which he applied would not hire a Jewish psychologist, even though he was "one of the top candidates for the position."[69] He was told: "We don't hire people of your faith."[70] And, Alicia Pedreira who, despite receiving excellent job performance reviews, was fired from a government-funded job because her sexual orientation was deemed incompatible with the religious mission of the religious employer.[71]

Government-funded religious discrimination strikes at the heart of the issue before us. How can we sanction the government denying jobs based upon the applicant's religious beliefs? How can we use taxpayer funds for positions we then deny those taxpayers because they hold disfavored religious beliefs?

Distorted Horror Stories

We also urge the Committee to be discerning about the anecdotes it hears today and in the future. We have encountered claims from the religious right in the past that, although based on a kernel of truth, often end up being false or exaggerated.

For example, the original reports out of a school in Massachusetts claimed that "an elementary school allegedly suspended a second-grader, . . . and required the boy to undergo a psychological evaluation after he drew a picture of Jesus Christ on the cross."[72]

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[67] *Id.*
[68] *Id.*
[69] Adam Liptak, "A Right to Bias is Put to the Test," *New York Times*, Oct. 11, 2002. Retrieved Oct. 21, 2011, from < http://www.nytimes.com/2002/10/11/us/a-right-to-bias-is-put-to-the-test.html?pagewanted =all&src=pm>.
[70] *Id.*
[71] Eyal Press, "Faith-Based Furor," *New York Times*, Apr. 1, 2001. Retrieved Oct. 21, 2011, from < http:// www.nytimes.com/2001/04/01/magazine/faith-based-furor.html?pagewanted=all&src=pm>.
[72] David Abel, "Taunton schools rebut report on child's Jesus drawing," *Boston Globe*, Dec. 15, 2009. Retrieved Oct. 24, 2011, from <http://www.boston.com/news/local/breaking_news/2009/12/ by_david_abel_g_6.html>.

After closer examination, it was revealed that the student wasn't suspended and the evaluation was not prompted based upon religion. Instead, the teacher saw the drawing as a "cry for help" because "the student identified himself, rather than Jesus, as the figure on the cross."[73] Following protocol, the teacher alerted the school's principal and staff psychologist.[74]

Upon filing a lawsuit against the Stevens Creek Elementary School in Cupertino, California, the Alliance Defense Fund (ADF) distributed a press release titled: "Declaration of Independence Banned from Classroom."[75] The *San Francisco Chronicle*, however, debunked those claims, explaining: "The Declaration of Independence is not banned from Stevens Creek Elementary School, or any classroom in Cupertino. Copies of the Declaration . . . . hang in the classrooms. It appears in textbooks distributed throughout the district."[76] The reality of the case was that the school had to restrict a teacher's use of supplemental materials because he was evangelizing students with those materials.[77] But rather than report that the materials were being used to evangelize captive students in a public schools setting, the message used then—and still today on the ADL website—is that the school banned the teaching of the Declaration of Independence.

Accordingly, we ask that you greet similar claims with caution.

Religious Exemptions

Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances. But, when faced with stories of members of minority faiths suffering true religious hardships—coercion, intimidation, discrimination— it is difficult to conceive that some claim that the biggest threat to religious freedom is that the religious exemptions already provided them are too narrow, even though expansions of most of these exemptions would create significant burdens on others.

An analysis by *The New York Times* of laws passed between 1989 and 2006 "shows that more than 200 special arrangements, protections or exemptions for religious groups or their adherents were tucked into Congressional legislation, covering topics ranging from pensions to immigration to land use."[78] The analysis also found that "new breaks have

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[73] *Id.*
[74] *Id.*
[75] Declaration of Independence Banned from Classroom, *ADL website*. Retrieved on Oct. 24, 2011 from <http://www.alliancedefensefund.org/Home/ADFContent?cid=3218>.
[76] Opinion, "Cupertino History Lesson," *The San Franscisco Chronicle*, Dec. 8, 2004. Retrieved on Oct. 24, 2011 from <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/12/08/EDGSVA7IJ31.DTL>.
[77] Joe Garofoli, "Battle over God in U.S. History Class," *The San Francisco Chronicle*, Dec. 8, 2004. Revisted Oct. 24, 2011 from <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/12/08/MNGPBA8DPL1.DTL>.
[78] Diana Henriques, "As Exemptions Grow, Religion Outweighs Regulation," *New York Times*, Oct. 8, 2006. Retrieved Oct. 24, 2011, from <http://www.nytimes.com/2006/10/08/business/08religious.html?pagewanted=all>.

also been provided by a host of pivotal court decisions at the state and federal level, and by numerous rule changes in almost every department and agency of the executive branch."[79] Religious organizations, therefore, surely cannot argue that the government is not respecting their needs for accommodations.

