Written Statement
of

Maggie Garrett, Legislative Director
and
Dena Sher, Assistant Legislative Director

Americans United for Separation of Church and State

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Subcommittee on the Constitution

the Hearing on

"The State of Religious Liberty in the United States"

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Chairman King, Ranking Member Cohen, and members of the Subcommittee, thank you for the opportunity to submit a statement for the record for the hearing on "The State of Religious Liberty in America."

Founded in 1947, Americans United is a nonpartisan advocacy and educational organization dedicated to preserving the constitutional principle of church-state separation, which is the foundation of true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to practice religion—or not—as they see fit without government interference, compulsion, support, or disparagement. We have more than 120,000 members and supporters across the country.

The United States Constitution grants us strong religious freedom protections and as a result, America is one of the most religiously diverse countries in the world.

This hearing seeks to examine the state of religious liberty and our statement focuses on five issues we believe pose a threat to religious freedom: President Trump's "Muslim ban," the misuse of the Religious Freedom Restoration Act (RFRA), the draft executive order on religious freedom, efforts to repeal or undermine enforcement of the Johnson Amendment, and attacks on state constitutional protections for religious freedom.

Obviously these policies have resulted—or would result—in harm to others. But something else is harmed too: they betray real religious freedom. Religious freedom is a fundamental American value. It guarantees us the right to believe or not as we see fit, but it doesn't give us a right to harm others or ignore laws designed to protect our welfare and our democracy. Enshrining discrimination in our nation's laws is not religious freedom. Nor is undermining democratic principles. These policies, some enacted in the name of religious freedom, weaken the noble principle.

President Donald Trump's "Muslim Ban"

On the campaign trail, then-candidate Donald Trump promised a "total and complete shutdown of Muslims entering the United States."[1] On January 27, President Trump delivered on his promise when he signed Executive Order 13,769.[2] The order does three main things: It "severely restricts immigration from seven Muslim countries, suspends all refugee admission for 120 days, and bars all Syrian refugees indefinitely."[3]

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[1] Press Release, Donald J. Trump, Statement on Preventing Muslim Immigration, Dec. 7, 2015, http://bit.ly/1jKL2eW.
[2] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017), http://bit.ly/2kk9Or0.
[3] Krishnadev Calamur, *What Trump's Executive Order on Immigration Does—and Doesn't Do*, Atlantic, Jan. 30, 2017, http://theatln.tc/2jJtb97.

That the executive order was meant to be Mr. Trump's Muslim ban is clear. For example, Rudy Giuliani has admitted that the order is the result of then President-elect Trump having tasked him with figuring out how to "legally" implement the "Muslim ban."[4] Mr. Trump further proved the order is targeted at Muslims when, the day signed the order, he declared that his administration will begin favoring Christian refugees[5] and that the order will not apply to people from banned countries who also hold an Israeli passport.[6]

This executive order is a breach of the foundational American promise of religious freedom for all. The Constitution protects the right of Muslims to exercise their beliefs, just like people who follow any other religion or no religion. Indeed, people of all faiths and backgrounds have long sought refuge in our country. Catholics, Protestants, Eastern Orthodox Christians, Jews, Muslims, Buddhists, Sikhs, Hindus and atheists, among others, have all come to America because of our country's promise of religious freedom. President Trump's order, however, turns its back on this deeply rooted tradition of religious freedom.

Furthermore, the order violates the Establishment Clause of the First Amendment to the Constitution:[7] Its "clearest command" is to forbid the government from officially preferring one religious denomination over another.[8] The order, in contrast, singles out Muslim-majority countries and subjects those who were born in or come from those countries (principally Muslims) to exclusion, detention, and expulsion, based on their faith. At the same time, the order affords exemptions and more favorable treatment to "religious minorit[ies]" in those countries—in other words, non-Muslims.

Because the executive order treats Muslims differently than non-Muslims, it must withstand strict scrutiny.[9] The government, however, has failed to demonstrate a compelling government interest. It asserts that the order was signed to enhance our national security, but has "not produced any evidence, beyond the text of the [order] itself" to support this assertion[10] or how the order furthers this interest.

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[4] Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—and Ordered a Commission to Do It 'Legally'*, Wash. Post, Jan. 29, 2017, http://wapo.st/2l15WZA; *See also* Interview with Lesley Stahl, *60 Minutes*, July 17, 2017, http://cbsn.ws/29NrLqj.

[5] David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN, Jan. 27, 2017, http://bit.ly/2kCqG8M.

[6] *See Message from U.S. Embassy Tel Aviv Consular Section*, U.S. Embassy in Israel, http://bit.ly/2l0KWB8.

