House Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues

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Statement of
Douglas Laycock

Armistead M. Dobie Professor of Law
Horace W. Goldsmith Research Professor of Law
Professor of Religious Studies
University of Virginia

Alice McKean Young Regents Chair in Law Emeritus
University of Texas at Austin

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University of Virginia Law School

Thank you for the opportunity to testify on the faith-based initiatives and the recommendations of the President's Advisory Council. This statement is submitted in my personal capacity as a scholar. I hold endowed professorships at the University of Virginia Law School, and an emeritus position at the University of Texas at Austin, but of course neither university takes any position on any issue before the Committee.

I have taught and written about the law of religious liberty for thirty-four years now. I have represented both religious organizations and secular civil liberties organizations—groups across the political and theological spectrums. My commitment on these issues is not to one side or the other in any political or cultural conflict, but to genuine religious liberty for all Americans.

I. Overview

The various programs grouped under the heading of Faith-Based and Neighborhood Partnerships are designed to deliver important services to Americans in need. Many Americans respond better to religious motivations than to secular motivations; other Americans respond better to secular motivations than to religious ones. It is therefore reasonable to expect that a menu of religious and secular providers of government-funded services will help more Americans more effectively than either religious or secular providers alone.

These faith-based programs are also designed to better protect the religious liberty of both providers and recipients of government-funded social services. Government agencies have long used religious providers to deliver important services. But before the first charitable choice legislation in 1996, there were no visible rules to protect the religious liberty of either providers or recipients, and the relevant constitutional rules remain undeveloped and little known.

Properly implemented, these programs protect the religious liberty of service providers by prohibiting discrimination between religious and secular providers and between religious providers of different faiths. Funding under most of these programs is delivered through grants and contracts awarded to providers, or what the religious liberty community calls "direct funding." Avoiding discrimination in these direct-funding programs requires that grants and contracts be awarded on the basis of clear and neutral criteria.

These programs further protect the liberty of service providers by protecting the religious autonomy and religious identity of religious providers. If a religious provider is best qualified to deliver the services that government wants to provide, the religious provider should get the grant or contract without having to surrender its religious identity. The government should not use the power of the purse to bribe or coerce these religious providers into surrendering their religious mission or surrendering control of the religious parts of their operations.

Properly implemented, these programs protect the religious liberty of recipients of government-funded services by prohibiting both religious and secular providers from discriminating among recipients on the basis of religion or on the basis of a recipient's willingness to participate in religious observances or practices. It follows from these nondiscrimination rules that a government-funded provider cannot require recipients of services to participate in religious observances or practices.

Again with the important caveat of "properly implemented," these programs further protect the religious liberty of recipients by guaranteeing a secular provider to any recipient who requests one. A state cannot use its power of the purse to bribe or coerce citizens into participation in religious programs.

Properly implemented, programs that fund the best providers of services, whether religious or secular, are better for the providers of services and better for the recipients—better in programmatic terms and better in religious liberty terms. But without careful attention to implementation, it would be easy for these programs to make things worse, secularizing religious providers with heavy-handed conditions on funding, forcing recipients of services into religious programs for lack of any good alternative, or even both at the same time.

II. The President's Advisory Council and Its Recommendations

The President's Advisory Council on Faith-Based and Neighborhood Partnerships made twelve recommendations. I will briefly review those recommendations in light of the ways in which the faith-based initiatives are designed to protect religious liberty.

A. Recommendations 1, 2, and 3

The Council's first three recommendations mostly concern the nitty gritty of delivering government-funded services under these programs. That is a subject on which I claim no expertise. I would merely emphasize that well-defined programs with clear criteria for awards of grants and contracts are relevant to the religious liberty side of these programs, because such criteria make it much easier to avoid discriminating between religious and secular providers and to identify and correct any discrimination that may occur. There have also been allegations of political discrimination in these programs, and clear criteria for awards are equally important to avoiding that problem.