Americans United believes that, in a very limited number of instances, religious exemptions are required by the First Amendment. More often, religious exemptions are not constitutionally required, but are adopted for policy reasons. More and more frequently, however, religious exemptions are being drafted so expansively that they violate the Establishment Clause or negatively impact innocent third parties. It is this last category of exemptions that should be rejected.

The more expansive an exemption, the more likely it is to violate the Constitution. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,[80] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."[81] For example, in *Texas Monthly, Inc. v. Bullock*,[82] the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose "substantial burdens on nonbeneficiaries" or they are designed to prevent "potentially serious encroachments on protected religious freedoms."

Broadening a religious exemption for mandated insurance coverage of contraceptives means that more women would be denied quality reproductive healthcare;[83] expanding a conscience clause for medical providers would result in more individuals being denied life saving emergency care;[84] and extending exemptions to bars on LGBT discrimination would increase the number of individuals are forced to suffer violations of their civil rights.

Conclusion

We should all be thankful that we live in a nation with a dizzying level of religious freedom compared to so many other places on the face of the globe. Our country has something like 2000 different identifiable religions and some twenty million humanists, freethinkers and atheists. At our best we work for a common goal of preserving the

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[79] *Id.*
[80] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[81] *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).
[82] 480 U.S. 1, 18 n. 8 (1989).
[83] Comments by Americans United on Proposed Regulations, Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621 (proposed Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).
[84] Comments by Americans United on Proposed Regulations, Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50274 (proposed Aug. 26, 2008) (to be codified at 45 C.F.R. pt. 48).

constitutional right of conscience for everyone. My friend, former Senator Lowell Weicker, once observed that if "the one true faith" wasn't in existence yet, if it came around, it would find its most fertile ground right here in the United States.

George Washington observed that the then new nation would "give to bigotry no sanction."[85] Indeed, that should be the goal of every witness here and every member of this body. Government—big, small or in-between—works best it does not embrace or repudiate particular faiths or religion in general, but rather is scrupulously neutral on that one area of life where the Constitution gives it no role under any circumstance: theological truth.

[85] George Washington's Response to Moses Seixas, August 21, 1790.

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September 30, 2011

Attn: CMS-9992-IFC2
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert Humphrey Building
200 Independence Ave., SW
Washington, DC 20201

To Whom it May Concern:

We write to submit comments regarding the proposed rule entitled "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act" (hereinafter "Proposed Rule"), which was published in the Federal Register on August 3, 2011. The Administration undoubtedly will receive numerous comments that focus on various aspects of the regulation. Our comments, therefore, will focus solely on refuting assertions that the religious exemption is unconstitutionally narrow and urge the Administration to reject arguments supporting its expansion.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances. Such accommodations, however, must not be applied more broadly than is necessary to protect religious freedom. One danger of granting overly expansive religious exemptions is that they may have a negative impact on innocent third parties.

For example, the Proposed Rule seeks to provide women better healthcare by providing insurance for and thus access to contraceptives. Adoption of the proposed religious exemption would deny some women this access. Expansion of the exemption would further increase the number of women who would be denied access to contraceptives and lessen any connection the exemption has to easing any potential religious burden. Accordingly, the Administration should reject arguments urging expansion of this exemption.

Courts have already upheld two nearly identical religious exemptions against claims that they were unconstitutionally narrow.[1] In both cases, the courts concluded that these exemptions from insurance mandates for contraceptives violate neither the Establishment Clause nor the

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

Free Exercise Clause of the United States Constitution. There is no legal justification, therefore, for claiming that the exemption in the Proposed Rule should be expanded.

To the contrary, more expansive exemptions are actually more likely to violate the Constitution. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,[2] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."[3] For example, in *Texas Monthly, Inc. v. Bullock*,[4] the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose "substantial burdens on nonbeneficiaries" or they are designed to prevent "potentially serious encroachments on protected religious freedoms." Expansion, therefore, is not only unnecessary; it may actually increase the likelihood that the exemption will be found unconstitutional.

