

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

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

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

Religious liberty is America’s most distinctive contribution to humankind. The genius of American religious liberty is that we protect every American’s religious beliefs and practices, no matter how unpopular or unfashionable those beliefs and practices may be at any given time. By protecting all religious beliefs and practices regardless of their popularity or political power, religious liberty makes it possible for citizens who hold very different worldviews to live

¹ 42 U.S.C. § 2000bb *et seq.* See Brief Amicus Curiae of the Baptist Joint Committee, the National Association of Evangelicals and other Religious and Public Policy Organizations in Support of Respondents, 2005 WL 2237539 at *1 (2005), filed in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). See also, Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 1 n.a (1994) (thanking Christian Legal Society’s Center for Law and Religious Freedom, “one of the prime proponents of the Religious Freedom Restoration Act”).

² 42 U.S.C. § 2000cc *et seq.* See, e.g., *Protecting Religious Freedom After Boerne v. Flores (Part III)*: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 26-37 (1998) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society); *Religious Liberty Protection Act*: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 1691 151-59 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society); *Religious Liberty*: Hearing Before the Senate Committee on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure 4-18 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society).

peaceably together.³ Robust religious liberty avoids a political community divided along religious lines.

But religious liberty is fragile, too easily taken for granted and too often neglected. A leading religious liberty scholar, Professor Douglas Laycock of the University of Virginia, recently warned: “For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.”⁴ Other respected scholars share the assessment that the future of religious liberty in America is imperiled.⁵

I. Congress’s Passage of the Religious Freedom Restoration Act was a Singular Achievement that Protects All Americans’ Religious Liberty.

Congress’s passage of the Religious Freedom Restoration Act of 1993 (RFRA)⁶ was a singular achievement. For over two decades, RFRA has been *the* preeminent federal safeguard of all Americans’ religious liberty. As heretical as it sounds, RFRA actually protects the average American’s religious liberty more than the First Amendment protects her religious liberty. This is the direct result of the Supreme Court’s dramatic narrowing, in 1990 in *Employment Division v. Smith*,⁷ of the protection the First Amendment offers free exercise of religion.

³ Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 840-41 (2014) (“Religious liberty has largely ended religious warfare and persecution in the West. It has enabled people with fundamentally different views on fundamental matters to live in peace and equality in the same society. It has enabled each of us to live, for the most part, by our own deepest values.”)

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

⁵ *See generally, e.g.*, Michael W. McConnell, *Why Protect Religious Freedom?*, 123 Yale L.J. 770 (2013); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 Mich. L. Rev. 1043 (2014); John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. Rev. 787 (2014); Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279 (2013).

⁶ 42 U.S.C. §§ 2000bb *et seq.*

⁷ 494 U.S. 872 (1990).

A. The Initial Impetus for RFRA

RFRA was an urgent response to the Supreme Court's 1990 decision in *Employment Division v. Smith*,⁸ which was authored by Justice Scalia and dealt a severe setback to religious liberty. Before the *Smith* decision, the Supreme Court's free exercise test had prohibited the government from burdening a citizen's religious exercise unless the government demonstrated that it had a compelling interest that justified overriding the individual's religious practice.⁹ The *Smith* decision reversed this traditional presumption. The government no longer had to show a compelling reason for overriding a person's religious convictions, but instead could simply require a citizen to violate her religious convictions no matter how easy it would be for the government to accommodate her religious conscience.

