

**THE STATE OF RELIGIOUS  
LIBERTY IN AMERICA**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON THE CONSTITUTION  
AND CIVIL JUSTICE  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FIFTEENTH CONGRESS  
FIRST SESSION

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FEBRUARY 16, 2017  
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Statement submitted by the Family Research Council. This material is available at the Committee and can be accessed on the committee repository at:

<http://docs.house.gov/meetings/JU/JU10/20170216/105593/HHRG-115-JU10-20170216-SD004.pdf>

Statement submitted by the Honorable John Conyers, Jr., Michigan, Ranking Member, Committee on the Judiciary. This material is available at the Committee and can be accessed on the committee repository at:

<http://docs.house.gov/meetings/JU/JU10/20170216/105593/HHRG-115-JU10-MState-C000714-20170216.pdf>

Letters submitted by the Honorable Steven Cohen, Tennessee, Ranking Member, Subcommittee on the Constitution and Civil Justice. This material is available at the Committee and can be accessed on the committee repository at:

<http://docs.house.gov/meetings/JU/JU10/20170216/105593/HHRG-115-JU10-20170216-SD003.pdf>



**THE STATE OF RELIGIOUS LIBERTY IN  
AMERICA**

**THURSDAY, FEBRUARY 16, 2017**

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON THE CONSTITUTION

AND CIVIL JUSTICE,

COMMITTEE ON THE JUDICIARY,

*Washington, DC.*

The subcommittee met, pursuant to call, at 1:07 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve King [chairman of the subcommittee] presiding.

Present: Representatives King, Goodlatte, DeSantis, Franks, Gohmert, Gowdy, Cohen, Nadler, and Raskin.

Staff Present: John Coleman, Counsel; Jake Glancy, Clerk; James Park, Minority Chief Counsel, Subcommittee on the Constitution and Civil Justice; Veronica Eligan, Minority Professional Staff; and Matthew Morgan, Minority Professional Staff.

Mr. KING. The Subcommittee on the Constitution and Civil Justice will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time.

We welcome everyone to today's hearing on the state of religious liberty in America.

I now recognize myself for an opening statement.

James Madison's writings made clear he believed that the United States Constitution, by design, would protect religious liberty. Expressing this view in the Federalist No. 10, Madison stated that, "The inference to which we are brought is that the causes of faction among people cannot be removed, and that relief is only to be sought in the means of controlling its effects"—meaning the effects of factions. "Indeed, by design, our system of government was intended to take mankind as it is, not as those in government often just want it to be."

In his influential document titled, Memorial and the Remonstrance Against Religious Assessments, Madison pointed out that, "The failed attempts by past governments to regulate religious thought," and Madison stated that, "Torrents of blood have been spilled in the old world, by vain attempts of the secular arm, to extinguish religious discord by proscribing all difference in religious opinion," close quote.

Madison proposed that only equal and complete liberty would ensure that religious discord among factions did not harm the health and prosperity of the State. This idea would later be enshrined in

and prosperity of the State. This idea would later be enshrined in the establishment and free exercise clauses of the First Amendment, which state that, quote, “Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof,” close quote, which just means Congress will not establish a State religion.

Despite the protections afforded the American people under the First Amendment, religious liberty is threatened today. This is, in part, a result of Supreme Court precedent that has twisted the original meaning of the religion clauses. The free exercise clause, for example, after the much criticized *Employment Division v. Smith*, has been interpreted so narrowly that Congress saw a need to pass the Religious Freedom Act of 1993, known as RFRA, to restore the most robust, compelling interest standard found in earlier decisions. RFRA, which was introduced by Congressman Chuck Schumer—seems interesting to note that at this point, in retrospect—received overwhelming bipartisan support from a broad coalition of over 50 organizations that included the American Civil Liberties Union, Americans United for the Separation of Church and State, the Home School Legal Defense Association, Concerned Women for America, and the Christian Life Commission of the Southern Baptist Convention.

Other cases, however, continue to leave an ugly stain on American jurisprudence. One such case is *Everson v. Board of Education of Ewing*, which was authored by Justice Hugo Black in 1947. Appropriating the phrase, quote, “wall of separation between church and State,” close quote, from Thomas Jefferson’s 1802 letter to the Danbury Baptist Association, Justice Black redefined the establishment clause despite the fact that his metaphorical wall appears nowhere in our Constitution. Moreover, in his book titled, “Separation of Church and State,” legal historian, Philip Hamburger meticulously documents a strong connection between the phrases originally used in the *Everson* case and the anti-Catholic ideology of the Ku Klux Klan, though Justice Black himself was a former Klansman.

More recently, Americans’ religious liberty was threatened by executive action under the previous administration. I think of Little Sisters of the Poor, Hobby Lobby, Hossana-Tabor and many others who have spent years of their life defending themselves in court only to win in the Supreme Court and be rewarded with the obvious conclusion that our body of laws cannot regulate our conscience. And our Founders recognize our Nation and the human race as a whole has drawn strength from a diversity of ideas and beliefs.

My hope is that today’s hearing will shed some light about the challenges now facing religious liberty in the United States. I want to thank the witnesses for your testimony.

And before I recognize the ranking member for his opening statement, I first would like to submit a letter from the Family Research Council regarding today’s hearing.

Without objection, the statement will be entered into the record.

**STATEMENT SUBMITTED BY THE FAMILY RESEARCH COUNCIL**

This material is available at the Committee and can be accessed on the committee repository at: <http://docs.house.gov/meetings/JU/JU10/20170216/105593/HHRG-115-JU10-20170216-SD004.pdf>.

Mr. KING. The chair now recognizes the ranking member of the Subcommittee on the Constitution and Civil Justice, Mr. Cohen of Tennessee, for his opening statement.

Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

Today's hearing is the first hearing of this subcommittee, the Constitution and Civil Justice Subcommittee of the 115th Congress. And we look forward to working with Mr. King. We have traveled together and we have served together and we have had committees together, and I look forward to this one.

I had the pleasure of working with the chairman when he was chairman and I was ranking member of the Executive Overreach Task Force in the last Congress. The Task Force, which we ought to revive for, indeed, we have an executive in need of scrutiny. Executive in need of scrutiny. We certainly have that situation. So I look forward and hope we will continue that work in this 115th Congress.

Today's hearing on the state of religious liberty in America is very timely. And I am sorry that the state of religious freedom is not so good at the moment, for our Nation seems to have entered a dark zeitgeist. When it comes to religious freedom, our most fundamental values as embodied in the First Amendment's religion clause are under threat.

I heard, it was on television, I guess, of President Obama's executive order banning all refugees—President Trump. Sorry. Wrong President—wishful thinking. I channel myself back to the good old days. When I heard President Trump's executive order banning all refugees and all travelers from seven majority Muslim countries with what effectively amounted to an exception that favored Christian refugees for admission, I was disturbed. I thought, this is not the America that I grew up in, studied, and revere, and take an oath to uphold.

This executive order must be seen in context for how it coincides with President Trump's campaign promise of a, quote, "total and complete shutdown of Muslims entering the United States."

Rudy Giuliani, a prominent Trump supporter, said the President wanted a, quote, "Muslim ban," unquote, and asked him for a way, quote, "to do it legally." Good evidence in the cases that later came forward but terrible for the idea that our country was looking at a religious test. And President Trump did on television the same thing in an interview when he said he wanted to prioritize Christian refugees over those of other faiths.

Now, I supported a bill I think that we had about Christian refugees, and I think there might have been a minority of Democrats on that. There was a lot of Republicans and just a few of us Democrats. So I understand the fate of the Christian refugees. But to take our immigration policy and prioritize one religion is still wrong, whether that was the Christian minority or Jewish or Buddhist or whoever.

I cannot believe our country, which has a history of being a haven for religious freedom going all the way back to the pilgrims, John Winthrop talking about our shining city upon a hill, which I think Reagan then played upon, would engage in such an act of religious intolerance.

The freedom to worship one's God or no God is fundamental to our national identity and our essential character as a large and diverse society and central to our values. If religious freedom means anything, it means that all religions and not just those of the majority culture have a right to be free from discrimination by our government.

