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Submission of The Becket Fund for Religious Liberty

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The Becket Fund is a nonpartisan, nonprofit, public interest law firm dedicated to protecting the free expression of people of all religious traditions.

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Universal Periodic Review of Member-State United States of America

The Becket Fund for Religious Liberty, in special consultative status with ECOSOC, submits this analysis of the rule of law and religious freedom law in the United States of America (USA) as a contribution to the Universal Period Review of UN member-state USA.

1. Background

The USA has been a place of religious diversity since its inception. Many of the original colonies of the United States of America were founded by religious dissidents seeking refuge in North America. These groups included Quakers, Baptists, Catholics, and Puritans. Some of the early colonial leaders engaged in religious persecution of minority groups. Others, like Roger Williams in Rhode Island, established early models of religious liberty as a response to the troubled past that many dissident groups experienced in other colonies and in Europe. Those laws were precursors to the modern American conception of religious freedom. This history of diversity and religious freedom is key to the modern understanding of religious liberty in the USA. Although it has at times struggled with prejudice and religious persecution, the USA has established a set of practices centered around the concepts of free exercise of religion and disestablishment of official state religion.

Today, the population of the USA is made up of approximately 78% Christians (approximately 51% of Americans are Protestant, while 24% are Catholic), 16% unaffiliated, 1.7% Jews, 0.7% Buddhists, 0.6% Muslims, and 0.4% Hindus.[1]

2. Legal Framework

2.1 Constitutional Framework

The primary protections for religious freedom in the USA are found in the United States Constitution. The First Amendment to the Constitution, enacted in 1791, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The two clauses of this provision are known as the Establishment Clause and the Free Exercise Clause, respectively. The first prohibits government establishment of official churches or religious dogma. The second prohibits the government from banning religious expression in all but the most extreme circumstances. In addition to these two clauses, individuals also enjoy freedoms under the Free Speech and Assembly provisions of the Constitution.[2] The Free Speech Clause, in particular, has been used to extend protection to minority religious groups engaging in unpopular and/or inflammatory forms of expression.[3] The Constitution likewise protects the freedom to assemble and freedom of association, which is the freedom of groups to select their own members and speakers. A separate provision of the Constitution prohibits the government from imposing any religious test in order to hold public office.

Due to the federal structure of the USA, the First Amendment originally applied only to the federal government. Individual states were free to treat religion as they saw fit and many actually maintained established state churches. Beginning in the 1940s, the Free Exercise and Establishment Clauses were re-interpreted to apply to all levels of government.[4] Although the clauses still speak of "Congress mak[ing] no law," the clauses prohibit such laws by any level of government in the USA. In addition, no treaty can override these constitutional provisions.

Because the USA has a federal system of government, additional religious liberty protections exist in some state and local governments. The federal constitutional provisions are the most important protections, and those most invoked. However,

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[1] *See* Pew Forum on Religion and Public Life, *US Religious Landscape Survey* (2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

[2] The First Amendment of the US Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[3] *See, e.g., West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). In this case, the Supreme Court held that the state could not compel participation in patriotic exercises, even in the height of a world war. The plaintiffs in that case were schoolchildren who had religious objections to the nation's Pledge of Allegiance and flag salute.

[4] *See Religious Freedom in the World* 416 (Paul Marshall ed., 2008). The Free Exercise Clause was incorporated in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). In that case, two missionaries were cited for breach of the peace because they were in a Catholic neighborhood distributing materials deeply offensive to Catholics. The Supreme Court held that the state's breach of the peace laws could not be used to punish this form of religious expression

the constitutions of each state also contain religious liberty protections similar to the federal First Amendment. Some state constitutions contain provisions which protect religious exercise more fully than the federal constitution.[5]

2.2 Statutory Framework

Statutory protection for religious conviction exists in the United States at the federal, state, and local levels. Federal law and many state laws prohibit religious discrimination in public places, housing, and the workplace.[6]

Two particularly significant pieces of federal legislation have been enacted in the past twenty years to ensure that the free exercise of religion is protected. The Religious Freedom Restoration Act (RFRA), which passed in 1993, states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." According to RFRA, in order to impose a burden to a person's free exercise of religion, the government must prove that the law involves an interest of the highest order (a "compelling government interest") and that it is applied in the means least restrictive of religious exercise.[7] Very few laws pass this exceedingly stringent standard. RFRA applies to actions by the federal government, but do not apply at the state or local levels.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) was passed in 2000 to provide stronger protection for religious freedom in the land-use and prison contexts, two areas in which Congress found repeated instances of religious discrimination and Free Exercise Clause violations.

Many states have laws which provide additional protection for religious freedom. These laws, known as state Religious Freedom Restoration Acts, were enacted in the wake of the *Smith* decision described below to ensure that conscientious objectors had additional protection not available under the federal constitution.

