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Anti-Defamation League®

February 16, 2017

The Honorable Steve King  
Chair  
House Judiciary Subcommittee on the  
Constitution and Civil Justice  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Steve Cohen  
Ranking Member  
House Judiciary Subcommittee on the  
Constitution and Civil Justice  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman King and Ranking Member Cohen:

We write to provide the views of the Anti-Defamation League (ADL) for today's House Judiciary Subcommittee on the Constitution and Civil Justice hearings on "The State of Religious Liberty in America," and ask that this statement be included as part of the official hearings record.

**The Anti-Defamation League**

For more than a century, the Anti-Defamation League has been an active advocate for religious freedom for all Americans – whether in the majority or minority. The League has been a leading national organization promoting interfaith cooperation and intergroup understanding. Among ADL's core beliefs is strict adherence to the separation of church and state effectuated through both the Establishment Clause and the Free Exercise Clause of the First Amendment. As an organization with deep roots in the Jewish community, we do not come to this position out of hostility towards religion. Rather, our position reflects a profound respect for religious freedom and a deep appreciation for America's extraordinary diversity of religious communities. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America, and to the protection of all religions and their adherents.

ADL believes that true religious freedom is best achieved when all individuals are able to practice their faith or choose not to observe any faith; when government neutrally accommodates religion, but does not favor any particular religion; and when religious belief is not used to harm or infringe on the rights of others through government action or others in the public marketplace. The United States government should not sanction discrimination in the name of religion – and it should not fund it. The right to individual religious belief and practice is fundamental. But there should be no license to discriminate with government authority or funds. Religion should not be used as a sword to restrict someone else's rights or to thwart federal or state civil rights or anti-discrimination laws.

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ADL advances these principles through education, coalition building, collaboration, interfaith dialogue, and the media. Where necessary, ADL advocates in the legislatures and courts to oppose coercive, exclusionary, discriminatory, or harmful laws, regulations, or policies. To this end, ADL has filed an *amicus* brief in nearly every major religious freedom case before the U.S. Supreme Court since 1947, as well as numerous briefs in lower appellate and trial courts. In Congress, we have played a lead role in working to enact significant religious freedom protection legislation, such as the Religious Freedom Restoration Act (“RFRA”) and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). ADL is also one of the leading providers of anti-bias education in the United States, having impacted millions of students and educators, teaching them to respect – not just tolerate – differences.

### **Religion in the Public Schools**

A core ADL concern is the appropriate role of religion in our nation’s public schools. This concern is based on a number of considerations unique to the public schools: the specific sensitivities and impressionability of school-age children; the fact that public schools are government institutions where attendance is mandatory; and the profound influence of school officials and teachers over students. These factors create a significant danger when religion is introduced into the public schools with the apparent endorsement of school administrators or teachers. A bottom line for us is that no child should be made to feel as if he or she is a guest in their own classroom or public school whose presence, at certain times of the day or certain times of the year, is tolerated or ignored.

Of great concern to ADL, as well, is the issue of religion in the science classroom. It is well-established law that while it is permissible to teach *about* religion in a secular context in public schools, it is unconstitutional to teach religion, as it amounts to indoctrination. This constitutional boundary is particularly important in the science classroom. Religious explanations for humankind, the diversity of life on earth, or the universe, including Creationism, “Creation Science,” or “Intelligent Design,” may not be taught as science under any circumstances. Evolution – the only scientific explanation for the history of life on earth – must be the only theory taught as scientific fact.

### **Public Funding of Houses of Worship and Other Faith-Based Institutions**

ADL has a deep appreciation for the vital role religious institutions have historically played, alongside government, in addressing many of our nation’s most pressing social needs. We strongly support properly-crafted government partnerships with religious-affiliated groups such as Catholic Charities, Jewish Federations, and Lutheran Social Services – partnerships which, for decades, due to strong constitutional safeguards, successfully operated without issues of taxpayer-funded proselytizing or discrimination.

However, President George W. Bush’s Faith-Based Initiative, beginning in January 2001 with the creation of the White House Office of Faith-Based and Community Initiatives, paved a different path. Through Executive Orders and changes to federal agency contracting regulations, the Bush Administration fundamentally altered the relationship between government and faith-based organizations, and opened the door to proselytizing in government-funded social welfare programs and religious discrimination in hiring and firing within taxpayer-funded programs.