The Proposed Religious Exemption

The Affordable Care Act (The Act) requires that group health insurance plans include benefits for preventative care services, including contraceptives. Although not required by the United States Constitution nor the Act, the Proposed Regulation includes an exemption from this mandate for any "religious employer" that:

(1) has the inculcation of religious values as its purpose;

(2) primarily employs persons who share its religious tenets;

(3) primarily serves persons who share its religious tenets; and

(4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.

The Free Exercise Clause Does Not Require Expansion of the Religious Exemption

In accordance with the Free Exercise Clause,[5] religious beliefs do not excuse compliance with valid and neutral laws of general applicability. Such laws are subject only to rational review—the lowest level of scrutiny—and not strict scrutiny.[6] The Proposed Rule, which mandates all group health insurance plans to include coverage for contraceptives, is clearly neutral and generally applicable and would survive rational review.

[2] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[3] *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).
[4] 480 U.S. 1, 18 n. 8 (1989).
[5] *Employment Division v. Smith,* 494 U.S. 872, 879 (1990).
[6] *Id.*; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Courts deem laws neutral unless they "target religious beliefs" or "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation."[7] The Proposed Rule, on its face, does not single out religious organizations for disfavored treatment, nor does it contain a masked hostility towards religion. To the contrary, the bill mandates insurance coverage with the religiously neutral aim of improving women's health.

The religious exemption, of course, references religion. But, the reference serves to grant religious organizations *preferred* treatment—an exemption. The Supreme Court, in determining whether a law is neutral for purposes of the Free Exercise Clause, "has never prohibited statutory references to religion for the purpose of accommodating religious practice."[8] Such an application of *Smith* would defy common sense and would render all statutes with religious accommodations subject to strict scrutiny. Indeed, "a rule barring religious references in statutes intended to relieve burdens on religious exercise would invalidate a large number of statutes."[9]

The court in *Catholic Charities of the Diocese of Albany v. Serio*[10] examined an exemption that defined "religious employer" in almost identical terms. It explained that the "neutral purpose of the law," which was also to "make contraceptive coverage broadly available to . . . women—is not altered because the Legislature chose to exempt some religious institutions and not others."[11] It continued: "To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions."[12]

The Proposed Rule is also generally applicable: It does not "in a selective manner impose burdens only on conduct motivated by religious belief."[13] The law is not underinclusive in a way that suggests the government targeted one religion for disfavored treatment. And, it cannot be said that "the burden of the [Proposed Rule], in practical terms, falls on [certain religious] adherents but almost no others."[14] As explained above, religious organizations are granted *preferential* treatment, in the form of an exemption. "That the exemption is not broad enough to cover" all organizations affiliated with a religious entity "does not mean that the exemption discriminates" against religion.[15]

Because the law is neutral and generally applicable, the government need only justify the mandate and the narrow scope of the exemption as being rationally related to the government interest. Mandating that group insurance policies cover contraceptives, unquestionably, is

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[7] *Lukumi*, 508 U.S. at 533.
[8] *Catholic Charities of Sacramento*, 85 P.3d at 83.
[9] *Id.* at 84. Included among these statutes that provide a religious exemption for religious organizations is Title VII of the Civil Rights Act, which exempts religious organizations from privately funded employment decisions.
[10] 859 N.E. 2d 459.
[11] *Id.* at 522.
[12] *Id.*
[13] *Lukumi*, 508 U.S. at 543.
[14] *Id*. at 536.
[15] *Catholic Charities of Sacramento County,* 85 P.3d at 84.

rationally related to the legitimate government interest of improving women's health. Indeed, both *Serio* and *Catholic Charities of Sacramento County v. Superior Court* concluded that the state has a "substantial interest in fostering the equality between the sexes, and in providing women with better health care."[16]

Accordingly, the Free Exercise Clause does not require the government to grant religious organizations an exemption from the law, let alone provide one that is even more expansive than what is already proposed. Indeed, "*Smith* is an insuperable obstacle to [a] federal free exercise claim" that the exemption must be expanded.[17]

Neither the Mandate Nor the Exemption is Required by the Establishment Clause

The Proposed Rule Does Not Need to Be Expanded to Avoid the Targeting of Certain Denominations for Unfavorable Treatment

Another argument used by those who seek to expand the exemption is that it unconstitutionally targets certain faiths for unfavorable treatment in violation of the Establishment Clause. In accordance with *Larson v. Valente*,[18] laws that target certain denominations for unfavorable treatment are subject to strict scrutiny.

