Written Statement of the American Civil Liberties Union

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Oversight Hearing on
the Religious Freedom Restoration Act and
the Religious Land Use and Institutionalized Persons Act

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For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

The goal of the ACLU's work on freedom of religion and belief is to guarantee that all are free to follow and practice their faith, or no faith at all, without undue governmental influence or interference. Since its founding in 1920, the ACLU has worked to protect religious believers of all backgrounds and faiths,[1] whether it is defending a student's right to read his Bible during free reading periods at his school in Tennessee,[2] the right of a Muslim man to wear religious headwear in a courtroom in North Carolina,[3] or the rights of persons in prisons, jails, and other places of detention to practice their faith.[4] The ACLU also advocates for laws and policies that heighten protections for religious exercise.[5]

Thank you for this opportunity to submit a statement for the record for the Oversight Hearing on the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). There is a need for affirmative protections for religious exercise and yet there is also a need to ensure that religious exercise cannot be used to discriminate against or otherwise harm third parties or override other significant interests.

Freedom of Religion and Belief

Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character. Given our robust, longstanding commitment to the freedom of religion and belief, it is no surprise that the United States is among the most religious, and religiously diverse, nations in the world. Indeed, religious liberty is alive and well in this country precisely because our government cannot tell us whether, when, where, or how to worship.

As enshrined in the First Amendment to the U.S. Constitution, religious freedom includes two complementary protections: the right to religious belief and expression, and a guarantee that the government neither prefers religion over non-religion nor favors particular faiths over

[1] "ACLU Defense of Religious Practice and Expression," http://www.aclu.org/aclu-defense-religious-practice-and-expression.
[2] Press Release, ACLU, "ACLU-TN Protects Student's Right to Read Bible at School" (Mar. 31, 2014), https://www.aclu.org/religion-belief/aclu-tn-protects-students-right-read-bible-school.
[3] ACLU of N.C., "Report: Man Removed from Lenoir Courthouse for Wearing Religious Attire" (July 3, 2012), http://acluofnc.org/blog/report-man-removed-from-lenoir-courthouse-for-wearing-religious-attire.html.
[4] *E.g.*, ACLU, "Holt v. Hobbs," https://www.aclu.org/religion-belief/holt-v-hobbs.
[5] One example: Religious liberty advocates, including ACLU, Anti-Defamation League, Becket Fund for Religious Liberty, and Christian Legal Society, asked the Under Secretary of Defense for Personnel and Readiness to revise regulations governing religious accommodations so that religiously observant service members and prospective service members who wear head coverings, uncut hair, or beards may continue to do so while serving our nation. Letter from Coalition to Jessica Wright, Under Sec'y of Def. for Pers. & Readiness (Apr. 2, 2014), https://www.aclu.org/religion-belief/coalition-letter-regarding-religious-accommodation-military.

others. These dual protections work hand-in-hand, allowing religious liberty to thrive and safeguarding both religion and government from the undue influences of the other.

Applying these religious liberty principles in a society where there are countless different religious beliefs and preferences, and harmonizing them with other core rights in our pluralistic society—rights of free speech, equality, privacy, etc.—is not always easy. But at a minimum, religious freedom means the following: We have the right to a government that neither promotes nor disparages religion generally, nor any faith, in particular. We have the absolute right to believe whatever we want about God, faith, and religion. We have the right to act on our religious beliefs, unless those actions harm others.

In practice, this means that the government should not promote prayer or other religious exercise and messages, coerce religious worship and belief, or give special preference or benefits to any particular faith or to religion generally. At the same time, religious liberty requires that the government permit a wide range of religious exercise and expression for people of all faiths, in public or in private. Government officials may not impede such religious exercise unless it would threaten the rights, welfare, and well-being of others or violate the core constitutional ban on governmental promotion of religion.