B. Recommendation 4

The Council's fourth recommendation is to re-emphasize to both granting agencies and social service providers the importance of religious liberty and of religious and political neutrality in the implementation of these programs.

I fully agree with these recommendations. I would add that when we emphasize "fidelity to constitutional principle" as an objective of these programs (Advisory Council's Report at 127), "constitutional principle" does not refer merely to limitations designed to constrain the religious content of these programs. It is not just the constitutional constraints on these programs, but also the programs themselves, that serve fidelity to constitutional principle. Religious freedom is best protected when government does not discriminate either in favor of or against religion.

I share the Advisory Council's sense that there is widespread misinformation and misunderstanding about the proper workings of these programs. Grants and contracts are administered by many federal, state, and local officials, most of whom are expert in their service program and not in religious liberty, and many of whom are overworked and underfunded. It is essential that such officials understand their religious liberty obligations under these programs, and if we want that to happen, the information has to be available prominently, in plain English, and in the sources of information they customarily look to concerning the grants and contracts that they administer.

The Advisory Council urges government officials to "instruct participants in the grant-making process to refrain from taking religious affiliations or lack thereof into account in this process." (Report at 128). That principle is absolutely fundamental to these programs, and if the Advisory Council believes that that is not already clear, it suggests that we have a long way to go in educating the bureaucracy about the proper working of these programs.

C. Recommendation 5

Recommendation 5 urges the government to clarify the explicitly religious activities that cannot be funded with federal funds. Again I agree. And here, the information must reach not just the many government officials awarding grants and contracts; it must reach the religious grantees.

D. Recommendation 6

Recommendation 6 is to give equal emphasis to protections for religious identity and to requirements that the religious and secular activities of government-funded service providers be separated in time or space.

Protection for the religious identity of religious service providers is essential to religious liberty and to the integrity of the faith-based initiative. Unless we protect the distinct identities of religious and secular service providers, these programs become destructive of religious liberty rather than protective of it. I regret that this recommendation was not more thorough going and that it was not unanimous. I will return at the end to the issue of employment, which is the most critical point about protecting religious identity.

The Advisory Council also emphasizes that religious activities must be supported with private funds, must be voluntary for recipients, and must be "separate in time or location from programs funded by direct government aid." (Report at 132). The requirements that religious activities be supported with private funds and voluntary for recipients are important and largely uncontroversial.

The requirement that any privately funded religious activities be separated in time or location from any government-funded secular services has come to be part of the conventional wisdom concerning these programs, and it is now embodied in federal regulations. But I do not believe that such separation is required by the Constitution.

Such separation is an administratively created prophylactic rule that protects religious liberty in some ways and constrains it in others. Separation of secular and religious functions makes it easier for religious providers to comply with their obligation not to coerce recipients of services into participating in religious activities. On the other hand, such separation interferes with religious identity and it prohibits religious free speech even when offered to individuals or audiences willing or eager to hear it. Such separation of religious and secular components of a program makes it more difficult to achieve the goal of offering genuinely secular and genuinely religious alternatives with respect to services that can be delivered either way. That goal enhances religious liberty and probably enhances programmatic success as well. The separation requirement now embedded in federal regulations is probably counterproductive.

The Supreme Court has not announced such a separation requirement in the twenty-four years since it began its shift to the view that equal funding for all providers, on a religion-neutral basis, is consistent with the Establishment Clause. The Committee should not assume that this administrative requirement of separation is also a constitutional requirement.

E. Recommendation 7

The Advisory Council's seventh recommendation is that the government emphasize and state more clearly the distinction between direct and indirect aid. Direct aid is aid paid directly from the government to the religious service provider, usually pursuant to a grant or contract. Indirect aid is aid delivered through the independent choices of private citizens, usually through some form of voucher.

I agree that this distinction is central to the Supreme Court's case law, although I predict that it will become less important over time. But even if some of today's doctrinal distinctions fade away, an important practical issue will remain.