[7] *See, e.g.*, Brief for Americans United for Separation of Church & State as Amicus Curiae, *Washington v. Trump*, No. 2:17-cv-00141 (W.D. Wash. Feb. 2, 2017), http://bit.ly/2knOQbB.

[8] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

[9] *Id.* at 246.

[10] Order Granting Preliminary Injunction, *Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB) at 17 (E.D. Va. Feb. 13, 2017).

The Establishment Clause also prohibits the government from "making adherence to a religion relevant in any way to a person's standing in the political community";[11] "the government may not favor one religion over another" by endorsing one or condemning another.[12] Looking at the history of the policy in question, which Courts have ruled is relevant to the constitutional analysis, it is clear that the government is disfavoring Muslims.[13] The genesis of the order and the "specific sequence of events leading to"[14] its signing communicates that the law was intended to be a "Muslim ban" and that Muslims are "outsiders, not full members of the political community."[15]

This detrimental policy only confirms the fears many people have had following the divisive rhetoric of the presidential campaign. It will further stoke anti-Muslim sentiment and anti-Muslim hate crimes that are already on the rise.[16] And at base, an attack on people who follow one faith undermines the protections that apply equally to all of us, no matter our religion or belief. Our country is stronger when we stand united to defend our values.

Misuse of the Religious Freedom Restoration Act (RFRA)

The federal Religious Freedom Restoration Act (RFRA) and its state counterparts are at the center of debates over religious freedom. There are serious disagreements over the reach of RFRA and whether it can be used to trump laws prohibiting discrimination or ensuring access to vital health care services.

In 1990, the Supreme Court ruled in *Employment Division of Oregon v. Smith*[17] that neutral and generally applicable laws do not violate the Free Exercise Clause even if they result in a substantial burden on religious exercise. People from many faiths and denominations, legal experts, and civil liberties advocates, including Americans United, saw this as a drastic change that would lessen constitutional protection for religious liberty. We formed a broad coalition to advocate for a congressional response to the *Smith* decision and in 1993, Congress passed RFRA.

RFRA was intended to reflect the state of the law before *Smith*: to provide heightened but not unlimited protections for religious exercise.
Soon after enactment of RFRA, however, commercial landlords with religious objections to cohabitation outside of marriage argued that the RFRA standard granted them the right to ignore housing-discrimination laws and refuse housing to

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[11] *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).
[12] *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005).
[13] *See id.* at 866.
[14] *Id.* at 862.
[15] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000).
[16] Matt Zapotosky, *Hate Crimes Against Muslims Hit Highest Mark Since 2001*, Wash. Post, Nov. 14, 2016, http://wapo.st/2lHUyoJ.
[17] 494 U.S. 872, 890 (1990).

unmarried couples.[18] This prompted concern by some of RFRA's leading proponents, including Americans United, that the federal law could be used as a defense to thwart civil rights claims. Indeed, after the Supreme Court held in 1997 that RFRA could not apply to the states, Congress attempted to pass a new bill[19] that would have applied the RFRA standard to the states, but it failed to pass because of concerns that the law would be used to justify discrimination.

Over time, this concern has grown stronger and is now shared more broadly as we've seen the RFRA standard misused. Here are some examples:

Discrimination in Healthcare

- In the now-infamous *Hobby Lobby* case,[20] the Supreme Court held that businesses can use RFRA to obtain an exemption from the Affordable Care Act's rule requiring their health insurance plans to cover contraception. The decision, however, failed to acknowledge that the Constitution prohibits the government from granting religious exemptions if they would result in real harm to others, such as denying women access to important medical services.

- In December 2016, a federal judge relied on RFRA to halt the Department of Health and Human Services from implementing the Affordable Care Act's protections that bar sex discrimination in the provision of healthcare services.[21] Because of this use of RFRA, women and LGBTQ people may now face discrimination trying to access healthcare.

- The U.S. Conference of Catholic Bishops, the National Association of Evangelicals, and others have argued that RFRA allows them to take federal grants to perform government services and then refuse to provide any services to which they object under that grant.[22] Specifically, they have argued that they have the right to take taxpayer money to serve unaccompanied immigrant minors—many of whom have been sexually abused—but refuse to provide these young women information about, referrals for, or access to necessary reproductive healthcare, as is required by law. If accepted, moreover, this argument could be used to withhold virtually any type of healthcare.

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[18] *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000); *Smith v. Fair Emp. & Housing Comm'n*, 913 P. 2d 909 (Cal. 1996); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994).

[19] Religious Liberty Protection Act, S. 2081 (2000) & H.R. 1691 (1999), 106th Congress; S. 2148 & H.R. 4019, 105th Congress (1998).

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

[21] *Franciscan Alliance, Inc. v. Burwell*, No. 7:16-cw-00108-O, 2016 WL 7638311, (N.D. Tex. Dec. 31, 2016).