Finally, the USA has also made religious freedom a foreign policy priority in passing the International Religious Freedom Act of 1998, which established a high-profile Ambassador-at-Large for International Religious Freedom in the Department of State.[8]

2.3 Government Structure and Agencies

The US Constitution states that there will be no religious test for holding an elected office. Thus, the representative democratic system of government allows for individuals of various religious convictions to hold public office. The US Equal Employment Opportunity Commission enforces federal laws that protect against religious discrimination in the workplace. The US Department of Justice maintains a Civil Rights Division in which the Special Counsel for Religious Discrimination "enforces federal statutes that prohibit discrimination based on religion in education, employment, housing, public accommodations, and access to public facilities."[9] The Civil Rights Division also prosecutes bias crimes against individuals on the basis of their religion. In response to the terrorist attacks on September 11, 2001, the Department of Justice established the Initiative to Combat Post-9/11 Discriminatory Backlash, with a particular focus on discrimination towards Arab, Sikh, Muslim, and South-Asian Americans.[10] In 2001, President George W. Bush established the Office of Faith-Based Initiatives, which is now the White House Office of Faith-Based and Neighborhood Partnerships.[11] This office in the executive branch facilitates the provision of social goods with faith-based organizations and helps these organizations find funding sources within the government.

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[5] *See, e.g., Humphrey* v. *Lane*, 728 N.E.2d 1039 (Ohio 2000); *In re Browning*, 476 S.E.2d 465 (N.C. 1996); *State* v. *Miller*, 549 N.W.2d 235 (Wis. 1996); *Attorney Gen.* v. *Desilets*, 636 N.E.2d 233 (Mass. 1994); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Rupert* v. *City of Portland*, 605 A.2d 63 (Me. 1992); *St. John's Lutheran Church* v. *State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992); *State* v. *Evans*, 796 P.2d 178 (Kan.1990); *State* v. *Hershberger*, 462 N.W.2d 393 (Minn. 1990).

[6] *See, e.g.,* 42 U.S.C. §§ 2000a-2000e.

[7] *See* 42 U.S.C. § 2000bb.

[8] *See* International Religious Freedom Act of 1998, Pub. L. No. 105–292, 112 Stat. 2787.

[9] *See* U.S. Dept. of Justice, *Protecting the Religious Freedom of All: Federal Laws Against Religious Discrimination* (2005), http://www.justice.gov/crt/religdisc/religionpamp.php.

[10] *See* U.S. Dept. of Justice, *Initiative to Combat Post-9/11 Discriminatory Backlash* (2008), http://www.justice.gov/crt/legalinfo/nordwg_mission.php.

[11] *See* Executive Order No. 13,498, 74 Fed. Reg. 6533 (Feb. 9, 2009).

2.4 International Commitments

In 1977, the USA signed the International Covenant on Civil and Political Rights (ICCPR),[12] which guarantees freedom of religion or belief.[13] Additionally, as a member of the United Nations, the USA has agreed to the principles expressed in the Universal Declaration of Human Rights, which also protects the fundamental right to freedom of religion or belief, including the right to change one's faith.[14]

3. Implementation

3.1 Narrowing of Free Exercise

The precise scope of the protections included in the Free Exercise Clause has been a subject of debate for many years. From the 1870s to the 1960s, the Free Exercise Clause was understood primarily to protect freedom of thought and belief, but not the freedom to take outward actions mandated by religious faith. In the 1963 decision *Sherbert* v. *Verner* the Supreme Court held that the Free Exercise Clause protected actions as well as beliefs.[15] In other words, religious believers who were burdened by even non-discriminatory laws could gain exemptions from those laws.

In 1990, the Supreme Court reversed course. In the case *Employment Division* v. *Smith* the Supreme Court held that religious believers were no longer entitled to exemptions from generally applicable laws.[16] However, the Free Exercise Clause does protect religious believers from laws which are discriminatory or which penalize religious conduct in situations where similar secular conduct is permitted.[17] This means that no level of government in the USA, federal, state, or local, may intentionally ban unpopular religious conduct. While the government retains the power to legislate for health, safety, and welfare, it must do so in a manner which does not single out particular religious beliefs or practices.

The current state of the law is protective for religious minorities subject to discrimination. However, it is less protective of those who have conscientious objections to facially neutral laws.[18] Recent examples include forcing medical professionals to provide abortions against their conscience and the proposed rescission of existing conscience protections for medical professionals.[19]

3.2 Establishment Problems

The USA is unique in its provision for disestablishment of religion. As originally understood, this provision prohibited the federal government from establishing a national religion. In the early days of the USA, several states had established churches, but these were abolished in the eighteenth and early nineteenth centuries as the result of political processes. In

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[12] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

[13] *See id.* art. 18 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."). The USA officially ratified the ICCPR in 1992 and held a reservation on Article 20 of that Convention. Article 20 prohibits the advocacy of hatred that constitutes incitement to discrimination, hatred, or violence. Given the breadth of the First Amendment of the US Constitution, Article 20 is not compatible with the USA's interpretation of free speech.