The Road to RFRA and RLUIPA

The ACLU has long believed that religious freedom encompasses heightened protections for religious exercise. In 1990, however, a divided Supreme Court in *Employment Division v. Smith* concluded that society cannot function where "each conscience is a law unto itself," and held, in an opinion written by Justice Scalia, that laws that impose a substantial burden on religious exercise but do not directly target religion need only be rationally related to a legitimate government interest.[6] People from many faiths and denominations, legal experts, and civil liberties advocates, including the ACLU, saw this as a drastic change in constitutional protection for religious liberty. The *Smith* standard would not adequately protect those requesting an exemption that primarily affects the requester and would not burden third parties, like the five-year old Native American boy who was suspended from school for violating the dress code because he wore his long hair in braids.[7]

Yet even prior to *Smith*, the right to exercise one's religion was never without limits, and it shouldn't be.[8] "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[9] It has long been understood that religious exercise should not interfere with others' rights, safety, and an ordered society.[10]

[6] *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).
[7] *See A.A. v. Needville Indep. Sch. Dist.*, 611 F. 3d 248 (5th Cir. 2010).
[8] *See, e.g., Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).
[9] *U.S. v. Lee*, 455 U.S. 252, 259 (1982).
[10] *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Watson v. Jones*, 80 U.S. 679, 728 (1872).

Passage of RFRA

Democrats and Republicans, people of all faiths, and groups that cared generally about civil liberties formed a broad coalition to advocate for a congressional response to the *Smith* decision. In 1993, Congress passed and President Bill Clinton signed the Religious Freedom Restoration Act (RFRA) to "restore" the heightened constitutional protections that applied before *Smith*. RFRA asks whether the law places a "substantial burden" on religious exercise. If yes, the government regulation needs, in the words of the statute, to "further a compelling government interest" using the "least restrictive means." Thus, minimal burdens were not supposed to trigger RFRA protection and even substantial burdens on religious exercise must be tolerated where the countervailing interest is significant. Those interests found to be compelling pre-*Smith* included, among others, combating discrimination, ensuring the comprehensiveness or administrability of a government program, and conformity with the Constitution.[11] Moreover, pre-*Smith* cases did not give unlimited protection to claims of infringement on religious exercise—the cases not only allowed the government to regulate religious exercise based on its compelling interests, such as "prevent[ing] tangible harm to third persons,"[12] but also required an accounting of the burdens religious exercise may pose on third parties.[13]

RFRA in Practice

RFRA Inapplicable to States and Attempts to Fix

RFRA was written very broadly, applying to all federal and state laws. In 1997, the Supreme Court in *City of Boerne v. Flores*[14] struck down RFRA as applied to the states. Many groups that were part of the RFRA coalition came together to advocate for a new bill, the Religious Liberty Protection Act (RLPA), to apply strict scrutiny to state laws that imposed a substantial burden on religious exercise.

But this alliance soon fractured over concerns that RLPA could be used as a defense to civil rights statutes. In the 1990s, landlords across the country had begun to argue that they should have a right to discriminate against unmarried couples based on their religious objections to cohabitation, notwithstanding state and local civil rights laws prohibiting discrimination on the basis of marital status. For instance, the U.S. Court of Appeals for the Ninth Circuit in *Thomas v. Anchorage Equal Rights Commission*[15] applied a standard of review very similar to RFRA's to the landlords' claim that compliance with such a law burdened the landlords' religious beliefs. The court held that the governmental interest in preventing marital status discrimination was not

[11] *See, e.g.*, *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 575 (1983); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1368-69 (9th Cir. 1986); *Lee*, 455 U.S. at 258; *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

[12] Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 886 (1994).

[13] *E.g.*, *Estate of Thornton*, 472 U.S. at 709-10; *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.").

[14] 521 U.S. 507 (1997).

[15] 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000). For other cases involving claims of religious freedom to discriminate in the rental of housing, see *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). The landlord was successful in *Desilets*.

compelling. As a result, the landlords did not have to comply with that civil rights law. Even though the *Thomas* decision was later vacated on other grounds, the decision demonstrated that RFRA might indeed be used to permit discrimination. At the same time, there were also claims by religiously affiliated employers seeking exemptions from contraceptive equity laws that provide equal benefits for women employees and dependents, which would have resulted in discrimination.

