

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING **EDITED**PEACEFUL COEXISTENCE? RECONCILING NON-DISCRIMINATION
PRINCIPLES WITH CIVIL LIBERTIES

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FRIDAY, MARCH 22, 2013

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The Commission convened in Room 1150, 1331
Pennsylvania Avenue Northwest, Washington, D.C. at
9:30 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ROBERTA ACHTENBERG, Commissioner (via telephone)

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner (via telephone)

MICHAEL YAKI, Commissioner (via telephone)

VANESSA EISEMANN, Parliamentarian

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STAFF PRESENT:

MARGARET BUTLER, Acting Chief, OCRE

JENNIFER CRON HEPLER

LILLIAN DUNLAP

PAMELA DUNSTON, Chief, ASCD

YASMIN ELHADY

ALFREDA GREENE

LENORE OSTROWSKY, Acting Chief, PAU

ELOISE PLATER

JOHN RATCLIFFE, Chief, BFD

MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

JOHN MARTIN

CARISSA MULDER

MARLENE SALLO

ALISON SOMIN

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P R O C E E D I N G S

9:30 a.m.

CHAIRMAN CASTRO: Okay. I'm going to call this meeting to order. Welcome.

I am Marty Castro, Chair of the U.S. Civil Rights Commission. I want to welcome everyone here this morning to our briefing on "Peaceful Coexistence? Reconciling Non-Discrimination Principles with Civil Liberties." It is currently 9:30 a.m. on March 22nd, 2013.

The purpose of this briefing is to examine recent legal developments concerning the intersection of Non-Discrimination Principles with those of Civil Liberties.

The discussion will involve both the ministerial exceptions in the case of *Hosanna-Tabor v. EEOC*, and the Student Group Non-Discrimination Policy in the case of *Christian Legal Society v. Martinez*.

Today's briefing features 10 distinguished speakers who will provide us with a diverse array of viewpoints on these topics.

For everyone's knowledge, this briefing is being audio cast to the public by PR Newswire through their subcontractor, MultiVu.

During the briefing, each panelist is

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1 going to have seven minutes to speak. After all the
2 panelists have made their presentations, then the
3 Commissioners will have the opportunity to ask
4 questions of them for an allotted time period.

5 I'm going to recognize those Commissioners
6 that will speak. I will always endeavor to be fair. It
7 will be a little wrinkle since we have at least three
8 Commissioners who are on the phone. So, those of you
9 on the phone, if you could highlight to me when you
10 want to speak, I will write your name down on the list
11 and then call on you.

12 Once I recognize a Commissioner to speak,
13 I would hope that they would in their conversations
14 with the panelists try to convey their question
15 succinctly, and try to keep the questions to one;
16 although, I know sometimes it requires a follow-up,
17 but just in the interest of time we want to make sure
18 that we have everyone have an opportunity to ask
19 questions, and everyone to respond to those as fully
20 as possible.

21 The panelists are going to notice a series
22 of warning lights in front of me and facing you. When
23 the light turns green that means you'll have seven
24 minutes. When it gets to yellow that means it's really
25 time to wrap up. You're going to have two minutes

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1 left. When the light turns red, you got to stop, just
2 like the traffic lights. We will give you an
3 opportunity to respond further in the question and
4 answers, but we do ask that you try to stop when that
5 red light comes on.

6 I ask my fellow Commissioners, as they
7 always have been, to be considerate of the panelists
8 and one another as we move forward on this very
9 important yet passionate topic for all of us. So,
10 those are the housekeeping items, so those are out of
11 the way.

12 Now, I'd like to introduce our panelists.
13 First of all, our first panel is led off by Kimberlee
14 Wood Colby, Senior Counsel at --

15 COMMISSIONER YAKI: Mr. Chairman, I just
16 want to let you know that Commissioner Yaki is here.

17 CHAIRMAN CASTRO: Great. Thank you,
18 Commissioner.

19 Our first panelist is Kimberlee Wood
20 Colby, Senior Counsel at the Center for Law and
21 Religious Freedom of the Christian Legal Society. Our
22 second panelist is Ayesha Khan, Legal Director of the
23 Americans United for Separation of Church and State.
24 Our third panelist is Lori Windham, Senior Counsel,
25 the Becket Fund for Religious Liberty. Our fourth

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1 panelist is Daniel Mach, Director of the American
2 Civil Liberties Union, Program on Freedom of Religion
3 and Belief.

4 So, I now will ask each of you to swear or
5 affirm that the information that you are about to
6 provide us is true and accurate to the best of your
7 knowledge, information, and belief. Is that true?

8 (Chorus of yeses.)

9 CHAIRMAN CASTRO: Yes. Okay, thank you.

10 Ms. Colby, please proceed. You've got
11 seven minutes.

12 **II. Panel I**

13 **Kimberlee Colby, Senior Counsel**

14 **Christian Legal Society**

15 MS. COLBY: Thank you, Chairman Castro.

16 CHAIRMAN CASTRO: You're welcome.

17 MS. COLBY: I'm Kim Colby, Senior Counsel
18 for the Christian Legal Society where I've worked for
19 over 30 years to protect students' right to meet for
20 religious speech on campus.

21 Christian Legal Society has long believed
22 that the pluralism essential to a free society
23 prospers only when the First Amendment rights of all
24 Americans are protected regardless of the current
25 popularity of their speech. For that reason, CLS was

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1 instrumental in passage of the Equal Access Act of
2 1984 that protects the right of all students to meet
3 for religious, political, philosophical, or other
4 speech on public secondary school campuses.

5 Thank you for inviting me to discuss the
6 ongoing problem of college administrators using non-
7 discrimination policies to exclude religious student
8 groups from campus.

9 At too many colleges, religious student
10 groups are being told that they cannot meet on campus
11 if they require their leaders to agree with their
12 religious beliefs. But it is common sense and basic
13 religious liberty -- not discrimination -- for
14 religious groups to expect their leaders to share
15 their religious beliefs.

16 On a typical college campus, hundreds of
17 student groups meet. As recognized student groups,
18 they can reserve meeting space, communicate with other
19 students, and apply for student activity fee funding
20 available to all groups. Without recognition, it is
21 virtually impossible to exist on campus.

22 The Supreme Court acknowledged the
23 importance of recognition in its landmark 1972
24 decision, *Healy v. James*. The Court ruled that the
25 First Amendment required a public college to recognize

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1 the Students for a Democratic Society. The Court
2 rejected the college's argument that it would be
3 endorsing the SDS's sometimes violent political agenda
4 if it recognized the group. Recognition, the Court
5 said, is not endorsement.

6 In 1981, in *Widmar v. Vincent*, the Court
7 ruled that the First Amendment protects religious
8 student groups' right to be recognized, and the
9 Establishment Clause does not prohibit religious
10 groups' meetings. Again, the Court ruled that
11 recognition is not endorsement.

12 After the Court removed the Establishment
13 Clause as a justification for denying religious groups
14 recognition, university non-discrimination policies
15 became the new justification. Non-discrimination
16 policies are good and essential, but at some colleges,
17 although by no means most, non-discrimination policies
18 are being misinterpreted and misused to exclude
19 religious student groups.

20 Non-discrimination policies are intended
21 to protect religious students, not prohibit them from
22 campus. It is common sense, not discrimination, for a
23 religious group to require its leaders to agree with
24 its religious beliefs. But last year, Vanderbilt
25 University administrators excluded 14 Catholic and

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1 Evangelical Christian groups from campus because they
2 required their leaders to share the groups' religious
3 beliefs. If I could have the second slide.

4 In August 2011, Vanderbilt administrators
5 informed the Christian Legal Society student chapter
6 that its expectation that its leaders would lead its
7 Bible studies, prayer, and worship was discrimination.
8 Its requirement that its leaders agree with its core
9 religious beliefs was also discrimination.

10 In April 2012, Vanderbilt told another
11 Christian student group that it could remain
12 recognized only if it deleted five words from its
13 constitution, "personal commitment to Jesus Christ."
14 Next slide. Those students left campus rather than
15 recant their religious belief in Jesus. Next slide.

16 While Vanderbilt refused to allow
17 religious groups to have religious leadership
18 requirements, it specifically announced that
19 fraternities and sororities could continue to engage
20 in sex discrimination in their selection of both
21 leaders and members.

22 That this is an ongoing national problem
23 is demonstrated by the Supreme Court's decision in
24 2009 to hear *Christian Legal Society v. Martinez*.
25 Unfortunately, in its decision the Court explicitly

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1 avoided addressing the issue of non-discrimination
2 policies, instead addressing an "all-comers" policy
3 unique to Hastings College of Law. The state law
4 school denied recognition to CLS law students because
5 Hastings claimed that their religious requirements for
6 40 leaders and voting members violated its non-
7 discrimination policy. During litigation, however,
8 Hastings discovered a new "all-comers" policy that
9 prohibited any group from requiring its leaders to
10 agree with its beliefs.

11 Five Justices upheld this novel policy
12 that eliminated all student groups' associational
13 rights, but in doing so the Court was unequivocal that
14 if a college allows any exemption to its "all-comers"
15 policy, it cannot deny an exemption to a religious
16 group.

17 For evidence of what the Supreme Court
18 will do when it actually decides the issue of non-
19 discrimination policies, consider the recent ruling in
20 *Hosanna-Tabor v. EEOC* where the Court ruled that non-
21 discrimination laws cannot be used to prohibit
22 religious organizations from deciding who their
23 leaders will be.

24 Of course, many colleges have recognized
25 that non-discrimination policies and religious liberty

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1 are entirely compatible. If I could have the next
2 slide. And these colleges have embedded robust
3 protection for religious liberty within their non-
4 discrimination policies. And these slides, if I could
5 have the next slide, are examples of those policies at
6 the University of Texas and the University of Florida.

7 Misuse of non-discrimination policies to
8 exclude religious persons from the public square
9 threatens the pluralism at the heart of our free
10 society. The genius of the First Amendment is that it
11 protects everyone's speech no matter how unpopular,
12 and everyone's religious beliefs no matter how
13 unfashionable. When that is no longer true, and we
14 seem dangerously close to the tipping point, when non-
15 discrimination policies are misused as instruments for
16 the intolerant suppression of traditional religious
17 beliefs, then the pluralism so vital to sustaining our
18 political and religious freedoms will no longer exist.

19 CHAIRMAN CASTRO: Thank you, Ms. Colby. Ms.
20 Khan, you have the floor.

21 **II. PANEL I**

22 **AYESHA KHAN, LEGAL DIRECTOR,**
23 **AMERICANS UNITED FOR SEPARATION**
24 **OF CHURCH AND STATE**

25 MS. KHAN: Good morning. My name is Ayesha

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1 Khan. I am the Legal Director at Americans United for
2 Separation of Church and State, where I oversee a
3 litigation program designed to advocate for a healthy
4 separation between religion and government.

5 We submit more than a dozen friend-of-the-
6 court briefs every year in important cases pending
7 before the Federal Courts and the State Supreme Courts
8 throughout the country.

9 Today, I'm going to briefly summarize the
10 positions that my organization took in *Christian Legal*
11 *Society* and *Hosanna-Tabor*, the two cases that Ms. Wood
12 discussed -- Ms. Colby discussed, sorry. And then I'll
13 take a step back and place those cases in the broader
14 landscape in which religious individuals and
15 organizations have sought exemptions from legal
16 requirements. And I'm going to close with a short
17 discussion of how societal and legal norms are subject
18 to considerable evolution in this area.

19 In *Christian Legal Society*, we argued that
20 universities have a strong interest in barring
21 exclusionary policies by on-campus organizations
22 because a principal purpose of providing those
23 organizations with meeting space and financial
24 assistance is to teach the interpersonal and
25 leadership skills that come from working

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1 collaboratively alongside people of different races,
2 genders, and religion. We argued that this interest
3 was especially important because educational
4 opportunities have historically been denied to many
5 students on account of their race, religion, gender,
6 or sexual orientation.

7 The U.S. Supreme Court largely agreed with
8 our analysis. The Court began by observing that
9 through its all-comers policy the university was
10 dangling the carrot of subsidy rather than wielding
11 the stick of prohibition. The Court concluded that the
12 university's policy insured that all students had
13 access to all leadership, educational, and social
14 opportunities provided by the law school.

15 The requirement allowed the law school to
16 avoid making intrusive inquiries into the exclusion of
17 students, and the policy served the law school's
18 educational objective of bringing together individuals
19 with diverse backgrounds and beliefs.

20 *Hosanna-Tabor*, in contrast, involved a
21 stick of prohibition rather than the carrot of
22 subsidy. There the issue was whether a parochial
23 school's termination of a teacher's employment was
24 governed by the Americans With Disabilities Act.

25 The school sought to take advantage of a

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1 Ministerial exception, a Court-created doctrine that
2 exempts religious entities from non-discrimination
3 statutes under the theory that religious institutions
4 should be able to select their ministers and other key
5 personnel without governmental involvement.

6 We joined with several other groups in
7 arguing that the exception should shield employment
8 decisions that are religiously driven, but should not
9 preclude scrutiny of adverse employment decisions that
10 are driven by rank animus unmoored from religious
11 tenets.

12 The Court did not adopt our approach;
13 instead, it declined to adopt any precise legal
14 formula for when the exception will apply, but it
15 considered the teacher's job title and her religious
16 functions to conclude that she was covered by the
17 exception.

18 These two cases represent only the tip of
19 the vast iceberg of situations in which religious
20 groups and individuals have sought exemptions from
21 anti-discrimination provisions. Landlords throughout
22 the country have refused to rent property to persons
23 living together out of wedlock claiming an exemption
24 from anti-discrimination ordinances prohibiting
25 discrimination on the basis of marital status.

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1 Business owners and students enrolled in
2 counseling programs have sought exemptions from
3 statutes or policies prohibiting discrimination on the
4 basis of sexual orientation. Muslim taxicab drivers in
5 Minnesota who wanted to avoid transporting passengers
6 who were carrying alcohol sought an exemption from an
7 anti-discrimination ordinance requiring them to
8 transport all passengers. Pharmacies and religious
9 non-profits have sought exemptions from statutes
10 designed to give women equal access to medications.
11 And if one looks even more broadly at all of the
12 situations in which religious individuals have sought
13 exemptions from various legal requirements, the
14 circumstances broaden further still.