But again, the Proposed Rule does not single out certain religions. Instead, it imposes the same rule on all religious denominations—it does not pick and choose among them based upon their beliefs or popularity. In short, it does not play favorites with religion. As explained in *Serio*, a governmental "decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause."[19]

A contrary reading of *Larson* would actually run counter to the interests of those seeking expansion of the exemption, as it would "call into question any limitations placed by the [government] on the scope of any religious exemption—and thus would discourage the [government] from creating any such exemptions at all."[20] Accordingly, strict scrutiny is also not triggered under the Establishment Clause and expansion of the exemption is not justified.

The Religious Exemption Does Not Need to Be Expanded to Avoid Excessive Entanglement

Those supporting expansion of the exemption also argue that application of the exemption requires the government to make determinations about an entity's religious character and operations in such a manner so as to cause excessive entanglement in violation of the Establishment Clause.[21] Applying the exemption, however, does not require the government to parse religious doctrine, define religious practices, or interrogate employees about their faith.

[16] *Serio*, 859 N.E. 2d at 468.
[17] *Id.* at 466.
[18] 456 U.S. 228 (1982).
[19] *Serio*, 859 N.E. 2d at 469.
[20] *Id*. at 526.
[21] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

Indeed, the Courts are frequently required to make determinations about the religious character of an organization to the extent required by this exemption. For example, the Free Exercise Clause requires Courts to determine whether an individual has a "sincerely held religious belief"; the Establishment Clause requires Courts to determine whether activities are secular or religious; and any statute with a religious exemption requires courts to determine whether an entity falls within its parameters. Expansion of the exemption, therefore, is not required to prevent excessive entanglement.

Expansion of the Exemption is Not Required to Prevent Intrusion into Church Autonomy

Proponents of expanding the exemption argue that the mandate interferes with matters of faith, doctrine, and church government. But, the Proposed Rule does nothing to interfere with a religious institution's decisions regarding its theological position on contraceptives or its teachings on the matter.[22] Nor does this Proposed Rule require the government to resolve internal church disputes involving the interpretation of church doctrine and regulations. Even application of the religious exemption does not turn on church policy regarding contraceptives. It instead turns on neutral terms that require no inquiry into the application or interpretation of church doctrines or regulations. Like in *Serio*, church autonomy "is not at issue"[23] when applying the mandate or the exemption. The Proposed Rule "merely regulates one aspect of the relationship between plaintiffs and their employers."[24] Once again, the law does not support expanding the exemption.

Even if the Proposed Rule Were Subject to Strict Scrutiny, Expansion of the Exemption Would Not Be Legally Required

Earlier, these comments discussed why neither the Free Exercise nor the Establishment Clause justifies the application of strict scrutiny to the question of whether the exemption is too narrow.[25] Even if a court were to determine that strict scrutiny applied, however, such scrutiny would still not require that the exemption be expanded.

The connection between a religious employer not subject to the exemption and its employee's ultimate use of that plan to cover contraception is far too attenuated to place a substantial burden on that employer. It is the individual employees who will make the independent private choice whether to avail themselves of prescription contraception as one of the many services under the group insurance plan. The intervening private choice that an employee makes breaks the circuit between the employer and any utilization of contraception, thereby vitiating any "burden" on the employer. In fact, under this Proposed Rule an employer may even formally communicate that it disapproves of the usage of contraceptives, whether to the public or to the

[22] *Catholic Charities of Sacramento County,* 85 P.3d at 77-78.
[23] *Serio*, 859 N.E. 2d at 465.
[24] *Id*.
[25] Proponents of an expanded exemption also argue that substantial burden test of strict scrutiny is justified under the Religious Freedom Restoration Act and the Free Speech Clause. We believe that none of these doctrines trigger strict scrutiny in this instance.

employees themselves. In the end, the provision of a comprehensive set of healthcare benefits is really no different than the provision of a paycheck; employees are free to utilize both kinds of benefits in any manner that they wish, and the employer cannot reasonably be perceived to support or endorse any particular use thereof. Therefore, the requirement that entities include coverage for contraceptives as part of group insurance plans places no substantial burden on the employer.