There has, lately, kind of been a group in America that had been saying that this is a Christian Nation, and that is not true. We are not a Christian Nation or a Judeo-Christian Nation. We are the United States of America, and we welcome all religions and put none over another, and that is why we have a First Amendment.

Casting suspicion on Muslims because they are Muslims is not an American value. Unfortunately, denigrating Islam and its followers seems to have become the latest form of dog whistle politics, and innocent people are paying the price. Hopefully, they won't be paying the price as greatly as we fear they will be as American troops might have people turn on them in Iraq where we suspended immigration, yet we are fighting with those people against ISIL.

Just yesterday, the Southern Poverty Law Center issued a report finding that the number of anti-Muslim hate groups in America rose sharply from 2015 to 2016, tripling from 34 to 101, a rise which coincided with the 2016 Presidential campaign and much anti-Muslim rhetoric.

A coalition of 24 civil rights and religious organizations wrote to this subcommittee, quote, "Treating one's faith as a second class and favoring others as the executive order does threatens all faiths and the religious freedom that protects us all," end quote. It is no argument to say that we need this order for national security reasons. Indeed, we have done nothing in the last 4 days—6 days, I guess, since the order was—the Ninth Circuit ruled on the order, and we were told that terrorists and bad hombres were rushing into our country by the hour and, yet we have done nothing Saturday, Monday, Tuesday, Wednesday, Thursday. No action.

It is not nearly tailored to countries with a history of terrorist attacks in America. In fact, those seven countries had little to no immigrants who committed a terrorist act. They were Americans with ancestry from Somalia. But the 9/11 folks, of course, were Saudi Arabia, and Egypt, and I think maybe the UAE, I am not sure, but certainly countries that weren't on that list, and that was unfortunate.

It brushes broadly, impugning entire countries and entire religion. Indeed, this is why Federal courts have found that, at least in these initial matters and district courts and in the Ninth Circuit, that the TRO should have been issued because there was a likelihood of irreparable harm and immediate damage, and then apparently that it likely violates the Constitution. Silence is not an option.



As the late, great Nobel Laureate and Holocaust survivor Elie Wiesel said, “We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented. We must speak out.”

And I yield back the balance of my time.

Mr. KING. I thank the gentleman for his statement.

And the chair now recognizes the chairman of the full Judiciary Committee, Mr. Bob Goodlatte of Virginia, for his opening statement.

Chairman GOODLATTE. Thank you, Mr. Chairman. I want to thank you for holding this hearing.

I want to thank the witnesses for the testimony they are going to offer.

Since the birth of our Nation, debates about religious liberty have been centered on the relationship between religion and government. Indeed, the Founding Fathers feared the effect of government on religion. In a letter dated June 12, 1812, to Benjamin Rush, John Adams stated that, “Nothing is more dreaded than the national government meddling with religion.” Many Americans today know all too well this dread. The policies and regulations implemented under the previous administration were in many cases hostile to the religious protections afforded by our Constitution. Thankfully, several of these policies were struck down by the United States Supreme Court.

In 2012, for example, the justices of the Supreme Court unanimously rejected the government’s argument in *Hosanna-Tabor*. To the surprise of many, the administration’s lawyers argue that the First Amendment had little application to the employment relationship between a church and its ministers. The court stated that requiring a church to accept or retain an unwanted minister or punishing a church for failing to do so intrudes upon more than a mere employment decision. The decision described by the administration—the decision described the administration’s lawyers’ position as extreme.

As this committee today examines current threats to religious liberty, my hope is that we approach this examination in the same spirit as when Congress passed the Religious Freedom Restoration Act in the 103rd Congress and was signed into law. I cosponsored that legislation, and I was amazed at the incredible bipartisan support it generated. By the time the bill passed by a voice vote, it had the support of 170 cosponsors from both sides of the aisle and overwhelming support from a variety of organizations across the political spectrum.

One key to the—to RFRA’s success is that it was carefully crafted to avoid being outcome determinative. No carve-outs were added, which ensure that courts would have the ability to look at all the circumstances on a case-by-case basis and make a decision particular to each case.

By passing this law, Congress made it clear that the Federal Government must provide religious accommodations in our laws, and any laws passed that infringe upon religious freedom must be subject to the strictest scrutiny in our courts.

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

I yield back.

Mr. KING. Thank you, Mr. Chairman. And I appreciate your opening statement.

And now I would recognize the ranking member for an opening statement.

Mr. COHEN. The ranking member is not here, but he does have a statement that I would like to enter into the record, without objection.

Mr. KING. Without objection, so ordered.

**STATEMENT SUBMITTED BY THE HONORABLE JOHN CONYERS, JR., MICHIGAN, RANKING MEMBER, COMMITTEE ON THE JUDICIARY**

This material is available at the Committee and can be accessed on the committee repository at: <http://docs.house.gov/meetings/JU/JU10/20170216/105593/HHRG-115-JU10-MState-C000714-20170216.pdf>.

Mr. COHEN. And I also have some statements that I would like to enter in response to some of the contentions that religious freedom requires the government to permit discrimination against members of the LGBTQ community and against women's health and reproductive rights as well as support and consideration—considering the discriminatory nature of the Muslim travel ban order. I would ask unanimous consent to allow these records—letters into the record from Catholics for Choice, the Human Rights Campaign, NARAL, Anti-Defamation League, and basically, you know, rounding up the usually suspects.

Mr. KING. Hearing no objection, also so ordered.

Mr. COHEN. Thank you.

Mr. KING. Thank you, Mr. Cohen. And they will be entered into the record.

This material is available at the Committee and can be accessed on the committee repository at: <http://docs.house.gov/meetings/JU/JU10/20170216/105593/HHRG-115-JU10-20170216-SD003.pdf>.

Mr. KING. And without objection, other members' opening statements will be made part of the record. Let me now introduce our witnesses.

Our first witness is Ms. Kim Colby. Ms. Colby is the director of the Center For Law and Religious Freedom of the Christian Legal Society. Our second witness, Ms. Smith, Ms. Hannah Smith, and she is senior counsel at Becket. And our third witness is Rabbi David Saperstein, who also served as director of the Religious Action Center of Reform Judaism and also former U.S. Ambassador at Large for International Religious Freedom. And our fourth witness is Mr. Casey Mattox. Mr. Mattox is a senior counsel and director at the Center for Academic Freedom.

Welcome to each and all of the witnesses.

And the witnesses' written statements will be entered into the record in their entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay in the time-frame, there is a light in front of you. And that light will switch from green to yellow indicating that you have one minute left to

conclude your testimony. When the light turns red, your 5 minutes are up, and we also want you to finish your thoughts however.

And before I recognize the witnesses for their testimony, it is a tradition here in the subcommittee that the witnesses be sworn in. So please stand to be sworn.

Do you swear—please. Do you swear that the testimony you are about to give before this committee is the truth, the whole truth, and nothing but the truth, so help you God?

You may be seated.

Let the record reflect that all the witnesses responded in the affirmative.

And I now recognize the first witness, Ms. Colby. Please turn on your microphone. And you are recognized for your testimony, Ms. Colby.

**TESTIMONY OF KIM COLBY, DIRECTOR, CHRISTIAN LEGAL SOCIETY'S CENTER FOR LAW AND RELIGIOUS FREEDOM; HANNAH SMITH, SENIOR COUNSEL, BECKET; RABBI DAVID SAPERSTEIN; AND CASEY MATTOX, SENIOR COUNSEL, ALLIANCE DEFENDING FREEDOM'S CENTER FOR ACADEMIC FREEDOM**

**TESTIMONY OF KIM COLBY**

Mr. COLBY. Chairman King, Ranking Member Cohen, and members of the subcommittee, thank you for inviting me to testify at this hearing on our most important freedom: The free exercise of religion. I am Kim Colby, director of the Christian Legal Society's Center for Law and Religious Freedom.

Recently, leading scholars have expressed grave concern about the future of religious freedom in America. For example, Professor Doug Laycock has written, and I quote, "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle, suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized," end quote.

