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:
"The State of Religious Liberty in America"
February 16, 2017

Chairman King, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me to testify at this hearing on "*The State of Religious Liberty in America.*" I am Kim Colby, the Director of the Christian Legal Society's Center for Law and Religious Freedom, where I have worked for three decades to advance religious freedom for all Americans.

The Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors, which serves student groups at approximately 140 law schools. CLS has long believed 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. For that reason, CLS was instrumental in the bipartisan passage of the Equal Access Act of 1984 that protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses.[1] For over 30 years, the Act has protected both religious and LGBT student groups seeking to meet for disfavored speech.[2] For the same reason, CLS recently joined with six other Christian campus ministries in issuing a public statement "denounc[ing] acts of violence against Muslim students and Muslim campus organizations."[3]

CLS also played a leading role in the 68-organization coalition that supported the bipartisan passage of the Religious Freedom Restoration Act of 1993 ("RFRA"), the preeminent federal protection for all Americans' religious freedom, as well as the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which protects all prisoners' religious freedom, as well as all local congregations' religious freedom in the zoning context.[4]

I. In Both Its Rhetoric and Reasoning, the Report Released by the United States Commission on Civil Rights Displays an Intolerance toward Americans' Religious Freedom Unworthy of the Federal Government.

Six years ago, a leading religious freedom scholar, Professor Doug Laycock, expressed deep concern about the current state of religious freedom in America, when he observed:

> Religious liberty is often controversial in specific application. But at least in the United States, it has long been popular in principle. It was not always so, and it may be changing back again. *For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle* -- suggesting

[1] 20 U.S.C. §§ 4071-4074 (2012). *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement) (recognizing CLS's role).

[2] *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (Act protects religious student group); *Straights and Gays for Equality v. Osseo Area School No. 279*, 540 F.3d 911 (8th Cir. 2008) (Act protects LGBT student group).

3 InterVarsity Christian Fellowship/USA, *et al*., *Evangelical Campus Ministry Statement to Muslim Campus Groups* (Nov. 30, 2016), http://intervarsity.org/news/intervarsity-supports-religious-freedom (statement of InterVarsity Christian Fellowship/USA; Chi Alpha Campus Ministries, USA; Christian Legal Society; Christian Medical and Dental Societies; Coalition for Christian Outreach; The Navigators; and Young Life).

[4] RFRA, 42 U.S.C. §§ 2000bb *et seq.* (2012); RLUIPA, 42 U.S.C. §§ 2000cc *et seq.* (2012).

> that free exercise of religion may be a bad idea, or at least, a right to be minimized.[5]

As if to confirm Professor Laycock's warning, on September 7, 2016, the United States Commission on Civil Rights ("Commission") released a briefing report entitled *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties.*[6] In its tone and substantive content, including its findings and recommendations, the Commission's Report marks a new and deeply 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 harmful and negative.

The Report arose out of a briefing held by the Commission on March 22, 2013. The purpose of the briefing was "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." Rep. at 1. The Commission called eleven witnesses, who provided written statements addressing how to reconcile any such conflict that might arise. [7] The Commission also received 110 written public comments, "an unusually large number for a Commission briefing," the overwhelming number of which "generally supported religious exemptions" and religious institutions' autonomy. Rep. at 23.

Three years later, the Commission issued a 296-page report with findings and recommendations that adopted the extreme position that governments should nearly always subordinate citizens' and religious institutions' religious freedom claims to nondiscrimination claims -- no matter how strong a specific religious freedom claim, or how weak a nondiscrimination claim, might be. In the Commission's view, this zero-sum result is the preferred outcome even when a citizen's religious freedom claim and a citizen's nondiscrimination claim could both be accommodated without denying either citizen the right to live according to her deepest convictions.

A. The Report represents a federal agency's unprecedented condemnation of religious freedom.

In his one-page statement, Commission Chairman Martin Castro disparaged religious freedom in terms not normally used by an American official in an official government report. Quoted in its entirety, Chairman Castro's statement declared:

> 'The government of the United States is not, in any sense, founded on the Christian religion.' – *John Adams*

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[5] Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011) (emphasis supplied).

[6] U.S. Comm'n. on Civ. Rts., *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, Briefing Rep. (Sept. 7, 2016), http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF (hereinafter "Report" or "Rep.").