[22] U.S. Conference of Catholic Bishops, Nat'l Assoc. of Evangelicals, et al., Comments on Interim Final Rule on Unaccompanied Children (Feb. 20, 2015), http://bit.ly/1RKFs5Y.

Employment Discrimination

- In August 2016, a federal court held that a funeral home violated the federal law barring employment discrimination because its dress code resulted in unlawful gender stereotyping. But the court went on to conclude that RFRA gives the funeral home a religious trump card over the federal civil rights law and thus, it could still fire an employee for violating its dress code.[23]

- A federal government policy, based on a troubling 2007 legal memorandum[24] cites RFRA to grant blanket exemptions to faith-based organizations from federal laws prohibiting hiring discrimination by recipients of federal grants. According to this policy, RFRA allows, for example, a faith-based organization to take taxpayer funds to run a shelter for domestic-violence victims and then refuse to hire qualified applicants to run that program based on their religion.[25]

Other Contexts

Attempts to use RFRA to harm others extend far and wide. We have seen efforts to use RFRA to refuse counseling to patients in same-sex relationships;[26] avoid ethics investigations;[27] obstruct criminal investigations;[28] shield religious organizations from bankruptcy and financial laws, in the process denying compensation to victims of sexual abuse;[29] and thwart access to health clinics.[30] In states with RFRAs that

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[23] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 WL 4396083 (E.D. Mich. Aug. 18, 2016).

[24] Office of Legal Counsel, Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act (June 29, 2007) http://bit.ly/1FVrMiK.

[25] *See* Office of Justice Programs, Civil Rights Division, U.S. Dep't of Justice, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013 Frequently Asked Questions (Apr. 9, 2014) http://bit.ly/2mgP18s.

[26] *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012) (arguing that offering counseling to individuals in a same-sex relationship burdened a counselor's religious exercise).

[27] *Doe v. La. Psychiatric Med. Ass'n*, No. 96-30232, 1996 WL 670414 (5th Cir. Oct. 28, 1996) (using federal RFRA to challenge an ethics investigation by the Louisiana Psychiatric Medical Association).

[28] *In re Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (claiming that RFRA prohibits government from compelling grand jury witness to testify against rabbi); *United States v. Town of Colo. City*, No. 3:12-CV-8123-HRH, 2014 WL 5465104 (D. Ariz. Oct. 28, 2014) (arguing that RFRA prohibited U.S. Department of Justice from compelling witness testimony in civil-rights lawsuit against city); *Perez v. Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572 (D. Utah Sept. 11, 2014) (holding that RFRA prohibited court from compelling witness testimony in child-labor case).

[29] *Listecki v. Official Comm. of Unsecured Creditors*, *780* F.3d 731 (7th Cir. 2015) (arguing that RFRA should shield Archdiocese from bankruptcy laws that would make more funds available to pay victims of sexual abuse).

[30] *E.g.*, *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (challenging Freedom of Access to Clinic Entrances Act under RFRA).

mirror the federal RFRA, the statutes have been invoked to avoid licensing requirements[31] and resist lawsuits over sexual abuse by clergy members.[32]

Most of these attempts have not yet succeeded, but following the Supreme Court decision in *Hobby Lobby*, the scales may tip in favor of those seeking to misuse RFRA.

The need for affirmative protections for religious exercise, however, is as true today as when RFRA was enacted. For example, a Sikh student used RFRA to successfully challenge Army regulations that barred him from enlisting in ROTC while wearing his articles of faith.[33]

Thus, last year, Representatives Bobby Scott and Joseph Kennedy introduced the Do No Harm Act.[34] The purpose of the bill is to restore the federal RFRA to its original intent. It would preserve the law's power to protect religious liberty but also clarify that it may not be used to harm others. Under the bill, people could still invoke RFRA in many cases, including those involving the right to wear religious garb and observe religious holidays.[35] RFRA, however, could not be used in ways that harm other people, including to: trump non-discrimination laws; evade child welfare laws; undermine workplace laws; deny access to healthcare; refuse to provide government-funded services under a contract; or refuse to perform duties as a government employee. The bill is focused on making clear that RFRA is a shield to protect religious exercise and not a sword to rend some of our Nation's most important laws that would result in harm to others.

The Draft Executive Order on Religious Freedom

The Trump Administration is currently considering a radical and sweeping executive order that would also misuse religious freedom to justify discrimination. RFRA has spawned wide-ranging concerns about when religion is used as an excuse

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[31] *Youngblood v. Fla. Dep't of Health*, No. 06-11523, 2007 WL 914239 (11th Cir. Mar. 28, 2007) (claiming health inspection of school operated by church violated Florida RFRA); *McGlade v. State*, 982 So. 2d 736 (Fla. Dist. Ct. App. 2008) (claiming that law requiring midwifery license burdened religious exercise).

