

Testimony of

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Written Testimony for the Hearing Record on

**“Oversight of the Religious Freedom Restoration Act and
the Religious Land Use and Institutionalized Persons Act”**

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Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for this opportunity to present testimony for the oversight hearing on the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure 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.

Americans United supports reasonable and appropriately tailored religious accommodations and exemptions when they would alleviate a true burden on religion. Such accommodations and exemptions should never be granted, however, when they would impinge on the rights or otherwise harm the interests of others. Religion is not a trump card that supersedes all other interests or that can justify imposing significant burdens on others. This position is what led us to support the passage of both RLUIPA and the RFRA.

RLUIPA and Its Application

RLUIPA provides protection solely in land use cases and to institutionalized persons. In America today, some religious minorities are denied the right to even construct houses of worship and other buildings for their congregations. They face not just the difficulties that some majority faiths must overcome, such as zoning roadblocks. They also face community—and sometimes national—protests, intimidation, and threats of violence.¹ Likewise, those in prison who adhere to minority faiths also still face difficulties obtaining accommodations for kosher meals,² access to worship spaces and materials,³ and the right to wear religious garb.⁴ RLUIPA is still needed to address these concerns, to alleviate true burdens on religious adherents without causing significant harm to third parties.

¹ See, e.g., Travis Loller, *Islamic Center of Murfreesboro: After Long Fight, Opening Day For Tennessee Mosque*, HUFFINGTON POST (Aug. 11, 2012), http://www.huffingtonpost.com/2012/08/11/after-long-fight-opening-day_n_1768915.html.

² See, e.g., *Rich v. Crews*, 2014 WL 523018, No. 1:10-cv-00157-MP-GRJ (N.D. Fla. Feb. 10, 2014) (involving a Jewish inmate seeking access to kosher meals).

³ See, e.g., *Pevia v. Shearin*, 2015 WL 790471, No. ELH-14-0631 (D. Md. Feb. 24, 2015) (involving a Native American utilizing RLUIPA to gain access to religious services).

⁴ See, e.g., Letter from the ACLU to Robert Lambert, Director of the Wyoming Department of Corrections, Jan. 10, 2014, <https://www.aclu.org/files/assets/WDOC%20Kippah%20Letter%201-9-14.pdf> (challenging a prison practice denying Jewish inmates the ability to wear a yarmulkes).

RFRA and Its Application

In *Employment Division of Oregon v. Smith*,⁵ the Supreme Court ruled that the Free Exercise Clause of the U.S. Constitution does not require the application of “strict scrutiny” to neutral and generally applicable laws. Many, including Americans United, viewed *Smith* as a step backwards for religious freedom, as the Court previously had applied strict scrutiny in these cases: the government could not substantially burden religion unless the government had a compelling interest and the law was narrowly tailored.⁶ In response, Congress passed RFRA to reinstate the pre-*Smith* standard. In passing RFRA, Congress quelled fears that, post-*Smith*, religious exercise would garner no protections. The examples of RFRA’s power that were frequently used by supporters were that the bill would prevent dry communities from banning the use of wine in communion services, government meat inspectors from requiring changes in the preparation of kosher food, the government from regulating the selection of priests and ministers,⁷ and a public school from forbidding a student to wear a yarmulke.⁸

Noticeably absent from that list of examples: that RFRA would allow corporations to ignore non-discrimination and public health laws; that government officials could deny citizens services, such as marriage licenses, to which they are entitled; or that government contractors and grantees could ignore non-discrimination provisions or service requirements because of their religious beliefs. Indeed, when Congress passed RFRA 22 years ago, supporters, including Americans United, intended for the bill to act as a shield to protect religion, not a sword to harm others.

Over the years, however, we have seen increasing attempts to use RFRA as a sword. These attempts include using RFRA to deny women access to healthcare and attempts to use RFRA to trump non-discrimination protections.

Recent Supreme Court Cases

In the last year, the Supreme Court issued opinions under both RFRA and RLUIPA. We believe that the Court got it right in the RLUIPA case, *Holt v. Hobbs*,⁹ but wrong in the RFRA case, *Burwell v. Hobby Lobby Stores, Inc.*¹⁰

Holt v. Hobbs

In January, the Court issued a unanimous opinion in *Holt v. Hobbs*, ruling that a prison policy prohibiting an inmate from wearing a ½-inch beard for religious reasons violated

⁵ 494 U.S. 872 (1990).