15 Religious businesses and organizations
16 have sought exemptions from health and safety codes,
17 labor laws, zoning requirements, and other regulatory
18 schemes. Individuals have sought religion-based
19 exemptions from the nation's drug laws. Parents have
20 sought to avoid criminal or civil liability for harms
21 that result from their decision to heed a religious
22 requirement to rely on spiritual rather than medical
23 care for the treatment of their children's illnesses.

24 Parents have sought exemptions from
25 compulsory education laws, for vaccination

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1 requirements, and requirements that children attend
2 certain classes or read certain materials as part of
3 receiving a public school education.

4 So, as you can see, the contexts in which
5 this issue arises are extraordinarily varied, and the
6 courts have needed to evaluate the facts, the relevant
7 statutory and constitutional provisions, the burdens
8 imposed by the regulation at issue in any particular
9 case, any harm that would result to third parties if
10 an exemption were to be granted, and any other
11 criteria pertinent to the situation before the court
12 in any given case.

13 In evaluating the burdens and the harms
14 that would result from an exemption, the courts have
15 also been influenced by evolving social, religious,
16 and legal norms. So, for example, in *Dole v.*
17 *Shenandoah Baptist Church*, the federal government
18 sought to enforce the Fair Labor Standards Act against
19 a parochial school that provided a salary supplement
20 to men but not women, in keeping with the biblical
21 view that the husband is the head of the household.

22 In *Bob Jones University*, the Supreme Court
23 addressed a situation involving schools that were
24 denied tax-exempt status, and they sought an exemption
25 under the Free Exercise and the Establishment Clause

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1 to continue to engage in racially-discriminatory
2 policies.

3 Had those cases presented themselves
4 decades earlier, those exemptions would probably have
5 been denied, but they were not granted, and it's
6 because society's thoughts on racial discrimination
7 and gender discrimination have evolved considerably
8 over time. And we're seeing the same trajectory in the
9 context of gay rights, an issue that's front and
10 center because of two arguments that will take place
11 before the U.S. Supreme Court next week.

12 Again, there are groups before the court
13 that are seeking exemptions and arguing that there
14 should be robust exemptions to engage in that kind of
15 discrimination. And, of course, it remains to be seen
16 how the Supreme Court will look at that, but I'm going
17 to be so bold as to hypothesize that whatever the
18 court says will not be the court's last word on the
19 subject, that both religious thought and the arguments
20 advanced by religious groups will change over time.
21 And we can only hope that in the course of that
22 evolution that we will remain true to Martin Luther
23 King, Jr.'s promise that "The arc of the moral
24 universe is long, but it bends toward justice."

25 CHAIRMAN CASTRO: We'll have to conclude

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1 now, you're a little over time.

2 MS. KHAN: Thank you.

3 CHAIRMAN CASTRO: We'll fully explore that
4 during questioning. Thanks. Please proceed.

5 **II. PANEL I**

6 **LORI WINDHAM, SENIOR COUNSEL**

7 **BECKET FUND**

8 MS. WINDHAM: Chairman Castro and other
9 esteemed members of the Commission, thank you for
10 inviting me to speak today.

11 I'm here today representing the Becket
12 Fund for Religious Liberty where I serve as Senior
13 Counsel. At the Becket Fund we protect religious
14 freedom for all religious traditions. We have defended
15 a mosque facing discrimination from its neighbors in
16 Tennessee, a Santeria priest banned from animal
17 sacrifice in Texas, and Amish home builders facing
18 jail time for their religious practices in New York.
19 We also represented a Lutheran Church before the
20 Supreme Court in *Hosanna-Tabor v. EEOC*. We believe
21 that the legal protections at stake in that case are
22 critical to the preservation of religious freedom in
23 our nation.

24 Today's discussion asks whether civil
25 liberties and anti-discrimination laws can be

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1 reconciled. The answer is yes. In most cases, greater
2 religious freedom and greater freedom of speech
3 further the same interests as our anti-discrimination
4 laws. They allow small and politically-weak groups to
5 maintain their missions and their voices. Cases like
6 *Hosanna-Tabor* demonstrate how we can protect both our
7 constitutional freedoms and our diverse society.

8 The Supreme Court did not rule 9-0 in
9 *Hosanna-Tabor* because none of the Justices care about
10 our anti-discrimination laws. They did so because the
11 balance between the two has already been struck. It
12 has been struck by our First Amendment. If the
13 separation of church and state means anything, it
14 means that the government should not be selecting
15 ministers.

16 I'm sure you all know the background of
17 the *Hosanna-Tabor* decision. The case was a conflict
18 between a Lutheran church and school and one of its
19 former teachers and commissioned ministers.

20 The teacher was terminated for refusing to
21 follow religious teachings on dispute resolution, but
22 sued under the ADA claiming that the religious reasons
23 were pretextual. In response, the church argued that
24 her suit was barred by the Ministerial Exception. That
25 legal doctrine states that courts should not interfere

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1 in employment disputes between churches and their
2 ministers.

3 The Supreme Court unanimously ruled in the
4 church's favor. The Court concluded that the First
5 Amendment prohibits the government from selecting
6 ministers, or penalizing religious bodies for those
7 selections. That is neither a new nor a minority view;
8 it is based upon our history. It is the view adopted
9 by all Federal Circuit Courts over the last 40 years,
10 and it is the view of a unanimous U.S. Supreme Court.

11 The Ministerial Exception itself is not
12 controversial. Every organization represented on this
13 panel recognizes that the exception exists and
14 protects important constitutional interests. We
15 disagree over its scope and how it should be applied
16 in particular cases.

17 Seemingly the only group not to recognize
18 Ministerial Exception was the EEOC. Before the Supreme
19 Court, the government argued that despite the religion
20 clauses, churches had no more constitutional
21 protections than labor unions or social clubs. The
22 Supreme Court criticized this argument in its opinion,
23 and Justice Kagan criticized it from the bench saying
24 it was amazing the government would make that claim.

25 For some, this idea might be acceptable.

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1 Some will, doubtless, reject the notion that religious
2 organizations should have any unique protection, but
3 for religious believers of many different faiths the
4 idea they would not have such rights is unthinkable.
5 That is not only because religious freedom is singled
6 out for special protection in our Constitution, but
7 because for many, religion is a fundamental and
8 organizing principle of life, commanding conscience
9 and informing moral choices. To say that religious
10 exercise has no unique freedoms, that religious bodies
11 have no special rights of their own, is to plunge our
12 government into the business of regulating religious
13 organizations.

14 The Ministerial Exception has protected a
15 wide variety of religious groups, including Orthodox
16 Jews, the African Methodist Episcopal Church, the
17 Salvation Army, the Seventh-Day Adventist Church, and
18 practitioners of traditional Native American
19 spirituality. Without that protection, each of these
20 groups and many others would be subject to intrusive
21 government oversight and extensive litigation.

22 There are difficult cases on the other
23 side of the equation, too. I'm sure we'll hear about
24 some today where religious groups make seemingly
25 questionable decisions and claim the shield of the

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1 Ministerial Exception. But just as we understand that
2 free speech means occasionally tolerating speech we
3 would prefer to silence, so, too, free exercise means
4 occasionally permitting action we would rather
5 prohibit. Our Constitutional rights will not protect
6 for us for long if they are designed to target the
7 worst offenders, rather than to protect the freedom of
8 each citizen.

9 Despite the occasional hard case, the
10 answer is not to pit religious freedom against anti-
11 discrimination norms, but to recognize that supporting
12 religious freedom promotes religious diversity. It
13 allows opposing viewpoints to thrive, dissenting
14 voices to call our leaders to account, and
15 religiously-inspired people to bring about social
16 change.

17 We have a proud tradition of such
18 movements in the United States. Religious groups have
19 been active in many important and initially-unpopular
20 social causes. Religious groups were active in the
21 Abolitionist Movement, served as a central organizer
22 of the Civil Rights Movement, and continue to advocate
23 for peace, provide social services, and act as a voice
24 for the disadvantaged today.

25 As Justices Kagan and Alito acknowledged,

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1 virtually every religion in the world is represented
2 in the population of the United States. The modern
3 Ministerial Exception is both a consequence of and a
4 protection for religious diversity.

5 This idea that freedom promotes diversity
6 is at work in the *Hosanna-Tabor* decision, and this
7 idea should also apply to less formal religious groups
8 such as student groups organized on college campuses.
9 Without the right to select their own leaders, they
10 cannot guarantee that those leaders will embody their
11 message.

12 As the Supreme Court said, "The interests
13 of society in enforcement of employment discrimination
14 statutes is undoubtedly important, but so, too, is the
15 interest of religious groups in teaching who will
16 preach their beliefs, teach their faith, and carry out
17 their mission."

18 "When a minister who has been fired sues
19 her church alleging that her termination was
20 discriminatory, the First Amendment has struck the
21 balance for us. The church must be free to choose who
22 will guide it on its way."

23 Although I'm here to address *Hosanna-*
24 *Tabor*, the lessons of religious freedom promoting
25 religious diversity can apply to other situations. The

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1 Ministerial Exception is distinct from the larger
2 question of religious exemptions from general laws.

3 CHAIRMAN CASTRO: Ms. Windham, could you
4 speak into that microphone. It's voice-activated so
5 you need to make sure that folks can hear you. You're
6 going in and out.

7 MS. WINDHAM: Thank you. The lesson of
8 religious freedom promoting religious diversity can
9 apply to other situations. The Ministerial Exception
10 is distinct from the larger question of religious
11 exemptions from general laws, but both are critical
12 and historically important protections for religious
13 freedom.

14 Such protections help religious groups,
15 including minority faiths, to thrive. Without such
16 protections, the Amish could be forced to give up
17 their way of life, Jehovah's Witnesses could be forced
18 to bear arms, Seventh Day Adventists and Orthodox Jews
19 could face a choice between their livelihood and
20 keeping the Sabbath. These are not hypothetical
21 issues; each is based upon a well-known case.

22 Protection for religious freedom is fully
23 consistent with the American tradition of democracy
24 and respect for the Rule of Law. The idea of
25 conscientious objections to general laws is not a new

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1 invention; it has a long and distinguished history.
2 The Religious Freedom Restoration Act and laws like
3 it, passed with broad bipartisan support, provide
4 guidance for the questions being discussed today. When
5 we allow those with sincere religious beliefs to live
6 their faith, even if it requires an exemption from
7 general laws, our nation is richer for it that
8 religious minorities are protected and religious
9 groups are free to serve their communities and our
10 nation. Thank you.

11 CHAIRMAN CASTRO: Thank you. Mr. Mach,
12 please proceed.

13 **II. PANEL I**

14 **DANIEL MACH, DIRECTOR, AMERICAN**
15 **CIVIL LIBERTIES UNION, PROGRAM ON**
16 **FREEDOM OF RELIGION AND BELIEF**

17 MR. MACH: Thank you members of the
18 Commission. I'm Daniel Mach, Director of the ACLU
19 Program on Freedom of Religion and Belief, and I'm
20 honored to be here this morning.

21 The issues addressed by the Commission
22 today lie at the heart of the ACLU's mission. We at
23 the ACLU have been fighting for the rights of
24 conscience and religious liberty, of believers and
25 non-believers, majority and minority faiths alike for

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1 almost a century. At the same time, the ACLU has stood
2 firm in opposing discrimination in this country,
3 working for decades to secure civil rights and
4 equality for all.

5 The two Supreme Court cases addressed in
6 this morning's panel touch on the intersection of
7 these fundamental rights and liberties. Taken
8 together, the decisions have been to respect for both
9 religious freedom and civil rights.

10 In *Hosanna-Tabor*, the Court reiterated
11 what every lower court to address the issue had
12 already concluded; namely, that there is a Ministerial
13 Exception grounded in the First Amendment that gives
14 houses of worship and affiliated institutions wide
15 latitude when selecting their ministers and setting
16 doctrine.

17 At the outset, although the ACLU would
18 have drawn slightly different lines, we fully embrace
19 the basic principles underlying the *Hosanna-Tabor*
20 decision, recognizing that a constitutionally-based
21 Ministerial Exception serves crucial religious liberty
22 interests.

23 In assessing the exception, though, it's
24 important to understand its reach and its limits.
25 First, the Supreme Court in the case emphasized that

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1 the exception applies only to suits by or on behalf of
2 ministers themselves. Religious institutions can't
3 assert the exception as a defense to lawsuits brought
4 by employees who aren't ministers.

5 Second, as for who qualifies as a
6 minister, the Court declined to adopt a concrete test,
7 but the decision's multi-factor, fact-specific
8 analysis made clear that the category is not
9 boundless, and the question of who qualifies is not
10 beyond judicial review.

11 Third, religious institutions may assert
12 the Ministerial Exception only as a defense in
13 employment discrimination cases. The exception doesn't
14 grant churches automatic blanket immunity from all
15 other legal claims brought against them by ministers,
16 like tort or contract claims. And it doesn't
17 automatically shield houses of worship from
18 enforcement of all other laws, criminal laws, child
19 labor laws and the like, as the church itself conceded
20 in *Hosanna-Tabor*.

21 The lower courts are still in the early
22 stages of applying the decision and its legacy remains
23 uncertain. In recognizing the vital Ministerial
24 Exception, the court reminded us in the case that,
25 "The interest of society and the enforcement of

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1 employment discrimination statutes is still,
2 undoubtedly important."

3 In light of that interest, the court's
4 decision is crafted to honor the vital relationship
5 between church and minister, while protecting the vast
6 majority of employees from the type of discrimination
7 that's antithetical to American values.

8 Unlike in *Hosanna-Tabor*, the *CLS* decision
9 addressed not whether religious groups have a
10 constitutional right to discriminate in the selection
11 of leaders and members, but rather whether such groups
12 have an affirmative right to do so with government
13 money and support. In discussing that decision, I'd
14 like to begin by highlighting several basic threshold
15 issues on which I wholeheartedly agree with the
16 plaintiff in the case.

17 Initially, it's beyond dispute that
18 religious liberty, free speech, and expressive
19 association are all fundamental constitutional rights.
20 And I certainly think that a complete ban on CLS's
21 ability to meet on campus, to choose its members,
22 express its message, or communicate with the student
23 population would be constitutionally suspect.