[14] Universal Declaration of Human Rights, Dec. 12, 1948, G.A. Res. 217A, art. 18, U.N. Doc. A/810 (Dec. 12, 1948).

[15] *See Sherbert* v. *Verner*, 374 U.S. 398 (1963)

[16] *See Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990).

[17] This protection was explained in the case of *Church of the Lukumi Babalu Aye* v. *City of Hialeah,* 508 U.S. 520 (1993), in which a town banned animal sacrifice shortly after an unpopular religious group known for animal sacrifices announced plans to build a temple in that town.

[18] In the military context, conscientious objection to combat is protected by federal laws providing for alternative service for conscientious objectors. The USA has conscientious objector protections dating back to its Civil War in 1860-65, and a federal system of alternative service has been in place since World War I. *See* Kevin J. Hasson, *The Right to Be Wrong* 52-53 (2005).

[19] *See Cenzon-DeCarlo* v. *Mount Sinai Hospital,* 2010 WL 169485 (E.D.N.Y., Jan. 15, 2010). In 2008, the Department of Health and Human Services issued a provider conscience rule meant to protect health workers whose conscience compelled them to refrain from participation in certain health services, including abortions and the dispensing of birth control. 45 C.F.R. 88.1. In 2009, the Department issued a proposed rescission of the 2008 conscience rule, but this rescission has not yet gone into force. *See* Rescission of the Regulation Entitled "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Practices in Violation of Federal Law," 74 Fed. Reg. 10207 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. 88.1).

1947, the Supreme Court first applied the Establishment Clause to state and local governments. The application of the Establishment Clause has been a source of confusion for the past 70 years. It permits some forms of religious expression by the government, including the practice of opening Congress with prayers[20] and, at least currently, the use of "under God" in the nation's Pledge of Allegiance and "In God We Trust" as the national motto, printed on currency.[21] However, it bans other forms of government religious expression, including some monuments containing Jewish or Christian Scriptures and official prayers in public schools.[22]

The application of the Establishment Clause in state schools has been particularly controversial. In the USA, education is either through fully state-funded "public" schools or fully privately funded "private" schools. A small subset of the population is educated in home schools conducted by parents. The vast majority of the population is educated for free in state schools. Because the Establishment Clause is applied to state schools, religious expression is limited in those schools. However, the USA also requires that state schools permit many forms of private religious expression and employ a policy of non-discrimination under the Free Exercise Clause. So, for example, state schools may not ban yarmulkes, headscarves, or other religious apparel.[23] State schools must also permit students to engage in religious exercise at school, which includes such actions as permitting Muslim students to participate in daily prayers and permitting Jewish students to receive kosher meals at school.[24]

Religious schools must be private and are not permitted to receive state funding. In recent years, limited state funding has been permitted to reach private schools through the use of public vouchers or scholarships awarded to students in troubled state schools. The scope and method of that funding is restricted by archaic state laws, described below, which were designed to prohibit public funding for schools run by unpopular religious minorities.

3.3 State-level Discriminatory Legislation

In the mid-19th century, a wave of anti-Irish Catholic fervor in the USA produced a nativist organization known as the "Know-Nothings." With the support of then-President Ulysses S. Grant, the Know-Nothings advanced legislation meant to stifle the development of Catholics and other minorities. In 1875, President Grant proposed a Federal Constitutional Amendment to prohibit government funding to any "sectarian" institutions.[25] U.S. Senator James Blaine of Maine formally sponsored Grant's amendment. His bill overwhelmingly passed in the House with a vote of 180 to 7, but failed to achieve the 2/3 majority in the Senate by 4 votes. In the aftermath, 40 states passed state constitutional amendments with similar provisions, today known as "Blaine Amendments."

The Blaine Amendments are still active in 40 states and are not only a problem for Catholics. They are enforced by states to deny funding to people of all faiths, including Jews, Protestants, and Muslims alike. The U.S. Supreme Court has ruled in *Mitchell* v. *Helms* that the Blaine Amendments have "a shameful pedigree that we do not hesitate to disavow" and represent a "doctrine, born of bigotry, [that] should be buried now." Blaine Amendments have been used by groups like the Ku Klux Klan (KKK) to discriminate against all sorts of religious people.

Two states—Nebraska and Pennsylvania—also have bans on government school teachers wearing religious clothing.[26] The State of Oregon recently repealed its KKK-inspired religious garb ban after a campaign led by religious minority groups.