As if to confirm his warning, 5 months ago, the United States Commission on Civil Rights released a report entitled, "Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties." The report marks a new and profoundly troubling inflection point in the deepening erosion of Americans' religious freedom. For the first time, at least to my knowledge, a Federal agency issued an official report that treated religious freedom as something shameful.

The report arose out of a briefing held by the Commission in the words of the written report, quote, "to learn how best to reconcile the conflict which, in certain cases, may exist between those seeking to practice religious faith and those seeking compliance with or protection of nondiscrimination laws and policies," end quote.

But the report's findings and recommendations make no effort to reconcile religious freedom and nondiscrimination. Instead, the report adopts an extremist position. Government should subordinate citizens' religious freedom claims to nondiscrimination claims whenever possible, no matter how strong a specific religious freedom claim is or how weak a nondiscrimination claim might be, and

modated without denying either person's ability to live according to her deepest convictions.

In perhaps the most disturbing paragraph in the report, the Commission chairman disparaged religious freedom when he wrote, and I quote, "The phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy, or any form of intolerance," end quote.

Four commissioners issued a longer statement equally dismissive of religious freedom, which concluded that nondiscrimination laws stand as a bulwark against the assaults of intolerance and animus. But, of course, that is equally true of religious freedom laws, which also serve as a bulwark against intolerance and animus. Nondiscrimination laws serve a valuable purpose. No one familiar with American history can doubt the need for them.

But history also teaches that religious people often are the targets of intolerance and animus from government itself. For that reason, American nondiscrimination laws universally include religion in their core list of protected categories, along with race, color, sex, and national origin. How ironic that nondiscrimination laws intended to protect religious persons are now used to stigmatize religious persons because they wish to live according to their deeply held religious beliefs.

History teaches that governments at some point almost inevitably target individuals and groups for persecution based on religion, but America has chosen a different path. Our Nation has dedicated itself to religious freedom for all citizens. This promise has drawn millions to America as the only reliable haven from ruthless religious persecution. Robust religious freedom assures all Americans that their faith will be respected, regardless of shifting political whims.

As another religious freedom scholar, Professor Michael McConnell wrote 3 years ago, and I quote, "Religious freedom is one thing nearly all Americans, left and right, religious and secular, have been able to agree upon, perhaps because it protects all of us. Because none of us can predict who will hold political power, all of us can sleep more soundly if we know that our religious freedom does not depend on election returns," end quote.

We need not and must not choose between religious freedom and nondiscrimination principles. Instead, we should reaffirm our commitment to a society in which all Americans are free to live according to their most deeply held beliefs.

Mr. KING. Thank you, Ms. Colby.

And the chair now recognizes Ms. Smith for your testimony.

#### **TESTIMONY OF HANNAH SMITH**

Ms. SMITH. Thank you.

Chairman King, Ranking Member Cohen, and distinguished—  
Mr. KING. Turn on your microphone, please.

Ms. SMITH. Good afternoon, and thank you for the invitation and opportunity to offer testimony at today's hearing on the state of religious liberty in America. My name is Hannah Smith, and I am

senior counsel at Becket, a nonprofit public interest law firm dedicated to protecting religious liberty for people of all faiths.

At Becket, for over 20 years, we have defended Buddhists, Christians, Jews, Hindus, Muslims, Native Americans, Sikhs, and Zoroastrians. Today, I would like to illuminate the state of religious liberty in America through the prism of recent cases to focus on two principles.

The first principle is that government must provide equivalent legal protections to religious groups when it provides those same protections to secular groups. The second principle is that religious organizations that perform so much of our country's charitable works should not be discriminated against merely because of their religious status.

My first point is illustrated through a recent Becket victory involving Sikhs in the Army. Sikhism is the world's fifth largest religion, and two of its core tenets include maintaining uncut hair and wearing a turban. These religious tenets have not prevented Sikhs from serving admirably in the U.S. military since the World War I era. But in 1981, the military passed a ban on beards. This ban contained multiple exceptions for secular reasons, accommodating nearly 100,000 soldiers with beards for medical or tactical reasons. But other than a few rare cases, the rule did not allow beards for religious reasons, and this ban resulted in the near total exclusion of Sikhs from the U.S. military.

So in 2016, Becket petitioned the Army to grant a religious accommodation to West Point graduate, Army Ranger and Bronze Star Medal recipient Captain Simmer Singh. After receiving this request, the Army ordered him to undergo a series of tests that other soldiers permitted to wear beards for medical reasons were not required to complete. Becket brought a lawsuit under the Religious Freedom Restoration Act to prevent this discriminatory testing and to obtain an accommodation for Captain Singh. Relying on RFRA, the court ruled in Captain Singh's favor and ordered the Department of Defense to cease all discriminatory testing against him, and granted him temporary protection.

At the beginning of this year, the Army issued new regulations providing that sincere followers of the Sikh faith will no longer be forced to choose between their religious beliefs and serving their country in the Army. This case demonstrates an important principle that should be uncontroversial. The government should not deny protections for religious reasons without justification when it is willing to offer those same protections for other reasons.

This same principle is demonstrated by Becket's Supreme Court case successfully defending a Muslim prisoner where the government prohibited him from growing a religiously required beard, even though it allowed beards for medical reasons. This principle is also at the heart of Becket's litigation defending the Little Sisters of the Poor, where the government is willing to exempt big corporations, its own military healthcare system, other churches, and small businesses from the HHS mandate, yet it will not offer the same protection to a group of nuns serving the elderly poor.

The second principle that I would like to discuss is that religious organizations that are simply trying to do their charitable work should not be discriminated against merely because they are reli-

gious. America's faith communities feed the hungry, house the homeless, and provide many other services, yet some States have laws on the books that make it difficult for these groups to do their good work. These laws include Blaine Amendments.

One current case on the Supreme Court's docket, Trinity Lutheran Church against Pauley, illustrates the problems associated with Blaine Amendments. In that case, Missouri's Blaine Amendment prevented a religiously affiliated preschool from receiving a State grant to refurbish its playground even though other nonreligious schools could receive funds to do the very same thing.

In another Blaine Amendment case, Becket represented Prisoners of Christ, a small nonprofit that has partnered with the State of Florida to help recently released prisoners reenter society. With a success rate at nearly three times the national average, Prisoners of Christ has helped 2,300 former inmates to get back on their feet. Despite these impressive results, an activist group relying on Florida's Blaine Amendment sued to prevent the State from partnering with this faith-based group. We successfully defended the prison ministry against this challenge, and Prisoners of Christ continues to partner with the State of Florida to do its vital work, reducing recidivism rates.

In conclusion, Becket applauds Congress' commitment to the principle that religious liberty is fundamental to freedom and to human dignity.

And I thank you for your time and look forward to any questions you may have.

Mr. KING. Thank you, Ms. Smith, for your testimony.

And the chair now recognizes Rabbi Saperstein for his 5 minutes. Rabbi.

Rabbi SAPERSTEIN. Chairman King, Ranking Member Cohen, and members of the community, over the past 2 years—over the past 2 years, I was honored to serve as the United States Ambassador at Large for International—this is on?

Mr. KING. Turn on your mike, please.

Rabbi SAPERSTEIN. Sorry.

Over the past 2 years, I was honored to serve as U.S. Ambassador at Large for International Religious Freedom and had the privilege to work closely with many of you on both sides of the aisle and many of those in the organizations represented here. This was an issue that galvanized people across ideological, religious, political lines, and I would acknowledge particularly Mr. Franks' work in this effort.

It is, therefore, especially painful for me that in our own Nation, a limited number of core issues and religious freedom so divide us. What I believe the issues we discuss—while I believe the issues we discuss here are of the utmost importance, at this time, when we are reflecting on the state of religious liberty in the United States, let us not lose sight of the fact that compared to other nations, the freedoms we have to worship; to organize our religious institutions and communities as we see fit; to celebrate our festivals openly, freely, and safely; to proselytize; teach, preach as we see fit, remains inspiring.

The—permit me to focus on three general areas this afternoon: The executive order on the immigration refugee, the Johnson

amendment repeal, and the purported executive order on religious freedom.