[7] As one of the eleven witnesses, I submitted a written statement. Rep. at 181-212 (written statement of Kimberlee Colby).

> 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.
>
> Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others. However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality. In our nation's past religion has been used to justify slavery and later, Jim Crow laws. We now see "religious liberty" arguments sneaking their way back into our political and constitutional discourse (just like the concept of "state rights") in an effort to undermine the rights of some Americans. This generation of Americans must stand up and speak out to ensure that religion never again be twisted to deny others the full promise of America.

Rep. at 29.

Commissioners Achtenberg, Kladney, and Yaki joined Chairman Castro in a lengthier separate statement remarkable for its dismissive treatment of religious freedom. The statement concludes with a declaration that "[n]ondiscrimination laws stand as a bulwark against the assaults of intolerance and animus." Rep. at 40. But, of course, religious freedom protections are equally important "as a bulwark against the assaults of intolerance and animus." Indeed, because religious people so often have been the targets of *governmental* "assaults of intolerance and animus," American nondiscrimination laws universally include "religion" in even the most succinct list of protected categories, along with race, color, and national origin. How ironic that nondiscrimination laws that have always protected religious persons are now used to stigmatize religious persons because they wish to live according to their long-held religious beliefs regarding marriage and sexual conduct.

History's most tragic recurring lesson is that governments at some point almost inevitably target individuals and people groups for persecution based on their religious beliefs, practices, or identities. But America has chosen a different path. With some sobering exceptions, our Nation has dedicated itself to religious freedom for all citizens. This promise of religious freedom has drawn millions to America as the only reliable haven from ruthless religious persecution, both past and present.

Sadly, the Commission's Report itself represents a sharp departure from our Nation's bipartisan tradition of enacting religious exemptions as a tried and true vehicle for protecting religious freedom. The Report goes so far as to single out a particular set of Christian beliefs

regarding marriage and sexual conduct for disdain and condemnation.[8] In so doing, the Report itself exemplifies the very "intolerance and animus" that the Commission claims to deplore.[9]

B. The Report's findings and recommendations sharply depart from the Nation's bipartisan tradition of employing exemptions to protect religious freedom.

As a general rule, of course, most laws specifically include exemptions for all manner of reasons. That is, exemptions are the norm in law; and religious exemptions are a small subsection of the multitude of exemptions scattered throughout the U.S. Code and state laws. Therefore, painting religious exemptions as "abnormal" or a "departure from the rule of law" is inaccurate. Religious exemptions are a longstanding, commonplace feature of the American legal landscape.

Moreover, if the "rule of law" refers to the desire to ensure that citizens receive substantive equal treatment under the law, then religious exemptions are essential to advancing that end of ensuring that religious citizens may participate fully and equally in our society. And to state an obvious fact, which seems to be frequently glossed over, when a legislature enacts a religious exemption through its lawful legislative process, that exemption is law and, therefore, is not a departure from the rule of law in any rational understanding of the concept.

Without religious exemptions, religious freedom cannot be adequately realized. Without religious exemptions, religious minorities have no legal redress when (not if) the majority, either intentionally or unintentionally, makes some aspect of their religious conduct illegal. Nor will "majority" faiths have redress should the government pass a law that has the effect of requiring them to do something prohibited by their faith or prohibiting them from doing something required by their faith.

1. Religious exemptions run deep in American tradition.

America's tradition of protecting religious conscience 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. Jewish persons were sometimes granted exemptions from colonial marriage laws that prevented obedience to Jewish marriage laws. Exemptions from paying taxes to maintain established churches spread in the late Eighteenth Century. Even though perpetually outnumbered in battle, George Washington urged respect for Quakers' exemption

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[8] *See, e.g., id.* at 29, 31. As Professor Marc DeGirolami, who also testified at the 2013 briefing, noted when the Report was released: "[T]he crown jewel in this disaster is Commission Chairman Martin Castro's one-paragraph statement at page 29 . . . . [L]et me only discuss the chairman's choice of epigraph. . . .[I]t suggests that for all the commission's talk of nondiscrimination, it harbors hostility to one religion specifically: Christianity. The commission should be upfront about it, and simply state that its real object is to repudiate the country's Christian heritage and to target Christianity for special legal disability." Marc DeGirolami, *The U.S. Commission on Abolishing Religious Freedom*, Library of Law and Liberty (Sept. 27, 2016), http://www.libertylawsite.org/2016/09/27/the-u-s-commission-on-abolishing-religious-freedom/.