Renaming President Bush's creation the White House Office of Faith-Based and Neighborhood Partnerships, President Obama continued the Faith-Based Initiative. But over the past eight years, the administration adopted welcome new rules and regulations to provide essential safeguards against proselytizing and discrimination for program participants and beneficiaries in federally-funded faith-based programs – important steps towards restoring government and religion to their proper roles. However, problems remain, including religious discrimination in hiring and firing within some taxpayer-funded social service and other programs.

ADL's concern also includes federal and state school vouchers and neo-vouchers programs, including the District of Columbia's voucher program, which primarily fund religious schools that engage in religious indoctrination. Superficially, school vouchers might seem a relatively benign way to increase the options poor parents have for educating their children. But in fact, vouchers pose a serious threat to values that are vital to the health of American democracy. Voucher programs compel taxpayers to fund parochial schools that indoctrinate particular faiths with which they are not affiliated or do not agree. Such funding undermines constitutional principles of the separation of church and state. While the U.S. Supreme Court upheld a Cleveland, Ohio school vouchers program in the 2002 *Zelman v. Simmons-Harris* case, that decision was limited to the facts in that particular case. And the Court's decision in *Zelman* does not disturb the bedrock constitutional principle that no government program may be designed to advance religious institutions over non-religious institutions.

Vouchers threaten our democracy in another core manner: by undermining our system of public education. Implementation of voucher programs sends a clear message that we are giving up on public education. The genius of the American system of public education is its inclusiveness. It serves all children, regardless of their religion, their academic achievements, or their ability to pay a fee. This policy of inclusiveness has made our public education system the backbone of American democracy. In contrast, many voucher programs allow participating schools to discriminate on the basis of religion, gender, disability, gender identity, sexual orientation, academic ability, or disciplinary history.

As our country becomes increasingly diverse, the public school system stands out as an institution that unifies Americans. Under voucher programs, our educational system and our country would become even more Balkanized than today. With the help of taxpayers' dollars, private schools would be filled with well-to-do and middle-class students and a handful of the best, most motivated students from inner cities. Meanwhile, public schools would be left with fewer dollars to teach the poorest of the poor and other students who, for one reason or another, are not able to attend or choose not to attend private schools. Such a scenario could seriously impair public education.

### **Religious Accommodation and Coercion in the Military**

Over the last decade, ADL has also raised concerns and advocated on issues of religious accommodation and coercion in the military. Members of the U.S. Armed Services must not be discriminated against on the basis of their religion. And our nation's honored military training academies – the U.S. Air Force Academy (USAFA), West Point, and the Naval Academy – bear a special responsibility to avoid religious coercion and to respect the rights of religious minorities guaranteed by the Constitution. Further, our military academies have an important

opportunity and responsibility to instill in our service personnel core democratic values, including those embodied in the First Amendment's religious freedom clauses.

Starting in 2005, ADL responded to serious allegations of religious harassment, proselytizing, and insensitivity at USAFA. Congress held hearings, and other organizations threatened to sue. While ADL expressed its concern to USAFA and in testimony to a House Armed Services Subcommittee, it also offered to assist USAFA with ADL's unique expertise in education and dealing with church-state and religious liberty issues. ADL's offer of assistance was accepted by the then-Superintendent of USAFA and each successive Superintendent has worked to improve the climate of religious respect for cadets and permanent party members.

In recent years, the issue of permissible prayer by military chaplains has become, needlessly, a highly partisan and divisive issue. Legislative proposals by some members of Congress were prompted by incorrect assertions about the effect the repeal of the military's ill-conceived and discriminatory "Don't Ask, Don't Tell" (DADT) policy would have on service members and chaplains with dissenting religious views. We have also witnessed efforts by some Members to enact legislative language to promote and facilitate explicitly sectarian prayer by chaplains at official military ceremonies and events, including those at which attendance is mandatory. Such efforts show a lack of respect for the diversity of religious beliefs in our military and threaten to erode unit cohesion.

On January 22, 2014, the Department of Defense published updated and revised Instructions on "Accommodation of Religious Practices Within the Military Services." The guidance describes policy, procedures, and responsibilities for the accommodation of religious practices in the Armed Forces. The promulgation of this guidance provides an important opportunity for the Department of Defense and all the service branches to make their religious accommodation guidance uniform. The guidance appropriately provided broad protection for an individual's religious speech and expression, and it properly states that a request for religious accommodation should promptly be granted if it will not affect mission accomplishment.