24 Finally, it's absolutely clear that
25 discriminatory enforcement of Hastings' policy, if say

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1 Hastings allowed other groups to violate the policy
2 with impunity, while punishing CLS for those same
3 violations, that would run afoul of the First
4 Amendment. But in the case before the Supreme Court,
5 CLS was asking not for equal treatment but for special
6 treatment, a preferential exemption from the Hastings
7 policy. And the Court wisely rejected that claimed
8 right, holding that a public university has the
9 constitutional authority to lend its name and funds
10 only to those groups or activities that are open to
11 all students.

12 Even without official recognition at
13 Hastings, CLS had ample opportunity to meet on campus,
14 gain access to campus facilities, and use bulletin
15 boards or other means of communicating with students,
16 but CLS was asking for more. And the Court found no
17 basis for mandating a special exemption from the
18 Hastings policy, and requiring the state school to
19 fund CLS's exclusionary acts.

20 Now, because the policy conditioned the
21 denial of benefits on certain conduct, the act of
22 discriminating against some members of the law school
23 community, and not merely on expression, the views of
24 the student groups, the court held that the policy was
25 viewpoint neutral. And the court also found that the

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1 non-discrimination rule was a reasonable one,
2 declining CLS's invitation to secondguess the
3 university's policy decisions. Among other things, the
4 policy promotes the basic principles of equality and
5 fairness in the crucial context of the public
6 university.

7 Now, while that policy required recognized
8 groups to admit all comers, some other colleges and
9 universities have more traditional non-discrimination
10 policies that bar recognized student groups from
11 denying membership based on a list of protected
12 characteristics, like race, sex, religion, sexual
13 orientation.

14 Now, Although the CLS case expressly
15 addressed only the Hastings all-comers policy, the
16 reasoning of the decision suggests that the
17 traditional non-discrimination policies should readily
18 pass constitutional muster, as well, as Justice
19 Stevens noted in his concurrence. In fact, in the only
20 post-CLS decision to address the issue, a Federal
21 Court of Appeals upheld San Diego State University's
22 traditional non-discrimination policy.

23 In the wake of the CLS decision, several
24 state legislatures have considered and in some cases
25 passed laws intended to undo the Supreme Court's

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1 decision, stripping universities of the ability to
2 adopt policies of the sort that were upheld by the
3 court. In so doing, those bills compromise the many
4 important interests recognized by the Supreme Court,
5 forcing colleges and universities to underwrite
6 discriminatory acts and limiting the educational
7 opportunities available to students.

8 Viewed in tandem, the Supreme Court's
9 decisions in these two cases help delineate the nature
10 and scope of some of our most cherished rights. As
11 with past struggles in cases over claimed religious
12 exemptions to non-discrimination rules, the two recent
13 decisions again recognize that due regard for
14 ecclesiastical independence and religious freedom need
15 not and should not undermine our nation's longstanding
16 commitment to equality and civil rights.

17 Any efforts to expand *Hosanna-Tabor* beyond
18 its confines, or to circumvent *CLS* through
19 legislation, should be met with deep skepticism. Thank
20 you.

21 CHAIRMAN CASTRO: Thank you, Mr. Mach. We
22 will now open it to questions from Commissioners.

23 II. PANEL I

24 QUESTIONS FROM COMMISSIONERS

25 CHAIRMAN CASTRO: Commissioner Kirsanow has

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1 raised his hand, so I recognize him. Before you go
2 forward, let me ask anyone on the phone, you want to
3 ask a question after Commissioner Kirsanow? No, okay.
4 What was that?

5 COMMISSIONER ACHTENBERG: Yes, please.

6 CHAIRMAN CASTRO: Is that Commissioner
7 Achtenberg?

8 COMMISSIONER ACHTENBERG: Indeed.

9 CHAIRMAN CASTRO: Okay, and then
10 Commissioner Gaziano after that. Commissioner
11 Kirsanow, you have the floor.

12 COMMISSIONER KIRSANOW: Thank you, Mr.
13 Chairman. I want to thank the panelists, this has been
14 really --

15 (Off microphone comment.)

16 COMMISSIONER KIRSANOW: -- contributed to
17 this hearing.

18 I've got a lot of questions, but first I
19 want to preface it by saying I've been on the
20 Commission for 12 years, and we have received more
21 pre-hearing comments on this issue than any other
22 issue in my 12 years on the Commission. It's
23 conceivable that it even predates my being on the
24 Commission in terms of the number of comments we've
25 gotten, and clearly this is an issue that generates a

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1 considerable amount of interest.

2 I have one overarching question, maybe
3 with some follow-up, I'll get a little bit more deeply
4 into the weeds on this. But, Ms. Colby, you mentioned
5 that the --

6 CHAIRMAN CASTRO: Commissioner, could you
7 speak a little more into your microphone?

8 COMMISSIONER KIRSANOW: I think you
9 indicated that you believe we are dangerously close to
10 a tipping point. And one of the questions I have is,
11 why is it, more than 100 years after equal protection
12 -- after the Fourteenth Amendment's Equal Protection,
13 and 50 years after Title VII -- are universities, for
14 example, seeming to come up with more restrictive
15 policies with respect to -- at least proponents of
16 some of these groups would argue -- more restrictive
17 policies with respect to faith-based groups on campus?

18 MS. COLBY: Well, I think that at many
19 colleges there just is not an appreciation for the
20 importance of religious liberty. Religious liberty, of
21 course, is a unique contribution of --

22 COMMISSIONER ACHTENBERG: I can't hear.

23 CHAIRMAN CASTRO: We're getting another
24 microphone over there. Sorry.

25 MS. COLBY: As I was saying, I think that

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1 religious liberty is too frequently taken for granted.
2 It's a fragile thing, and it can die from neglect. It
3 can be lost in a generation. And I think that at many
4 college campuses there just is not an appreciation for
5 the importance of religious liberty. And, also, I
6 think many college administrators do not understand,
7 and seem unwilling to understand, how the religious
8 student groups view the college administrators'
9 insistence that they get rid of their statement of
10 faith, or their requirements for their religious
11 leaders.

12 Take the Vanderbilt situation where the
13 college administrators just say, without thinking,
14 "Just drop five words from your constitution, and
15 you're still on campus," but the five words are
16 "personal commitment to Jesus Christ." In effect,
17 they're asking the students to recant their beliefs.
18 But I think they don't even begin to understand what
19 it is they're doing. So we need to see the sensitivity
20 toward religious students that we see toward other
21 student groups.

22 COMMISSIONER KIRSANOW: If I could just
23 follow up. Here at the Commission we deal with
24 discrimination issues, obviously, every single day.
25 And there is discrimination and there's

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1 discrimination. And when I say that, I mean that every
2 single day in every single moment every single one of
3 us discriminates. There's discrimination that is
4 frankly good discrimination. I don't eat sushi from a
5 roadside stand in Alabama that's been out there for
6 three days. Okay? I discriminate, that's good
7 discrimination. But then there is invidious
8 discrimination.

9 If there is a student organization that
10 says we would like our leadership to embrace the
11 values that we have, religious values we have, is that
12 invidious discrimination in the minds of any of the
13 panelists who would like to respond?

14 MS. WINDHAM: I would respond, and I would
15 say no, certainly not. It's critical for religious
16 groups to be able to select their leaders, select
17 those who are going to embody their message and their
18 mission. And when that is lost, then what you have
19 lost is not invidious discrimination at all. What
20 you've lost is the ability of religious groups to
21 maintain who they are, to maintain their identity, and
22 to maintain their mission.

23 MS. KHAN: I agree, actually, with Ms.
24 Windham that it is critical for groups to be able to
25 select their key personnel and the people who

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1 formulate and define their message, but nothing stands
2 in the way of that.

3 *Hosanna-Tabor* recognizes that; *Christian*
4 *Legal Society v. Martinez* was not about whether they
5 have that right, it was about whether they have that
6 right to do it with public dollars, which would
7 distinguish them from every other group with a
8 singular or very specific message.

9 I also think that it's misleading to talk
10 about this *Christian Legal Society* case as having
11 taken away the right to select their leaders. Leaders
12 are voted on, and if you have a group with a
13 particular orientation, we can only assume, and I
14 think the facts have borne that out with respect to
15 these groups, that people who share the mission of the
16 organization and want to advance it in the way the
17 membership does, get elected into leadership
18 positions. And that's true irrespective of what the
19 membership consists of.

20 CHAIRMAN CASTRO: Commissioner Achtenberg,
21 you now have the floor.

22 COMMISSIONER KIRSANOW: Ms. Colby wanted to
23 respond.

24 CHAIRMAN CASTRO: I'm sorry. I apologize.

25 MS. COLBY: I just wanted to follow up on

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1 that, that it's very important to recognize just as
2 you were saying, there are things that are not
3 wrongful discrimination. And I would just point the
4 Commission to Professor Garnett's excellent chapter in
5 the book that I reference in my written statement
6 where he really grapples with this issue in a very
7 helpful way.

8 But what I'd really like to reinforce is
9 what Lori said earlier, which is non-discrimination
10 policies and religious liberty are completely
11 compatible if we give a common sense interpretation to
12 what it means to engage in religious discrimination.
13 Obviously, religious groups having their leaders agree
14 with their religious beliefs is not discrimination,
15 it's basic religious liberty.

16 CHAIRMAN CASTRO: Commissioner Achtenberg,
17 you have the floor.

18 COMMISSIONER ACHTENBERG: Commissioner
19 Castro, who made the last remark, please?

20 CHAIRMAN CASTRO: Ms. Colby.

21 COMMISSIONER ACHTENBERG: All right. Thank
22 you very much.

23 To Ms. Khan and Mr. Mach, could you
24 respond to the following. Could you describe in your
25 opinion the extent to which the historical presence of

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1 discriminatory and anti-minority actions and
2 admissions and activity decisions in American
3 institutions of higher learning played a role in
4 underscoring the reasonableness of non-discrimination
5 policies, such as the Hastings non-discrimination
6 policy, and the extent to which you think that
7 influenced the court's reasoning in the *Christian*
8 decision. --

9 MS. KHAN: Well, on the first question
10 about the extent to which that played a role, we did
11 in our brief, the amicus brief that we submitted,
12 describe that long history of exclusion. Many of, for
13 example, the Ivy League schools excluded African
14 Americans, imposed quotas on Jews, so from the 1920s
15 to the late 1940s, for example, many universities
16 imposed admissions quotas on Jews. Princeton totally
17 excluded blacks, and Harvard and Yale admitted only a
18 handful of each. And the minority students who were
19 admitted to study were often denied access to
20 extracurricular activities and social clubs. And it
21 was in light of that history that we argued that the
22 university had reasonable concern with opening all of
23 its opportunities to all students irrespective of
24 race, religion, sexual orientation, what have you.

25 Whether that played a role in the court's

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1 thinking, I suspect it did. The court did say that it
2 could not imagine a more neutral policy than this, one
3 that requires all students to be accepted to all clubs
4 was a very inclusive environment in which kids would
5 be put with -- alongside people of differing views
6 and, thereby, sort of have a taste of democracy in
7 action.

8 MR. MACH: And just to echo that, we filed
9 a similar brief raising similar points about the
10 history of the denial of opportunities in higher
11 education, and I'm confident that it, at least, had
12 some effect. The Supreme Court cited our brief for
13 that very purpose, and for that very idea; that there
14 is the central role that access to education has
15 played in personal and professional development, and
16 that there is a history of discrimination in higher
17 education. And that is one of the stated goals of the
18 policy that the Supreme Court upheld.

19 CHAIRMAN CASTRO: Ms. Colby, you wanted to
20 respond? Yes, someone pass the mike to her, please.
21 Thank you.

22 MS. COLBY: This is Kim Colby.
23 Unfortunately, there's also a long history of
24 excluding religious groups from college campuses, as I
25 referred to in my earlier statement. So, for at least

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1 35 years on many college campuses the religious groups
2 have had trouble maintaining access for their
3 religious speech. At first the excuse was the
4 Establishment Clause. When the Supreme Court said
5 that wouldn't work, some of the college campuses then
6 went to non-discrimination policies. So, the history
7 here is one that's very disturbing, and it's why we
8 should be particularly careful. When non-
9 discrimination policies are being used to exclude
10 religious groups, it's just terribly ironic that in
11 the name of "inclusion," the religious groups are
12 being excluded from campus.

13 COMMISSIONER KLADNEY: Excuse me, Mr.
14 Chairman.

15 CHAIRMAN CASTRO: Yes? You want to be on
16 the list, Commissioner Kladney?

17 COMMISSIONER KLADNEY: Yes.

18 CHAIRMAN CASTRO: Okay. You'll come after
19 Commissioner Gaziano, and then I'll speak. Mr. Mach,
20 you wanted to respond?

21 MR. MACH: Sure, just one point on that.
22 Again, it bears repeating, and the court relied on
23 this fact heavily in the decision; that this was not a
24 policy that banned this group from existing. And, in
25 fact, even with the policy in place, the group was

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1 able to meet, hold meetings, have access to students.
2 And, in fact, there were at least 60 groups that
3 existed under the Hastings policy, including a number
4 of religious groups that got recognized status as well
5 as being able to meet. So, it's not the case that
6 these groups were banned.

7 CHAIRMAN CASTRO: All right. Commissioner
8 Gaziano, you have the floor, and then Commissioner
9 Kladney will follow you.

10 COMMISSIONER GAZIANO: Yes, thank you all.

11 COMMISSIONER KLADNEY: That's okay, Mr.
12 Chairman. That was actually the point I wanted to
13 make, that these groups are not being kicked off the
14 campus at all.

15 CHAIRMAN CASTRO: Okay.

16 COMMISSIONER GAZIANO: Okay. Well, good,
17 because I can challenge the underlying premise of that
18 statement with my question. But I wanted to thank you
19 all. This is both intellectually challenging and
20 interesting, and very important work, and that you all
21 agree at least at a very high and superficial level is
22 interesting, that not every claim a religious
23 institution or religious person makes can be honored,
24 but that most, or many, or some should doesn't -- is
25 nice. But let me see if I can laud a few principles

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1 for my question.