[9] Not all commissioners view religious freedom as a threat. In their individual dissenting statements, Commissioner Gail Heriot and Commissioner Peter Kirsanow reminded their fellow commissioners that religious freedom is an unalienable human right that is the foundation for other basic civil liberties, including freedom of speech and equality itself. Rep. at 42-154.

from military service.[10] During World War II, Jehovah's Witness schoolchildren won exemption from compulsory pledges of allegiance to the flag in the landmark decision of *West Virginia Board of Education v. Barnette.*[11]

"Religion-specific exemptions are relatively common in our law, even after [*Employment Division* v.] *Smith*[, 494 U.S. 872 (1990)]." [12] In *Smith,* the Supreme Court severely weakened the constitutional protection for the free exercise of religion. Responding to *Smith* with nearly unanimous bipartisan support, Congress passed RFRA in 1993, in order to provide a broad statutory religious exemption that requires the government to demonstrate a compelling interest which it is unable to achieve by less restrictive means before it can substantially burden citizens' religious exercise. Congress also enacted other modern exemptions, including: RLUIPA's protection for all religious congregations and prisoners in 2000; the American Indian Religious Freedom Act Amendments of 1978 to protect Native Americans' religious exercise;[13] and the Religious Liberty and Charitable Donation Protection Act of 1998 to protect religious congregations.[14]

Religious exemptions are embedded in the Nation's DNA. Respect for religious conscience is not a novel idea or an afterthought or a luxury, but the very essence of the American political and social compact.

2. Several of the Report's findings and recommendations ignore this basic American commitment to religious exemptions as an essential element of religious freedom.

In its findings and recommendations, which are contained in three pages at Rep. 25-27, the Report seems oblivious to what is necessary for authentic religious freedom to survive. These deeply flawed findings and recommendations include the following:

a. Finding No. 2 ignores the Supreme Court's recent unanimous ruling that subordinated a nondiscrimination claim to a religious freedom claim.

Finding No. 2 states that "[t]he U.S. Supreme Court has recently reaffirmed the foremost importance of civil liberties and civil rights, including non-discrimination laws and policies, in three significant cases." Rep. at 25. One would expect the finding to begin with the Court's only recent decision that directly involved a federal nondiscrimination law and a religious freedom

[10] *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1409, 1466-73 (1990) (describing many 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).

[11] 319 U.S. 624 (1943).

[12] Michael McConnell, *The Problem of Singling Out Religion,* 50 DePaul L. Rev. 1, 3 (2000).

[13] 42 U.S.C. § 1996 (2012).

[14] 11 U.S.C. § 548(a)(2) (2012).

claim, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[15] particularly since the briefing had focused upon that case.

In *Hosanna-Tabor*, a unanimous Court ruled:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.[16]

Hosanna-Tabor echoed an earlier unanimous decision, *Corporation of Presiding Bishop v. Amos*,[17] in which the Supreme Court upheld the constitutionality of Section 702 of Title VII of the Civil Rights Act of 1964,[18] which exempts religious employers from Title VII's overall prohibition on religious discrimination. The *Amos* Court upheld a religious organization's decision to fire an employee who did not conduct himself in accordance with the religious employer's religious standards of conduct, rejecting the employee's misguided claim that the religious exemption violated the Establishment Clause.

Finding No. 2 completely ignores *Hosanna-Tabor* while focusing on three cases in which the Court did not directly decide a conflict between a nondiscrimination law and a religious freedom claim: *Christian Legal Society v. Martinez*[19]; *EEOC v. Abercrombie and Fitch Stores, Inc.*[20]; and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).[21] In *Martinez*, the majority was explicit that it was not deciding whether a university's nondiscrimination policy could be used to override a religious organization's right to require that its leaders and members agree with its religious beliefs.[22] In *Obergefell*, while the majority emphasized that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach

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[15] 565 U.S. 171 (2012).

[16] *Id.* at 196.