If there were a substantial burden, it surely would be overcome by a compelling state interest. As stated above, courts have already concluded that the state's interest in "fostering equality between the sexes, and in providing women with better healthcare" is sufficient to justify the law.[26]

The Policies of the Faith-Based Initiative Do Not Justify Expansion of the Exemption

One of the most troubling arguments is that the exemption should be expanded because entities that seek to use the exemption would have to forgo federal funding provided under the framework of the Faith-Based Initiative. Indeed, organizations should have to forgo federal funding if they refuse to offer health insurance benefits that the government deems important to women's health.

Some have noted that only entities that primarily serve persons of their own faith may utilize the exemption, but only organizations that serve persons regardless of faith may obtain funds under the Faith-Based Initiative. Proponents of expanding the exemption claim that organizations should be allowed to both receive federal funds under the Faith-Based Initiative *and* utilize the exemption in the Proposed Rule.

To the contrary, religious organizations that accept federal funds should have to adhere to the same rules as other organizations that receive federal funds. And, the federally funded workers hired by religious organizations should be extended the same benefits and rights provided to other workers. It defies common sense to think that the government would *loosen* the rules regarding insurance coverage for religious organizations that wish to receive the benefit of public tax dollars. Along with government funds comes certain requirements and when a religious organization accepts taxpayer dollars those rules must continue to apply. Accordingly, organizations that reap the benefits of federal funding should undoubtedly be denied an exemption from the insurance mandate.

Conclusion

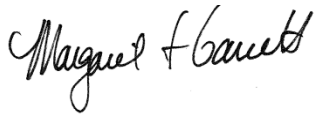
Neither the Free Exercise Clause nor the Establishment Clause requires that the Proposed Regulations provide religious entities an exemption from the insurance coverage mandate. Clearly then the law does not require that the Administration expand the exemption's

[26] *Serio*, 859 N.E. 2d at 468.

definition of "religious employer." Indeed, the more expansive the exemption, the more likely it is to fail constitutional muster. Accordingly, the Administration is under no legal obligation to expand the exemption and it should reject calls for expansion.

Please feel free to contact me with any questions you may have about these comments (202-466-3234). Your attention to this matter is greatly appreciated.

Sincerely,



Maggie Garrett
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September 25, 2008

Office of Public Health and Science
Department of Health and Human Services
Attention: Brenda Destro
Hubert Humphrey Building
200 Independence Avenue, SW
Room 728E
Washington, D.C. 20201

Re: Comments on the "Provider Conscience Regulation"

Dear Ms. Destro:

Americans United for Separation of Church and State submits these comments on the Proposed Rule entitled "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law" (Proposed Rule), which was published by the Department of Health and Human Services (HHS) in the Federal Register on August 26, 2008. Although the Proposed Rule has many flaws, we limit our comments to Sections 88.4(d)(1)[1] and 88.5(c)(4).[2]

The blanket religious exemption in 88.4(d)(1) and 88.5(c)(4) would provide workers in HHS-funded programs with an absolute and unqualified right to refuse to perform any service or activity if it is contrary to their religious convictions. These provisions violate constitutional and statutory law, and create bad policy. HHS should remove these provisions from its final rule.

Granting employees an absolute and unqualified right to refuse to perform their duties due to religious convictions violates the Establishment Clause of the First Amendment to the United States Constitution. In addition, although the Administration appears to

[1] Section 88.4 (d)(1) states that entities governed by the Proposed Rule shall not "require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the Department if such service or activity would be contrary to his religious beliefs or moral convictions."

[2] Section 88.5(c)(4) would mandate that entities that receive HHS funding sign a certification that they "will not require involvement in procedures that violate an individual's conscience as part of any part of any health service program, in accord with all applicable sections of 45 CFR part 88."

base its authority for the promulgation of this language on 42 U.S.C. § 300a-7(d) (Church Amendment D), the Proposed Rule reaches far beyond the confines of the statutory provision. Furthermore, the Proposed Rule conflicts with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq.* (Title VII), and the recent guidelines issued by the Bush Administration through the Equal Employment Opportunity Commission (EEOC).

Even if the Proposed Rule were not proscribed by constitutional and statutory law, the policy ramifications prompt its rejection: passage would endanger patients and threaten to overturn important medical decisions. Its astonishingly broad and far-sweeping reach extends beyond reproductive healthcare, such as sterilization and abortion, to areas such as end-of-life directives, patients with HIV, and psychiatric medicines. Allowing healthcare workers a blanket exemption from serving clients under these circumstances—with no consideration of the effect such exemption would have on the patients—creates a grave threat to safety and civil rights.