2 First of all, I thought it was helpful
3 that Ms. Khan pointed out that universities
4 themselves, and what universities do and what they
5 allow their students to do is the first distinction
6 I'm going to lay out; that universities used to
7 discriminate on the basis of race. No, they still do.
8 The *Fisher* case is an example, and some of us want
9 that to stop. Some of us want that to stop very much,
10 but the more important principle that I think we need
11 to address in this panel is the extent to which a
12 university that is a government institution or
13 receives federal funds can deny freedom of
14 associations guaranteed by the First Amendment. And
15 the simple truth is it can't, and there's maybe a
16 handful of universities that don't fall into one of
17 those categories. So, if a university is denying the
18 freedom of association of students that's protected in
19 the First Amendment, and they're federally-funded, the
20 fact that they can still meet on their own dime is not
21 a defense.

22 The third distinction that I'd then like
23 to discuss is the correctness of *CLS v. Martinez*. It's
24 a very disappointing decision. It is hopeful to me, of
25 course, I don't -- it was decided on peculiar facts,

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1 over-reading a stipulation. I don't even know, if
2 properly litigated again, that the Supreme Court
3 Justices who decided it would necessarily come out in
4 the same way. But Justice Stevens, bless his heart,
5 had some rather cramped views on religious liberty, is
6 no longer on the Court, and I'm very thankful that if
7 Vanderbilt continues its discriminatory policies that
8 groups like CLS and others will take it back to the
9 Supreme Court. So, I'd like to focus on getting that
10 wrong-headed decision overturned.

11 As I, or as many of the scholars have
12 pointed out, and even an all-comers policy can be
13 written in a way so that it is an anti-free
14 association policy. It's even more troubling, as Ms.
15 Colby has testified, when such an all-comers policy
16 that is an all-purpose anti-free association policy,
17 itself unconstitutional and troubling, is then
18 enforced, either written or enforced in a purposefully
19 discriminatory manner.

20 So, I suppose I heard a little bit of
21 disagreement from Mr. Mach, and I'd like to invite Ms.
22 Colby and Mr. Mach in particular to try to help engage
23 on that particular issue.

24 CHAIRMAN CASTRO: If anyone needs the
25 question read back, there's a court reporter --

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1 COMMISSIONER GAZIANO: No, I'll --

2 CHAIRMAN CASTRO: I know it was long-winded
3 --just kidding. Go ahead.

4 MS. COLBY: I did want to address the fact
5 that, as the Supreme Court in *Healy* in 1972 said, the
6 denial of recognition to a group, even if it in theory
7 can still meet in the coffee shop in the student
8 union, the denial of recognition is really the denial
9 of existence to that group. And our practiceour
10 experience with Hastings bears that out. There is no
11 CLS chapter at Hastings now. It ceased to exist as a
12 result of the denial of recognition.

13 The 14 groups, the Catholic and
14 Evangelical groups at Vanderbilt, are having a very
15 difficult time meeting off campus because Vanderbilt
16 pushed them off campus. It denied them access to the
17 student fair. It denied them access to so many of the
18 means of communicating within the campus, that for all
19 practical matters, they cease to exist on the campus
20 there.

21 This is really where *Martinez* got it so
22 wrong, but thankfully it's a very narrow decision.
23 *Martinez* ignored *Healy*, *Widmar*, and *Rosenberger*, and
24 three or four other decisions that said -- contrary to
25 what is being said here -- that recognition is not a

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1 subsidy, it isn't an endorsement, it is merely the
2 students being able to access the fees that they all
3 are required to pay , and having the chance to
4 reserve space on campus and to access the
5 communication channels that all of them need to get
6 their message out.

7 MR. MACH: I think the evidence in that
8 case and around the country suggests that groups that
9 choose to select their members on these bases can
10 continue to exist and even thrive on campus without
11 official recognition. In the case itself, the Supreme
12 Court noted that, even under the policy, CLS hosted a
13 variety of activities the year after it was denied
14 recognition, and the number of students attending
15 those meetings and events doubled. Fraternities and
16 sororities also don't comply with these policies and
17 are, therefore, not recognized student organizations,
18 and as we all know they thrive on many campuses.

19 As for the cases that were mentioned, the
20 Supreme Court I think appropriately distinguished
21 those earlier cases. The big distinction between cases
22 like *CLS* and *Healy*, *Widmar*, and *Rosenberger* was that
23 in those cases there was a denial of access to a
24 forum on the basis of viewpoint. And here the Court
25 made very clear, and I think they got it right, that

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1 the policies, the non-discrimination policies, target
2 conduct, the act of deciding who should be a member
3 and who should be excluded, and not the viewpoint of
4 those groups.

5 COMMISSIONER GAZIANO: Would you admit --
6 just one follow-up -- that the free association
7 rights of a particularly small and unpopular club
8 could easily be swamped by a concerted majority who
9 wants to register as faux members and subvert the
10 unpopular and small student organization? Maybe you
11 say that's what the constitution requires, but isn't
12 that at least possible under your view of the world?

13 MR. MACH: That was an argument that was
14 raised in the case, the idea that with an all-comers
15 policy any small group can be taken over by students
16 that are antithetical to their views. The problem with
17 that argument is that there was --

18 COMMISSIONER GAZIANO: It was improperly
19 dismissed, but what is your view?

20 MR. MACH: My view is that it was properly
21 dismissed, and here's why. There was no evidence of
22 that ever happening. The Court, I think, rightly
23 pointed out that that argument was more hypothetical
24 than real. And as the Court pointed out, there were
25 many groups that had existed under the policy,

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1 including a number of religious groups, and that idea
2 of takeover had just never occurred.

3 CHAIRMAN CASTRO: Let me -- do you want to
4 say something, Ms. Kahn?

5 MS. KHAN: I believe, if I recall
6 correctly, that the Court said that if that were to
7 occur and present itself, that that would be a
8 different case. So, I think the *CLS v. Martinez*
9 decision does not deprive a student group that would
10 be in that situation from seeking assistance from the
11 university in addressing it.

12 MS. COLBY: But if it's been taken over,
13 how does the group complain to the administration? I
14 mean, it's a different group already. As a practical
15 matter that can't be taken care of.

16 One thing that Mr. Mach said that I wanted
17 to correct is that, at most college campuses, the
18 fraternities and sororities are recognized groups.
19 This is why most colleges will not adopt an "all-
20 comers" policy because it's clear under the *Martinez*
21 decision that they have to apply that total openness
22 --no selecting leaders and members on any basis - to
23 everyone, including fraternities and sororities. It's
24 one of the things that makes the Vanderbilt situation
25 particularly stinging, as I already mentioned. For

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1 whatever reason, Vanderbilt will not allow the
2 religious groups to choose their leaders based on
3 their religious beliefs, but it's perfectly fine, and
4 Vanderbilt says this in its policy, for the
5 fraternities and sororities to continue to engage in
6 sex discrimination not only as to leaders, but as to
7 members.

8 MS. WINDHAM: Mr. Chairman, if I may also
9 respond briefly. I simply wanted to note that there's
10 been a lot of discussion about historical
11 discrimination in the education context, and that's
12 certainly an important concern, but here we're not
13 talking about access for individuals to a longstanding
14 and important club. We're talking about a new group
15 trying to organize. And I think it's particularly
16 pernicious when our First Amendment is used to
17 sanction the exclusion of small, and unfamiliar, and
18 unpopular viewpoints, and to keep them out of a
19 particular forum and to make it more difficult for
20 these groups to organize and even get off the ground
21 to try and make their point and make their voices
22 heard.

23 CHAIRMAN CASTRO: Now it's my turn to ask.
24 So, it does seem that as Commissioner Gaziano said, at
25 a high level there is some agreement as to certain

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1 exceptions. I think the question really is one of, you
2 know, where do we draw the line. And it can't be, at
3 least in my estimation, an "I'll know it when I see
4 it" line. I think we need to have some level of
5 clarity. And my concern and fear is that exceptions
6 tend to swallow the rule. And this is not a
7 hypothetical situation, but we're already seeing
8 things happening at the state level.

9 Kansas has submitted a bill, HB-279, on
10 the basis of freedom of religion to allow for anti-
11 discrimination laws to be trumped by -- or even
12 regulations to be trumped if someone has a sincerely-
13 held religious belief. And in that instance I believe
14 it's targeting the LGBT community.

15 We've seen instances where religious
16 beliefs have been coming in strong contrast with Fair
17 Housing laws where folks are not being given the
18 opportunity to rent homes because they may not be in
19 the same religious belief of the landlord, or they may
20 not hold the same view, or they may be an unwed
21 couple. So, where do we draw the line so that
22 religious liberty which is important to our country
23 does not swallow the rule of anti-discrimination laws?

24 MS. WINDHAM: Mr. Chairman, if I may
25 respond. I believe that the line was drawn very well

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1 by Congress when it passed the Religious Freedom
2 Restoration Act. This is the Act, actually, that the
3 Kansas Act which you mentioned is modeled upon, which
4 states that, when religious exercise is substantially
5 burdened by an otherwise neutral and general law, that
6 the religious believer may receive an exception unless
7 there's a compelling government interest in the
8 enforcement of that law. And I believe that this is a
9 policy that works very well. It's a system that works
10 very well. It's a system that's been in place for 20
11 years now, and the walls have not fallen down. It is a
12 system that was in place prior to the *Smith* decision
13 for about 30 years as a matter of constitutional law.
14 So, this is a system that works very well in our
15 country, and has been enacted by Congress, and about
16 half the states now have some form of RFRA in them.
17 And I think it's important to note --

18 CHAIRMAN CASTRO: May I ask you a question?

19 MS. WINDHAM: Certainly.

20 CHAIRMAN CASTRO: Could you tell me what
21 the difference is between a substantial burden and an
22 insubstantial burden?

23 MS. WINDHAM: Certainly. There's a large
24 body of case law on that, and really it boils down to
25 a case-by-case consideration. The Supreme Court said

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1 in the *Gonzales v. O Centro* case, which was a RFRA
2 case, that you have to look at each individual case.
3 It's not enough to pass one-size-fits-all legislation
4 and say that this is going to apply to everyone. You
5 need to look at what are the particular circumstances,
6 how is the particular burden falling on this religious
7 believer, and you need to look at the government
8 interest. What is the government interest in this
9 particular circumstance? Can an exception be made, or
10 are the interests so strong they can overpower them?

11 And in certain circumstances, the Supreme
12 Court has recognized that there is a compelling
13 government interest in racial discrimination -- I
14 should say in prohibiting racial discrimination, an
15 important distinction. So, it's clear that anti-
16 discrimination laws are going to win in a number of
17 these cases, but there are other times where the
18 religious believers are going to be able to receive an
19 exception, and receive protection for their religious
20 exercise.

21 CHAIRMAN CASTRO: Anybody else want to add
22 to that? Mr. Mach?

23 MR. MACH: Yes, just I think one of the
24 questions that you asked was what does substantial
25 add, and I think that's an important question because

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1 some of the state legislation of the sort that you
2 mentioned includes a prohibition on simply burdens,
3 and not substantial burdens. And what that means is it
4 could open the door to all sorts of claims, however
5 incidental to religious exercise.

6 Now, we at the ACLU certainly believe that
7 religious exercise should get heightened protection.
8 We believe the *Smith* decision written by Justice
9 Scalia -- which basically said that any rule that is
10 neutral and generally applicable to all will survive a
11 free exercise challenge even if there's a substantial
12 burden on that free exercise -- we think that decision
13 was wrong, but in many of the laws that are being
14 proposed right now in the states, the claimed right to
15 religious exemption is written in such a way that it
16 will have the effect of harming the rights and well
17 being of others. And I think in those situations, that
18 is where we would draw the line.

19 CHAIRMAN CASTRO: Ms. Khan? You want to
20 pass the mic, please.

21 MS. KHAN: I think it's very hard to have
22 one-size-fits-all rules in this area. I think we do
23 have to trust that the courts are going to wrestle
24 with all of the very complex not just factual but
25 legal issues that are involved in any given instance.

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1 So, I don't think we can sit here and say we need
2 clarity on this because you imagine, for example, just
3 to contrast two cases, the Amish don't want to send
4 their kids to public school and comply with compulsory
5 education laws. They won that right. And the court
6 evaluated a whole host of considerations to reach the
7 result. It didn't harm anybody to let them do this.

8 Contrast that with the Amish don't want to
9 put an orange triangle, a reflective orange triangle
10 on the bag of their buggy. Well, they may not have the
11 right to be exempted from the normal traffic and
12 safety rules because their compliance could impact the
13 safety of other people. And we can't sit here and come
14 up with a rule that's going to cover both of those
15 situations because they necessitate a specific
16 approach. So, I think that's an important factor, that
17 this is such a complex issue that arises in so many
18 circumstances that I think it's difficult to prejudge
19 a proper outcome in any particular situation.

20 CHAIRMAN CASTRO: Ms. Colby wants to --

21 MS. COLBY: Well, I just want to tell you
22 something you already know, and you're the experts on,
23 which is that it's a very common practice for non-
24 discrimination laws to include exemptions for
25 religious people. So, we've had experience with this,

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1 Title VII probably being the best example of this.
2 But it is it is a long part of our tradition to be
3 balancing these two concerns. We've had practice
4 with it, and we don't always get it perfectly, but it
5 is a big part of our heritage not to go one way or the
6 other, but to give these religious exemptions. That's
7 why I included as examples of best practices the
8 University of Texas and the University of Florida's
9 policies. They have very robust non-discrimination
10 policies, but they also insert a sentence saying
11 religious groups get to choose their leaders according
12 to their religious beliefs, and so they have the best
13 of both worlds.

14 CHAIRMAN CASTRO: Before I move on to the
15 two Commissioners who indicated here, is there anyone
16 else on the phone that I can put on the list that
17 wants to ask questions? Okay, I'm going to have
18 Commissioner Heriot and then Commissioner Kirsanow.

19 COMMISSIONER HERIOT: Okay. I thought about
20 not saying anything during this briefing because I
21 think these areas are very, very difficult, and to
22 some extent probably intractable. I have a lot of
23 sympathy for Ms. Colby's point. I do believe that
24 these religious organizations on campus have been
25 wronged. I also have quite a bit of sympathy for the

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1 Chairman's point, because it would be nice to have
2 rather clear law in this area.