The widespread opposition to the Muslim ban is set in the context and heard through the filter of months of anti-Muslim rhetoric in the campaign; threats of a Muslim registry; the President's explicit statements, even after the election, referencing a Muslim refugee ban; significant increase in hate crimes. You eluded, Mr. Cohen, to the new report that came out from the Southern Poverty Law Center and the state of new anti-Muslim hate groups. Reports of children who are bullied at school; increased opposition to mosques being built in communities, desecration, arson of mosques, and other communal sites; harassment on the internet, by strangers on the street. As I have found in so many nations across the globe, impingement on religious freedom includes the pressures and fears that emanate from perceived societal and governmental hostility, which chill open expression of religious identity in communal life.

The President has indicated that he wants to change the Johnson amendment, totally destroy it, as he said at the National Prayer Breakfast, which prohibits houses of worship, like all tax-exempt organizations, from endorsing or opposing political candidates and parties. There are four reasons why the amendment should not be changed.

First, if houses of worship become involved in campaigning, they run a serious risk of new extensive government regulation and monitoring of their religious activities.

Second, the prohibition against electioneering by nonprofits helps avoid undermining the structure of campaign finance regulations. If political donors can bypass those restrictions by giving their campaign contributions through a church and getting a tax deduction for it, it would result in a major diversion of campaign funding into houses of worship which will become slush funds for campaigns. And since churches do not report who their donors are, it would greatly reduce transparency in election campaigns.

Third, repealing current law would almost certainly have a divisive impact on houses of worship. We have enough divisions over liturgy and music and pastors and sermons and theology without importing America's explosively divisive electoral politics. Our houses of worship are among the few places that people of differing cultural, political, ethnic divides can find a sense of unity and comity so desperately needed in our Nation today.

And, finally, pastors and clergies already have the right to speak about political issues, and even though it is being debated in campaigns from the pulpit under the current rules and a personal capacity without the use of church funding, clergy have the same citizen rights to endorse or oppose candidates or parties or anyone else.

The draft executive order that has been reported raises a number of issues of primary concern. But at the core of those concerns is the notion of a free exercise claim to discriminate.

To my colleagues here and the distinguished members of the committee, help me understand what are the limits of this right being asserted to discriminate. If an employer, small business owner, a head of a religiously affiliated nonprofit asserts a insin-

cere religious belief that Blacks are inferior to Whites; Catholics, Muslims, Jews, and Hindus are inferior to Protestants; differently abled are inferior to nondisabled; Latinos to Anglos, if they assert a sincere belief that religious quality of their business and their nonprofit requires that they only serve or hire those of the same religion, do they have the right to bar those customers and employees who are members of what are protected classes?

Even if we agree that racial discrimination should be treated differently, if religious claims to discriminate must be accommodated, it threatens the entire scheme of civil rights. It will affect the LGBT community particularly, women particularly. And the principle that government money should not be used in tax dollars to discriminate is an important bedrock core.

Our courts, including the Supreme Court today, has upheld the right, the compelling interest to end discrimination as a justification to limit the free exercise of religion. We need to work together to find ways to balance it to embody as much as possible without losing either of the two principles.

Mr. KING. Thank you, Rabbi Saperstein.

The chair now recognizes Mr. Mattox for his testimony.

#### **TESTIMONY OF CASEY MATTOX**

Mr. MATTOX. Mr. Chairman, members of the committee, my name is Casey Mattox. I am senior counsel with Alliance Defending Freedom.

Our Nation enjoys a rich heritage of protecting First Amendment freedoms, ensuring Americans are able to freely speak and act consistent with their beliefs, even when those beliefs are unpopular. In fact, until very recently, a hearing on religious freedom might have been rather boring, because we would have all been on the same side.

Just weeks after *Roe v. Wade*, even its defenders supported the Church amendment, named for its democratic sponsor, ensuring that the government could not force Catholic hospitals and medical professionals to violate their conscience. It passed 372 to 1 in the House and 92 to 1 in the Senate. That is naming a post office territory. And I doubt any legislation any of you have ever advocated for has had that kind of support.

That bipartisanship on conscience persisted with Presidents Carter and Clinton signing additional religious freedom laws. We have united to protect everything from wartime conscientious objectors to the rights of parents to direct their children's education.

The returns on America's investment in religious freedom are not just a diverse and pluralistic society, but over \$1 trillion in services provided by religious ministries and nonprofits because they are free to serve their communities consistent with their faith. Sadly, in recent years, this commitment to preserving religious freedom has become contingent on whether the person's beliefs conform to the prevailing government orthodoxy.

Justice Alito rightly called the growing threat of government to individual conscience ominous this past summer in his dissent in the case, and for good reason. ObamaCare forced the Little Sisters of the Poor and religious colleges to serve as a drug mule in violation of their conscience, but now its compelling some families to



pay for other people's elective surgical abortions. In California, with the prior administration's blessing, of even mandating that churches pay for abortions from the offering plate.

You have also heard of many individuals in ministries being targeted by the government for their suddenly controversial but historically common belief about marriage. Just this morning, the Washington State Supreme Court ruled that the State can force a 72-year-old grandmother to create custom expression for an event that violates her conscience. Since when did we decide it is okay for the government to personally and professionally destroy someone because of their beliefs? This should frighten all of us.

You can celebrate the kind of government-compelled speech and targeting of religious beliefs that happened to the Stormans and Baronelle if you like, but you can't do that and claim that you support religious freedom. And this ominous threat to religious freedom is impacting people who could never have dreamed that the fight would come to them.

Donald and Ellen Vander Boon owned the West Michigan Beef Company, a meat processing facility employing over 45 hard-working Americans and putting food on the table for countless families. They are at risk of having their plant shut down because the USDA inspector claimed that an article discussing marriage that Mr. Vander Boon had left on the break room table violated a new USDA antiharassment policy.

Or even children's safety on playgrounds. We will be before the Supreme Court later this spring in Trinity Lutheran because the State of Missouri rejected a preschool from a program supplying recycled rubber tires for playground services solely because the church runs the daycare.

The 115th Congress and the new Trump administration have much to do to restore respect for these fundamental freedoms. Thankfully, President Trump, recognizing that religious freedom is good for everyone, promised during his campaign that he would make religious liberty his first priority. We hope that he will keep his promise and sign an executive order ensuring Americans are not unfairly punished by the Federal Government for peacefully living consistent with their beliefs. And his commitment should also embolden Congress to lead in preserving fundamental freedoms by passing legislation like the Conscience Protection Act, the First Amendment Defense Act, and the Free Speech Fairness Act. But this leaves me to my final point.

To fully address the future of religious freedom, we must also address the growing disregard for the First Amendment on our university campuses. Today's students are tomorrow's members of Congress, judges, teachers, and voters. They will only be able to protect the First Amendment if they understand and value it. But our universities are, frankly, failing. Heavily funded by taxpayer dollars, they are silencing students' speech through speech codes, speech zones, bias response teams, not teaching them to civilly engage in a marketplace of ideas where the confidence that in America you are free to speak and act consistent with your beliefs. ADF has assisted hundreds of students and student groups of varying religious and political beliefs.

Just recently, a Michigan Young Americans for Liberty student arrested for distributing copies of the Constitution on her own campus. And Young Americans for Freedom at Cal State, L.A., where faculty members actually linked arms with others to prevent students from entering an auditorium to hear a speech on, ironically, freedom of speech. These cases aren't just about these students, but the First Amendment lessons being taught to all the future legislators, teachers, and voters on those campuses.

Congress has a responsibility to ensure that the hundreds of billions of dollars in Federal taxpayer funds are being used in a way that advances, not undermines, respect for First Amendment rights of all Americans.

Mr. MATTOX. Members of the committee, the real test of liberty is what happens when you disagree? Please don't allow the current politically popular beliefs to become a litmus test for participation in civil society. Demand more from the public universities that are training the next generation, and preserve every citizen's freedom to peacefully live and work consistent with their conscience and free from fear of government punishment. Thank you.