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[20] Opening prayers in the US Congress have included prayers from various traditions, including Jewish, Muslim, Christian, and Hindu. The texts of Jewish, Muslim and Hindu prayers are available on the Office of the Chaplain's website. *See* http://chaplain.house.gov/archive/index.html?id=1319; http://chaplain.house.gov/archive/index.html?id=1333. *See also A Hindu Prayer in the Senate Meets Protest*, N.Y. Times, Jul. 13, 2007.

[21] Several challenges to this language are ongoing. *See Newdow* v. *Rio Linda Union School District,* 597 F.3d 1007 (9th Cir. 2010); *Freedom from Religion Foundation* v. *Hanover Sch. Dist.*, 665 F.Supp.2d 58 (D.N.H. 2009).

[22] See *Engel* v. *Vitale*, 370 U.S. 421 (1962) (striking down teacher-led recitation of "Regents' prayer" in public school).

[23] *See, e.g.,* Brian Knowlton, *U.S. Takes Opposite Tack from France in Headscarf Debate,* N.Y. Times, Apr. 3, 2004 (describing federal government's actions to ensure that a Muslim girl could wear her headscarf in state school). *See also* H.B. 3686, 2009 Leg., Special Sess. (Ore. 2010) (enacted) (repealing prior laws which prohibited public school teachers in Oregon from wearing "religious dress" in the classroom).

[24] *See* The Becket Fund for Religious Liberty, *Muslim Prayer Protected in Texas Public School* (Dec. 20, 2005), http://www.becketfund.org/index.php/article/453.html.

[25] N.B. "Sectarian" was code for "Catholic."

[26] *See* 24 Pa. Stat. Ann. § 11-1112; Neb. Rev. Stat. § 79-898.

Seven states in the USA—Massachusetts, Michigan, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Wyoming—still have arcane blasphemy laws in their state codes. While these blasphemy statutes are without legal effect, they nonetheless set a negative example by retaining centuries-old religious prejudices in official state codes.[27]

3.4 Autonomy of Religious Organizations

One additional protection for religious freedom rooted in the First Amendment is the prohibition on government interference in internal religious affairs. Federal and state courts are not permitted to rule on certain issues which are considered internal religious matters. For instance, courts will not hear cases in which a minister or priest challenges her dismissal from employment, since such cases interfere with the internal decisions of a religious body and may involve decisions on matters of religious doctrine.[28] Courts must also follow special rules in cases involving church property disputes, so that the government minimizes its involvement with religious matters.[29]

This prohibition on entanglement with religious matters also protects religious organizations from problems with government registration. In the USA, no formal registration is required in order for a religious organization to meet and begin holding services. Organizations which wish to establish legal identities in order to hold property, pay employees, and receive tax exemptions may organize as a corporation under the laws of their state. Incorporation is a simple and inexpensive process. Incorporation laws are religiously neutral, and generally the same standards apply to religious organizations as apply to businesses and secular charities. The First Amendment prohibits government officials from prohibiting, delaying, or otherwise interfering with the incorporation of a religious group.

4. Recommendations

During the Universal Periodic Review, the UN Human Rights Council should commit to considering religious freedom in its evaluation of the United States of America. We respectfully recommend that UNHRC address the overbroad use of the Establishment Clause to exclude religious expression from public life.

In addition, the UNHRC should take the opportunity to point out the best practices that the USA has shown in its approach to the disestablishment of an official state religion while also using all means possible to ensure that religious exercise is not burdened by the state unless there is a compelling government interest that is achieved in the least restrictive means. In particular, the USA's practice of taking especial care to protect the rights of religious minorities should be praised, as well as its refusal to impose onerous registration requirements on religious organizations.

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[27] Courts uniformly refuse to uphold blasphemy convictions. *See, e.g., Commonwealth* v. *Perry*, 42 Pa. D. & C.2d 264 (Pa. Quar. Sess. 1967) (holding that the defendant's speech was not sufficient to constitute a charge of blasphemy). Interestingly, the most recent of these cases was a 1990 criminal case brought under the Massachusetts blasphemy statute. *See* Paul Langner, *Judge Dismisses Blasphemy Charge against Atheist*, Boston Globe, Jan. 18, 1990. In that case, the defendant was charged with blasphemy after saying at a lecture that "God has a perverse sense of humor" if the Bible is the word of God. *Id.* Instead of taking the opportunity to declare the Massachusetts blasphemy law unconstitutional, the judge dismissed the case at the request of the assistant district attorney, saying only that the defendant's actions did not amount to a crime. *Id.*

[28] *See Petruska* v. *Gannon University*, 462 F.3d 294 (3d Cir. 2006); *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006).

[29] *See Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952) (the constitution recognizes "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."). *See also Jones* v. *Wolf,* 443 U.S. 595, 608 (1979) (court proceedings "involv[ing] considerations of religious doctrine and polity" unacceptable).