Testimony of

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Submitted to the

Subcommittee on Energy
of the
Senate Committee on Energy and Natural Resources

Written Testimony for the Hearing Record on
S. 1084, S. 717 and Other Pending Energy Efficiency Legislation

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Americans United offers this written statement to the Energy Subcommittee of the Senate Committee on Energy and Natural Resources to express our strong concerns regarding S. 717, "the Nonprofit Energy Efficiency Act," as it is currently written. Although we take no position on the underlying purpose of the bill—the creation of a program that awards grants to nonprofit organizations for the purpose of retrofitting nonprofit buildings with energy-efficiency improvements—we oppose the language in the bill that explicitly authorizes these grants to "houses of worship." Providing taxpayer funded retrofitting grants to houses of worship threatens religious liberty and creates serious Establishment Clause concerns. Regardless of the value of the proposed grant program, it should not be implemented in a manner that violates cherished religious freedom protections.

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 worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

The Bar on Providing These Grants to Houses of Worship Protects Religious Freedom

The bar on the government grants to retrofit houses of worship is an important limitation that exists to protect religious freedom for all. First, it protects religion and houses of worship. Houses of worship are special in our country and our constitution. They are both the place where worship takes place and are themselves expressions of worship. Accordingly, they are accorded special protections—exemptions, accommodations, and tax deductions. Restrictions on government funding of religion is also a special protection—they protect the conscience of the individual taxpayer, safeguard the autonomy of the religious institution, and ensure an equal playing field for all religions by prohibiting the government from playing favorites.

Such a bar also upholds the fundamental principle that no taxpayer should be forced to fund a religion with whom he or she disagrees and that the government should never support building ("establishing" religion in its most basic form) religious sanctuaries. And, it protects against the government favoring, or creating the perception of favoritism for, certain religions over others.

The *Tilton* and *Nyquist* Line of Supreme Court Cases Prohibits Such Grants for Houses of Worship

In order to further religious freedom, the U.S. Constitution places certain limits on the government's ability to fund houses of worship. The *Tilton* and *Nyquist* [1] line of Supreme Court cases firmly establish that the constitution prohibits the government from providing aid for the construction, repair, and maintenance of houses of worship. These cases stand for the proposition that "the State may not erect buildings in which religious activities are to take place" and "it may not maintain such buildings or renovate them when they fall into disrepair."[2]

[1] *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).
[2] *Nyquist*, 413 U.S. at 777.

Tilton v. Richardson,[3] the first in the line of cases, involved a challenge to the constitutionality of a federal law under which federal funds were used by secular and religious institutions of higher education for the construction of libraries and other campus buildings. The law allowed money to go to religious institutions, but it also contained a provision that expressly prohibited funds from being spent on buildings that would be used for worship or sectarian instruction. Although the Court upheld the program, it unanimously held that the provision was constitutionally required and unanimously invalidated part of the statute that would have allowed religious schools to convert the federally-funded facilities for worship or sectarian instruction after twenty years had passed. The court explained: "If at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion."[4] *Tilton* stands for the proposition that no building constructed with federal funds can *ever* be used for worship or sectarian instruction.[5]

The Supreme Court reaffirmed this principle two years later in *Hunt v. McNair*,[6] when it upheld the South Carolina Educational Facilities Authority Act, which established an "Educational Facilities Authority," through which educational facilities could borrow money for the construction and renovation of their facilities at favorable interest rates. The Act, however, required each lease agreement to contain a clause forbidding religious use in such facilities and allowing inspections to enforce that requirement.[7] The Court upheld the Act, including the condition that government-funded physical structures could never be used for religious worship or instruction.

Finally, in *Committee for Public Education v. Nyquist*,[8] the Supreme Court struck down New York's program of providing grants to nonpublic schools for the maintenance and repair of "school facilities and equipment to ensure health, welfare, and safety of enrolled students." The Court summarized its previous holdings as "simply recogniz[ing] that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one."[9] The Court then held that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."[10] In other words, government funding for the construction, maintenance, or repair of physical structures is unconstitutional unless there is no possibility that the structures will be used for sectarian worship or instruction.

This line of cases clearly holds that, in accordance with the constitution, the federal government may not provide direct grants to renovate and green houses of worship.

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[3] 403 U.S. 672 (1971).
[4] *Id.* at 683.
[5] *Id*. at 692 (Douglas, J., concurring in part and dissenting in part).
[6] 413 U.S. 734 (1973).
[7] *Id.* at 744.
[8] 413 U.S. 756, 762 (1973),
[9] *Id.* at 775.
[10] *Id.* at 777.