The Proposed Rule Violates the Establishment Clause of the United States Constitution.

In contrast to most accommodation laws, Sections 88.4(d)(1) and 88.5(c)(4) of the Proposed Rule provide no exceptions, no balancing, and no consideration of the effect such refusal would have on the employer, other employees, and patients.[3] Such a blanket exemption for employees' religious objections violates the Establishment Clause of the United States Constitution.

In *Estate of Thorton v. Caldor*, 472 U.S. 703, 710-11 (1985), the United States Supreme Court (in an 8-1 opinion) struck down a Connecticut law granting employees "an absolute and unqualified right not to work on their Sabbath." In

[3] *See*, *e.g.*, 42 U.S.C. §§ 2000e-2(a) & (c), 2000e(j) (Title VII of the Civil Rights Act) (requiring a religious accommodation in the workplace unless it would cause an undue hardship); 42 U.S.C. §§ 12101-12117, 12201-12213 (Americans With Disabilities Act) (requiring a reasonable accommodations for a person with disabilities unless it would cause undue hardship); 42 U.S.C. §§ 2000cc, *et seq.*, (Religious Land Use and Institutionalized Persons Act) (requiring governments to grant religious exemptions in zoning and institutionalized person cases where a federal rule creates a significant religious burden unless the government has a compelling interest to impose the rule without the exemption); 42 U.S.C. § 2000bb, *et. seq.* (Religious Freedom Restoration Act) (requiring the federal government to grant religious exemptions where a federal rule substantially burdens religion unless the government has a compelling interest to impose the rule without exemption).

finding an Establishment Clause violation, the Court focused on the fact that the right not to work was granted "no matter what burden or inconvenience this imposes on the employer or fellow workers." *Id.* at 708-09. The law provided "no exception," no account of "the imposition of significant burdens," and "no consideration as to whether the employer has made reasonable accommodation proposals." *Id*. at 709-10. The "unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses," and is unconstitutional. *Id*. at 710.

The Supreme Court invoked this principle more recently in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).[4] In *Cutter*, the Supreme Court upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA), which demands that the government grant religious accommodations in zoning decisions and in situations where institutionalized persons seek accommodations for religious practices and beliefs unless the government has a compelling interest to impose the rule without exemption. *Id.* at 722-23. The Court distinguished RLUIPA from the Connecticut Sabbath law in *Caldor*, concluding that the RLUIPA accommodation provision did not violate the Establishment Clause. According to the Court, RLUIPA, unlike the Sabbath law, did not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Id.* at 722. To meet the confines of the Establishment Clause, "an accommodation must be measured so that it does not override other significant interests." *Id.*

The Proposed Rule is not "measured," it does "override other significant interests," and it "elevates the accommodation of religious observance over . . . safety," including a patient's health or even life. *Id.* It applies "no matter what the burden or inconvenience [it] imposes on" others. *Caldor*, 472 U.S. at 708-09. Such an "absolute and unqualified" right to refuse to perform health services, therefore, violates the Establishment Clause. *Id.* at 710-11. As a result, Sections 88.4(d)(1) and 88.5(c)(4), which fail to protect patient health and safety, fail to meet constitutional muster and must be rejected.

[4] *See also Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n. 11 (1987) (holding that granting state-funded unemployment compensation to a person who was laid off because she could not work on the Sabbath did not violate the Establishment Clause because it, unlike the Sabbath law in *Caldor*, did not single out religious employees as the only persons entitled to such treatment).

The Proposed Rule Improperly Extends Far Beyond What Is Contemplated and Intended by the Statute.

Even if Sections 88.4(d)(1) and 88.5(c)(4) were not unconstitutional, HHS should reject them because they extend beyond what is permitted by statute. Section 88.4 (d)(1) states that entities governed by the Proposed Rule shall not "require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the Department if such service or activity would be contrary to his religious beliefs or moral convictions." Although it is true that this language is taken from Section D of the Church Amendment, the Proposed Rule fails to limit the provision to sterilization or abortion, as the statute does. 42 U.S.C. § 300a-7(d).