If funds are distributed to service providers through the independent choices of the recipients of services, then there is

little risk that government officials will discriminate between religious and secular service providers, or between religious service providers of different faiths. From the government's perspective, the distribution of funds is mechanical: the money goes to the provider chosen by each recipient of services.

But if government awards grants or contracts to providers chosen by the funding agency, then government discretion is inherent in the process, and the risk of deliberate or inadvertent discrimination is ever present. Then it becomes critical to have clear criteria and procedures in place to ensure that grants and contracts are awarded without regard to religion.

F. Recommendation 8

Recommendation 8 is to increase transparency of these programs. This includes more specific recommendations to post online all the rules and governmental guidance for these programs, the forms needed to apply for and administer grants and contracts, and a list of service providers that receive federal funds.

These recommendations would protect religious liberty in multiple ways. Posting rules and guidance online would help to disseminate that information and make it easier for funding agencies and funded service providers to comply. It would make the information more readily accessible to all and reduce the disadvantages now faced by service providers who are not familiar with the process for awarding grants and contracts. Posting lists of providers awarded grants and contracts would increase the odds that any discrimination for or against religious providers would be detected. These are all good recommend-dations.

G. Recommendation 9

Recommendation 9 is a set of recommendations for monitoring compliance with the religious liberty rules that govern these programs.

This is a very important set of recommendations. These tend to be low visibility programs, hard to monitor from the outside. There is a risk that funding agencies will discriminate between religious and secular providers, either because of failure to understand the rules or because of active hostility to the rules. And there is a risk that funded service providers will coerce religious participation or discriminate against nonbelieving recipients of services, again through either misunderstanding or willfulness.

Compliance cannot be left merely to the good faith and understanding of the many different federal, state, and local funding agencies or the many different funded service providers. I fully endorse the recommendations for monitoring compliance.

H. Recommendation 10

Recommendation 10 is to strengthen the implementation of protections for the religious liberty of recipients of government-funded services. This is critical. These protections will not enforce themselves.

Recipients of government-funded services are often uninformed, struggling with other serious problems, and dependent on the service provider. We cannot assume that they either know their rights or will assert them.

The guarantee of a secular alternative to religious providers is fundamental to these programs. But it may be difficult to implement in a world where these programs are often underfunded and oversubscribed. Government may have to increase funding and the number of spaces in programs, or else reserve existing spaces, to ensure that a secular provider is available for all recipients who request one.

I. Recommendation 11

Recommendation 11 is that the Internal Revenue Service make it easier and less expensive for religious organizations to

obtain formal recognition of their status as tax-exempt organizations under §501(c)(3). This is a sound recommendation.

Churches and similar places of worship in other faiths, their integrated auxiliaries, and conventions and associations of churches and similar places of worship, are automatically entitled to tax exemption under §501(c)(3). But claiming their automatic exemption gives them no document from the IRS to prove their tax-exempt status. To get that, they have to go through the whole elaborate process required of organizations whose charitable status may be much less apparent.

There needs to be an intermediate solution, by which organizations that are automatically exempt under §501(c)(3) can get documentation of that exemption with reasonable cost and effort. This is what the Advisory Council has recommended.

J. Recommendation 12

Recommendation 12 is to promote other means of protecting religious liberty in these programs. One such means suggested is to develop a list of best practices among religious providers, and to make that list available to all religious providers. This is a good recommendation.

I would add that the government should compile a similar list of best practices among funding agencies, and make that list available to all funding agencies.

Much of the Advisory Council's discussion of Recommendation 12 is devoted to the question of whether religious service providers should form a separate corporation to receive government funds. And by a vote of 13-12, the Advisory Council recommends that government require such separate corporations.

This recommendation is a mistake. The separate corporation is a formality that does little or nothing to protect religious

liberty. Corporate status exists in the lawyer's office and the accountant's office; it is largely meaningless on the ground.