⁶ See, e.g., *Hernandez v. C.I.R.*, 490 U.S. 680 (1989); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

⁷ 139 Cong. Rec. S. 2822 (Mar. 11, 1993) (floor statement of Sen. Edward Kennedy), available at http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/cr-s2822-24-1993.pdf

⁸ 139 Cong. Rec. S. 9821 (July 2, 1992) (floor statement of Sen. Orrin Hatch), available at http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/cr-s9821-23-1992.pdf

⁹ 135 S.Ct. 853 (2015).

¹⁰ 134 S.Ct. 2751 (2014).

RLUIPA. We filed an *amicus* brief that supported the inmate in this case and believe this case was properly decided.¹¹

First, there was no evidence in the record that petitioner's request was anything other than a sincere attempt to comply with a religious duty in a way that is consistent with the conditions and demands of confinement. Second, it was clear that the policy did not further the prison's compelling interest in maintaining safety. As explained by the magistrate judge who was viewing the plaintiff at the time, "it's almost preposterous to think that you could hide contraband in your beard."¹² Third, allowing an inmate to wear a beard did not cause any harm to others.

Holt is a perfect example of the how RFRA and RLUIPA were intended to work.

Burwell v. Hobby Lobby

In June 2014, the Supreme Court issued its opinion in *Hobby Lobby*, holding that closely held for-profit corporations were covered by RFRA and do not have to provide health care insurance coverage for contraception if their owners claim doing so would violate their religion. We believe the Court decision was wrong in several regards.

First, the majority opinion detached RFRA from pre-*Smith* case law even though the Act itself states that its purpose was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U. S. 398 (1963) and *Wisconsin v. Yoder*, 406 U. S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."¹³

Second, the Court failed to engage in a real analysis of whether the alleged religious burden on the plaintiffs was substantial. Instead, the Court simply stated that it "is not for us to say that their religious beliefs are mistaken or insubstantial."¹⁴ As explained by Justice Ginsburg, the majority opinion "barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial."¹⁵ But, "RFRA, properly understood, distinguishes between 'factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature,' which a court must accept as true, and the 'legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened,' an inquiry the court must undertake."¹⁶ If the Court had properly performed this analysis, it would have concluded that requiring a corporate entity to provide insurance coverage that its employees may or may not use is too attenuated to constitute a substantial burden.

¹¹ Brief for Americans United for Separation of Church and State as *Amicus Curiae*, *Holt v. Hobbs*, 135 S.Ct. 853 (2015) https://au.org/files/pdf_documents/14-5-29_Holt-Hobbs-AU_Amicus.pdf.

¹² *Holt*, 135 S.Ct. at 863.

¹³ 42 U.S.C. § 2000bb(b) (1993).

¹⁴ *Hobby Lobby*, 134 S.Ct. at 2779.

¹⁵ *Id.* at 2798 (Ginsburg, J., dissenting).

¹⁶ *Id.* (quoting *Kaemmerling v. Lappin*, 553 F. 3d 669, 679 (D.C. Cir. 2008)).

Third, although the majority acknowledged that it “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,”¹⁷ it discounted the real harm that granting the sought exemption would have on women. The Court’s decision allows employers like Hobby Lobby to forgo providing any coverage for contraception, leaving women without the ability to access contraception without cost barriers – a deterrent for many women for whom any additional cost can be burdensome. And, it removes a woman’s ability to make decisions about her own reproductive health and family needs, and instead places that power in the hands of a corporation.

Justice Ginsburg, who joined the majority in *Hobbs* but issued a strong dissent in *Hobby Lobby*, described the main difference between these cases: “Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. ____ (2014), accommodating petitioner’s religious belief in [*Holt v. Hobbs*] would not detrimentally affect others who do not share petitioner’s belief.”¹⁸

Fortunately, *Hobby Lobby* is a narrow decision that should not be extended beyond the specific facts before the Court. Unfortunately, the decision has motivated and emboldened many to push even harder to use RFRA in nefarious ways, such as continuing to deny women access to healthcare and trying to discriminate against others.

In addition, the decision is likely to harm religious freedom in ways its proponents had never contemplated: it has rightfully made many less likely to support even very narrow religious exemptions. As part of its least restrictive means analysis, the Court concluded that the closely-held corporations deserved an exemption under RFRA because the regulation already provided an accommodation to religious non-profit organizations. In short, the government’s decision to accommodate some—even though that accommodation was not required by the Free Exercise Clause or RFRA—resulted in the government having to accommodate all—even though the difficulty of administering the exemption and the harm caused to employees was of much greater significance. A lesson many have taken from *Hobby Lobby*, therefore, is that the government should reject all religious exemptions or RFRA could demand that the exemptions be drastically expanded.