"[T]he meaning of statutory language, plain or not, depends on context." *Bailey v. Robinson*, 516 U.S. 137, 146 (1995). Thus, one need look no further than the title of 42 U.S.C. § 300a-7 to understand its meaning: "**Sterilization or Abortion**." Accordingly, the only court to consider the scope of Section 300a-7 rejected the plaintiff's claim that the statute protected her from participating in the cessation of a patient's nutrition and hydration. The Court held that reliance on Section 300a-7 was "misplaced" because the statute "concern[ed] the right to decline to perform requested sterilization and abortion procedures based on moral or religious convictions." *Elbaum v. Grace Plaza of Great Neck*, 148 A.D. 2d 244 (N.Y. App. Div. 1989). HHS, therefore, should reject these provisions of the Proposed Rule or, at a minimum, must limit the scope of these sections to HHS-funded abortion and sterilization procedures.

Sections 88.4(d)(1) and 88.5(c)(4) of the Proposed Rule Would Conflict with Title VII and Decades of Religious-Accommodation Case Law.

For several decades, Title VII has been the preeminent federal statute addressing employment discrimination based on religion. 42 U.S.C. § 2000e, *et. seq.* Under 42 U.S.C § 2000e(j), an employer must accommodate an employee's religious observance or practice unless the accommodation creates an undue hardship on the employer.[5] The law respects the rights of religious employees, but also takes into consideration the burdens that the accommodation would place on third parties, customers, and patients. Accordingly, public safety, patient health, and the mandates of other laws must be considered before an employer makes a decision regarding a requested religious accommodation.

[5] *See also* 29 C.F.R. Parts 1605.1, 1605.2, and 1605.3.

After decades of Title VII enforcement, the meaning and reach of the statute is clear and well defined. Employers and employees have a basic understanding of their rights under the law. Furthermore, Title VII has served employees in the public health field well, finding in their favor in many instances.[6]

Nonetheless, Section 88.4(d)(1) of the Proposed Rule simply ignores Title VII and creates a separate religious discrimination exemption for healthcare workers in HHS-funded programs. This exemption, however, would require religious accommodation regardless of any burden placed on patients, co-workers, or healthcare facilities.

In addition to creating confusion, the Proposed Rule places employers in no-win situations. The requested accommodation **must** be granted regardless of the consequences. This is true even if adherence to the Proposed Rule would risk the life of the patient or would violate other laws. For example, in HHS-funded programs, the following could occur:

- When an employee refuses to treat a patient in an emergency situation for religious reasons, the employer would have to follow this Proposed Rule and risk the life of the patient.[7]

- A patient has the right to refuse treatment, including executing advanced directives to refuse life-extending treatment, such as feeding tubes. If a respiratory specialist, for religious reasons, were to object to terminating life-extending treatment, the health facility could find itself

[6] *See*, *e.g.*, *Nead v. Bd. of Trs.*, No. 05-2137, 2006 WL 1582454 (C.D. Ill. June 6, 2006) (finding against an employer who failed to consider an accommodation for a nurse who said in an interview for a promotion that she would not dispense emergency contraception); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999) (holding in favor of a pharmacist who refused to sell condoms because the employer failed to consider an accommodation); *Tramm v. Porter Mem'l Hosp.*, No. H 87-355, 1989 U.S. Dist. LEXIS 16391, at *33 (N.D. Ind. Dec. 22, 1989) (ruling in favor of an employee who refused to clean abortion instruments because the employer did not consider an accommodation).

[7] This stands in contrast to Title VII caselaw, which does not require an employee to risk a patient's life in order to accommodate a religious practice or belief. *See*, *e.g.*, *Shelton v. Univ. of Med. and Dentistry*, 223 F. 3d 220 (3d Cir. 2000) (holding that a hospital that offered to transfer a nurse who refused to treat certain pregnancy complications based on her religious views acted property because it was not required to risk that a patient be denied emergency medical treatment).

deciding whether to follow this Proposed Rule or violating the right of the patient to direct his or her own medical treatment.[8]

- If an employee's refusal to serve a patient could result in malpractice, the employer, under the Proposed Rule, would have to commit malpractice rather than require the employee to provide the requisite standard of care to a patient. This would not just risk providing the patient with sub-par health treatment, but could impose legal and monetary penalties on the employer.

- In one federal district court case, an employee argued that, as "a member of the Church of the American Knights of the Ku Klux Klan, a religious organization," he was compelled to display his tattoo of a "hooded figure standing in front of a burning cross." *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976, 978, 979 (N.D. Ind. 2000). Under Title VII, the employer could forbid that activity. *Id.* at 979. If, however, this same employee were to work for an HHS-funded healthcare facility and refused to treat African-American, other non-white, or Jewish patients, the healthcare facility would have to accommodate his refusal.