The ACLU was particularly concerned about the hard-won protections at the state and local level that afforded civil rights protections not found in federal law, including protections for LGBT people.[16] As a result, the ACLU sought to add language to RLPA to ensure that it could not be used to discriminate or deny the rights of others. When such efforts were unsuccessful, the ACLU withdrew its support for the bill, and raised strong concerns about the ways that it could be used to allow discrimination.[17] RLPA ultimately failed.

Troubling RFRA Claims

RFRA continues to be used in the very ways that were troubling two decades ago—it's being used to abridge others' rights. For example, during the Bush administration, World Vision, a faith-based organization that ran a taxpayer-funded juvenile justice program, asked the Department of Justice to excuse it from a statutory nondiscrimination provision and allow it to hire only those who share similar Christian beliefs. In a break with precedent and sound reasoning, the Justice Department's Office of Legal Counsel (OLC) maintained that RFRA could be used by religiously affiliated organizations to discriminate in employment, thereby compelling taxpayer support for such discrimination.[18]

As part of the Affordable Care Act, the federal government issued a rule that requires employers to cover contraception without a co-pay in their employees' health plans. Dozens of cases around the country were filed by for-profit corporations using RFRA to challenge the rule. These corporations, employing thousands of people, objected to some or all contraceptive coverage based on their owners' sincerely held beliefs and sought exemptions from the rule. But such exemptions would amount to discriminating against their employees and would mean employees and their dependents' health insurance coverage fails to meet their health care needs.

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[16] There are also examples of religious liberty defenses being raised in many other contexts, including race discrimination, *e.g.*, *Bob Jones Univ.*, 461 U.S. at 604, and sex discrimination, *e.g.*, *Fremont Christian Sch.*, 781 F.2d at 1368-69 (9th Cir. 1986).

[17] *See Hearings on H.R. 1691 Before the Subcomm. On the Const. of the H. Comm. On the Judiciary*, 106th Cong. 165 (statement of Christopher Anders) (1999), *available at* https://www.aclu.org/religion-belief/testimony-legislative-counsel-christopher-anders-hr-169-religious-liberty-protection; *see also* James M. Oleske, Jr., *Obamacare, RFRA, and the Perils of Legislative History*, 67 Vand. L. Rev. *En Banc* 77, 84-87 (2014) (discussing congressional debate on RLPA and noting Rep. Bobby Scott's concerns about RLPA's impact on civil rights claims).

[18] Mem. for the Gen. Counsel, Office of Justice Programs, from John P. Elwood, Dep. Ass't Att'y Gen., Office of Legal Counsel *Re: 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). The Bush Administration sought to repeal these provisions (White House, "Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved," *available at* http://georgewbush-whitehouse.archives.gov/government/fbci/religious-hiring-booklet-2005.pdf), but each time Congress refused to do so.

Last summer, in *Hobby Lobby v. Burwell*,[19] the Supreme Court held that RFRA permits closely held corporations to use their religious beliefs to take away benefits guaranteed to their employees by law—something the Court has never before sanctioned. In so doing, the Court radically redefined the understanding of a "substantial burden" on religious exercise. Rather than engaging critically with this question, as courts had in the past, the Court simply accepted Hobby Lobby's assertion that there was a burden that was substantial.[20] And although the Court seemed to reaffirm the principle that exemptions under RFRA must avoid harm to third parties,[21] as of today, this is not the case. Hobby Lobby and the other companies that made RFRA claims may now refuse their employees and dependents the health care benefit of contraception, which medical experts recognize as critical to ensuring women's health and well-being. As a result, the women employed there could be left with inadequate health insurance coverage.