Mr. KING. Thank you, Mr. Mattox. Thank you for your testimony.

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

And I will say, Mr. Mattox, on campus and around in the communities around America, we are seeing more and more pushback on freedom of speech and the resistance you described in your testimony. And aside from what Congress can do, how would you suggest we approach this? I don't remember any time in the couple-centuries of our country that we have had this kind of resistance to freedom of speech. How do you describe this drift, what has caused it, and what would you suggest we do about it as a people?

Mr. MATTOX. Thank you for the question. You know, I think it is directly tied to this larger cultural problem we have. I think that on many university campuses, you have administrators who don't seem to understand that they are, in fact, bound by the First Amendment, that it actually applies to them. And they communicate that message to their students. They act as if they are a private institution separated from whatever constraints the First Amendment would provide. And that is the great concern, that students are going to teach—are going to carry that lesson forward, this is how you act as a government official. Because in many cases—

Mr. KING. That is why professors get tenure, and they are insulated from criticism, including criticism from their students, and so this grows on our college campuses. And do you think it is because the public doesn't know or understand this is going on? And why do people write tuition checks to people that will educate them in such a way?

Mr. MATTOX. You know, the only permit that a student should require to be able to speak on a university campus is the First Amendment. And I think everyone seems to agree with that. I think the difficulty is that people don't—people don't grasp the connection between what is happening on campuses and what is going to end up happening in the rest of our culture. They think of students as being there in that place, and they are not permitted to

speak freely, and that seems like a problem for them. But the bigger problem is that those people are going to leave those campuses, and they are going to be the people who are going to be sitting on this dais one day. So it is critically important that they are learning about the First Amendment, understand it, and see how it is supposed to actually play out.

Mr. KING. Now we have students on campus that are learning that if their feelings are hurt, others don't have a right to freedom of speech, and we are being trained to have the sensitivity, the responsibility to anticipate if somebody's feelings are hurt before we speak something that may well be objective truth. So I just take this another step, then, and say we are—one of the foundations of Western civilization is rational thought and reason.

Do you see that being eroded in colleges and universities across our country?

Mr. MATTOX. Well, it is certainly difficult on many university campuses these days to actually try to have an honest conversation, because you will have speech codes. You know, the people have calculated that only about 6 percent of universities actually have written policies that are—that adequately protect students' First Amendment rights. So it is a serious problem.

Mr. KING. Thank you, Mr. Mattox.

And I turn to Rabbi Saperstein. And I just—as I listened to your testimony, I began to think about a circumstance that took place at Walter Reed hospital just a few years ago where they came out with a ruling, and it was a 4-page document. Speaking from memory here. On the fourth page of the document, part of that memo was that the religious workers who came into Walter Reed hospital would not be allowed to bring in any Bibles or other religious artifacts, even to go in and to serve our wounded troops, some of whom may be spending their last days at Walter Reed. And it was a very precise and inclusive order, and it was definitive. It wasn't—you couldn't—it wasn't ambiguous.

And I would ask where you would come down on an order like that that was part of this—remains now part of the public record of Walter Reed hospital.

Rabbi SAPERSTEIN. I am not familiar with the particular situation, but stepping back from it and just answering that on general principles, a government official has a right to wear their own religious garb, here, of course, the yarmulke, Sikh turban, whatever it might be, that identifies them, who they are. They are not allowed to use their position there to proselytize or in any course or way to offend people.

If somebody who is a patient asks for something, accommodating that kind of request so that they can live out their religious conscience is an appropriate action here. So—

Mr. KING. Then you would say that they should be free to bring in their religious artifacts, they just can't be allowed to force that on an unwanted scenario?

Rabbi SAPERSTEIN. I am not sure what it means to bring it in. If they are bringing it in, carrying it around with them, it is—you know, the difference between forcing it on them becomes a little bit opaque. But I think the general principle between their own iden-

tity and what they are able to do in a way that wouldn't convey they are trying to impose it on others is an important—

Mr. KING. I would point out they reversed that decision before sundown that day. And I am glad that doesn't stand today. And I appreciate your response.

And I would like to just quickly stretch the limits a little bit and say to Ms. Smith, can a person be forced to violate their conscience by, I will say, a Federal edict that has to do with religious liberty? For example, baking a cake for a wedding you might disagree with the scenario of that wedding, or setting up flowers, those kind of things? Can they be forced to violate their conscience?

Ms. SMITH. In those cases, I want to emphasize that I really think we are not dealing with blatant discrimination. What we are dealing with is freedom of expression. And I think all of us in this room would agree that in a robust, pluralistic society like America is, where we have so many different views on so many fundamental issues—life and marriage and sex and abortion and death penalty—that we need to be able to allow others to express those views, to live out their religious freedom without government coercion.

But more importantly, we should not be allowing government to step in and choose winners and losers and say, we are going to penalize you because you have a view that is in the minority that we don't support. And so I think these cases really need to be viewed in the lens of freedom of expression, and that we need to protect that freedom of expression for those religious individuals.

Mr. KING. Thank you, Ms. Smith. I appreciate it.

And I yield now to the—recognize the gentleman from Tennessee for his 5 minutes.

Mr. COHEN. Thank you, sir.

Ms. Smith, following up on that question. What if a couple—that bakers decided that they didn't want to bake a cake for an interracial couple? Would *Loving v. Virginia* have any effect in civil rights laws in not allowing—requiring them to bake that cake, give them a pizza, or whatever other things we have had?

Ms. SMITH. Well, again, just going back and looking at some of the examples that had been part of the public discourse on this subject over the last few years. For example, Walmart decided that it didn't want to bake a cake that had a Confederate flag on it. Should we force Office Depot to print posters that deride Planned Parenthood? No, we shouldn't.

There are a variety of different moral views that have been taken by corporations and individuals, and we protect that free expression because it is a matter of free speech. And, again, I would just point you to the *Hurley* decision, which was a unanimous opinion at the Supreme Court, where the Supreme Court said that expression trumps antidiscrimination laws.

So I think we really need to be sensitive to the fact that these cases are really about expression, and whether we agree or not with the expression, we need to defend the right of the speaker.

Mr. COHEN. So you are saying that they could deny an interracial couple because they didn't agree with interracial marriage, is what you are saying, because that is their right of expression.

Ms. SMITH. No, that is not what I said. And I think what is important to contrast in the Loving—

Mr. COHEN. Can you answer the question?

Ms. SMITH. In the Loving case, I think it is really important to contrast what the Supreme Court said in Obergefell. When you look at the language that Justice Kennedy uses in the majority opinion in Obergefell, he refers to the religious beliefs of those who believe in traditional marriage as decent and honorable. These are sincere beliefs that are held by good people.

And the language that the Court—in fact, all nine members of the Court—adopted in that opinion was one to say, look, there are a lot of different views on marriage. We should encourage that diversity of views on marriage, and these are decent and honorable people who hold these views, and we are not going to deride them here. Those are the words of Justice Kennedy.

So I think there is a very different case when you are talking about Obergefell than when you are talking about a case like Loving.

Mr. COHEN. So in Loving, you are saying they can or cannot discriminate against the interracial couple? Yes or no?

Ms. SMITH. Look, what I am saying is race is very different in our society. Okay? In every context—

Mr. COHEN. The Supreme Court is the same, though. Obergefell and Loving are both Supreme Court cases, raising the idea that there is a right to get married.

Ms. SMITH. So race is very different, and race has always been different in our constitutional lexicon. We have always recognized that the government has—

Mr. COHEN. So you are saying they would not be allowed to discriminate—

Ms. SMITH. We have always said that the government has a very powerful interest—

Mr. COHEN. Ms. Smith, you are not going to answer the question. It is a yes-or-no answer. Yes or no, could the couple say, I will not do you a cake because I don't believe—my religious beliefs do not allow me to give an interracial couple a cake? Yes or no?

Ms. SMITH. I believe that race is special. Race is different.

Mr. COHEN. Rabbi Saperstein, how do you think about that? Can you give me an answer how you think that would work?