[32] *E.g.*, *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHDX07CV125036425S, 2013 WL 3871430 (Conn. Super. Ct. July 8, 2013) (arguing that Connecticut RFRA precludes claims against Church for negligent supervision and retention of alleged abuser).

[33] *Singh v. McHugh*, 109 F.Supp.3d 72 (D.D.C. 2015).

[34] Do No Harm Act, H.R. 5272, 114th Cong. (2016).

[35] In fact, in *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010), a boy, who was being raised by his parents in his father's Native American religious tradition and wore his long hair in two braids in accordance with his religious beliefs, used the Texas RFRA to successfully challenge his school's dress code that barred boys from wearing long hair. Similar to the Do No Harm Act, the Texas RFRA may not be used in most circumstances as a defense to civil rights laws. Tex. Civ. Prac. & Rem. Code § 110.011.

to harm others and this draft executive order only intensifies these concerns. Religious freedom is fundamental; the right to discriminate is not.

The scope of the draft executive order is nothing short of shocking, allowing discrimination by for-profit corporations and taxpayer-funded organizations, among others. The order targets LGBTQ people and women, but it would also affect those of minority faiths, non-theists, and almost anyone else.

It would authorize discrimination in hiring, public services and benefits, healthcare, adoption and foster care services, education, and more. And it would favor social service providers, corporations and government employees who oppose marriage for same-sex couples, oppose abortion, and think gender identity is fixed before birth.

By permitting religion to be used an excuse to discriminate, the draft executive order would actually fly in the face of real religious freedom.

The draft executive order incorporates aspects of (and expands) many laws and policy proposals that have been rejected by Congress and the states, have been struck down by the courts, and have spurred widespread opposition from faith communities, businesses, civil rights organizations, legal scholars, and the public. Here is an overview of a few of its provisions.

An Even Broader Russell Amendment

The Russell Amendment was named after Representative Steve Russell (R-OK) who added the language to the House version of the FY2017 National Defense Authorization Act (NDAA) during a marathon markup of the bill last year. It would have greenlighted taxpayer-funded hiring discrimination. The provision, which was not even contemplated in the Senate and was the subject of strong opposition in both chambers,[36] was ultimately rejected during conference.

The Russell Amendment would have applied the religious exemptions from Title VII of the Civil Rights Act[37] and the Americans with Disabilities Act[38] to *all* federal grants and contracts with religiously affiliated organizations. Contrary to the claims of its proponents, the provision did not reaffirm existing law. Rather, it would have created a sweeping new exemption. The result would be that religiously affiliated contractors and grantees could discriminate in employment against anyone it says does not conform to its religious beliefs. This could include someone who doesn't

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[36] When the NDAA came to the House floor, Representatives Charlie Dent (R-PA) and Adam Smith (D-WA) filed a bipartisan amendment, along with several other Republicans and Democrats as cosponsors, to strip the language. Dent-Smith Amendment to H.R. 4909, 114th Cong. (2016), http://bit.ly/2lDJ6XD. In addition, 42 senators signed a letter opposing the measure. See Bridget Bowman, *Democrats Draw Line Over LGBT Provision in Defense Authorization Bill*, Roll Call, Oct. 25, 2016, http://bit.ly/2lg7jXU.

[37] 42 U.S.C. § 2000e-1.

[38] 42 U.S.C. § 12113(d)

regularly attend religious services, is in a same-sex marriage, undergoes a gender transition, gets divorced, uses birth control, or is pregnant and unmarried.

The executive order would adopt the Russell Amendment and extend its reach even further to include for-profit contractors and grantees.

If adopted, it would authorize widespread taxpayer-funded discrimination—wrong in any guise. No one should be disqualified from a taxpayer-funded job because he or she is the "wrong" religion or because he or she does not follow the same religious "tenets" as the employer. Furthermore, it would violate the constitutional prohibition on the government directly funding or providing aid to private institutions that engage in discrimination.[39]

First Amendment Defense Act

The First Amendment Defense Act (FADA) was introduced in the 113th and 114th Congresses[40] and similar legislation has been considered in state legislatures across the country only to face widespread backlash. Last year, three of these controversial measures were approved by the legislatures: the governors of Georgia[41] and Virginia[42] vetoed their bills and a federal court enjoined Mississippi's bill.[43]

The draft executive order includes many aspects of FADA and expands others. It would allow those who, based on religious beliefs, oppose marriage for same-sex couples, oppose sex outside of marriage, oppose abortion, and think gender identity is fixed before birth to ignore laws that conflict with their beliefs. And perhaps most troubling, it would require the government to "reasonably accommodate" its employees, contractors, and grantees who want to engage in discrimination in the scope of their work. People seeking government services could face discrimination, denial of certain services, or condemnation and proselytization.