B. The Broad Bipartisan Support for RFRA

In response to the *Smith* decision, a 68-member coalition of diverse religious and civil rights organizations, including such groups as the Christian Legal Society, Baptist Joint Committee for Religious Liberty, Americans United for Separation of Church and State, National Association of Evangelicals, American Jewish Congress, and American Civil Liberties Union,¹⁰ coalesced to encourage

⁸ *Id.*

⁹ *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁰ The following religious and civil rights organizations formed the Coalition for the Free Exercise of Religion to secure RFRA's passage: "Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference on Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League; Association of Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Christian Science Committee on Publication; Church of the Brethren; Church of Jesus Christ of Latter-day Saints; Church of Scientology International; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Episcopal Church; Evangelical Lutheran Church in America; Federation of Reconstructionist Congregations and Havurot; First Liberty Institute; Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation; Hadassah, The Women's Zionist Organization of America, Inc.; Home School Legal Defense Association; House of Bishops of the Episcopal

Congress to restore substantive protection for religious liberty.¹¹ RFRA restored the “compelling interest” test by once again placing the burden on the government to demonstrate that a law is sufficiently compelling to justify denial of citizens’ religious freedom.¹²

Senator Edward Kennedy and Senator Orrin Hatch together led the bipartisan effort to pass RFRA in the Senate.¹³ RFRA passed by a vote of 97-3 in

Church; International Institute for Religious Freedom; Japanese American Citizens League; Jesuit Social Ministries, National Office; Justice Fellowship; Mennonite Central Committee U.S.; NA'AMAT USA; National Association of Evangelicals; National Council of Churches; National Council of Jewish Women; National Drug Strategy Network; National Federation of Temple Sisterhoods; National Islamic Prison Foundation; National Jewish Commission on Law and Public Affairs; National Jewish Community Relations Advisory Council; National Sikh Center; Native American Church of North America; North American Council for Muslim Women; People for the American Way Action Fund; Presbyterian Church (USA), Social Justice and Peacemaking Unit; Rabbinical Council of America; Traditional Values Coalition; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association of Congregations; United Church of Christ, Office for Church in Society; United Methodist Church, Board of Church and Society; United Synagogue of Conservative Judaism.” Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210 n.9 (1994) (listing these groups and noting that “[t]he American Bar Association did not formally join the Coalition, but repeatedly endorsed the bill.”)

¹¹ On November 7, 2013, the Newseum co-sponsored an event commemorating the twentieth anniversary of the passage of RFRA, entitled “*Restored or Endangered? The State of Free Exercise of Religion in America.*” During the event’s first panel, leading participants in the RFRA coalition described the key events that led to RFRA’s passage. The panel’s discussion is available at https://www.youtube.com/watch?v=M_84dFFH8g0 (last visited February 11, 2015). See also, Baptist Joint Committee for Religious Liberty, “*The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom,*” available at <http://bjcmobile.org/wp-content/uploads/2013/11/RFRA-Book-FINAL.pdf> (last visited February 11, 2015).

¹² See Richard Garnett and Joshua Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2006 Cato Sup. Ct. Rev. 257, 259 (2006) (“By enacting RFRA, however, Congress codified an apparently broad, bipartisan, and ecumenical consensus that the *Smith* rule does not adequately protect and respect religious liberty.”). See generally, Douglas Laycock and Oliver S. Thomas, *supra* note 10; Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249 (1995); Berg, *supra* note 1.

¹³ See *The Religious Freedom Restoration Act: Hearing Before the Senate Committee on the Judiciary on S. 2969, A Bill to Protect the Free Exercise of Religion 2* (1992) (statement of Sen. Kennedy) (“The Religious Freedom Restoration Act, which Senator Hatch and I, and 23 other Senators have introduced, would restore the compelling interest test for evaluating free exercise

the Senate and a unanimous voice vote in the House.¹⁴ President Clinton signed RFRA into law on November 16, 1993. In his signing remarks, President Clinton observed, “We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom.” He noted that the Founders “knew that there needed to be a space of freedom between Government and people of faith that otherwise Government might usurp.” President Clinton attributed to the first amendment the fact that America is “the oldest democracy now in history and probably the most truly multiethnic society on the face of the Earth.” He explained that RFRA “basically says [] that the Government should be held to a very high level of proof before it interferes with someone’s free exercise of religion.”¹⁵

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

A. What RFRA Actually Does

1. RFRA creates a level playing field for Americans of all faiths: RFRA puts “minority” faiths on an equal footing with “majority” faiths.¹⁶ Essentially, RFRA makes religious liberty the default position in any conflict between religious conscience and federal regulation. Without RFRA, a “minority” faith would need to seek individual exemptions every time Congress considered a law that might unintentionally infringe on its religious practices. With RFRA, a “minority” faith is automatically *presumed* to be entitled to an exemption from a

claims.”); *id.* at 7 (statement of Sen. Hatch) (“I want to thank you, Senator Kennedy. I appreciate your leadership on this vital legislation, and I am pleased to be a principal co-sponsor with you of the Religious Freedom Restoration Act of 1992.”).