However, that guidance fell short in providing workable mechanisms for soldiers to obtain and maintain religious accommodations. In early April, 2014, an unusually-broad interfaith coalition of twenty-one national religious liberty organizations wrote to urge the Pentagon<sup>1</sup> to urge more

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<sup>1</sup> American Civil Liberties Union, American Jewish Committee (AJC), Americans United for Separation of Church and State, Anti-Defamation League, Baptist Joint Committee for Religious Liberty, Becket Fund for Religious Liberty, Chaplain Alliance for Religious Liberty, Christian Legal Society, The Church of Jesus Christ of Latter-day Saints, The Episcopal Church, Forum on the Military Chaplaincy, General Conference of Seventh-day Adventists, Interfaith Alliance, Muslim Advocates, National Council of Jewish Women, Sikh American Legal Defense and Education Fund (SALDEF), Sikh Coalition, South Asian Americans Leading Together (SAALT), United Methodist Church, General Board of Church and Society, Union of Orthodox Jewish Congregations of America, and the Union for Reform Judaism.

<http://www.adl.org/assets/pdf/civil-rights/religiousfreedom/religionmilitary/religious-accommodation-military-letter-2014-04-02.pdf>

accommodation for fundamental aspects of minority religious practices of some aspiring soldiers, including observant Jews and Sikhs:

As currently drafted, section 4(g) of the revised Instruction would require religiously observant service members and prospective service members to remove their head coverings, cut their hair, or shave their beards – a violation of their religious obligations – while their request to accommodate these same religious practices is pending. This is so, even if they are otherwise qualified to serve and an accommodation is unlikely to undermine safety or other necessary objectives. We urge you to reconsider this provision, which has the effect of forcing some religiously observant service members to make an impossible choice between their faith and their chosen profession.

The coalition letter urged revisions to the religious accommodation Instruction to avoid “an unwelcome and unnecessary chilling effect on religious liberty” which would “limit opportunities for talented individuals of faith to serve in our nation’s military.”

Following a lawsuit by Captain Simratpal Singh requesting religious accommodations, the Army issued a directive in March 2016 providing an exception to the Army’s personal appearance and grooming standards to enable the Captain to wear a beard, turban, and uncut hair in observance of his Sikh faith. And in October 2016 the Army provided welcome further clarity and guidance on religious accommodation requests. We remain committed to working with Pentagon officials towards the goal of promoting religious accommodation and respect in all the service branches.

#### **Sectarian Prayers before Local Legislative Bodies**

ADL has long opposed sectarian and non-sectarian prayers in legislatures, although the Supreme Court authorized certain legislative prayers in *Marsh v. Chambers* in 1983. Even non-sectarian prayers have the potential to divide communities along religious lines as they can exclude community members from polytheistic faiths or no faith tradition.

The Supreme Court’s closely-divided 2014 *Greece v. Galloway* town council prayer decision is deeply disturbing. It effectively permits overtly-sectarian opening prayers in one faith tradition before local legislative bodies where ordinary community members seek redress from public officials. Indeed, there already have been many reports about municipal or county board members expressing intentions to have invocations in only one faith tradition at public meetings.

In our pluralistic society, prayers at meetings of local legislative bodies – particularly sectarian ones – inevitably cause some community members to feel isolated or excluded, and divide communities along religious lines. Although the *Greece* decision generally permits sectarian legislative prayers, it does not mandate them. ADL firmly believes that invocations before public meetings of local legislative bodies are coercive and bad public policy. The League strongly discourages local public officials from instituting prayers – sectarian or non-sectarian – at public meetings. To the extent that some communities feel a need to open their meetings with some sort of solemnizing moment, the most appropriate and inclusive alternative would be a moment of silence.

ADL has provided guidance for local governments, as well as an online FAQ explaining the overly-permissive nature of the *Greece* decision and why refraining from sectarian and non-sectarian opening prayer practices is the best approach – promoting and preserving the religious liberty of all community members.<sup>2</sup>

### **Anti-Muslim Discrimination**

ADL has been very concerned about efforts to infringe on the religious freedom rights of Muslim Americans. To counter these infringements on religious liberty, ADL established the Interfaith Coalition on Mosques (ICOM) in 2010, which was created to assist Muslim congregations seeking to expand or build mosques who face discriminatory treatment by a local government. ICOM has written multiple *amicus* briefs and letters promoting the rights of Muslim congregations under RLUIPA.

In addition, ADL has played a leadership role in opposing so-called “application of foreign law” bills in many state legislatures. These proposals seek to address the fictional threat of Islamic law infiltrating the American legal system. They reflect nothing more than confusion, misunderstanding, or camouflaged bigotry, and detrimentally impact the religious freedom of observant Jews, Muslims, and others. However, dozens of these bills have been filed and ten states have enacted them.