These FADA-inspired provisions would violate the Equal Protection, Establishment, and Free Speech Clauses of the U.S. Constitution.

(1) Equal Protection Clause Violations

These provisions could affect many people—same-sex couples, unmarried couples, couples in which one person had been married before, single mothers, anyone who

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[39] *E.g.*, *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974); *see also Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2986 (2010); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F. 3d 790, 803 (9th Cir. 2011).

[40] First Amendment Defense Act, S. 1598 & H.R. 2802, 114th Cong. (2015). The prior version of this legislation was called the Marriage and Religious Freedom Act, S. 1808 & H.R. 3133, 113th Cong. (2013).

[41] Greg Bluestein, *Nathan Deal Vetoes Georgia's 'Religious Liberty Bill,' Atlanta Journal-Constitution* (Apr. 9, 2016), http://on-ajc.com/1MvNqE3.

[42] Britni McDonald, *'Religious Liberty' Bill Vetoed by Governor McAuliffe, NBC12* (Apr. 15, 2016), http://bit.ly/2mK4RG5.

[43] *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss. 2016).

has had sex outside of marriage, the children of people whose relationships are disfavored, transgender persons, and anyone who supports access to the full range of reproductive healthcare. And the discrimination they would face is rationalized by the desire to protect others "who have . . . religious objections."[44] The Supreme Court, however, has rejected this justification, because the intent is to make these specific groups of people "unequal to everyone else."[45] Essentially, these provisions "would demean [these groups], remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law."[46] Indeed, "[t]he deprivation of equal protection of the laws is [the provisions'] very essence."[47]

(2) Establishment Clause Violations

The provisions also violate the Establishment Clause in two ways.

First, these provisions give a stamp of approval to particular religious viewpoints and thus, "must be treated as 'suspect.'"[48] Yet, it's clear they are neither justified by a compelling governmental interest, nor tailored to further that interest, and thus, are unconstitutional. There must be "actual, concrete" burdens on free exercise in order for the government to have a compelling interest in favoring those particular beliefs to carve out widespread exemptions from laws and policies.[49] Such burdens are decidedly absent here.[50] And even if one were to argue the provisions serve a compelling interest, the exemption is sweeping in scope and not narrowly tailored.

Second, although the government may offer religious exemptions even where it is not required to do so by the Free Exercise Clause of the U.S. Constitution,[51] a religious exemption "must be measured so that it does not override other significant interests" and may not "impose unjustified burdens on other[s]."[52] Thus, exemptions like these, which would result in harm to and discrimination against others, are impermissible under the Establishment Clause.[53]

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[44] *See Romer v. Evans*, 517 U.S. 620, 635 (1996).
[45] *Id.*
[46] *Barber*, 193 F. Supp. 3d at 709.
[47] *Id.* at 711.
[48] *Id.* at 719 (citing *Larson*, 456 U.S. at 246-47).
[49] *See id.* at 720. *See also Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) ("Of course, in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action.").
[50] Barber, 193 F. Supp. 3d at 720.
[51] In some instances exemptions may be constitutionally permissible but unwise public policy.
[52] *Cutter v. Wilkinson*, 544 U.S. 709, 722, 725 (2005); *see also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 704 (1985).
[53] *See, e.g.*, *Barber*, 193 F. Supp. 3d at 721-22 (explaining that the Mississippi FADA violates "this 'do no harm' principle").

(3) Free Speech Clause Violation

First, these provisions constitute content-based discrimination and are thus "presumptively unconstitutional."[54] On their face, they treat speech and activities related to particular views about marriage, sex, gender identity, and abortion more favorably than all other speech on other subject matters. This differential treatment cuts across a host of topics spelled out under the executive order, including taxes, education, and employment.

Second, these provisions also constitute viewpoint discrimination. "[T]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[55] These provisions run afoul of this rule because they single out certain viewpoints—those that oppose marriage for same-sex couples, oppose abortion, and oppose protections from transgender people—for preferential treatment.

Child Welfare Provider Inclusion Act

The draft executive order incorporates the Child Welfare Provider Inclusion Act, legislation that was introduced in 113th and 114th Congresses.[56] This provision would allow federally funded child welfare agencies to refuse to provide services on the basis of agencies' religious beliefs. The result would be taxpayer-funded discrimination against children and their families, including prospective foster and adoptive parents, as well as youth in care.

This provision is clearly aimed at sanctioning LGBTQ discrimination, but would apply broadly. Thus it could also sanction discrimination against foster or adoptive families because they are an interfaith couple, an unmarried couple, a single parent, someone who's been divorced, or a couple who belongs to a faith different from the agency's. What's most troubling is that this provision would undermine bedrock child-welfare standard by placing an agency's religious beliefs over the best interests of the children they contract to serve.