The employees who actually provide the services are the ones who must comply with the rules for protecting the religious liberty of recipients. They may respect the religious autonomy of recipients, or they may try to force religious ministrations on recipients who do not want them. They may take either course as employees of a church, and they may take either course as employees of a separate corporation. It is the employees in direct contact with service recipients who are critical, not a corporate structure that employees may not understand or even know about.

I agree that it is important to keep government funds separate from private funds, but that can be done with separate bank accounts, with or without a separate corporation. There are substantial incentives to separate bank accounts, most obviously in the audit requirements. Funds provided by government grant or contract are subject to government audit, and as the 1996 legislation recognized, if the government funds are commingled with other funds, the entire commingled fund becomes subject to audit. If the government funds are segregated, then the government has no reason to audit anything else. 42 U.S.C. §604A(h)(2) (2006). Separate corporations are not needed to reinforce this strong incentive to segregating funds.

III. The Issue of Employment

An issue the Advisory Council did not address is whether a religious organization that receives a federally funded grant or contract must forfeit its right to prefer employees who share the organization's faith commitments. If a religious organization provides social services eligible for government funding, but provides those services with a workforce committed to the organization's religious teachings and mission, may or must that organization be excluded from government funding on the ground of its employment practices?

In its Recommendation 6, the Advisory Council emphasized the importance of protecting the religious identity of religious providers who accept government funds. Nothing is more important to religious identity than the ability to hire employees who support the religious mission and will faithfully implement it. No protection for religious liberty in these programs is more important than protecting the right to hire such employees.

Protecting recipients of services from religious coercion is *equally* important, but it is not *more* important. The issue in each case is the same: the power of government funding should not be used to coerce either providers or recipients of government-funded services into becoming more or less religious then they would be of their own free will. Neither providers nor recipients should be coerced into participating in religious activities against their will or into abandoning or limiting religious activities against their will.

From the beginning of the modern civil rights era, Congress has protected the right of religious organizations to employ "individuals of a particular religion." 42 U.S.C. §2000e-1(a) (2006); 42 U.S.C. §2000e-2(e)(2) (2006). Religious organizations should not forfeit this statutory right (which in at least some contexts is also a constitutional right) when they accept a government grant or contract to provide social services.

An offer of funding conditioned on forfeiting the right to employ adherents of the faith would force the religious organization either to abandon its religious exercise in order to fund its program, or to forfeit potential funding in order to maintain its religious exercise. Such conditional offers of funding would convert the faith-based initiative from a program that protects religious liberty, by prohibiting discrimination between religious and secular providers, into a program that attacks religious liberty by bribing or coercing religious providers into surrendering their religious identity. Opponents of the faith-based initiative, who would exclude religious providers from participating in government-funded programs in the first place, can get their way indirectly if they can require all the religious providers to secularize their workforces as a

condition of participation. If all the workforces are secularized through bans on consideration of religion in hiring, there will soon enough be no genuinely religious providers participating. Both the religious liberty goals and the programmatic goals of the faith-based initiative would be defeated.

Requiring religious providers to surrender their right to hire would be fundamentally wrong as a matter of policy. It would also be illegal. As the Supreme Court has long recognized, requiring a person to surrender part of his religious exercise as a condition of receiving government funding amounts to a financial penalty on the exercise of religion. In the first modern case under the Religion Clauses, a case much cited by strict separationists, the Court said that a state may not exclude any persons, "because of their faith or lack of it, from receiving the benefits of public welfare legislation." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In *Sherbert v. Verner*, the Court said that loss of financial benefits on account of Sabbath observance "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. 398, 404 (1963). In *Thomas v. Review Board*, 450 U.S. 707, 718 (1981), the Court said that conditioning benefits on abandonment of religious practice puts "substantial pressure on an adherent to modify his behavior and violate his beliefs," and that when this happens, "a burden upon religion exists." "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." The Court repeated each of these statements in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 140–41 (1987), and it reaffirmed them again in *Frazee v. Illinois*, 489 U.S. 829, 832 (1989). These cases are part of the law of the Religious Freedom Restoration Act, which was enacted specifically "to restore the compelling interest test as set forth in *Sherbert v. Verner*." 42 U.S.C. §2000bb(b)(1) (2006).