Earlier this month, ADL filed *amicus* briefs objecting to President Trump’s Executive Order (EO) temporarily banning entry into the United States of people from seven majority-Muslim nations. Critics have contended that the EO’s purpose is unconstitutional under the First Amendment because it specifically targets Muslims. In her recent decision, Virginia Federal District Court Judge Leonie Brinkema noted that “the Commonwealth has produced un rebutted evidence supporting its position that it is likely to succeed on an Establishment Clause claim. The ‘Muslim ban’ was a centerpiece of the president’s campaign for months, and the press release calling for it was still available on his website as of the day this Memorandum Opinion is being entered.” ADL has vigorously opposed the EO, and, tracing America’s history as a nation dedicated to ideals of equality, liberty and justice, our *amicus* brief warns against repeating the shameful times in our past when America has turned against those ideals.

### **Discrimination in the Guise of Religious Freedom**

ADL firmly believes that the “play in the joints” between the Establishment Clause and Free Exercise Clause allows and, in many instances, mandates government to accommodate the religious beliefs and observances of citizens. Religious accommodation, however, has its limitations. In a pluralistic society, religious accommodation cannot be used to trample the rights of others.

ADL has joined *amicus* briefs opposing secular businesses from refusing to comply with the Affordable Care Act’s contraception mandate based on religious objections, including joining a brief in the 2014 U.S. Supreme Court case, *Sebelius, et al. v. Hobby Lobby Stores, Inc., et al.*,

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<sup>2</sup> See ADL publication entitled, “Opening Prayers at Public Meetings of Local Town Councils, Questions & Answers About the Greece v. Galloway Decision” - (web-page last visited February 16, 2017).

and other cases against refusals to abide by public accommodations laws based on religious objections to same-sex marriage.

In addition, ADL has opposed overly-broad religious exceptions to anti-bullying laws relating to sexual orientation and gender identity. And the League has taken issue with post-secondary students in secular counseling, social worker, and psychology programs seeking to opt out of curriculum requirements relating to LGBT clients or issues on religious grounds.

The League has also opposed so-called “First Amendment Defense Acts” (FADA) at the federal and state level. FADA is designed to block enforcement of federal or state anti-discrimination laws so long as that non-compliance is grounded in religious or moral objections. To the extent that these legislative proposals seek to extend special protections for specific religious beliefs or a preference for a particular religious understanding of marriage, they are unconstitutional under the First Amendment’s Establishment Clause. Because the legislative proposals seek to enshrine a particular religious viewpoint into law and lack a secular purpose, they necessarily run afoul of Establishment Clause principles. In addition, these bills violate the Establishment Clause because their primary effect, if not its sole effect, is to advance the religious viewpoints enshrined in the text of the legislation. By granting special exemptions for those who hold the enumerated religious viewpoints, the government cannot help but express that such views are deserving of a special status.

### **Political Speech by Tax-Exempt Organizations**

Since 1954, the Johnson Amendment has prohibited any tax-exempt organization, including religious organizations, from endorsing or opposing a particular political candidate. President Trump has vowed to eliminate the Johnson Amendment and legislation has been introduced to repeal it.

Under current law, houses of worship may not engage in partisan political activity – and they may not donate tax-exempt money to political campaigns. Clergy and other religious leaders have broad First Amendment rights to speak out on a range of political and social issues. The one thing they may not do is endorse or oppose a specific candidate for public office or use their resources in partisan campaigns. Supporters of the Johnson Amendment argue that it protects the wall between church and state, allowing each to operate free of the influence of the other. Repealing the Johnson Amendment would also likely result in divisive partisan debate in congregations, and pave the way for tax-exempt donations to flow through churches to candidates, effectively turning houses of worship into PACs.


### **Conclusion**

Safeguarding religious freedom requires constant vigilance, and it is especially important to guard against one group or sect seeking to impose its religious doctrine or views on others. As George Washington wrote in his famous letter to the Touro Synagogue in 1790, in this country “all possess alike liberty of conscience.” He concluded: “It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its


protection should demean themselves as good citizens, in giving it on all occasions their effectual support.”

We appreciate the opportunity to provide our views on this issue of high priority to our organization. Please do not hesitate to contact us if we can provide additional information or if we can be of assistance to you in any way.

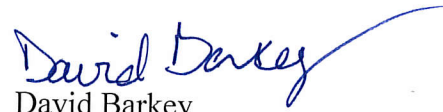
Sincerely,



Ian Scharfman  
Chair, Religious  
Freedom Task Force



Michael Lieberman  
Washington Counsel



David Barkey  
Southeastern Area Counsel  
Religious Freedom Council