Like the FADA-inspired provisions, this provision would also violate the Establishment Clause of the First Amendment. To meet the confines of the Establishment Clause, an exemption may not place "unyielding weight" on the religious interest "over all other interests,"[57] including the interests of child placing agencies. This provision would clearly fail to meet that standard.

Women's Health

Another provision of the executive order is aimed at undermining the Affordable Care Act's rule requiring most health insurance plans, including plans provided by

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[54] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[55] *Id.* at 2230 (citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).
[56] Child Welfare Provider Inclusion Act, S. 667 & H.R. 1299, 114th Cong. (2015) & S. 2706 & H.R. 5285, 113th Cong. (2014).
[57] *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703, 704, (1985).

employers, to cover all FDA-approved methods of contraception with no co-pay. The rule exempts houses of worship. It also contains a religious accommodation for religiously affiliated nonprofits and, following *Hobby Lobby*, closely held for-profit corporations. These entities only need to notify the government in writing if they have objections to providing this coverage. Then, the government will work with third-party insurance companies to provide the coverage at no cost to affected women.

This provision of the draft order, however, would create a new religious exemption that would reach much further than the existing contraceptive coverage rule exemption and accommodation. It would completely exempt any employer, whether a for-profit corporation or a religiously affiliated university, from having to cover vital preventive care in their health insurance plans, including contraception, well woman visits, screening for gestational diabetes, HPV testing, counseling for STIs, counseling and screening for HIV, and breastfeeding supplies and support. As a result, women would be left without coverage for contraception and other critical preventive services.

The provision would create a blanket exemption for any employer who states an objection, even in the absence of a burden on religious exercise, which raises serious Establishment Clause concerns. Furthermore, because this provision of the draft executive order entirely exempts objecting employers, it would contradict a key element of the *Hobby Lobby* decision: the Court permitted objecting employers to get out of providing the coverage because the government could give them the accommodation and there would be "precisely zero" impact on women.[58] The executive order's provision would have a vastly greater impact on women seeking healthcare.

In sum, the draft executive order, supposedly intended to protect religious freedom, is actually an assault on this fundamental principle.

Efforts to Repeal or Weaken the Johnson Amendment

The Johnson Amendment prohibits tax-exempt organizations, including houses of worship, from endorsing or opposing political candidates. This protects the integrity of houses of worship as well as our elections.

Under current law, houses of worship can speak out on political or social issues. For instance, houses of worship can take positions on issues of concern, lobby on legislation and endorse or oppose non-partisan referendum; host candidate forums and distribute answers to candidate questionnaires; and encourage people to vote,

[58] *Hobby Lobby*, 134 S. Ct. at 2760 (religious accommodation would have "precisely zero" impact on third parties*); see also id.* at 2786 (Kennedy, J. concurring and controlling opinion) (no accommodation should "unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling").

including through voter registration drives, and driving people to the polls. They, just like secular tax-exempt organizations, just can't endorse or oppose candidates.

In addition, religious leaders may endorse or oppose a party or candidate when acting in their personal capacity. For example, Pastor Robert Jeffress endorsed Donald Trump for president.[59] Because he did so in his personal capacity, rather than as pastor of his church, this did not violate the Johnson Amendment in any way.

The Johnson Amendment, therefore, does not silence houses of worship or prevent them from engaging in the political arena. Nor does it prevent people of faith from endorsing candidates in their personal capacity.

Recent polls demonstrate that the vast majority of Americans agree with the Johnson Amendment's protections and believe houses of worship should stay out of partisan campaigns. According to the Life Way Research poll 79 percent of Americans think it is wrong for a pastor to endorse a candidate during a church service, while 75 percent said houses of worship shouldn't support candidates at any time.[60]

Nonetheless, President Trump has pledged to "get rid of and totally destroy the Johnson Amendment" because he claims it interferes with the "right to worship according to our own beliefs."[61] He has boasted that repealing the current law "will be [his] greatest contribution to Christianity," because with the Johnson Amendment, Christians "don't have any religious freedom, if you think about it."[62] The recent draft "religious freedom" executive order has shown he takes that promise seriously: one provision would undermine current law by limiting the ability of the Internal Revenue Service to enforce it.