The Misappropriation of RFRA

Unfortunately, *Hobby Lobby* is not the only example of a misuse of RFRA.

Several non-profit organizations continue to challenge the Affordable Care Act regulations that require employers that provide group health insurance plans to cover

¹⁷ *Id.* at 2801 (Ginsburg, J., dissenting)(quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

¹⁸ *Holt*, 135 S.Ct. at 867 (Ginsburg, J., concurring).

contraception.¹⁹ They argue that the religious accommodation is insufficient and violates RFRA. Under the regulations, religious non-profit organizations are “eligible for an accommodation to the contraceptive coverage requirement, whereby once they advise that they will not pay for the contraceptive services, coverage for those services will be independently provided by an insurance issuer or third-party administrator.”²⁰ These groups do not have to contract, pay, refer, or arrange for coverage of contraceptives at all. Nonetheless, these groups claim that the accommodation violates RFRA because the government is requiring them to fill out a form or otherwise notify the government that they want to utilize the exemption.

What these groups are really arguing is that RFRA guarantees them a full exemption from the insurance mandate. But a full exemption is not warranted for these organizations. Lifting the inconsequential burden of notifying the government would impose a huge burden on the women these organizations employ, as they would lose coverage entirely.

Claims that RFRA can be used to trump nondiscrimination laws are also becoming more common. For example, some have argued that RFRA allows faith-based organizations to ignore nondiscrimination requirements that govern government grants and contracts. The idea that religious organizations should be allowed to take government funds *and* claim a religious exemption to get out of the terms required by the grant or contract is outrageous. Yet, it is happening today. An erroneous George W. Bush-era Justice Department, Office of Legal Counsel memo argues that, under RFRA, faith-based grantees can dismiss statutory requirements that prohibit grant funds from being used for religious hiring discrimination.²¹ And, when President Obama signed an Executive Order last summer to prohibit government contractors from discriminating in hiring against LGBT employees, detractors immediately argued that RFRA could be used to undermine these newly issued protections.²²

Similar claims are being made under state RFRAs. Most recently, the Alliance Defending Freedom sent legal memos to government clerks in states with marriage equality, making the unsound assertion that, under state RFRAs, government officials who oppose same-sex marriage based on religion can and should refuse to issue marriage

¹⁹ See, e.g., *University of Notre Dame v. Sebelius*, 743 F. 3d 547, 548 (7th Cir. 2014); *Priests for Life v. U.S. Dept. of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014).

²⁰ *Geneva College v. Sec’y U.S. Dept. of Health & Human Serv.s*, Nos. 13–3536, 14–1374, 14–1376, 14–1377, 2015 WL 543067 (3d Cir. Feb. 11, 2015).

²¹ Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, 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).

²² Sarah Posner, *Will Anti-LGBT Government Contractors Have a RFRA Claim*, RELIGION DISPATCHES, <http://religiondispatches.org/will-anti-lgbt-government-contractors-have-a-rfra-claim/>

licenses to same-sex couples.²³ And, private businesses are waging failed attempts to use state RFRA to trump state non-discrimination laws.²⁴

Conclusion

Americans United supported the passage of RFRA and RLUIPA because we believed they would provide protection to individuals whose religious beliefs were truly burdened and it would not be used to justify material harm to third parties. We still support these laws, but only in so far as they provide appropriate and narrowly-tailored religious exemptions in these circumstances. We have significant concerns about how many are trying to misappropriate RFRA and use it to trump non-discrimination laws and deny women healthcare services. If Congress decides to address these misuses, it should do so by ensuring that RFRA cannot be used to harm third parties.

²³ See, e.g., Memorandum from Alliance Defending Freedom to Rhode Island Clerks Responsible for Issuing Marriage Licenses (July 31, 2013), available at <http://www.adfmedia.org/files/RIClerksMemo.pdf>.

²⁴ *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) cert. denied, 134 S. Ct. 1787 (Apr. 7, 2014); *Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (Colo. Civil Rights Comm'n June 2, 2014) (final agency order) https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf; *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Jan. 7, 2015), https://www.aclu.org/sites/default/files/assets/2015-02-18--ord._denying_defs._msj_and_granting_pls._and_wa_states_msj.pdf.