Rabbi SAPERSTEIN. I think that the compelling interest of the government in ending discrimination here would limit the religious claim involved. If they want to participate in commerce, then they have to abide by the antidiscrimination rules. If there is a way within that to accommodate some of the religious freedom claims, that is a discussion we can have. But the core answer to your question is the compelling interest of discrimination prevails. And I think that was at the basis of the Supreme Court's nine-nothing decision today in the Arlene Flower case.

Mr. COHEN. Have you seen a rise in anti-Semitic and/or anti-Muslim behavior in the country since the election of 2016 or during the campaign of 2016 forward? Rabbi Saperstein.

Rabbi SAPERSTEIN. Yes. You know, there have been reports from the ADL and Southern Poverty Law Center from police departments about significant escalation in hate speech, hate crimes

against, particularly, the Muslim and the Jewish community. Very alarming.

Mr. COHEN. It is alarming. And I can testify of my own that I didn't get too many jabs for being Jewish until this past 3 to 6 months. And I have seen a lot of them on social media and it is scary.

Rabbi SAPERSTEIN. This campaign seemed to have lifted some of the powerful cultural and social constraints that we had against hate speech in this country. Millions of people we know hold prejudicial views, but you didn't articulate them except on the fringes. But the confluence of the internet's anonymity that allows for that expression and then the discussion in the campaign has lifted some of those constraints. And I think—I hope people on both parties, leaders from both parties, will work together with the religious leaders of America to help restore some of those restraints.

Mr. COHEN. One last question. Do you agree with Ms. Colby's claim that the report by the United States Commission on Civil Rights disparages religious freedom or that there is an erosion of religious liberty in America? Rabbi Saperstein.

Rabbi SAPERSTEIN. Yes. I was troubled by some of the language in the report, Mr. Cohen. I thought it was excessive in this. I think where they come down on that core question I indicated of, is there a compelling interest in terms of enforcing discrimination laws that will restrain the exercise of religion, make those people claim a right to discriminate. I think that finding is a correct finding. I thought the language in it was excessive and was not helpful in terms of giving the respect to religious freedom that the fact it is enshrined in our First Amendment requires.

Mr. COHEN. Thank you, sir.

Mr. KING. Thank you. Mr. Cohen yields back.

And the chair now recognizes the gentleman from Florida, Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

Rabbi, I read your testimony, and you talk about the President's executive action to prevent terrorist infiltration into America, that it would be barring Muslim refugees from seven countries and, effectively, favor Christians at the expense of Muslims. Correct?

Rabbi SAPERSTEIN. Yes.

Mr. DESANTIS. What is your basis for that?

Rabbi SAPERSTEIN. The countries selected were countries with, overwhelmingly, a Muslim population—

Mr. DESANTIS. That is not true. There are two different aspects. The first aspect are seven countries that Congress had previously identified. That was for a 90-day overall immigration moratorium. The second part of it applied to refugees was in the 120-day moratorium on the entire refugee program worldwide. So—and then within that refugee—

Rabbi SAPERSTEIN. And he made clear afterwards, the minorities in those countries should have preference afterwards. And that means in the majority Muslim—

Mr. DESANTIS. Worldwide. No, no, no. The refugee program, in the executive order, it said that the relevant service secretaries are further directed to make changes, to extent permitted by law, to prioritize refugee claims made by individuals based on the reli-

gious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. That applies worldwide. That doesn't just apply to Christians. It is not favoring a Christian refugee over a Muslim refugee.

Now, maybe in your testimony you meant to just simply say that it is much more likely that a majority of Muslim country would oppress a Christian minority than vice versa. I don't know if that is what you are saying. But the executive order does not say that. You are conflating one part of the executive order with another.

And I appreciate your coming here, but if you are testifying as an expert on the law, you should be doing it and putting it out there accurately. And you didn't do that in this case, and it is disappointing to read that.

Rabbi SAPERSTEIN. In addition—in addition to the fact that, insofar as those countries are concerned, the seven countries are concerned, that it would—that the favoring of minorities would result in the non-Muslim population—

Mr. DESANTIS. That happens worldwide. Worldwide.

Rabbi SAPERSTEIN. Insofar—insofar as that is the case, it also has to be said in the context of everything else I cited in the testimony.

Mr. DESANTIS. The seven countries are not relevant.

Rabbi SAPERSTEIN. All of the discussions, including the President's, after the election about—talking about a Muslim ban, that is a filter through which the world hears it, that is a filter through which religious leaders on the right and the left in America—

Mr. DESANTIS. That was not, in fact, what was put in there. And so we deal with things. We actually read the statutes. We read these orders. We read the different things. And I appreciate the rhetoric, and maybe that is not helpful, but that does not change the fact that the refugee provision for religious persecution was for any minority religion in the entire world that applies to Muslims, it applies to Christians.

And, yes, in the serious situation, we had a situation where 10 percent of the population is Christian. They were facing a disproportionate amount of persecution, and the amount of refugees that made it to the United States were a small, small fraction of 1 percent.

Let me ask you this, Ms. Smith: We now have a change of administration. There have been cases about Little Sisters of the Poor, a lot of regulatory burdens on the free exercise of religion. We talk about things like Hobby Lobby, that was not enacted by a statute. That was the bureaucracy, you do this, then the bureaucracy grows, and it infringes on people's free exercise of religion.

So with a new administration and a new HHS Secretary, are there going to be opportunities to relieve these burdens appropriately through the—through the administrative process rather than having to go to court?

Ms. SMITH. Well, we certainly hope so. I first just want to thank Members of Congress who have stood up for the Little Sisters of the Poor and who have advocated for them. We really appreciate those of you who have stood by us for the last 4 years in this litigation. It has been really astonishing to see the government continue this fight against the Little Sisters and to argue over 4 years that

there was really no other way that they could accomplish this goal without using the Little Sisters' healthcare plan. You know, we can put a man on the moon, and we can put mail in everybody's mailbox every day, but we can't figure out a way to get these contraceptives to women without using the nuns' healthcare plans.

So I do think that it is particularly astonishing in light of the fact that the government has granted exemptions to big corporations, its own military healthcare system; it has granted exemptions to small businesses and other churches. It certainly can broaden the exemption for the Little Sisters of the Poor. And we hope the administration will do just that and allow the Little Sisters to get back to the good work that they do serving the elderly poor that they have done for the last 175 years.

Mr. DESANTIS. So I think that, as government expands, we're going to continue to have these conflicts. And if you had a limited government and actually let the people closer—governments closer to the people resolve a lot of this stuff, we would have less conflict as a society. And so I hope that this Congress will take that under advisement and govern itself accordingly.

And I yield back.

Mr. KING. I thank the gentleman from Florida.

And now I recognize the gentleman from New York, Mr. Nadler, for his 5 minutes.

Mr. NADLER. Mr. Raskin is next.

Mr. KING. I would be happy to recognize Mr. Raskin for his 5 minutes.

Mr. RASKIN. First of all, I want to thank the gentleman from New York for his graciousness.

Thank you, Mr. Chairman.

I want to start, not by berating or castigating any of our witnesses, but thanking all of you for your work on behalf of religious freedom and religious liberty, which gets to my first question. Some people would cast the current global political condition as a war between Christianity and Islam, which obviously promotes a certain negative dynamic in terms of our ability to interact with more than 1 billion people on Earth.

The other way of framing America's role in the world is that we were the first nation conceived in revolution against monarchy and theocracy to declare religious liberty and religious freedom and political freedom, the hallmark of our society.

Now, it was complicated, though, because the people who first got over here were religious refugees. The Puritans were fleeing the Anglican Church. And so they got to freedom in Massachusetts. Hallelujah. But then they turned around and set up their own little theocracy and began to tyrannize the Quakers, who were driven to Rhode Island and then Pennsylvania, where you also found the Anabaptists. And every State kind of developed its own religious character. My home State of Maryland, the Free State, was a State that was open to Catholics being first class citizens, but they discriminated against Jews and said they couldn't hold office and so on. And that was the pattern around the country.

The development of our religious freedom is the chronicle of the progress of two principles: One is that everybody can practice exactly as they want to, as they see to worship, but also they can't



gain state power and oppress everybody else. The first is the free exercise principle. The second is the Establishment Clause: no establishment of religion.