Members of Congress have also introduced legislation attacking the Johnson Amendment. Representative Walter Jones (R-NC) has reintroduced his bill that altogether repeals the Johnson Amendment. It would permit houses of worship and all other tax-exempt organizations to endorse or oppose candidates.[63] Representatives Steve Scalise (R-LA) and Jody Hice (R-GA) and Senator Jim Lankford (R-OK) have introduced the "Free Speech Fairness Act."[64] It would allow tax-exempt organizations—both houses of worship and secular nonprofits—to make statements endorsing or opposing candidates for public office so long as those statements are made in the "ordinary course" of carrying out their tax-exempt

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[59] *Pastor Robert Jeffress Explains His Support for Trump*, *NPR's All Things Considered*, (Oct. 16, 2016), http://n.pr/2ejRasw.
[60] Bob Allen, *Poll Says Most Americans Want to Keep Political Endorsements Out of Church*, Baptist News Global, Sept. 12, 2016, http://bit.ly/2mkM9bl.
[61] Julie Zauzmer, *Trump Said He'll 'Totally Destroy' the Johnson Amendment. What Is It and Why Should People Care?* Wash. Post, Feb. 2, 2017, http://wapo.st/2l1vcSK.
[62] *Id.*
[63] H.R. 172, 115th Congress (2017).
[64] H.R. 781 & S. 264, 115th Congress (2017).

purpose and don't incur more than "de minimis incremental expenses." Although this might sound like a narrow exemption to current law, it is quite broad. For example, every sermon, bulletin, or newsletter could include an endorsement of a candidate. In fact, a house of worship could endorse a candidate in any activity it carries out or resources it shares as long as there is ostensibly another purpose.

Repeal or weakening of the Johnson Amendment, however, would threaten religious freedom.

Current law protects the integrity of houses of worship. Changing the law would transform houses of worship into political action committees, fundamentally changing their character and diminishing the distinctive role of houses of worship in our country. For instance, it would threaten their "prophetic voice"—when they speak out on issues of justice and morality. And it would divide congregants and set houses of worship against each other along political lines.

Current law also protects the independence of houses of worship. Houses of worship often do good works within the community, but may also labor to adequately fund their ministries. Permitting electioneering in houses of worship would give partisan groups incentive to use congregations as a conduit for political activity and expenditures. Changing the law would also make charities and houses of worship vulnerable to individuals and corporations who could offer large donations and then demand they take a position on a candidate.

Attacks on No-Aid Provisions In State Constitutions

Freedom of conscience means that you can decide which religion to follow—if any—without government coercion or interference. The core of our Constitution's guarantee of religious freedom is the principle that religion must be freely chosen.

That's why the United States is one of the most religious and religiously diverse nations in the world and has long been a refuge for people from around the world seeking true religious freedom.

The religion clauses of U.S. Constitution and provisions in thirty-nine state constitutions safeguard this freedom by ensuring the government cannot endorse or fund religion[65] The founding generation believed that governmental aid harms religion because it would result in coerced religious activity and thus, impede taxpayers' freedom of conscience. They also believed it would produce resentment, untoward competition between faiths for government resources, and religious

[65] *See* Brief for Baptist Joint Committee for Religious Liberty & General Synod of the United Church of Christ as Amici Curiae, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (July 5, 2016), http://bit.ly/2mNMY8r.

strife.[66] James Madison summed it up simply, "religion & Govt. will both exist in greater purity, the less they are mixed together."[67]

In the last several years, the no-aid principle that is so key to our religious freedom, has come under attack. Religious institutions that want money from the government seek to upend firmly established precedent that protects religious belief and religious institutions against the heavy hand of government.

In trying to access taxpayer funds, these religious institutions claim that distinctions made by the government between churches and non-religious entities are discriminatory and must be ended. In fact, though, there is a long tradition of treating churches differently under the law. For instance, churches are not subject to Title VII's prohibition against religious discrimination in hiring,[68] legal requirements governing retirement plans under ERISA,[69] registration requirements under the Lobbying Disclosure Act,[70] and the obligation of nonprofit organizations to register with the IRS and submit annual informational tax filings.[71] These legal advantages protect against government interference with religious practice. It is this same principle of special treatment, based on an aversion to meddle with or coerce religion, that motivates exclusion of churches from government funding programs.

The attacks on this principle continue despite a 2004 Supreme Court ruling in *Locke v. Davey*.[72] The Washington state constitution contains a no-aid provision, ensuring that taxpayer funds are not "applied to any religious worship, exercise or instruction." A theology major sued the state because he was not eligible for a state-funded university scholarship program. The Court rejected his claim, holding that the denial of funding fell within the "play in the joints" between the Free Exercise and Establishment Clauses that permits the government to choose not to fund religious education or institutions even when it might be constitutionally permissible to do so.[73]

And in April of this year, the Supreme Court will hear *Trinity Lutheran Church of Columbia, Inc. v. Pauley*,[74] a case in which the plaintiff seeks to limit the holding of *Locke* and create a federal mandate on states to fund churches. Trinity Lutheran Church sued the Missouri Department of Natural Resources after it denied the church's request to participate in a program that provides funding to purchase