[17] 483 U.S. 327 (1987).

[18] 42 U.S.C. § 2000-e.

[19] 561 U.S. 661 (2010).

[20] 135 S. Ct. 2028 (2015).

[21] 135 S. Ct. 2584 (2015).

[22] 561 U.S. at 678 ("This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution."); *id.* at 678 n. 10; *id.* at 698 (Stevens, J., concurring) (noting that the Court "confines its discussion to the narrow issue presented by the record . . . the all-comers policy") (citation omitted).

the principles that are so fulfilling and so central to their lives and faiths,"[23] no religious claim or nondiscrimination law was at issue in the case.

But it is the Commission's treatment of *Abercrombie* that is truly odd. The case involved Title VII of the Civil Rights Act of 1964,[24] a federal nondiscrimination law that acts as a religious exemption in employment situations. Like many employers, Abercrombie and Fitch had a dress code for its employees, which prohibited employees from wearing "caps." A young Muslim woman who applied for a job was interviewed but did not receive an offer because she wore a headscarf to the interview in accordance with her religious beliefs. She sued Abercrombie and Fitch pursuant to Title VII because she was denied the job due to her wearing the headscarf.

If the Commission were correct in its overall conclusion that religious exemptions should not be legally required, then the Muslim job applicant would have no legal redress. Abercrombie and Fitch would be allowed to apply its lawful dress code evenhandedly to all job applicants.

But federal nondiscrimination law actually requires employers to provide religious exemptions from their otherwise lawful employment policies to religious applicants and employees, if they can do so without undue hardship. Therefore, as the Supreme Court held, federal nondiscrimination law required Abercrombie and Fitch to provide the Muslim woman with a religious exemption. Without Title VII's religious exemption, the Muslim woman would have had no legal recourse despite being denied employment based on her religious practice.

The Commission's characterization of *Abercrombie* misses the point that religious exemptions are an essential component of federal nondiscrimination laws, a striking example of the importance of religious exemptions in actually preventing discrimination.[25]

b. Findings No. 4 and No. 6, as well as Recommendation No. 1, misguidedly urge only "narrow" protection for religious freedom.

Finding No. 6 asserts that the Supreme Court has "recently affirmed the *narrowness* of the analytical frame work within which claims of government interference with the free exercise of religion must be construed under RFRA . . . and that meticulous factual inspection is necessary in the process of adducing – or rejecting – RFRA exceptions to civil liberties and civil rights protections." Rep. at 26 (emphasis supplied). Finding No. 4 similarly claims that "religious exemptions from non-discrimination laws and policies must be weighed carefully and defined *narrowly* on a fact-specific basis." Rep. at 25 (emphasis supplied). Recommendation No. 1

[23] 135 S. Ct. at 2607.

[24] 42 U.S.C. § 2000e-2(a) & § 2000(j).

[25] For helpful scholarly thinking on protecting religious freedom and nondiscrimination principles, see Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, Yale L.J. Forum 369 (March 16, 2016), http://www.yalelawjournal.org/pdf/Laycock_PDF_wgmv6xbh.pdf; Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279 (2013); Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 Harv. J. L. & Gender 103 (2015); Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 Notre Dame L. Rev. 1341 (2016); Richard W. Garnett, *Confusion about Discrimination*, The Public Discourse (Apr. 5, 2012), http://www.thepublicdiscourse.com/2012/04/5151/; John D. Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference* (U. Chicago Press 2016).

warns that "[o]verly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as *narrowly* as applicable law requires." Rep. at 26 (emphasis supplied).

While it is certainly true that courts generally have not held in specific cases that a RFRA claim outweighs a nondiscrimination claim (which is why the claim that the federal RFRA and state RFRAs are "licenses to discriminate" is pure hysteria), it is not true that the Supreme Court has "affirmed the narrowness of the analytical frame work . . . under RFRA." Rep. at 26. Instead the Supreme Court has instructed the lower courts to engage in meticulous factfinding and a rigorous analytical frame work in evaluating RFRA claims, but the meticulous factfinding and rigorous analysis are particularly to be applied to the *government's* claim that it has a compelling state interest unachievable by a less restrictive alternative. Certainly courts must satisfy themselves that a RFRA claimant's religious beliefs are sincere and substantially burdened; however, the inquiries as to the religious claims are to be conducted with an appropriate deference to the claimant's understanding of her religious beliefs.