3 I guess I don't so much have a question as
4 I have a point I want to throw out and find out what
5 reaction I get from you. Twenty years ago, colleges
6 and universities did not subsidize school
7 organizations the way they do now. I've always thought
8 that this is a problem, that taxing students in order
9 to pay for various voluntary organizations, you know,
10 there's an up side to it, but I think it mainly has a
11 down side. And I sympathize with Ms. Colby's point
12 that, you know, for religious organizations to then
13 say okay, that's fine, you know, we'll be the chumps.
14 We won't get subsidized when everybody else is
15 subsidized. You know, that's a problem.

16 What if we were simply to go back to the
17 earlier point where colleges and universities,
18 particularly I'm thinking of state colleges and
19 universities, were to not be such -- I'm trying to
20 think of the right word for it, totalitarian isn't the
21 right word, but you know what I'm trying to say, you
22 know, being involved in every single aspect of student
23 life.

24 CHAIRMAN CASTRO: Ubiquitous?

25 COMMISSIONER HERIOT: Ubiquitous, maybe

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1 that's the right word here. Shouldn't we have colleges
2 and universities, at least state colleges and
3 universities, that make it a point not to be so
4 ubiquitous and, hence, I believe allow civic life
5 among students to thrive in a way that avoids a lot of
6 the questions we're talking about today? Comments?

7 MS. COLBY: I'll start and then pass the
8 microphone down. I agree, and I would like to see it
9 become much more that the student groups support
10 themselves and the marketplace of ideas is based on
11 who supports what.

12 Unfortunately, some organizations,
13 including national organizations, get a lot of money
14 through those student groups going up to the national,
15 so it's going to be very hard to unentrench them.

16 The Supreme Court had the opportunity to
17 use the Speech doctrine to cut back on these programs,
18 and the Court avoided that. But it did say that these
19 programs have to be viewpoint-neutral in the way that
20 they're administered because it's clear that there's
21 definitely a dynamic by which one side of the
22 political spectrum is getting much more of the money
23 than the other. I think that decision, *Board of*
24 *Regents v. Southworth*, has helped somewhat.

25 I know in some of the work I've done, I've

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1 been able to at least get the universities to adopt a
2 viewpoint-neutral mechanism for allocating the fees
3 which they did not have --

4 COMMISSIONER HERIOT: But that then just
5 gets us down the road we're now where a lot of -- a
6 lot of different hard questions.

7 COMMISSIONER GAZIANO: Commissioner Heriot,
8 would you just allow this clarification? To what
9 extent would availability of meeting rooms not be
10 solved, and to what extent, maybe the panel can talk
11 about, is the availability of meeting rooms more
12 important than funds, or electronic meeting posting
13 boards, internet, that kind of thing?

14 MS. COLBY: That's an excellent point.
15 The funding issue that took over *Martinez* was really
16 a complete red herring because what really is at stake
17 for the smaller groups, like the Christian Legal
18 Society, and the other religious groups, is the
19 ability to reserve space on campus to meet, the
20 ability to communicate through the website, access to
21 the electronic signs in the student union, and
22 participation in the student activity fair at the
23 beginning of the school year. Those are the key
24 things.

25 COMMISSIONER HERIOT: I would think that

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1 without the purse strings issue those issues become a
2 lot easier for people to get along on, that if you
3 just allow a meeting room. That's what makes life a
4 lot easier and avoids some of the very real questions
5 that are being brought up by the panelists here.

6 And let me say that I would extend this
7 not just to colleges and universities, but government
8 in general. Purse string issues create huge problems
9 between groups that have different views of how the
10 universe should be organized, and if we have a smaller
11 government we'll have fewer issues of this sort.

12 CHAIRMAN CASTRO: Ms. Kahn.

13 MS. KHAN: My organization would not in
14 principle have a problem with what you're describing.
15 I think that's an educational policy question that I
16 don't have a great deal to add on to. But I think once
17 purse strings do get involved, and this goes with
18 respect to colleges, universities, and the government
19 in general, that constitutional provisions are
20 triggered and they matter.

21 CHAIRMAN CASTRO: Ms. Windham.

22 MS. WINDHAM: I think that the policy you
23 propose is very sensible and might eliminate some of
24 these problems, but I think that Commissioner
25 Gaziano's point is also well taken here. We've been

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1 arguing a lot about funding, but what was really most
2 important to the CLS group was the ability to reserve
3 meeting rooms, have a table, reach out to new students
4 at a new student fair, those sort of actions. So, the
5 funding policy -- having a different sort of funding
6 structure, or no funding structure -- might help but
7 it would not eliminate the entire problem.

8 CHAIRMAN CASTRO: Mr. Mach, nothing to add?
9 No? Okay. We will now go to Commissioner Kirsanow. Is
10 there any Commissioner on the phone that would like to
11 ask questions? We've got about 11 minutes left of the
12 briefing, the first panel. No? Okay, Commissioner
13 Kirsanow.

14 COMMISSIONER GAZIANO: I'll move up if no
15 one else does. You don't have a second.

16 CHAIRMAN CASTRO: Okay. Commissioner
17 Kirsanow.

18 COMMISSIONER KIRSANOW: Thank you, Mr.
19 Chair. Actually, Commissioner Heriot touched upon the
20 question that I wanted to ask, so I just wanted to
21 make an observation with respect to the burden placed
22 on religious organizations on campus.

23 As I mentioned at the outset, we received
24 a number of comments from a variety of student
25 organizations that were very aggressive in noting that

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1 they're being substantially burdened, at least in
2 their estimation, by their various universities. One
3 of the organizations, there was a University Christian
4 Fellowship, for example, submitting a number of
5 comments about the fact that they're essentially being
6 forced off campus, essentially they are being -- their
7 mission has been diluted because of the requirements
8 placed on them by the university, so this is not an
9 ephemeral and kind of nebulous concern. And it goes
10 beyond the funding issue.

11 But, I guess, if I were to ask a question,
12 and we've talked a little bit about balance, and I
13 agree with Ms. Khan that you can't come up with a
14 bright-line rule right here. It's impossible. I think
15 to a large extent it's a case-by-case analysis. You
16 have to balance burdens.

17 We've got issues with respect to the
18 nature of the discrimination, as I mentioned at the
19 outset, whether a discrimination is invidious,
20 immutable characteristics seem to trigger the type of
21 invidious discrimination we talked to more readily
22 than other types of discrimination, but also who does
23 the discriminating?

24 In the case of student religious
25 organizations, we've got a finite group of five or

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1 six, maybe 50 students, college students who are
2 arguably discriminating by selecting certain
3 individuals or adhering to a particular set of beliefs
4 versus the state actor that does the discriminating.
5 When the state does the discriminating and you can
6 look at, you know, the theories underpinning cases
7 like --

8 (Background noise.)

9 COMMISSIONER KIRSANOW: When a state does
10 it, there are no escape valves. When a tiny
11 organization does it, you can go elsewhere. So, the
12 question I think really is if we are looking at not --
13 discrimination spans a whole spectrum of issues, but
14 if we're looking at the discrete issue of invidious
15 discrimination, shouldn't we err on the side of the
16 non-state actor in the case of religious
17 discrimination. If there is a question, if it is a
18 close call, doesn't it make sense to err on the side
19 of the non-state actor? Anyone can respond.

20 CHAIRMAN CASTRO: Ms. Windham.

21 MS. WINDHAM: Thank you, Mr. Chairman. I
22 would agree with that. I think that's an important
23 point, and I think it's important to note that when
24 you are putting a thumb on the scale so to speak on
25 the side of the non-state actor, you are allowing

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1 small, and new, and unpopular groups the ability to
2 gain a foothold, the ability to form to spread their
3 message, and to make arguments in a public square.

4 CHAIRMAN CASTRO: Ms. Khan.

5 MS. KHAN: I think that that point sort of
6 elides the distinction between a prohibition and an
7 extension of a subsidy. So, for example, if you look
8 at the general notion of the extension of a subsidy,
9 there are lots of cases that the Supreme Court has
10 decided. Take *Rust v. Sullivan*, for example, where the
11 court -- the government can condition a funding stream
12 on certain activities. It can say to a funded -- a
13 publicly-funded program that you can't counsel about
14 abortion, but it can't put -- criminalize a non-funded
15 program from engaging in that same kind of counseling.
16 So, talking about this in sort of generic, using words
17 like invidious discrimination, I think fails to convey
18 or capture that distinction. And that's essential in
19 understanding *CLS v. Martinez*. You can't kick it to
20 the curb in understanding that case because look at
21 *Hosanna-Tabor*, it came out differently. And there's a
22 reason that it --

23 COMMISSIONER KIRSANOW: We also have to get
24 to what is a subsidy. As Commissioners Gaziano and
25 Heriot talked about, you know, you could argue that

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1 the mere recognition or -- mere, but because the
2 permission of the use of rooms, whether it be
3 electronic rooms, or chat rooms, whether it be
4 physical rooms versus actual dollars, and whether
5 those dollars, for example, come from student fees,
6 which fees are non-negotiable. You must compel, you
7 must give to Caesar these fees. Caesar then dispenses
8 it to all except the one organization that has a
9 religious component to it, yet they are still
10 compelled to subsidize everybody else. So, I agree
11 with you. I mean, there is a number of gradations
12 there, no bright lines; but, again, when there's a
13 close question, and given the constitutional concerns
14 with respect to religious freedom and the ability to
15 obliterate unpopular views by the state, doesn't it
16 make more sense to err on the side of the non-state
17 actor in close questions?

18 MS. KHAN: Well, I think - obliterate, I
19 imagine, is a strong word. I'd be interested in
20 hearing from Ms. Colby about how many Christian Legal
21 Society chapters there are around the country.

22 MS. COLBY: We have approximately 90
23 chapters around the country, but obliterate is not too
24 strong a word. As I've already said, at Hastings there
25 is no CLS chapter because of this. Other organizations

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1 have also suffered the end of an organization on a
2 particular campus whenever that group has been
3 derecognized.

4 The fact is that *Martinez* just got it
5 wrong. It ignored 40 years of precedent that said that
6 allowing student groups to have access to meeting
7 space and campus channels of communication is just not
8 a subsidy. It is the students' speech, and this is
9 where what Ayesha was saying was not on point. *Rust* is
10 about when the government decides to speak through a
11 program, then it can fund that program and say this is
12 what you will say with our money. But no one has ever
13 thought, until Justice Ginsburg's aberration in
14 *Martinez*, that what the student groups are saying in
15 these student speech fora is the speech of the
16 university. The university, even in Hastings, and this
17 was one of the facts that the Court just ignored, the
18 university at Hastings had at least three different
19 written disclaimers saying it was not responsible for
20 the speech at various student groups.

21 So, again, the law for 40 years has been
22 what the student groups are saying in these fora,
23 whether it's the SDS or the Christian Legal Society,
24 is not endorsed, or sponsored, or subsidized by the
25 university just because it's occurring on campus,

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1 because that's where the students' world is.

2 CHAIRMAN CASTRO: Mr. Mach would like to
3 respond. Could you pass the microphone to him, please?

4 COMMISSIONER ACHTENBERG: Mr. Chairman,
5 might I be recognized? Is there still time?

6 CHAIRMAN CASTRO: Yes, so right after Mr.
7 Mach, then you'll have the last --

8 COMMISSIONER YAKI: Mr. Chair, Commissioner
9 Yaki would like to be recognized at some point, too.

10 CHAIRMAN CASTRO: All right. We'll go a
11 little over. Go ahead, Mr. Mach.

12 MR. MACH: Okay. I just wanted to add a bit
13 to what was said on that last subject. The two
14 important issues here, one was just discussed and I
15 completely agree with Ms. Kahn on the fact that the
16 subsidy component here is a crucial one, and it's what
17 distinguishes this case from one in which there's a
18 complete prohibition on groups.

19 The second, though, is that what the
20 university rule does is not target groups on the basis
21 of their viewpoint. And the court made that very
22 clear, the lower court to follow up on it in the *San*
23 *Diego State* case, made the same point.

24 Groups are singled out and the condition
25 is based on conduct of those groups, the act of

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1 deciding whom the groups want to exclude. It is not on
2 the basis of viewpoint. And *Rosenberger* makes clear
3 that if the rule were we're going to fund all groups
4 but those with a religious viewpoint, then that would
5 be unconstitutional. That is not what the rule in *CLS*
6 was. It was not we are going to allow this for groups
7 with a certain viewpoint, but not groups with other
8 viewpoints. It is solely targeted on the acts of those
9 groups. And the Supreme Court has made clear that acts
10 are not shielded from regulation merely because they
11 express a discriminatory idea or philosophy.

12 CHAIRMAN CASTRO: So, we're going to go to
13 Commissioner Achtenberg, then Commissioner Gaziano.
14 We'll close with Commissioner Yaki. I ask the
15 Commissioners to be brief and the panelists, as well,
16 in their responses. So, Commissioner Achtenberg.

17 COMMISSIONER ACHTENBERG: Thank you, Mr.
18 Chairman. I'd like to turn our attention if I might to
19 the *Hosanna-Tabor* case, and specifically I'd like to
20 ask Ms. Kahn about whether or not the concern that I
21 now have as I appreciate the articulated principles in
22 that case that there may become some kind of chilling
23 effect upon the rights of employees of religious
24 organizations who wish to report internal misconduct,
25 whether there might be some misinterpretation or some

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1 intended interpretation such that they might believe
2 their conduct is protected and come to learn that it
3 is not. Might this lead to misunderstanding of whether
4 or not a licensed professional may have an obligation
5 to report? Could you discuss both the positive and
6 negative implications of the kinds of distinctions
7 that were articulated in that case from your points of
8 view?

9 MS. KHAN: Well, I don't do employment
10 discrimination work, generally speaking, so I don't
11 know that I'm the greatest authority on this, but I
12 will tell you that my concern with *Hosanna-Tabor* is
13 how the Ministerial Exception is defined. So, I think
14 it is a situation where I'm concerned that the
15 exception, literally the exception swallows the rule.

16 And as you -- it started, as its name
17 reflects, as an exception for ministers, and it has
18 morphed into something that now covers a parochial
19 school teacher who teaches a secular subject but may
20 in the course of her day teach some religion. Does it
21 include, for example, somebody who happens to monitor
22 religious education who might not actually convey it?