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[66] *See* Brief of Religious & Civil Rights Organizations as Amici Curiae at [page number], *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (July 5, 2016), http://bit.ly/2lBQNNZ.
[67] Letter from James Madison to Edward Livingston (July 10, 1822), in James Madison, *Writings*, 786, 789 (Library of Am. 1999).
[68] 42 U.S.C. § 2000e-1(a).
[69] 29 U.S.C. § 1003(b)(2).
[70] 2 U.S.C. § 602(8)(B)(xviii).
[71] 26 U.S.C. §§ 501(c)(1)(A), 6033(a)(3)A)(i) & (iii).
[72] 540 U.S. 712 (20014).
[73] *Id.* at 718-19, 725.
[74] *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (July 5, 2016).

scrap-tire materials for the resurfacing of playgrounds. State officials denied the application because the Missouri Constitution's no-aid provision does not allow taxpayer dollars to fund churches.

Trinity Lutheran argues that the no-aid provision unconstitutionally discriminates against religion by excluding churches from eligibility for general grant programs. In *Locke*, the Court held that Washington's no-aid provision was not motivated by "animus toward religion." but reflects a central anti-establishment interest reflected in many state constitutions.[75] But Trinity Lutheran's claim not only ignores our nation's long history of barring government support of religion in order to protect freedom of conscience, but it also endangers all other differential treatment of churches—including those that benefit churches. Churches cannot pick and choose when they get the advantages of special treatment and when they don't. Giving it up for the sake of money here means they may have to give up exemptions to laws carved out specially for churches.

Moreover, Trinity Lutheran argues that the Supreme Court should require the government to provide direct cash grants to a church, something the Court has never authorized.[76] In this case, the taxpayer funds would be used for capital improvements—a new playground surface—of church property. Yet, it is impossible to fund capitol improvements without funding religion: there's no actual separation between secular and religious facilities at a church.[77] Under Trinity Lutheran's argument, even building a church or repairing a sanctuary would be permitted if there's a state grant available to buy lumber.[78] That, however, is clearly what the founding generation sought to avoid. Indeed, it is hard to think of anything that is a more clear establishment of religion than the state using taxpayer dollars to build a church.

It should be noted that Trinity Lutheran contends that the no-aid provision is rooted in anti-Catholic bigotry arising out of the so-called Blaine Amendment—a failed effort to amend the U.S. Constitution that began in late 1875. This historical argument is simply wrong.[79] The history of the federal Blaine Amendment is far more complicated—and far less nefarious—than Trinity Lutheran lets on. Although some contemporaries saw it as a way to limit the political influence of the Catholic Church, others recognized it as an attempt both to ensure that the public schools

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[75] *Locke*, 540 U.S. at 721-23, 725.
[76] In fact, the Court is wary of the "special dangers associated with direct money grants to religious institutions." *Mitchell v. Helms*, 530 U.S. 793, 855 (2000) (O'Connor, J., concurring).
[77] *See Com. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) ("No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible, within the context of these religion-oriented institutions, to impose such restrictions.")
[78] It is inapt to compare a grant program like this to police and fire protection. That is a service provided to everyone in the community for the benefit of both those protected and the community at large. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947).
[79] *See generally*, Brief for Legal & Religious Historians as Amici Curiae, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (July 5, 2016). http://bit.ly/2lBQvXp.

would be secular and therefore open to all faiths, races, and nationalities, and to ameliorate the denominational strife that comes when religious groups angle to impose their own religious beliefs on their neighbors' children in the public schools. And in fact, the imperative to reserve public funds for public schools started in states long before the federal constitutional amendment was proposed.

Finally, the public does not want to repeal and undermine our state constitutional protections. Just this year, despite a well-funded campaign, Oklahomans voted overwhelmingly to reject a repeal of their state no-aid clause.[80] Missourians also voted against a provision that would have created an exemption to their no-aid clause for certain social service programs.[81] And, in 2012, Floridians overwhelmingly rejected a ballot initiative to repeal its no-aid clause.[82]

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Thank you for the opportunity to submit this statement for the record. Americans United remains steadfast in our work, as we have for seventy years, to fight back against these threats to religious freedom.

[80] Okla. State Election Board, Official Results – General Election (Nov. 17, 2016), http://bit.ly/2fnVBTg.
[81] Mo. Secretary of State, 2016 General Election Official Results, Nov. 8, 2016 (Dec. 12, 2016), http://on.mo.gov/2lDH61s.
[82] Fla. Division of Elections, 2012 Precinct-Level Election Results (Nov. 6, 2012), http://bit.ly/2c8f8Gp.