Contrary to the Report, recent Supreme Court decisions have made clear that the government bears the burden of demonstrating that 1) it has a compelling interest that justifies substantially burdening a citizen's religious exercise and 2) the interest cannot be achieved by a less restrictive means. The Court has instructed lower courts to engage in meticulous factfinding and rigorous analysis of the government's interest and means in three cases in the past decade: *Gonzales v. O Centro*[26]; *Burwell v. Hobby Lobby*[27]*;* and *Holt v. Hobbs*.[28]

In 2006, in *O Centro,* a unanimous Court held that "RFRA . . . contemplate[s] an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened."[29] In 2014, in *Hobby Lobby*, the Court assumed, without deciding, that the government might have a compelling interest, but that the government failed to demonstrate that it could not achieve its interest by a less restrictive means.

In 2015, in *Holt*, a unanimous Court closely scrutinized the factual basis for, and ultimately rejected, prison officials' claims that their denial of a Muslim prisoner's request to grow a ½-inch beard for religious reasons met the rigorous standards of RFRA's sister statute, RLUIPA. While agreeing that prison security was generally a compelling interest, the Court scrutinized the facts and determined that they did not sustain prison officials' claims of a compelling interest achieved by a less restrictive alternative as to this particular prisoner. As the Court explained:

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[26] 546 U.S. 418 (2006).

[27] 134 S. Ct. 2751 (2014).

[28] 135 S. Ct. 853 (2015).

[29] 546 U.S. at 430-431.

> RLUIPA, like RFRA, contemplates a " 'more focused' " inquiry and " 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" — the particular claimant whose sincere exercise of religion is being substantially burdened.' " *Hobby Lobby*, 573 U.S., at —, 134 S.Ct., at 2779 (quoting *O Centro*, *supra*, at 430–431, quoting § 2000bb–1(b))). RLUIPA requires us to " 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' " and "to look to the marginal interest in enforcing" the challenged government action in that particular context. *Hobby Lobby*, *supra*, at —, 134 S.Ct., at 2779 (*quoting O Centro*, *supra*, at 431; alteration in original).[30]

The Court could not be clearer: RFRA's analytical frame work and meticulous factfinding are not intended to narrow religious freedom but to narrow the ability of government to restrict citizens' religious exercise. Only if the government demonstrates to a court a factual basis for its claim that it is achieving a compelling governmental interest by the least restrictive means may the government override citizens' religious exercise.

c. Recommendation No. 3 mischaracterizes the holding in *Employment Division v. Smith.*

Recommendation No. 3 claims that "[i]n the absence of controlling authority to the contrary such as a state-level, RFRA-type statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holdings of *Employment Division v. Smith*, which protect religious beliefs rather than conduct." This claim is problematic for numerous reasons.

First, as *Smith* illustrated, its holdings protected both belief and conduct:

> [T]he "exercise of religion" often involves not only belief and profession but the *performance of (or abstention from) physical acts*: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. . . . [A] State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[31]

[30] 135 S. Ct. at 863.

[31] 494 U.S. at 877-78 (emphasis supplied).

Second, the *Smith* decision made clear that Congress and state legislatures could adopt statutory religious exemptions. The *Smith* decision rests on a theory of judicial restraint that is wary of judges finding religious exemptions as a matter of constitutional interpretation. *Smith's* holding on that point was persuasively critiqued by the leading religious freedom scholars at the time of the decision, and I believe it to be wrong. But regardless of the correctness of *Smith*'s concern regarding judges finding *constitutionally required* religious exemptions, the *Smith* Court made clear that legislatures are free to enact *statutory* religious exemptions.[32] Thus, Recommendation No. 3's implication that *Smith* frowned on statutory religious exemptions is unfounded.