23 I think there's lots of factual questions
24 that concern me about the breadth of that exception.
25 So, yes, I can imagine a chilling effect in terms of

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1 not just reporting misconduct, but filing litigation
2 because of the risk that you would be considered a
3 minister and, therefore, have no coverage whatsoever.
4 And mind you, remember that the Ministerial Exception
5 doesn't just cover religious discrimination, it covers
6 every kind of discrimination. So, it exempts religious
7 organizations from complying with race discrimination
8 rules, gender discrimination rules, national origin
9 discrimination rules. It is carte blanche to engage in
10 discrimination of the most rank sort with respect to
11 somebody who falls into the category of a minister.

12 MS. WINDHAM: Mr. Chairman, if I may
13 respond briefly.

14 CHAIRMAN CASTRO: Ms. Windham.

15 MS. WINDHAM: The Ministerial Exception is
16 not carte blanche to engage in discrimination. What it
17 is is a protection and the insurance that our federal
18 government is not going to be in the business of
19 deciding who chooses our ministers.

20 The Supreme Court said, and I quote from
21 page 710, "We express no view on whether the exception
22 bars other types of suits, including actions by
23 employees alleging breach of contract or tortious
24 conduct by their religious employers." There's nothing
25 in *Hosanna-Tabor* that suggests something like a

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1 mandatory, criminal mandatory reporting statute would
2 be invalid, or that it would be prohibited. There's
3 nothing in *Hosanna-Tabor* to prohibit non-ministerial
4 employees from still bringing actions against
5 religious organizations. So, I think it's important to
6 note that this decision is appropriate. It is
7 appropriately limited and it protects the rights of
8 religious organizations to maintain their identities
9 and to be true to their religious missions.

10 CHAIRMAN CASTRO: Commissioner Gaziano, if
11 you could be brief, and then we'll go to Commissioner
12 Yaki.

13 COMMISSIONER GAZIANO: Two quick points,
14 and I'm not sure that anyone needs to react. First of
15 all, I wanted to thank Commissioner Heriot who I
16 interrupted. I wanted to wholeheartedly endorse her
17 suggestion that we should eliminate the money and
18 eliminate that part of the problem. It sounds like a
19 great idea. But in addition to the meeting -- the
20 essential nature of meeting rooms on campus and
21 internet to collaborate, I wanted to also mention the
22 ability to host outside speakers like the four of you
23 is an essential part of at least a club whose mission
24 it is to supply an outlet for learning on or the
25 promotion of particular political, ideological, or

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1 religious views. And that's the sense in which the
2 all-comers policy is seen as neutral is ridiculous.

3 An all-comers policy may serve no problem
4 for a sports club like the Ultimate Frisbee Club, and
5 anyone who wants to play ultimate frisbee meets on
6 Wednesday. It is a discriminatory -- can be written
7 and it seems to be applied in a discriminatory manner
8 in violation of free exercise, and in violation of
9 when it is applied to these very vital clubs that are
10 supplying the missing link in many campuses for
11 learning, and the promotion of these political
12 ideological viewpoints.

13 And my final thought is, I think it is
14 naive to think that even if such policies can -- even
15 if some club can survive, even if it's willing to
16 denounce its commitment to Jesus Christ if it is a
17 Christian society, that such a policy couldn't also be
18 used to subvert people of a certain age who went to
19 Yale, and I'm not one of them, talk about the schism
20 created in the Party of the Right. They talk about it
21 as if it is still a deep, deep wound.

22 I participated in ideological clubs where
23 there are schisms, and it is unreasonable to think
24 that one of the groups that is fighting for control of
25 that organization wouldn't employ outsiders who have

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1 nothing to do with the original purpose of the mission
2 to subvert those organizations.

3 So, with that I am happy that Justice
4 Stevens has taken his retirement, that Justice Kagan
5 will reverse the injustice of *CLS v. Martinez* when
6 stupid universities require cases to be brought before
7 the Supreme Court.

8 CHAIRMAN CASTRO: I just want to clarify
9 that one of the ideological groups that you're
10 involved with that has schisms is not this group.

11 (Laughter.)

12 CHAIRMAN CASTRO: So, Commissioner Yaki,
13 you have the last question.

14 COMMISSIONER YAKI: Yes, thank you very
15 much, and this was very interesting. I always like to
16 follow Commissioner Gaziano because he usually
17 crystalizes my thoughts in a direction.

18 I don't know if anyone is seriously saying
19 that we ask the student group to give up their belief
20 in Jesus Christ, Allah, the Talmud or anything like
21 that. What I do know from my own experience from being
22 in student government and being in university settings
23 and dealing with the issues of resource allocation and
24 recognition that I think there is a distinction. I
25 support the reasoning of Justice Ginsberg in that

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1 we're talking about -- and I don't support this sort
2 of Trojan horse idea that access to meeting rooms is a
3 lot different than access to funding. I think that any
4 time -- when you talk about meeting rooms, you're
5 talking about essentially the confirming and use of
6 government and public facilities for the benefit of a
7 specific group because invariably there's janitorial,
8 lighting, other kinds of things, whether it's the
9 maintenance of the web page, server, anything like
10 that. And then when you put it in with conduct that is
11 strictly prohibited by our Constitution among other
12 documents, that universities have the ability, almost
13 have an obligation to insure that those scarce
14 resources are not being misused in a way to actively
15 engage in prohibited conduct. And I don't believe that
16 you can change the way these -- anyone thinks, but I
17 do believe that you cannot support the way that a
18 group will act. And I see very little problem with the
19 *Martinez* decision in that regard, and look forward to
20 Panel II.

21 CHAIRMAN CASTRO: Okay. Well, thank you,
22 Commissioner. Thank you, panelists. We appreciate your
23 thoughtful contributions to this subject, and we will,
24 of course, take a bit of a 10-minute break so that we
25 can get the second panel in place, change out the

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1 microphone. And we hope that you'll stick around for
2 the second part, and we'll be back in 10 minutes.

3 (Whereupon, the proceedings went off the
4 record at 10:58 a.m., and went back on the record at
5 11:11 a.m.)

6 CHAIRMAN CASTRO: Okay. We're going to get
7 started on our second panel, but before we actually
8 move forward I just want to let folks know, both the
9 Commissioners who are on the line telephonically as
10 well as any members of the public who are listening
11 via audio, please mute your phone. The feedback makes
12 it difficult for us and you to hear what's going on
13 during the streaming and during the testimony, so if
14 you could please make sure that those are muted.

15 And to the current panel, I don't know if
16 all of you were here earlier, but I just want to
17 reiterate we have a system of warning lights here. You
18 will each have seven minutes to make your statement.
19 Of course, green light goes on, you start; yellow
20 light, you've got two minutes to wrap up, red light,
21 time to stop, and then we'll be able to delve in a
22 little further once we as Commissioners begin to ask
23 our questions.

24 So, let me now having said that begin to
25 introduce our current panel. Thank you. Our first

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1 panelist is Marci Hamilton, the Paul R. Verkuil Chair
2 in Public Law at the Benjamin Cardozo Law School,
3 Yeshiva University. Our second panelist is Marc
4 DeGirolami, Associate Professor at St. John's
5 University School of Law. Our third panelist is Leslie
6 C. Griffin, the William S. Boyd Professor of Law at
7 the University of Nevada, Las Vegas, Boyd School of
8 Law. Our fourth panelist is Michael Helfand, Associate
9 Professor at Pepperdine University School of Law, and
10 Associate Director of the Diane and Guilford Glazer
11 Institute for Jewish Studies. And our fifth panelist
12 is Alan Brownstein, the Boochever and Bird Chair for
13 the Study and Teaching of Freedom and Equality at the
14 University of California, Davis School of Law. Our
15 sixth panelist is Edward Whelan, President of the
16 Ethics and Public Policy Center.

17 I am now going to ask each of you to swear
18 or affirm that the information that you are about to
19 provide to us is true and accurate to the best of your
20 knowledge and belief. Is that correct?

21 (Chorus of yeses.)

22 CHAIRMAN CASTRO: Okay, thank you. Ms.
23 Hamilton, you have the floor.

24 **III. PANEL II**

25 **MARCI HAMILTON, PROFESSOR,**

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BENJAMIN N. CARDOZO SCHOOL OF LAW

MS. HAMILTON: Good morning.

CHAIRMAN CASTRO: Good morning.

MS. HAMILTON: Thank you so much for inviting me to this hearing today. Essentially, I understand our task as talking about the collision between religious liberty claims and civil rights. I think that I'll just make two brief comments.

The first comment is just terminology. There are those in the religious liberty universe who are fond of referring to something they call the Church Autonomy Doctrine. The *Hosanna-Tabor* case and every other case at the United States Supreme Court on the free exercise of religion do not use that phrase. Autonomy has never been a phrase that has ever been adopted by the United States Supreme Court, and you wouldn't expect them to.

The United States Constitution protects ordered liberty, and protects religious individuals in their free exercise, but not autonomy from the law. That would simply be lawlessness never, ever identified by the Supreme Court.

In the *Hosanna-Tabor* case on behalf of many organizations that work on behalf of child sex abuse victims, I wrote an amicus brief in which I say

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1 to the Supreme Court I hope that, one, you will not
2 pre-decide any case that involves a child sex abuse
3 victim. And, two, I hope you will not adopt the
4 autonomy theory that has been proposed by various
5 amicus briefs.

6 I'm very glad to say that the Supreme
7 Court majority did not use the term "autonomy" once,
8 and did not say that there is an autonomy doctrine. In
9 fact, only two members of the Court used the term,
10 Justice Alito joined by Justice Kagan. So, I think we
11 can now be pretty certain that autonomy and the
12 concept of lawlessness that's attached to it does not
13 apply to religious entities. And they are responsible
14 to the legal obligations that apply to everyone else.

15 The second thing I'd like to raise, I have
16 spoken to virtually every individual who was
17 discriminated against in one of the cases that
18 involves the Ministerial Exception Doctrine in the
19 last several years. And I'd like to impress on the
20 Commission that the vast majority of Americans assume
21 they have rights against invidious discrimination, and
22 that includes our ministers and our clergy.

23 The Supreme Court held that there's a
24 constitutional right under the First Amendment for a
25 religious organization to avoid the application of the

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1 laws which this Commission is charged with guarding,
2 the civil rights laws.

3 That decision was inevitable. There was no
4 way that the Supreme Court was ever going to say that
5 the Catholic Church has to have women as priests, or
6 Orthodox Jews have to have women as Rabbis. That was
7 not going to happen, so that was expected.

8 The Court made it very clear they were not
9 saying that all disputes between religious employers
10 and employees are outside of the First Amendment, but
11 the key here is this. If you are a priest in the Roman
12 Catholic Church and you're black, and you're fired for
13 race discrimination, that church is protected under
14 the *Hosanna-Tabor* decision for that race
15 discrimination, even though it's not based on
16 religious belief.

17 If you're a female chaplain in a position
18 at a university, which for a long time has been open
19 to women and men, and the university chooses to
20 replace you with a man because it wants a man rather
21 than a woman, and engages in otherwise illegal gender
22 discrimination, that university is now protected.

23 If you have narcolepsy and you go back to
24 work and you're told you can't go to work because they
25 don't want you, a church now has the right to say too

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1 bad, the Americans with Disabilities Act doesn't apply
2 to us, and neither does the ADEA the Discrimination in
3 Employment Act involving age.

4 My point is this: *Hosanna-Tabor* does, in
5 fact, protect the rights of religious groups to
6 determine who their clergy are, and it goes beyond
7 that to ministers. There's a gray area of who the
8 ministers are. All these cases are still fact-
9 dependent.

10 But out of an absolute sense of fairness
11 to all the employees who work for religious
12 organizations, I think this Commission should propose
13 proactively that religious organizations be required
14 to disclose, first, whether an employee will be
15 considered a minister and, second, that a minister is
16 not protected by laws that ban discrimination.

17 The biggest problem for religious
18 organizations, of course, is that humans run them.
19 Humans make bad decisions, and they discriminate on
20 the basis of race and gender. I think it's extremely
21 unfair for an employee to join a religious
22 organization and not be informed that he or she is
23 not going to have rights under the anti-discrimination
24 laws. And, therefore, it should be a requirement as
25 part of the hiring that they disclose whether or not

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1 this religious organization is going to treat this
2 employee as a minister who, therefore, will not be
3 afforded civil rights against the organization, or as
4 an ordinary employee who retains their rights under
5 the civil rights laws.

6 The last thing I would add is that
7 religious organizations sought this exception and
8 thought it was good for them. To the extent they
9 engage in invidious discrimination that's not required
10 by their theology, I think they're going to find this
11 isn't a regime that's terribly good for them. They're
12 going to be better off with transparency, as we found
13 in the child sex abuse cases. To the extent that they
14 would oppose a requirement of clear disclosure of the
15 truth of whether the employee is a minister or not, I
16 think that would be a very sad development. Thank
17 you.

18 CHAIRMAN CASTRO: Thank you, Ms. Hamilton.
19 Mr. DeGirolami.

20 **III. PANEL II**

21 **MARC DeGIROLAMI, ASSOCIATE PROFESSOR,**

22 **ST. JOHN'S UNIVERSITY SCHOOL OF LAW**

23 MR. DeGIROLAMI: Thank you very much. Thank
24 you very much, Marci. Thanks, also, to the Commission
25 for inviting me. I'm delighted to be here. Thank you,

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1 Commissioner Kirsanow.

2 I think rather than diving into any
3 particular issue, although I will talk about the
4 Ministerial Exception in my remarks, I want to begin
5 with the subject of the panel itself, and that is
6 conflicts between civil rights and non-discrimination
7 norms. And I think it's important to pause over the
8 word "conflict," really to take the measure of it
9 before taking on any of the more discrete issues that
10 the Commission is interested in, because sometimes
11 there can be what at least from my perspective is a
12 somewhat hasty desire to solve conflict, especially in
13 this area, solve it before really understanding it.

14 The wish to resolve a conflict can
15 sometimes mask the complexity and the depth of the
16 conflict. And I think that an over-eager desire to
17 resolve conflict can obscure the possibility that
18 conflicts are part of every person's existence,
19 they're part of every institution's existence, they
20 are part of the existence, the experience of politics,
21 generally. So, we've been asked to consider certain
22 kinds of conflicts, conflicts between and among
23 rights. And underlying each of those rights are
24 multiple values, the right to religious liberty
25 includes conventional values that one generally hears

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1 about like liberty, and autonomy, with apologies to
2 Professor Hamilton, and equality, but also less
3 conventional values like piety, and asceticism, and
4 charity, and devotion, and self-control, and
5 obedience.