Looking Ahead

The need for affirmative protections for religious exercise is real and is equally true today as it was when *Smith* was decided. The ACLU recently brought a RFRA challenge to Army regulations that would bar a Sikh student from enlisting in Army ROTC unless he complied with all Army grooming and uniform rules, which would require him to immediately cut his hair, shave off his beard, and remove his turban, all of which violate his faith.[22] He is dismayed that the military has asked him to make the impossible decision of choosing between the country he loves and his faith, especially considering the Army has already permitted three other Sikhs to serve while wearing their articles of faith.[23] This is exactly what RFRA was designed to do—provide for exemptions or accommodations for religious exercise when doing so would not cause harm to others.

As explained above, however, RFRA's application isn't limited to these sorts of cases. Even though the majority said its holding in *Hobby Lobby* was limited, we don't yet know what impact the case may have on other areas of the law, including anti-discrimination measures and insurance coverage for other health care. What we *can* be sure of is that many individuals and institutions may now feel emboldened to assert religious objections to other laws. The question will then be how courts will assess these potential claims and whether they will adequately account for costs to third-parties, like employees, students, or customers.

In light of the troubling ways in which RFRA is being used, there is ongoing discussion of another legislative fix for RFRA. This time it must clearly and explicitly ensure that religious exercise cannot be used to discriminate against or otherwise harm others.

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[19] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
[20] *Id.* at 2778-2779.
[21] *See 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"); *id.* at 2760 (religious accommodation would have "precisely zero" impact on third parties).
[22] *Singh v. McHugh*, No. 1:14-cv-01906 (D.D.C. filed Nov. 12, 2014).
[23] Iknoor Singh, "The Army Is Making Me Choose Between My Faith and My Country," *Huffington Post*, Nov. 12, 2014, http://www.huffingtonpost.com/iknoor-singh/sikh-army-rotc_b_6147686.html.

RLUIPA

The Religious Land Use and Institutionalized Persons Act (RLUIPA) story is quite distinct from RFRA. RLUIPA was enacted after RLPA could not pass. RLUIPA, in contrast to RFRA and RLPA, is very limited in scope. It was designed to address specific, well-documented problems experienced by institutionalized persons and in land use.[24] The ACLU helped lead efforts to enact this important statute.

In legislating protections for prisoners, Congress addressed "frivolous or arbitrary barriers" that impeded prisoners' religious exercise and sought to alleviate "egregious and unnecessary" prison restrictions on religious liberty.[25] As a result, RLUIPA fosters prison safety. First, it creates even-handed procedures and promotes non-arbitrary and fair decisions by prison officials, which in turn promote promote safety.[26] Second, accommodating prisoners' free exercise of religion also can moderate the harsh impact of prison life and promote rehabilitation, thereby further enhancing prison safety.[27]

When applying these protections, the Supreme Court has made clear that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,"[28] and any "accommodation must be measured so that it does not override other significant interests."[29] Justice Ginsburg succinctly explained this principle: an accommodation was permitted under RLUIPA because it "would not detrimentally affect others."[30] The Court explained that a prison may be justified in denying an accommodation should the request be "excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective function of [the] institution."[31] It is reassuring that the Court's RLUIPA jurisprudence has clearly set forth the existing obligation to account for whether an accommodation would impose a burden on others or override significant interests like safety.

Just last month, the Supreme Court unanimously ruled that RLUIPA protects a Muslim prisoner who sought to grow a half-inch beard in accordance with his religious beliefs.[32] The ACLU filed an amicus brief in that case on behalf of the prisoner.[33] The ACLU has used RLUIPA to defend other prisoners' free exercise rights:

[24] *Cutter v. Wilkinson*, 544 U.S. 709, 715 & 716 n.5; 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).
[25] *Cutter*, 544 U.S. at 716 (citations omitted).
[26] Br. for Former Corr. Officials as *Amici Curiae* in *Holt v. Hobbs*, No. 13-6827 (May 29, 2014), 20-28, available at https://www.aclu.org/religion-belief/holt-v-hobbs-amicus-brief.
[27] *Id.* at 12-20.
[28] *Cutter* at 720 (citing *Estate of Thornton*, 472 U.S. 703).
[29] *Id.* at 722.
[30] *Holt v. Hobbs*, 135 S. Ct 853, 867 (2015) (Ginsburg, J. concurring).
[31] *Cutter*, 544 U.S. at 726.
[32] *Holt*, 135 S. Ct. at 867.
[33] *See* Br. for Former Corr. Officials as *Amici Curiae* in *Holt v. Hobbs.*