The *Tilton* and *Nyquist* Line of Cases Remains Good Law and Is Applicable

The rule set down by the Supreme Court in the *Tilton/Nyquist* line of cases remains controlling law, as it has never been overruled in any subsequent Supreme Court decision. Indeed, in its more recent cases examining the constitutionality of government aid under the Establishment Clause, the Supreme Court has maintained that direct money grants create "special Establishment Clause dangers."[11]

Proponents of this provision may try to argue that the Sixth Circuit case, *American Atheists v. City of Detroit Downtown Dev. Auth.,*[12] limits *Tilton* and *Nyquist* and justifies these grants. This case involved a challenge to a downtown revitalization project that issued grants to organizations, including houses of worship. The decision, which upheld the grants, is an outlier in this area of the law[13] and, nonetheless, cannot overturn a Supreme Court decision. Furthermore, the court considered only "neutrality" to uphold the program even though *Mitchell* states that the Supreme Court has "never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[14] Neutrality alone cannot not save a grant program.

Proponents of providing government construction grants to houses of worship also try to distinguish *Tilton* and *Nyquist* by pointing to free speech cases. But in *Locke v. Davey*,[15] the Supreme Court explained that the speech-forum cases do not apply to government grant cases: A government-funded scholarship program "is not a forum for speech. . . . Our cases dealing with speech forums are simply inapplicable."[16]

Congress Has Consistently Followed the Principle of *Tilton* and *Nyquist*

Congress has consistently recognized that the constitution bars direct funding for the building, renovating, and repairing of buildings used primarily for religious purposes. Such provisions exist throughout the U.S. Code.[17] And, most recently, Congress recognized the applicability of this precedent when it limited green construction funding in the Recovery Act to buildings in

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[11] Even though *Mitchell* was a fractured opinion, 9 justices agreed that direct money grants are different than in-kind aid. *Mitchell v. Helms*, 530 U.S. 793, 819 (1999) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995)) (Thomas, J.,); *see also id.* at 856 (O'Connor, J., *concurring*) (describing *Tilton* as striking down the grant statute because it lacked a "secular content requirement").

[12] 567 F. 3d 278 (6th Cir. 2009).

[13] *See, e.g., Community House v. Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (enjoining a private company that leased a government built and owned building from conducting religious services and other religious activities at a homeless shelter, even though the religious activities were voluntary); *FFRF v. Bugher*, 249 F.3d 606, 614 (7th Cir. 2001) (striking down cash grants for telecommunications access for both public and private schools because the grants "provide[] a direct subsidy to participating religious schools."); *Foremaster v. City of St. George*, 882 F. 2d 1485 (1989) (striking down a grant of free electricity to a house of worship).

[14] *Mitchell*, 530 U.S. at 840 (emphasis in original).

[15] 540 U.S. 712 (2004).

[16] *Id.* at 720 n.3 (2004); a*ccord Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 839 (W.D. Mich. 2005), *aff'd* 479 F. 3d 403, 410 (6th Cir.2007) ("the unconstitutional viewpoint restriction discussed in *Rosenberger* is limited to cases involving speech in a public forum"); *see also Freedom from Religion Foundation v. McCallum*, 179 F. Supp. 2d 950, 980 (W.D. Wis. 2002) (This "interpretation of the free speech clause would require the state government to recognize a forum for private expression with regard to each of its fiscal decisions.")

[17] *See, e.g.,* 20 U.S.C.A. § 1066c; 20 U.S.C.A. § 1062; 20 U.S.C.A. § 1103e; 25 U.S.C.A. § 1813; 20 U.S.C.A. § 1068e; 25 U.S.C.A. § 3306; 20 U.S.C.A. § 1011k; & 29 U.S.C.A. § 2938.

which secular activities take place.[18] We urge Congress to continue following Supreme Court precedent and the principles of religious liberty.

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For all of the reasons listed above, we object to S. 717 as written and urge this subcommittee to fix this Constitutional infirmity. We urge that the subcommittee remove "houses of worship" from the list of eligible entities and include language, similar to the language in so many other statutory provisions, that restricts the grants from funding the renovation of buildings in which primarily religious activities take place.

[18] Section 14004(c)(3) of the Americans Recovery and Reinvestment Act of 2009 prohibited renovation of buildings used for religious worship or instruction.