Funding without conditions protects the religious liberty of the groups that are funded. What about the religious liberty of those who would work for government-funded charities? What about the charge of "government-funded discrimination"?

The way to protect the religious liberty of those who would work for charities is to fund a diverse array of charities without discrimination. Many government-funded charities will be secular, and those that are religious will come from a variety of faiths. When these employers are considered collectively, there will be jobs for employees of all faiths and of none. We cannot protect an individual right to work for specific religious organizations without destroying the separate religious identities of those organizations.

The whole notion of a right to work for a religious organization without regard to whether the applicant shares the organization's religious commitments is founded in a category mistake. Religion became part of the canonical list of civil rights categories when Congress's attention was focused on employment in the commercial sector. The goal was to ensure that religious minorities could participate in business, work in the professions or any other occupation, and receive services from "establishments doing business with the general public." S. Rep. 88-872, 1964 U.S. Code, Cong. & Admin. News 2355, 2355. No one ever intended to require synagogues to appoint Baptist rabbis, or Catholic Charities to hire atheist social workers. That is why Title VII contains express exceptions to keep that from happening.

Government funding does not change the competing interests in religious liberty. A claimed right to work for a religious organization without supporting that organization's religious commitments is still fundamentally inconsistent with religious liberty; it is still destructive of a religious organization's right to exercise its religion.

One traditional reason for opposing the grant of government funds to religious organizations has been that government money would corrupt religious organizations, because the money would inevitably come with conditions that would force religious organizations to distort their mission or abandon tenets of their faith. This is a genuine risk, and programs under the faith-based initiative should be designed to minimize the danger. It is counterproductive at the level of first principle to

claim that such corrupting conditions are actually *required*—that government cannot grant funds to religious charities unless it requires them to abandon religious hiring, or any other tenet of their faith. If there are going to be grants to religious organizations, these grants should be structured in a way that protects religious liberty, not in a way that burdens it.

A ban on religious hiring by religious organizations would also be unworkable. No one seriously believes that the major Jewish charities will hire a Christian or Muslim Executive Director, or that Catholic Charities will put Jews and Protestants in its top positions, or that an evangelical Protestant church will appoint a nonbeliever to head its §501(c)(3) affiliate. Not even the most rigorous opponents of a religious organization's right to hire members of the faith seem to expect that. Disqualifying all religious charities that hire members of their own faith even for executive positions would immediately disqualify all religious charities.

Most religious charities want a critical mass of believers in rank-and-file positions too. Some want believers in every position. Allowing religious charities to hire believers for executive positions, while disqualifying charities that hire believers for "too many" positions, would burden these charities' exercise of religion as described above. It would also require intrusive government inquiries into many jobs at each organization, and it would require difficult line drawing to distinguish positions in which religious hiring is permitted from other positions in which it is not. Such intrusive government inquiries into religious organizations are a Religion Clause problem in themselves. It was to avoid the burden of such inquiries, and to avoid the burden of negative answers, that Congress amended Title VII to allow religious organizations to prefer believers for work in *all* their activities, not merely their "religious" activities. *Compare* Civil Rights Act of 1964, §702, 78 Stat. 253, 255; *with* Equal Employment Opportunity Act of 1972, §3, 86 Stat. 103, 103–04.

None of this analysis is changed by the Supreme Court's decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971

(2010). That decision upheld an alleged rule that recognized student organizations at the Hastings Law School must be open to all students, with no membership requirements based on status or belief. There are two things to note about that case. First, the opinion interpreted the Constitution; it did not interpret the Religious Freedom Restoration Act.