Accordingly, the Proposed Rule should be rejected because it endangers patients and risks placing employers in violation of other laws.

Sections 88.4(d)(1) and 88.5(c)(4) of the Proposed Proposed Rule Would Also Conflict with the EEOC's Recently Released Compliance Manual

The Equal Employment Opportunity Commission released a new Compliance Manual on "Religious Discrimination" on July 22, 2008—a mere three (3) months ago. 2 EEOC § 915.003 (2008). This in-depth manual "defines religious discrimination, discusses typical scenarios in which religious discrimination may arise, and provides guidance to employers on how to balance the needs of individuals in a diverse religious climate." *Id.* at 3. The manual applies to religious accommodation requests within all employment contexts, including those in public health. Indeed, the manual provides the specific example of when an employer must accommodate a pharmacist who refuses to

[8] *Elbaum v. Grace Plaza of Great Neck*, 148 A.D. 2d 244 (N.Y. App. Div. 1989) (holding that hospital workers who refused to remove artificial life support for a patient based on their religious beliefs were violating the patient's right to self-determination and thus the hospital was ordered to obey the wishes or transfer the patient to another hospital).

dispense or answer questions from a customer about contraceptives. *Id.* at 68-69. The manual explains that the employer must accommodate the pharmacist by allowing him or her to signal to another pharmacist to assist the customer. *Id.* It is only if such arrangement is not possible that he or she may be transferred to another position. *Id.* And even then, the pharmacist cannot be transferred to a "position that entails less pay, responsibility, or opportunity for advancement unless a lateral transfer is unavailable or would otherwise pose an undue hardship." *Id.*

This manual demonstrates that accommodations for religious belief and practice in the workplace are being administered properly and fairly. Under Title VII, as recognized by the EEOC manual, religious needs of employees are generally respected and accommodated unless they would unduly harm employees or third parties, such as patients seeking access to procedures and medication.

Sections 88.4(d)(1) and 88.5(c)(4) of the Proposed Rule Would Endanger Patients and Could Undermine the Goals and Programs of Health-Service Facilities.

Because Sections 88.4(d)(1) and 88.5(c)(4) provide employees an absolute and unqualified right to refuse service, patient health and health-service programs would be put at risk. The services an employee could refuse to perform include refusing to provide fertility treatments for a lesbian patient; provide or fill psychiatric, HIV, birth control, methadone, or sleeping aid prescriptions; or honor a patient's end-of-life decree that rejects life-prolonging treatment. Under the plain language of the provision, the following could take place:

- An employee who works in a psychiatric hospital could convert to a religion that opposes psychiatry and psychiatric medicine, and thereafter refuse to assist in any activities relating to psychiatry and psychiatric drugs. Even though this religious belief would essentially prevent the employee from performing any duties, the employer would be required to keep the employee on staff.

- An employee who works at a trauma center, which specializes in severely injured patients, could refuse to perform or assist in any case involving a blood transfusion. Again, this refusal could prevent the

employee from working on most cases in the center, but the employer would be required to keep the employee on staff regardless of the consequences to the patients.

- An emergency nurse could refuse to treat a person on the emergency room table because that person has HIV. The employer must allow this.

- A counselor could refuse to counsel unmarried, gay, or lesbian clients at an HIV clinic. And, the counselor could also refuse to counsel any patient at the clinic who suffers from drug addiction.

Again, because these sections of the Proposed Rule threaten patient health, HHS should reject them.

Conclusion

The blanket religious exemption created in Sections 88.4(d)(1) and 88.5(c)(4) violates the Establishment Clause of the United States Constitution and, thus, these sections of the Proposed Rule simply should be rejected. Even if the provisions were constitutional, HHS must limit them to abortion and sterilization so that they do not exceed the confines of the statutory authority. Finally, the Proposed Rule considers only an employee's religious convictions and totally disregards the countervailing healthcare needs of patients. Thus, Sections 88.4(d)(1) and 88.5(c)(4) should be rejected because of their deeply adverse policy ramifications. We urge HHS to carefully consider these comments because the Proposed Rule could have significant ramifications for the healthcare services of countless patients.

Please feel free to contact me at (202) 466-3234, with any questions regarding these comments. Your attention to this matter is greatly appreciated.

Sincerely,

Margaret F. Garrett
Assistant Legislative Director