Okay. Now, Rabbi and Ambassador Saperstein, let me start with you. To what extent in your work as Ambassador At Large, Religious Ambassador, were you able to carry the real great story of America to the rest of the world? To what extent are you able to say that what makes us a miraculous country is the fact that we separated church from state, we broke from the history of inquisition and crusades and witchcraft trials and so on, and we proclaimed religious freedom for each person? To what extent is that story being heard around the world?

Rabbi SAPERSTEIN. It was a central message in my work. It was already recognized by thoughtful people and leaders, political leaders and religious leaders with whom I met across the globe. In addition to that, the confluence of the three clauses of the Constitution—no religious test for office, free exercise of religion, no establishment of religion—it is something—a wall keeping government out of religion, allowing religion to flourish with a diversity, strength, and robustness here unmatched almost anywhere in the democratic world. That idea led to the proposition that, in America, for the first time in human history, your rights as a citizen would not depend upon your religious practices, beliefs, or identity—

Mr. RASKIN. Or your membership—

Rabbi SAPERSTEIN. And it was a central message in the work that we did.

Mr. RASKIN. Well, thank you very much for your work. Forgive me for rushing everybody through. We're allowed only 5 minutes here. I'm a constitutional law professor. I would stay here all day with you guys if I could.

So let me just see if we can do this one on a yes/no basis. Leaving aside the controverted implications of the President's executive order for a moment, do all of you agree that it would be unconstitutional to have a ban on Muslims entering the country? Formulate it like that, and perhaps we can just start, Ms. Colby, with you and just go down.

Ms. COLBY. Yes, a ban on Muslims.

Mr. RASKIN. Ms. Smith, would you agree that a ban on Muslims would be unconstitutional?

Ms. SMITH. I would agree with that.

Mr. RASKIN. Rabbi.

Rabbi SAPERSTEIN. I would.

Mr. MATTOX. I am not an immigration lawyer. So I am going to have to beg out of the question. So I apologize.

Mr. RASKIN. Would all of you agree that creating a Muslim registry would be unconstitutional in America?

Ms. COLBY. I'm not sure what a registry is.

Mr. RASKIN. Well, compelling everybody of a particular religious faith to go and sign their name on a government document declaring their religion to be Muslim.

Ms. COLBY. That would be a violation of the exercise.

Mr. RASKIN. You would agree that is unconstitutional, Ms. Smith?

Ms. SMITH. I'm a little hesitant to answer hypotheticals where I'm not sure of the exact contours of what you're talking about.

Mr. RASKIN. Well, imagine a world without hypotheticals, Ms. Smith. There would be no law professors.

Ms. SMITH. I understand that. But I'm a litigator. I am not a law professor. So I care about facts. I care about concrete circumstances.

Mr. RASKIN. As a litigator, you understand that the bench will ask questions that you have to answer.

So let's take it away from Muslims then. Would it be unconstitutional to say that all Catholics, all Jews, or all the Seventh-day Adventists have to go and append their name to a public document?

Ms. SMITH. I think, as a general matter, those types of things are highly suspect, yes.

Mr. RASKIN. Rabbi Saperstein.

Rabbi SAPERSTEIN. Singling out any protected group, including religious group, for behavior—for treatment that you do not do to other similarly situated groups is inherently an unconstitutional standard and barred by the Constitution.

Mr. RASKIN. Mr. Mattox.

Mr. MATTOX. The example there actually is similar to a situation that was being imposed by the Department of Education this past year where they were listing Christian colleges and calling them out as particularly problematic. And those sorts of things raise concerns. That's probably as much as I can say in the immigration context—

Mr. RASKIN. No. This is not for immigrants. I'm talking about for citizens.

Mr. MATTOX. No, that would be problematic.

Mr. RASKIN. You agree it would be unconstitutional to ask everybody in the country who belongs to a particular religious group to go append their name?

Am I out of time, Mr. Chairman? I'm sorry. I had just begun with you guys too.

Mr. KING. The gentleman from Maryland yields back.

And now the chair would recognize the gentleman from Arizona, Mr. Franks, for his 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, I'm glad to see you sitting in that chair. I know that you're a man deeply dedicated to the Constitution. And it was my honor to sit in that chair at one point in my life, and it is indeed a special privilege. And I'm glad you are where you are, sir, and I congratulate you if somebody hasn't done so. I think this is your first meeting, your first hearing, and it's especially appropriate in my mind that we're talking about religious freedom because religious freedom is, in my judgement, the cornerstone of all other freedoms. It is astonishing, when you look across the world, those places where there is religious freedom, so many other things work out well too. There is freedom of expression. There is freedom of press. There is abundance, many times, economically. But where there is religious persecution and religious freedom is not allowed, all kinds of tragic things happen. So I can't express to you the level of significance that I hold this subject and appreciate you for un-

derstanding that for your very first hearing as the chairman of the Constitution committee.

You know, the Bill of Rights passed by the First Congress included protections for religious freedom because, without religious freedom and freedom of conscience, obviously, as I've said, all other religious liberties, all other liberties, religious or otherwise, essentially cease to exist. And if there's anything that characterizes America, it is that we hold these truths to be self-evident, that we believe that at that time they believed we were all created, and that's what made us equal. So, essentially, the idea of America was a religious statement, a pretty heavy thing. So if we don't at least protect the right of those people that have been the progeny of that great document to embrace religious freedom, then I think we make a terrible mistake, and we sort of undermine and vitiate the whole purpose for this Nation.

In America, every individual has the right to religious freedom and the First Amendment expression so as long as they do not deny the constitutional rights of another. And true tolerance, in my judgment, Mr. Chairman, doesn't mean that we have no differences. It means that we're kind and decent to each other in spite of those differences. We recognize that we have differences, but we embrace those differences, not because we agree with the other guy, but because we see the other guy as a fellow human being. And somehow we're all just trying to find our way home here, and we have a sense in the core of every human soul I think that there's something out there bigger than ourselves, and we want to embrace that. And the quickest way I think to bring people together is to recognize that, and I hope that we do.

Thomas Jefferson once said: The constitutional freedom of religion is the most inalienable and sacred of all human rights. Now, those are not my words, but I certainly think that he's on to something there.

So, Ms. Smith, in your testimony, you detailed the many ways in which minority faith groups have benefited from statutory protections for the free exercise of religion, like the Religious Freedom Restoration Act, RFRA, and the Religious Land Use and Institutionalized Persons Act. And recently some have called for RFRA to be amended, as you know, making it essentially inapplicable to Federal laws like the Civil Rights Act of 1964. Do you believe that amending RFRA could cause harm to the minority faith groups it was intended to protect and essentially for the last 20 years? What do you think the implications are?

Ms. SMITH. I do. And thank you very much for that question. I think if you look back over the 24 years that RFRA has been on the books and you do a survey of all of the cases in which RFRA has been cited—and we've actually done this at Becket—not just on the Federal level but also on the State level, I think it's really astonishing to notice that most of the cases where RFRA has been used as the basis for a decision are in some ways protecting religious minorities in our country. And I highlighted some of those examples in my written testimony and touched on a few of them today in my oral statement, but, you know, Captain Singh, for example, you know, he relied on RFRA. Pastor Soto is another Becket client. He's a Native American pastor. The government came in

and raided his powwow and took away their eagle feathers. And it was RFRA that actually allowed us to get those eagle feathers back for him.

And there are other stories. There is a wonderful story of a Native American kindergartner in Texas where he wanted to wear a braid for religious reasons, and the school grooming policies forbade him from doing that. And it was the Texas State RFRA that allowed him to wear his religious braid.

There is another story that didn't turn out so well that I think is illustrative of how important State RFRA's also can be, and that is of a Kansas woman who was a Jehovah's Witness, and she needed a bloodless liver transplant. And, at the time, that was not available in Kansas, but it was available in a neighboring State. She was not able to get permission from Medicaid to get permission to go out of State to get that procedure so she brought a lawsuit. And, at the time, Kansas didn't have State RFRA. So she had constitutional grounds. Long story short, as her case went up on appeal, her health deteriorated, and by the time her case ended, she was no longer in a position to receive that liver transplant, and she died. Now had there been a RFRA in Kansas at that time, her lawsuit would have been much quicker, and she probably would be alive today.