Second, the opinion carefully avoided addressing the most important constitutional difficulty. The original rule at Hastings tracked the general pattern of civil rights laws in the United States. The rule prohibited religious discrimination; it did not prohibit political or ideological discrimination. The Christian Legal Society argued that this was viewpoint discrimination. Student organizations with political viewpoints could protect their identity by insisting on *political* loyalty, but student organizations with religious viewpoints could not protect *their* identity by insisting on *religious* loyalty.

Hastings worked very hard to keep that issue from being decided, announcing in the midst of litigation that its unwritten policy had always been that every student organization must be open to every student, with qualifications that dribbled out later. The Supreme Court worked hard to avoid deciding that issue, accepting Hastings' repeated changes and clarifications of its policy. So the Court declined to consider whether it is constitutional to single out religious organizations as the only organizations that could not insist that their members support their cause. *See id.* at 2982–84.

Of course the federal civil rights laws track the usual categories; religious discrimination is prohibited but political and ideological discrimination is not. So environmental organizations are not required to hire employees who are opposed to environmental protection, and no statute changes that situation if the environmental organization receives a federal grant for a demonstration project. An environmental organization is entitled to insist that its employees support the cause.

A religious organization has the same right to insist that its employees support its cause. This right is guaranteed by the exemptions for religious organizations in Title VII. Neither Congress nor the executive branch should change the law so that religious organizations forfeit that guarantee if they accept a federal grant. Such a change would be destructive of religious liberty, not protective of it.

IV. A Further Note on the Religious Freedom Restoration Act

I explained above why the Religious Freedom Restoration Act protects the right of religious organizations to hire employees who share the organization's faith commitments. There is another step to that argument. It depends on close textual analysis of the statute, so I have saved it for this separate section.

It is sometimes suggested that RFRA is simply inapplicable to federal grant programs. That is inconsistent with the statutory text, which says that RFRA "applies to *all* federal law, and to the implementation of that law." 42 U.S.C. §2000bb-3(a) (2006) (emphasis added). It is also inconsistent with the expressly stated intent to codify *Sherbert v. Verner*, which was a case in which government withheld a grant of funds.

Even more specifically, it is inconsistent with the express indication in the statutory text that Congress thought about grant programs and expressly declined to exclude them from the Act. This last point is textually complex, depending on a double negative that is spread over two sentences, but it is important to parse it through. Section 2000bb-4 first says that RFRA does not affect the Establishment Clause. Then it says that "[g]ranting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall *not* constitute a violation of this chapter." "This chapter" is all of RFRA. So RFRA does not prohibit grants to religious organizations.

The next sentence says: "As used in this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does *not* include the denial of government funding, benefits, or exemptions." (*Id.*, emphasis added). The only place where the term "granting" is used in "this section" is in the preceding sentence, to say that granting funds is *not* a RFRA violation. So when Congress goes out of its way to state what should have been obvious—that granting does not include denial—it is taking denials of funding *out* of the sentence that says that granting is *not* a RFRA violation. Denials are not in that sentence; denials are *not* not a RFRA violation. That is, translating the double negative into simpler English, denials of funding *may be* a RFRA violation.

Section 2000bb-4 does not of itself say that withholding funds *is* a RFRA violation; that depends on the analysis of substantial burden and compelling interest under §2000bb-1. But §2000bb-4 says that denials of funding are not excluded from the statute. Denials of funding are subject to the same RFRA analysis as any other government decision challenged as a burden on religious exercise.

V. Conclusion

Properly implemented, the faith-based initiative protects religious liberty. "Properly implemented" means that government funding is made available without regard to religion, and that neither the funding agencies nor the funded service providers use the power of the government purse to distort the religious choices of services providers or service recipients.

It is important to protect service recipients from coerced participation in religious activities. And it is equally important to protect service providers from coerced secularization. It is incoherent, at least in terms of religious liberty, to argue for one of these principles without the other.