6 Those are only some of the values that
7 religious liberty can help a person or an institution
8 to achieve and, therefore, only some of the reasons
9 that we ought to be interested in protecting religious
10 liberty. Those values, of course, do compete with and
11 conflict with others that obtain in a particular
12 social and cultural circumstances, including values
13 against unjust discrimination.

14 So, conflicts can occur not just among
15 different types of values, as when a Roman Catholic's
16 autonomy of conscience conflicts with a state's
17 interest in a certain conception of equality, or non-
18 discrimination, or good health, but also among
19 different values of the same type as when a Roman
20 Catholic's conception of equality, and what that means
21 for religious liberty, conflicts with the conception
22 of equality contained in say Title VII of the Civil
23 Rights Act, and what that means for religious liberty.

24 So, we might be able to agree, and I take
25 it that this was the theme of the earlier panel today.

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1 We might be able to agree at a very high level of
2 abstraction that equal treatment means the absence of
3 unjust discrimination, but what counts as unjust
4 discrimination is open to an array of conflicting
5 interpretations. And those interpretations are
6 underwritten by conflicting values.

7 Okay. Now, I want to make a stronger
8 claim. The state of being in conflict, the condition
9 of experiencing and living through and with certain
10 kinds of conflicts is often the best approximation of
11 justice that we are capable of. Conflict may be a
12 great evil for legal theorists or philosophers but it
13 is not a great evil for us, and for our legal
14 traditions. Conflict is an essential and deep feature
15 of society and of our laws. It is unavoidable and it
16 is positively desirable since it is the result of our
17 different backgrounds, our different outlooks, and our
18 different memories.

19 Nothing that I've said, of course, negates
20 the importance of compromise, and I agree entirely
21 that certain interests, interests, for example, in
22 securing the physical safety of the weak, are so
23 important that they should always trump conflicting
24 interests. But apart from those extreme cases which I
25 believe are extreme cases and should be treated as

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1 such, compromise does not mean harmony, compromise
2 does not mean the relaxation of tension.

3 At any rate, if the question that this
4 panel is being asked to consider is how should we
5 resolve conflicts between religious freedom and gay
6 rights in various contexts, or how do we resolve
7 conflicts between the many goods of church autonomy
8 and the vindication of non-discrimination norms, then
9 my reaction, like that of the ornery law student, is
10 to resist a hypothetical. We won't resolve it. We
11 shouldn't expect to resolve them, and we should not
12 want to resolve them. Maybe these conflicts are
13 susceptible of halting partial and temporary
14 compromise, but there generally is in any contemporary
15 society like ours a wide variety of moral attitudes.

16 A reasonable person knows this, those with
17 zealous feelings deplore the mess and push for
18 resolution in which their opinions are dominant. That
19 is why in my prepared remarks I highlighted and
20 praised the Supreme Court's opinion in the *Hosanna-*
21 *Tabor* case, because rather than elevate a single value
22 like neutrality, or non-discrimination, or equality,
23 or liberty to supreme constitutional status and what
24 would have been a misguided effort to solve the
25 conflict, the court kicked off its opinion by

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1 exploring some of the rich history of religious
2 liberty. It adopted a traditional mode of
3 constitutional interpretation. It identified the ways
4 in which a particular conception of church autonomy is
5 fundamental to our own distinctive tradition of
6 religious freedom. And it held rightly that the best
7 way to judge whether and how the values underwriting
8 the Ministerial Exception apply as they interact and
9 inevitably conflict with non-discrimination norms is,
10 and here I agree with Professor Hamilton, highly
11 particularized.

12 Constitutional adjudication in this area,
13 in which conflicts are so frequent because they
14 represent our collective commitment to incompatible
15 values, needs to proceed as narrowly and incrementally
16 as possible. Decisions which are highly attuned to
17 factual particulars, historical compromises, decisions
18 that work from a suite of factors rather than a single
19 premeditated ideal, and decisions that face not
20 forward towards some idealized global resolution but
21 backward towards the litigants, the doctrine, and the
22 history that precedes them; those are the kind of
23 decisions that we should hope for, and that we need.
24 Thanks very much.

25 CHAIRMAN CASTRO: Ms. Griffin, you have the

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1 floor.

2 **III. PANEL II**

3 **LESLIE GRIFFIN, PROFESSOR,**

4 **UNIVERSITY OF NEVADA, LAS VEGAS**

5 **SCHOOL OF LAW**

6 MS. GRIFFIN: Yes, good morning. Thank you,
7 Chairman Castro and other Commissioners for inviting
8 me to testify. And thanks especially to your excellent
9 staff for helping us get here and setting everything
10 up for us.

11 Thank you for asking me to testify about
12 the conflict between anti-discrimination norms and
13 civil liberties. Religious freedom and equality are
14 two of our most cherished --

15 (Off microphone comments.)

16 MS. GRIFFIN: Religious freedom and
17 equality are two of our most cherished constitutional
18 norms. Today, however, some interpretations of
19 religious freedom undermine equality, leaving anti-
20 discrimination principles and religious freedom on a
21 collision course. This is especially true of
22 legislation that has been drafted to protect religious
23 liberty, but that may, instead, license individuals
24 and even corporations to discriminate in the name of
25 religion.

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1 The Supreme Court has long held that
2 religious beliefs are absolutely protected by the
3 First Amendment, but that religious actions are not.
4 Religious conduct must yield to the law and its
5 protection of all citizens. That principle was
6 endorsed by the Supreme Court in the *Bob Jones* case
7 when it said that free exercise didn't entitle Bob
8 Jones to a tax exemption if it discriminated on the
9 basis of race.

10 The same principle applied in the case you
11 just discussed this morning, *Christian Legal Society*,
12 which reiterates the fundamental point that the
13 government does not have to endorse discrimination
14 even when faced with religious appeals to do so.
15 According to the court, religion did not entitle CLS
16 to a special dispensation from Hastings' rule that all
17 student groups must accept all comers.

18 State courts have also endorsed this
19 principle in the cases upholding laws that require
20 employers to provide contraceptive insurance to their
21 employees. The highest courts of California and New
22 York ruled that state legislation promoting women's
23 access to contraception does not violate the rights of
24 religious employers. Those courts properly applied the
25 Supreme Court's leading free exercise precedent,

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1 *Employment Division v. Smith*, to deny Catholic
2 Charities' request that it be exempted from the law's
3 application.

4 Exempting Charities from the law, the
5 California Supreme Court reasoned, would sacrifice
6 women's right to equality. The California court
7 expressed its special concern about not granting a
8 religious exemption to a law that would harm the
9 rights of third parties, here the employees.

10 This important free exercise principle of
11 not allowing religious organizations to harm the
12 rights of third parties is currently at risk in the 52
13 cases challenging the contraceptive mandate of the
14 Affordable Care Act, especially the some 23 cases
15 brought by for-profit companies that challenged the
16 insurance coverage on the grounds that it violates
17 their religion. And these for-profit companies involve
18 construction companies, HVAC companies, manufacturers,
19 a company that mines, processes, and distributes
20 ceramic materials. And the owners all claim that their
21 moral and religious beliefs against contraception
22 should relieve them of the obligation to provide
23 insurance to their employees in various states.

24 Now, the employers are currently losing
25 their free exercise claims as they should under *Smith*,

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1 but the courts have been mixed on the results under
2 the Religious Freedom Restoration Act which prohibits
3 the federal government from substantially burdening a
4 person's exercise of religion. And although RFRA was
5 passed to promote civil liberties, its interpretation
6 now potentially harms the rights of third parties.

7 A significant number of courts is starting
8 to rule that the contraceptive mandate substantially
9 burdens the employer's exercise of religion, and even
10 that some corporations enjoy either constitutional or
11 statutory rights to practice religion. That's what the
12 courts are debating now.

13 I think that one of the problems is that
14 the courts have focused on the substantial burden
15 language to the exclusion of the exercise of religion
16 language. Many discussions of religious freedom today
17 assume that anything motivated by a moral or religious
18 belief should enjoy some kind of exemption from the
19 law, and that should not happen because, as I said at
20 the beginning, religious conduct is not absolutely
21 protected: religious belief is.

22 So, if running a for-profit business or
23 providing insurance coverage to employees become the
24 exercise of religion, and if companies large and small
25 can receive special exemptions from the laws, there's

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1 little chance that the anti-discrimination laws can
2 survive.

3 Women's equality is at stake in the
4 contraception cases. And, of course, we see these as
5 conflicts in other cases, right, of commercial
6 photographers, or bakers refusing services to gay and
7 lesbian couples who want to marry, or concerns about
8 medical providers or pharmacists refusing care to
9 people. So, as federal and state religious freedom
10 statutes protect an increasing range of religious
11 refusal, more individual freedom of third parties is
12 threatened.

13 Now, as the court stated in *Lee* in
14 refusing to exempt the Amish from the Social Security
15 taxes laws, some religious practices must yield to the
16 common good. Every person cannot be shielded from all
17 the burdens incident to exercising every aspect of the
18 right to practice religious beliefs. And I think
19 that's one of the dangers right now in the *Hosanna-*
20 *Tabor* case. As everybody has acknowledged, *Hosanna-*
21 *Tabor* is a very fact-specific case, and can be read
22 very narrowly; and, yet, it also can start to be read
23 very broadly to suggest that you need more and more
24 institutional religious freedom. So, there's a risk of
25 interpreting *Hosanna-Tabor* to conflict with all those

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1 anti-discrimination norms which serve our norm of
2 equality.

3 There's another constitutional reason I
4 think why it's dangerous to accommodate any religious
5 employer at the expense of not only their employees
6 but other secular employers. Giving an economic
7 preference to religious corporations and individuals
8 should violate the Establishment Clause. So, free
9 exercise is not an absolute right. Sometimes it has to
10 yield to equality and disestablishment if anti-
11 discrimination norms are to be protected. Thank you.

12 CHAIRMAN CASTRO: Thank you. Mr. Helfand.

13 **III. PANEL II**

14 **MICHAEL HELFAND, ASSOCIATE PROFESSOR,**

15 **PEPPERDINE UNIVERSITY SCHOOL OF LAW**

16 MR. HELFAND: Many thanks for the
17 opportunity to address the Commission at today's
18 briefing exploring tensions between non-discrimination
19 and religious liberty.

20 In my written statement to the Commission,
21 I focused on the extent to which religious
22 institutions should be afforded the constitutional
23 right to direct their own internal affairs free from
24 government interference. In my comments today I'd
25 like to address three questions.

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1 First, why is it that we value religious
2 institutions as part of our constitutional order?
3 Second, what constitutional protection should be
4 afforded religious institutions because of this value?
5 And then, third, what limitations should we place on
6 these constitutional protections? Let me begin with
7 the value of religious institutions.

8 Stripped to its essentials, a liberal
9 democracy must affirm the right of individuals to
10 develop and revise their own vision of what it means
11 to live, as the philosophers say, the good life. This
12 right insures that individuals can lead sincere and
13 authentic lives making their own decisions on matters
14 of faith and identity free from government intrusion.

15 Of course, thinking through who we are and
16 what we believe is not something typically done in
17 isolation. We invariably work through these deeply
18 personal questions while in conversation, often
19 embracing values and ideals shared by others.

20 More narrowly, many people conclude that
21 they can only accomplish their religious goals by
22 joining with others who share their own core faith
23 commitments. This is precisely why the Supreme Court
24 originally understood the value of religious
25 institutions as based upon the "implied consent" of

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1 their membership. Because individuals voluntarily join
2 religious institutions to pursue religious objectives,
3 the institution is granted by the implied consent of
4 the membership the authority to make rules and develop
5 doctrine that promotes those goals. In turn,
6 individuals can utilize religious institutions as a
7 resource to develop their own vision of what it means
8 to live a good life. But religious institutions can
9 provide this infrastructure only so long as they can
10 speak on matters of religious faith and doctrine free
11 from government intervention.

12 The Supreme Court captured this core
13 intuition in 1952 endorsing a "freedom for religious
14 organizations and independence from secular control or
15 manipulation," and then returned to this core
16 constitutional commitment in *Hosanna-Tabor* by
17 emphasizing that the First Amendment "gives special
18 solicitude to the rights of religious organizations."

19 This autonomy stems from the implied
20 consent of a religious institution's membership which
21 authorizes the institution to make rules and develop
22 doctrine that promotes shared religious objectives.
23 And religious institutions must, therefore, be
24 protected from governmental attempts to hijack their
25 internal decision making process.

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1 Now, the logic underlying the
2 constitutional value of religious institutions
3 provides a blueprint for determining the scope of
4 constitutional protections afforded them. To see how,
5 consider the Department of Health and Human Services'
6 promulgation of the so-called Contraception Mandate,
7 which protects the reproductive rights of women by
8 requiring covered employers to include contraception
9 methods in employees' insurance policies. However, in
10 enacting this policy, the Department of Health and
11 Human Services has provided limited exemptions to
12 religious organizations who believe complying with the
13 mandate will require them to violate their religious
14 consciences. Accordingly, this debate pits two
15 competing and important values against each other:
16 enhancing reproductive rights and protecting religious
17 conscience.

18 Approaching this dilemma from the vantage
19 point of implied consent immediately focuses our
20 attention on the following question; did the employees
21 in question implicitly grant their employer authority
22 to make rules aimed at achieving religious objectives?
23 Thus, for an employer to receive an exemption as a
24 religious employer would require that the employees
25 were cognizant of the employer's religious objectives

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1 and, therefore, impliedly consented to the authority
2 of the employer to make rules to achieve those goals.

3 Adopting such an approach provides wider
4 protection to companies that openly and obviously
5 incorporate religion into their day-to-day operations.
6 In such instances, employees can be assumed to
7 implicitly consent to the institution's authority over
8 religious matters because they recognize that their
9 employer's primary goal is to achieve religious
10 objectives.