So these stories just demonstrate the power of State RFRA's and what they do and what they can do to protect religious minorities around the country.

Mr. FRANKS. Mr. Chairman, my time is gone. Thank you, sir.

Mr. KING. I thank the gentleman from Arizona particularly for his remarks and the questioning here today.

And now I would recognize the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

Let me ask Rabbi Saperstein the following. You've seen—or I assume you've seen—the draft executive order on religious freedom that's been circulating in the news media that the Trump administration is supposedly considering implementing. I've seen the draft language. I want to ask you about that draft executive order. The executive order specifies a set of core beliefs for special protection, namely the belief that marriage is or should be recognized as union of one man and one woman, that sexual relations are properly reserved for such a marriage, that male and female and their equivalents refer to an individual's immutable biological sex as objectively determined by anatomy, physiology, or genetics at or before birth, and that human life begins at conception and merits protection at all stages of life. The order does specify religious—the order specifies religious views about sex. If this draft order says only those specified beliefs would receive protection and accommodation by the Federal Government or special protection and accommodation by the Federal Government, would that executive order be constitutional?

Rabbi SAPERSTEIN. I think it raises very serious equal protection issues as well as turning over—when you are talking about government contractors, turning over discretionary judgment to that contractor based on their religious belief as to when government services and benefits can be provided to those they serve, and that

raises Grendel's Den/Larkin problems that the Court has been very, very resistant about. So I think it raises significant constitutional problems.

Mr. NADLER. Would it not also raise Establishment Clause questions, setting one belief system or a set of beliefs ahead of others?

Rabbi SAPERSTEIN. I think this does.

Mr. NADLER. Thank you. Let me also note that I was one of the people who was instrumental back in 1993 in passing RFRA, as were you, Rabbi Saperstein, and I was one of the two authors of RLUIPA, Religious Land Use and Institutionalized Persons Act. And I take pride in those.

I think, however, that they are subject to misuse and that I think much of the debate we are having is really a debate about a sword versus a shield. I always viewed RFRA and RLUIPA and Religious Freedom Act generally as a shield for your religious beliefs. The government cannot impose religious beliefs on you, and government should not be able in normal circumstances, in the absence of some life-threatening thing or something, to inhibit your ability to follow your religion.

However, it should not be used as a sword to enable you to impose your religious beliefs on someone else. It seems to me that that's the questions that we've been getting into and that we've been addressing so that if a—let's get to the question of an employer who provides health insurance to his employee and is mandated to do so by government or to pay a fine and his religious belief—his religious belief—Walmart's religious belief, if Walmart can be said to have a religious belief, says that contraception is wrong, and, therefore, you, as a Walmart employee, cannot get coverage for contraception in violation of your belief that it is perfectly okay. How do you balance that?

Rabbi SAPERSTEIN. The key part of the logic of the Hobby Lobby decision was that these accommodations on the least restrictive means side of the analysis work because women have a way to get contraception. It was built into the system. What you can't do is have a system in which there is an exemption that will leave women without that contraception, without that kind of coverage. So I have serious problems.

May I also just point out one other crucial part of this? In 3(c) of the executive order, it has your balancing test from RFRA that everyone approves of here. When it gets to all of the actual meat of the executive order in section 4, it drops all of that. It says—the simple wording is the simple assertion of a religious claim to discriminate in the areas you asked about and a whole range of other areas in almost every agency in the government, requires a simple sincere belief that you have a right to discriminate, and then there's no balancing test, not substantial burden, not compelling interest, not least restrictive means. Just the assertion of the claim allows—and this would radically—radically—revamp the very thing that's been praised by my colleagues here of RFRA and the way that the RFRA system works.

Mr. NADLER. That would say, in effect, that if you have a religious objection to allowing a gay couple to come into your restaurant—or, for that matter, by analogy, an interracial couple, you have the right to do that, and the Civil Rights Act is wrong to vio-

late your religious freedom to discriminate on the basis of your sincerely held religious belief that interracial couples or gay couples shouldn't associate with each other.

Rabbi SAPERSTEIN. Sadly, that's the way I do read the executive order, Mr. Nadler.

Mr. NADLER. Thank you very much.

I see my time has expired.

Mr. KING. The gentleman from New York has yielded back his time.

The chair would now recognize the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I thank the witness for being here.

I understand, Ms. Smith, your comment that RFRA allowed someone to wear religious clothing or braiding, but I still believe that the United States Constitution is what allows people to do that, whether or not there's a RFRA. Unfortunately, there are some in the Nation that believe their status as a pseudo-intellectual is somehow threatened if they were to allow people to practice things that were inconsistent with what other pseudo-intellectuals think is appropriate. And, therefore, we have had our freedoms madly infringed upon.

It's also such an irony, for example, we see in Germany—and I have German lineage on my father's side, my great-grandfather came over in 1870. Because, I think, Germany was, you know, behind the Holocaust, responsible for the death of over 6 million Jewish people because they were Jewish people. Even though I understand Mr. Soros' position that, you know, probably everybody would have turned in fellow Jews, obviously, that's not what happened. Some have a conscience, and some don't. But I'm amazed to see Germany now bending so far backwards. We don't even want to check to see if people coming in feel just like Hitler did, that Jews are vermin and need to be wiped off the Earth, because they are letting some people in that believe that. They are so afraid of being called Nazis that they are letting people in who were—their beliefs were allied with the Nazi beliefs during World War II and totally supportive of the Holocaust.

So I'm also a bit perplexed. When I look at the oath of office I took as a prosecutor, as a member of the United States Army, as a judge, as a chief justice, as a Member of Congress—support and defend the Constitution of the United States against all enemies, foreign and domestic—and yet I heard the question from my friend across the aisle being put to the witnesses about would it be unconstitutional to deny Muslims to come into the country. Well, I would submit it depends on what the specific person's beliefs were because thank God, most Muslims don't believe that if they are going to be in America, they need to supplant, destroy the U.S. Constitution, erect a dictator, a caliph who will dictate how we can and will live, because that is an enemy to the Constitution, and we have an oath to protect that against all such enemies. But most Muslims, they are thrilled to come in to the United States, be able to worship as they wish. But there are Muslims—and I know the President of the United States, the last President said that ISIS is not Islamic. The trouble is he only had training in Islam in his youth in Indo-

nesia, as far as I know, unless Pastor Wright did. But you have Baghdadi, the head of the Islamic State, who has his Ph.D. in Islamic studies, and he says: “We are Islam. We are the true Islam. These other people who don’t want to destroy the United States and destroy the Constitution of the United States and wipe out all those who don’t believe as we do, they are not true Islam.”

So, if those people want to come into the United States and destroy our way of life—and it doesn’t give me any comfort that, not only do they hate Jews, but as Khalid Sheikh Mohammed put in his pleading that’s been declassified, he believes that all Jews are vermin and should be killed, but also anyone who has ever said that God has a Son, which would mean all Christians. So he puts the Jews and the Christians together, and he claims to be the ultimate Muslim, and he believes he has the right and an obligation to wipe out Christianity and Judaism.

And I would submit, Mr. Chairman, that if we’re going to keep our oath, we have an obligation to find out, not just if somebody says Christians, Jew, Buddhist, whatever Muslim, but what do you believe, and I believe that’s where we have fallen down, and that’s what President Trump was trying to avoid, people coming in so that we can vet them. Are you a Muslim who believes that you can follow the Constitution, or are you one that believes you need to destroy it? We need to find out how to vet them, keep out those who do want to destroy us, allow those in who won’t.

I yield back, only because I’m out of time.

Mr. KING. The chair thanks the gentleman from Texas, who yields back the balance of time.

This concludes today’s hearing. Thanks to all our witnesses for attending.

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

This hearing is now adjourned. Thank you.

[Whereupon, at 2:28 p.m., the subcommittee was adjourned.]