Third, the Court has amply demonstrated in its unanimous rulings in *Gonzales v. O Centro, supra,* and *Holt v. Hobbs, supra,* that statutory religious exemptions are not only permissible but will be given a deferential, broad interpretation by the Court. The author of *Smith*, Justice Scalia, joined these unanimous decisions, which upheld Congress's generous religious exemptions in RFRA and RLUIPA. Indeed, Justice Scalia joined the *Hosanna-Tabor* decision, which limited the *Smith* ruling to cases of criminal physical conduct.[33] And Justice Scalia provided the fifth vote in *Hobby Lobby*, which observed that "RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required."[34]

Yet again, the Report creates a narrative that advocates only for the narrowest of religious exemptions when, as Supreme Court decisions demonstrate, broad religious exemptions are constitutionally permissible and good public policy if our society is to have robust religious freedom.

d. The Report fundamentally misconceives the vital role played by the Religious Freedom Restoration Act in creating a level playing field for all Americans' religious exercise.

By urging States with their own RFRAs to amend them and "guarantee that those statues do not unduly burden civil liberties and civil rights with status-based discrimination," Rep. at 27, Recommendation No. 3 encapsulates the Commission's fundamental misunderstanding of the good that RFRA does and why religious exemptions, such as RFRA, are essential if religious freedom is to survive. Recommendation No. 4 further demonstrates this fundamental misunderstanding of RFRA with its call for "[f]ederal legislation . . . to clarify" RFRA's protection for religious exercise. Any amendment to RFRA would be a severe blow to all Americans' religious freedom.

Congress's passage of RFRA was a singular achievement. For 24 years, RFRA has been *the* preeminent federal safeguard of all Americans' religious freedom. As heretical as it may

[32] *Id.* at 890.

[33] 565 U.S. at 189-190.

[34] 134 S. Ct. at 2767.

sound, RFRA actually protects most Americans' religious freedom more fully than the First Amendment does.

In response to the *Smith* decision, a 68-member coalition of diverse religious and civil rights organizations coalesced to urge Congress to restore substantive protection for religious freedom. Senator Edward Kennedy and Senator Orrin Hatch together led the bipartisan effort to pass RFRA in the Senate by a vote of 97-3. RFRA passed in the House by a unanimous voice vote.[35] President Clinton signed RFRA into law on November 16, 1993. In his signing statement, President Clinton observed, "We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom." 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."[36]

The Commission Report fails to understand what RFRA does and 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."[37] 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. 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."[38]

Only after hearing all sides does a judge determine whether the government's interest overrides a citizen's religious exercise on the facts of the specific case. In the twenty-four 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.

RFRA creates a level playing field for Americans of all faiths and puts "minority" faiths on an equal footing with "majority" faiths. 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 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.

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[35] 139 Cong. Rec. 26,416 (cumulative ed. Oct. 27, 1993); 139 Cong. Rec. H8715 (daily ed. Nov. 3, 1993).

[36] President William J. Clinton, *Remarks on Signing the Religious Freedom Restoration Act of 1993* (Nov. 16, 1993), http://www.gpo.gov/fdsys/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf.

[37] *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).

[38] 546 U.S. at 439 (emphasis supplied). *See also id.* ("Congress . . . legislated 'the compelling interest test' as the means for the courts to 'strik[e] *sensible balances* between religious liberty and competing prior governmental interests.'") (emphasis supplied).

If all Americans belonged to the same 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. 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." 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." [39]

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 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."[40]

Conclusion

Religious freedom assures all Americans that their faith will be respected and protected regardless of shifting political winds. As Professor Michael McConnell presciently wrote:

> Religious beliefs have always generated controversy. But religious freedom -- the right of individuals and groups to form their own religious beliefs and to practice them to the extent consistent with the rights of others and with fundamental requirements of public order and the common good -- has long been a bedrock value in the United States and other liberal nations. 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.
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> . . . Recently, however, this consensus seems to be weakening--largely from fallout over culture-war issues such as abortion and the legal recognition of same-sex relationships. Many activists on these

[39] Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181, 184, 185 (1992).

[40] Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 694 (1992).

> issues see religion as antagonistic to their interests, and are responding in kind. A new whiff of intolerance is in the air.[41]

Misuse of nondiscrimination policies to exclude religious persons from the public square threatens the pluralism at the heart of our free society. Those who insist that we must choose between religious liberty and nondiscrimination policies demand a zero-sum game in which religious liberty, nondiscrimination principles, and pluralism all ultimately lose.

[41] Michael W. McConnell, *Why Protect Religious Freedom?*, 123 Yale L. J. 770, 772-773 (2014).