- The ACLU and the ACLU of Wyoming sent a letter protesting the Wyoming Department of Corrections' practice of prohibiting prisoners from wearing religious headgear outside of their cells.[34]
- The ACLU of Alabama represented a prisoner seeking to wear his hair unshorn in accordance with his Native American faith.[35]
- The ACLU of Michigan successfully represented Muslim and Seventh-Day Adventist prisoners in a religious class action challenging two Michigan Department of Corrections policies: one which accommodated Jewish prisoners by providing kosher meals while denying Muslim prisoners halal meals, while the other failed to excuse inmates from their work assignments on the Sabbath.[36]
- The ACLU and affiliates in Florida and Texas filed friend-of-the-court briefs supporting Jewish prisoners' right to receive a Kosher diet.[37]

These cases are all examples where the requested accommodations do not harm other prisoners or other significant interests.

RLUIPA also covers religious land use. One of the most important provisions prohibits governmental action that discriminates on the basis of religion or religious denomination.[38] This ensures that land-use laws can't target a pastor's ministry to serve and provide housing to those in need[39] and zoning decisions can't discriminate against minority faiths, such as denying a zoning permit for a Muslim prayer space based on community objections.[40]

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There is certainly a need for affirmative protections for religious exercise. At the same time, there is also a clear need to ensure that religious exercise is not used and cannot be used to discriminate against or otherwise harm third parties or override other significant interests.

Thank you for the opportunity to submit this statement for the record. Should you have any questions, please contact Dena Sher, Legislative Counsel, (202) 715-0829 or dsher@aclu.org.

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[34] Carrie Ellen Sager, "Why Is Wyoming Discriminating Against Jewish Prisoners?" ACLU Blog of Rights (Jan. 10, 2014), https://www.aclu.org/blog/prisoners-rights-religion-belief/why-wyoming-discriminating-against-jewish-prisoners.

[35] ACLU of Ala., 2004 Legal Docket, *available at* http://www.aclualabama.org/WhatWeDo/LegalDockets/2004%20Docket %20page%202.pdf.

[36] ACLU of Mich., Legal Docket (Jan. 2015), http://www.aclumich.org/courts/legal-dockets#9religion; Press Release, ACLU of Mich., "ACLU, Michigan Corrections Settles Religious Freedom Lawsuit" (Nov. 21, 2013), http://www.aclumich.org/issues/halal/2013-11/1894.

[37] Br. for ACLU, ACLU of Fla., & Becket Fund for Religious Liberty, *Amicus Curiae* in *U.S. v. Fla. Dep't of Corr.*, No. 14-10086-D (May 28, 2014), *available at* http://www.becketfund.org/wp-content/uploads/2014/05/CA11-Kosher-Amicus-Brief-as-filed1.pdf; Br. for ACLU, ACLU of Tex., *Amicus Curiae* in *Moussazadeh v. Tex. Dep't of Criminal Justice*, No. 09-40400 (Jan. 13, 2012), *available at* https://www.aclu.org/religion-belief/moussazadeh-v-tdcj-amicus-brief.

[38] 42 U.S.C. § 2000cc(b)(2).

[39] Press Release, ACLU of Ala., "ACLU Files Lawsuit to Protect Pastor's Right to Practice His Christian Faith" (Aug. 27, 2014), http://aclualabama.org/wp/aclu-files-lawsuit-protect-pastors-right-practice-christian-faith/.

[40] Press Release, ACLU, "Muslim Prayer Space Granted Permit in Kentucky" (Nov. 9, 2010), https://www.aclu.org/religion-belief/muslim-prayer-space-granted-permit-kentucky.