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

¹⁵ President William J. Clinton, *Remarks on Signing the Religious Freedom Restoration Act of 1993*, Nov. 16, 1993, available at <http://www.gpo.gov/fdsys/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf> (last visited June 8, 2014).

¹⁶ An excellent introduction to RFRA’s importance to religious Americans is a ten-minute video that features Native Americans, Presbyterians, Jews, and Sikhs recounting RFRA’s importance to their religious exercise. “*Faces of Free Exercise*,” The Becket Fund for Religious Liberty, available at <http://www.youtube.com/watch?v=J3TbItCxWdk> (last visited February 11, 2015).

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

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

¹⁷ As Professor Michael McConnell explained at the time RFRA was being debated, the Supreme Court's *Smith* ruling gave "a decided advantage to 'majority' religions . . . [which,] because their numbers give them substantial political influence, will be able to enter and win protection in the political arena. In addition, their members are often involved in the drafting of legislation, and they generally design the laws (consciously or unconsciously) in light of their religious mores." Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181, 186-87 (1992). See also, Garnett and Dunlap, *supra* note 12, at 260 (The Constitution "allows – and even invites – governments to lift or ease the burdens on religion that even neutral official actions often impose. Notwithstanding our constitutional commitment to religious freedom through limited government and the separation of the institutions of religion and government, it is and remains in the best of our traditions to 'single out' lived religious faith as deserving accommodation.").

¹⁸ Congress has never exercised its option under 42 U.S.C. § 2000bb-3(b) to "explicitly exclude[]" a law from RFRA's application. The philosophical underpinnings of RFRA have always weighed strongly against any carve-out because there is no limiting principle for why any particular governmental interest should be given a special permanent exemption, or a carve-out, from RFRA. Any carve-out would immediately result in the disadvantaging of some faith(s) in relationship to other faiths, precisely the result that RFRA was intended to prevent. The Newseum panelists repeatedly emphasized how loath the RFRA Coalition was to create any carve-out whatsoever. See *supra* note 11.

As was explained soon after its passage, RFRA's sponsors "insisted instead on a unitary standard for evaluating all free exercise claims" because:

"The bill's sponsors, as well as the Coalition supporting the bill . . . felt strongly that Congress had no business picking and choosing which religious claims should be protected and which should not. . . . [T]he bill's supporters feared that an exemption for prisons would lead to other exemptions, possibly jeopardizing the bill's passage. Similar exemptions had already been demanded by pro-life groups, public schools, landmark commissions, and other interest groups."

Laycock and Thomas, *supra* note 10, at 240.

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

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

2. RFRA protects America’s religious diversity: If all Americans belonged to only one religion, RFRA might not be necessary. In that case, the government might realistically be expected either to exempt the monopolistic religion’s practices from any law they would otherwise violate, or to not pass the law in the first place. But America is a country of tremendous religious diversity.²⁰ As a result, “it is not surprising that well-intentioned, broadly-applicable legislation often conflicts, sometimes severely, with the religious beliefs of certain groups of people.”²¹ Rather than force religious people to a choice between obeying their government or obeying God, “it makes sense to create exceptions for those groups whenever that can be reasonably done,” especially in light of “our society’s dedication to religious toleration and pluralism.”²²

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

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

¹⁹ “What is at stake in the debate over religious exemptions is whether people can be jailed, fined, or otherwise penalized for practicing their religion in the United States in the twenty-first century.” Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J.L. & Religion 139, 145 (2009).

²⁰ See Mark L. Rienzi, *Why Tolerate Religion?* By Brian Leiter. Princeton, N.J.: Princeton University Press. 2013. Pp. Xv, 187. *Defending American Religious Neutrality.* by Andrew Koppelman. Cambridge, Mass.: Harvard University Press. 20, 127 Harv. L. Rev. 1395, 1395 & n.1 (2014) (“The United States is a place of enormous religious diversity.”), *citing* The Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey 10 (2008), archived at <http://perma.cc/L58D-977M> (“The Landscape Survey details the great diversity of religious affiliation in the U.S. at the beginning of the 21st century. The adult population can be usefully grouped into more than a dozen major religious traditions that, in turn, can be divided into hundreds of distinct religious groups.”)).

²¹ McConnell, *supra* note 17, at 184. As Professor McConnell notes, “[f]rom the point of view of religious believers, it does not really matter whether a law is directed at them; the injury to their religious practice is the same regardless of the legislators’ motivation.” *Id.* at 185.

²² *Id.*

and remains essential to maintaining that diversity. RFRA ensures religious diversity by protecting all religions, including the hundreds of numerically disadvantaged faiths, by increasing the likelihood that those faiths will obtain sensible exemptions from well-intentioned laws that unknowingly restrict their religious practices. In short, “[a]ccommodations are a commonsensical way to deal with the differing needs and beliefs of the various faiths in a pluralistic nation.”²³

3. RFRA allows Congress to legislate without fear that it unknowingly will burden a religious practice: RFRA is a commonsense approach that allows Congress to legislate without holding extensive hearings on every potential effect that a bill might have on Americans’ religious liberty. This is particularly comforting given that much legislation changes significantly as it wends its way through the legislative process. Substantive language changes often are made long after the opportunity for hearings has passed.

4. RFRA protects against administrative abuses of delegated rulemaking authority: As we saw in *Burwell v. Hobby Lobby Stores, Inc.*,²⁴ RFRA protects against administrative abuses of agencies’ rulemaking authority. As Chief Justice Roberts presciently observed in *Gonzales v. O Centro*, RFRA rebuffs the “classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”²⁵ Or as scholars have observed, “boilerplate findings and assertions by the government about a program’s aims and importance are not enough to sustain its burden in RFRA cases.”²⁶

5. Rather than giving religious citizens a free pass, RFRA gives citizens much needed leverage in their dealings with government officials. RFRA ensures that the government must explain its action if it restricts citizens’

²³ Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 694 (1992) (“Exemptions from such laws are easy to craft and administer, and do much to promote religious freedom at little cost to public policy.”).

²⁴ 134 S. Ct. 2751 (2014).

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

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

religious exercise. By requiring government officials to explain their unwillingness to accommodate citizens' religious exercise, RFRA enhances government's transparency and accountability. RFRA incentivizes government officials to find mutually beneficial ways to accomplish a governmental interest while respecting citizens' religious exercise – a win-win solution for all.

6. RFRA reduces long-term social and political conflict: RFRA enables social stability in a religiously diverse society. In the long-term, it minimizes the likelihood of political divisions along religious lines. The reason is simple: “religious liberty reduces social conflict; there is much less reason to *fight* about religion if everyone is guaranteed the right to *practice* his religion.”²⁷ In other words, RFRA implements the Golden Rule in the context of religious liberty: by protecting others' religious liberty, we protect our own religious liberty. Just as controversy frequently flares when free speech protections are triggered for an unpopular speaker, so controversy will sometimes accompany a particular application of RFRA. But our society has prospered by protecting all Americans' free speech, and it will prosper only if all Americans' free exercise of religion is protected.

7. RFRA honors the deep American tradition of granting exemptions for religious citizens: Religious liberty is embedded in our Nation's DNA. Respect for religious conscience is not an afterthought or luxury, but the very essence of our political and social compact. RFRA embodies America's tradition of protecting religious conscience that predates the United States itself. In seventeenth century Colonial America, Quakers were exempted in some colonies from oath taking and removing their hats in court.²⁸ Jewish persons were sometimes granted exemptions from marriage laws inconsistent with Jewish law. Exemptions from paying taxes to maintain established churches spread in the eighteenth century.

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

²⁸ See, e.g., Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73 (1990) (discussing religious exemptions in early America); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1804-1808 (2006) (same); Laycock, *supra* note 19, at 139-153 (same).

Perhaps most remarkably, when America was fighting for its liberty against the greatest military power of that time, Congress stalwartly adopted the following resolution:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.²⁹

8. RFRA protects the right of all women and men to seek truth:

Perhaps most importantly, religious exemptions allow human beings to seek the truth. As Professor Garnett posits, “human beings are made to seek the truth, are obligated to pursue truth and to cling to it when it is found, and [] this obligation cannot meaningfully be discharged unless persons are protected against coercion in religious matters.” Therefore, “secular governments have a moral duty . . . to promote the ability of persons to meet this obligation and flourish in the ordered enjoyment of religious freedom, and should therefore take affirmative steps to remove the obstacles to religion that even well-meaning regulations can create.”³⁰

9. RFRA reinforces America’s foundational commitments to religious liberty as an inalienable right and to a healthy pluralism essential to a free society: RFRA is remarkable not only for Congress’s renewal of its pledge to respect and protect religious liberty – first given in 1789 when Congress framed the First Amendment – but also for Congress’s renewed pledge to the constitutional principle that our government is to be one of limited power. Rarely does any government voluntarily limit its own power, but RFRA stands as such a too-rare reminder that America’s government is a limited government that defers to its citizens’ religious liberty except in compelling circumstances. By

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

³⁰ Garnett and Dunlap, *supra* note 12, at 281. See also, Laycock, *supra* note 3, at 842 (“Protecting religious liberty reduces human suffering; people do not have to choose between incurring legal penalties and surrendering core parts of their identity.”)

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

B. What RFRA Does Not Do

Contrary to its critics' claims, RFRA does not predetermine the outcome of any case or claim. As Senator Kennedy accurately predicted during hearings on RFRA, "Not every free exercise claim will prevail."³¹ Instead, RFRA implements a *sensible balancing* test by which the *religious claimant* first must demonstrate that the government has substantially burdened a sincerely held religious belief.³² The government then must demonstrate a compelling interest that cannot be achieved by a less restrictive means. As the Supreme Court explained in *O Centro*, "Congress has determined that courts should strike *sensible balances*, pursuant to a compelling interest test that requires the Government to address the particular practice at issue."³³ As a RFRA scholar has explained, "[t]he compelling interest test is best understood as a balancing test with the thumb on the scale in favor of protecting constitutional rights."³⁴

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

³¹ *The Religious Freedom Restoration Act*: Hearing Before the Senate Committee on the Judiciary on S. 2969, A Bill to Protect the Free Exercise of Religion 2 (statement of Sen. Kennedy).

³² 42 U.S.C. § 2000bb(a)(5) ("the compelling interest test as set forth in prior Federal court rulings is a workable test for striking *sensible balances* between religious liberty and competing prior governmental interests") (emphasis supplied).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fortunately for religious liberty, Congress is bicameral, and the July 2014 attempt to weaken RFRA failed. In 1993, by passing RFRA, Congress re-committed the Nation to the foundational principle that American citizens have the God-given right to live peaceably and undisturbed according to their religious beliefs. In 2015, Congress must remain vigilant to ensure that RFRA remains

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

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

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

⁴¹ See Hearing, *supra* note 13, at 8 (statement of Sen. Metzenbaum) (“We all know that America . . . was founded as a land of religious freedom, as a haven from religious persecution. . . . I am proud to be an original cosponsor of the Religious Freedom Restoration Act, which restores the high standards for protecting religious freedom.”).