11 By contrast, institutions that do not make
12 their religious objectives clear to others cannot lay
13 claim to constitutional protections predicated on the
14 implied consent of their members. The key to an
15 implied consent analysis is that it focuses on the
16 factual context of each employer. What such analysis
17 eschews is the inflexible criteria adopted by the HHS
18 to determine what employers receive exemptions as
19 religious employers. Most notably, an implied consent
20 approach wholly rejects the categorical claim that
21 for-profit organizations cannot be exempted from the
22 contraception mandate on the assumption that such
23 organizations do not exercise religion. Instead, using
24 implied consent as our guide we should inquire whether
25 a particular employer, whether a non-profit or for-

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1 profit, openly and obviously pursues religious
2 objectives in a manner clear to its employees.

3 Now just as implied consent can expand the
4 protections afforded religious institutions, so too it
5 can limit them. Where religious institutions engage in
6 conduct that fails to promote religious objectives,
7 then we can no longer presume that the institution's
8 membership impliedly consented to such conduct. And,
9 in turn, the Constitution does not protect conduct to
10 which the institution's membership did not implicitly
11 consent.

12 Indeed, this is precisely the limitation
13 on religious institutional autonomy the Supreme Court
14 advocated in the early half of the 20th century. In
15 1929, for example, the Supreme Court noted that it
16 would not defer to the decisions of religious
17 institutions where they advance "fraud, collusion, or
18 arbitrariness." Such a limitation made quite a lot of
19 sense given the reasons why we value religious
20 institutions.

21 Individuals ask religious institutions to
22 make rules and develop doctrine that help the
23 membership achieve lofty religious objectives, but
24 individuals do not ask religious institutions to make
25 decisions premised on fraud or collusion.

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1 The Supreme Court, however, has expressed
2 unwillingness to impose these side constraints on
3 religious institutions, worrying that doing so would
4 require courts to investigate internal religious
5 matters in violation of the Establishment Clause. But
6 it may be high time to revisit that conclusion.

7 For example, claims of discrimination
8 leveled by employees against religious institutions
9 often boil down to accusations of pretext. The
10 religious institution claims to have terminated an
11 employee on the basis of protected religious
12 considerations while the employee claims that the
13 religious considerations are simply a pretextual ploy
14 to disguise prohibited forms of discrimination.

15 While courts typically refuse to address
16 claims of pretext for fear of becoming impermissibly
17 entangled with religious doctrine, such refusals are
18 based on an over-expansion of the Establishment
19 Clause, which should prevent judicial intervention
20 only when the religious institution makes a decision
21 on the basis of religious doctrine, and not where
22 religious doctrine is simply a pretext for other forms
23 of discrimination.

24 In sum, religious institutions must be
25 afforded constitutional protection to decide matters

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1 of faith and doctrine because they provide the
2 infrastructure for individuals to pursue religious
3 objectives in concert with others. For this reason,
4 individuals are deemed to impliedly consent to the
5 authority of religious institutions to make internal
6 decisions that achieve these religious goals.

7 Thus, when religious institutions make
8 sincere and authentic decisions about religious
9 matters as opposed to decisions predicated on fraud or
10 collusion, those decisions must remain beyond the
11 reach of government except under the most extremely
12 compelling of circumstances. Thank you.

13 CHAIRMAN CASTRO: Thank you. Mr.
14 Brownstein, you have the floor.

15 III. PANEL II

16 **ALAN BROWNSTEIN, PROFESSOR,**

17 **UNIVERSITY OF CALIFORNIA AT DAVIS LAW SCHOOL**

18 MR. BROWNSTEIN: Good morning, and thank
19 you for inviting me to today's briefing. My remarks
20 this morning will focus on the issue of accommodating
21 religious objectors to same-sex marriage.

22 I am unequivocally committed to the moral
23 necessity of states recognizing same-sex marriages.
24 I've also spent the last 25 years of my professional
25 life writing about and advocating for the rigorous

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1 protection of religious freedom.

2 A shared common foundation creates the
3 possibility of reconciling the competing values in
4 this very disputed area of life and law. Religious
5 liberty and the right of same-sex couples to marry are
6 both important autonomy rights that parallel each
7 other in significant ways.

8 For devoutly religious persons, religion
9 is a core aspect of their identity, of who they are.
10 Similarly, sexual orientation is a fixed and core
11 aspect of a gay or lesbian person's identity. Just as
12 it is unfair and useless to insist that gays and
13 lesbians should just stop being gay, it is equally
14 unacceptable to insist that devoutly religious persons
15 should just stop obeying the dictates of their faith.

16 Also, religion and sexual orientation have
17 a merged identity and conduct dimension to them. It
18 makes no sense to tell devout Catholics that they are
19 protected as to their religious identity but are
20 prohibited from practicing Catholicism. It is
21 similarly senseless to protect the identity of gays
22 and lesbians while prohibiting their right to sexual
23 intimacy. Neither gays, nor lesbians, nor devoutly
24 religious individuals can reasonably be required to
25 separate their conduct from their identity. Religion

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1 is no more an easily-discarded so-called life style
2 than is an orientation toward sexual intimacy.

3 Moreover, both religious belief and
4 affiliation and same-sex marital relationships are the
5 source of duties and responsibilities. They're both
6 intended to express the seriousness of mutual
7 commitments. Religious people want the liberty to
8 fulfill the responsibilities arising out of their
9 relationship with God. Same-sex couples want to marry
10 to express their commitment to the person with whom
11 they want to share their lives, and to fulfill the
12 responsibilities that arise out of this relationship.

13 And, finally, the essence of religious
14 liberty is the right to be different and to be wrong
15 in the eyes of others. A commitment to religious
16 liberty tempers conflicts among religions by allowing
17 adherents of different faiths to follow their own path
18 even if other religions believe it is a wrong and
19 sinful road that takes them away from God.

20 Similarly, protecting the liberty interest
21 of both religious adherents and same-sex marital
22 couples requires the mutual recognition of the right
23 to be wrong in the other group's eyes. Personal
24 autonomy rights are meaningless if they can only be
25 exercised in approved ways. There is no gold standard

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1 that defines the scope of fundamental rights by only
2 protecting what the majority deems to be the best
3 religions or the best kinds of sexual intimacy.

4 Now, if both of these autonomy rights
5 deserve respect, how should we reconcile them when
6 they're in conflict with each other?

7 To answer that question, we should look at
8 existing models of religious accommodation. The
9 resolution of conflicts between civil rights laws and
10 civil liberty rights have a long history. Same-sex
11 marriages do not represent a unique outlier problem
12 because of their impact on religious liberty.

13 Two models are offered as a basis for
14 determining when religious accommodation should be
15 granted. One model analogizes discrimination against
16 same-sex marital couples to racial discrimination.
17 Under this approach few accommodations, if any, would
18 be granted. I reject this analogy because racism has
19 played such a uniquely invidious role in American
20 history. The goal of purging racial discrimination
21 from our society has no equal and no counterpart.

22 Another model analogizes accommodations
23 for religious objectors to same-sex marriage to
24 conscience clauses for health care providers who
25 refuse to perform abortions. I reject this analogy, as

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1 well. Narrow and limited accommodations focused on a
2 specific set of health care procedures have little
3 relevance to religious objections to ongoing
4 relationships that may endure for decades.

5 An alternative and better model would
6 focus on accommodations that permit discrimination on
7 the basis of religion itself. That is, a starting
8 point for our inquiry would be to ask whether we would
9 allow religious individuals or institutions in similar
10 circumstances to discriminate against prospective
11 employees, clients, tenants, or customers because of
12 their religious beliefs and practices.

13 Before accepting discrimination against
14 same-sex couples, we should determine whether we are
15 willing to accommodate discrimination against Jews,
16 Muslims, Mormons, or Catholics in analogous
17 situations.

18 Now, this model requires political
19 decision makers to recognize that when they consider
20 religious exemptions to civil rights laws protecting
21 same-sex martial couples, there is something of
22 serious value on each side of the scale.

23 This model won't give us hard and fast
24 answers to every accommodation question, but it does
25 suggest an approach to guide the evaluation of

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1 proposed accommodations. For example, the model would
2 protect non-profit religious institutions far more
3 than it would protect commercial businesses. Title
4 VII's exemption of non-profit religious organizations
5 from the statute's prohibition against religious
6 discrimination in hiring would apply to discrimination
7 in the hiring of gays and lesbians, and arguably to
8 the denial of spousal benefits to the non-employed
9 spouse of the same-sex couple.

10 In other circumstances, however, the
11 autonomy of religious institutions would be
12 subordinated to the needs and rights of gay and
13 lesbian families. I cannot imagine a religious
14 hospital being allowed to deny the legal prerogatives
15 due the spouse of a patient because the hospital
16 objected to an interfaith marriage, or to the marriage
17 of previously-divorced individuals. Accordingly,
18 religious hospitals would have to acknowledge the
19 rights due the same-sex spouse of a patient in their
20 care.

21 And, again, this model provides a
22 framework for beginning a discussion about reconciling
23 religious liberty and the right of same-sex couples to
24 marry. It isn't a final answer to all of the issues
25 that arise in this area, but in this very heated and

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1 disputed area of life and law, having a place to begin
2 the discussion is no small matter. Thank you.

3 CHAIRMAN CASTRO: Mr. Whelan.

4 **III. PANEL II**

5 **EDWARD WHELAN, PRESIDENT,**
6 **ETHICS AND PUBLIC POLICY CENTER**

7 MR. WHELAN: Thank you, Chairman.

8 As I explain more fully in my written
9 testimony, the sweeping application of non-
10 discrimination principles poses an increasingly severe
11 threat to civil liberties, especially to our first
12 liberty of religious freedom.

13 The clash between non-discrimination
14 principles and religious liberty, in particular, has
15 been exacerbated by the Obama Administration's
16 hostility to a robust conception of religious liberty,
17 and by its determination to subordinate religious
18 liberty to its ideology of radical sexual autonomy.
19 The so-called HHS contraception mandate provides a
20 prime example.

21 In implementing President Obama's
22 signature health care legislation, the Department of
23 Health and Human Services announced last year that it
24 will require many employer-provided health insurance
25 plans to include in the preventive services that they

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1 cover all FDA-approved forms of contraception,
2 including those contraceptives that sometimes operate
3 as abortifacients.

4 As I explain in my written testimony, for
5 those employers who have religious objections to
6 providing some or all of the mandated coverage, this
7 HHS mandate clearly violates their rights under the
8 1993 Federal Religious Freedom Restoration Act or
9 RFRA, and also under the Free Exercise Clause of the
10 First Amendment. Even worse, it displays an illiberal
11 contempt for the religious views of those whom it
12 seeks to coerce.

13 I'd like to briefly address two aspects of
14 the test under RFRA. First, I think it is clear that
15 an employer is engaged in an exercise of religion when
16 she for religious reasons refuses to provide health
17 insurance that covers contraceptives or abortifacients
18 . RFRA was adopted against a backdrop of prominent
19 Supreme Court cases in which the exercise of religion
20 consisted of abstentions like not working on the
21 Sabbath, not sending one's children to high school,
22 and not taking part in the production of armaments.
23 Further, RFRA itself defines exercise of religion
24 broadly to mean any exercise of religion whether or
25 not compelled by or central to a system of religious

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1 belief.

2 I'd also like to mandate here how the HHS
3 mandate clearly flunks the least restrictive means
4 test under RFRA. The question under this test is
5 whether imposing the HHS mandate on an employer who
6 has religious objections to it furthers the
7 government's interest in increasing access to
8 contraceptives via the means that is least restrictive
9 of the religious liberty of the objecting employer.

10 The question virtually answers itself.
11 There are lots of alternative means by which the
12 government could increase access to contraceptives
13 without conscripting objecting employers. For example,
14 direct government provision of contraceptives,
15 government payment to third-party providers, mandates
16 on contraceptive providers, and tax credits, or
17 deductions, or other financial support for
18 contraceptive users. Instead of pursuing any of these
19 alternatives, the Obama Administration adopted the
20 single means that is most restrictive of the religious
21 liberty of objecting employers.

22 Even more troubling than the Obama
23 Administration's violations of RFRA is the fact that
24 its conduct was willful and deliberate. Before it
25 finalized the HHS mandate, the Administration received

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1 thousands and thousands of comments explaining the
2 impact the mandate would have on employers who have
3 religious objections. Without conducting any review of
4 the legality of the mandate under RFRA, the
5 Administration bulldozed ahead. At the very least it
6 did so despite the mandate's impact on objectors, but
7 there's ample reason to believe that the Obama
8 Administration found it desirable to trample the
9 consciences of many Americans, for as I outlined in my
10 written testimony, the HHS mandate is part of a
11 broader pattern of the Obama Administration's
12 hostility to the religious liberty of traditional
13 religious believers.

14 The Administration's hostility is, in
15 turn, part of its broader so-called progressive
16 vision. In that vision, the moral propositions
17 associated with traditional religious beliefs are
18 dismissed as irrational and bigoted, and religious
19 institutions and believers are deemed to have value,
20 and to be tolerated, only insofar as they serve the
21 interest of the state and conform themselves to its
22 norms. In the progressive dystopia, in the name of
23 diversity everyone must be the same.

24 The American tradition of broad religious
25 liberty has operated to minimize the instances in

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1 which Americans have understood their religious
2 identities and duties to be in conflict with their
3 identities and duties as citizens. By instead
4 dragooning objecting employers to be their vehicle for
5 increasing access to contraceptives and abortifacients
6 , the Obama Administration is putting many Americans
7 to a grave test of conscience, and it is doing so
8 gratuitously for an end that could be easily
9 accomplished through other means.

10 Now, the spread of same-sex marriage also
11 threatens to sharply exacerbate the conflict between
12 non-discrimination policies and religious liberty. An
13 episode just last month illustrates the potential
14 severity of that clash. Responding to complaints that
15 a Civil Unions bill failed to provide any meaningful
16 protection for religious objectors, Colorado State
17 Senator Pat Steadman displayed his contempt for
18 religious liberty by declaring, "So, what to say to
19 those who say religion requires them to discriminate.
20 I'll tell you what I'd say, get thee to a nunnery and
21 live there then. Go live a monastic life away from
22 modern society, away from people you can't see as
23 equal to yourself, away from the stream of commerce
24 where you may have to serve them." Again, those are
25 the contemptuous and I think contemptible remarks of

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1 Colorado State Senator Pat Steadman.

2 As I detail in my written testimony, the
3 redefinition of marriage to include same-sex couples
4 would generate widespread clashes between existing
5 laws that bar discrimination on the basis of sex,
6 marital status, or sexual orientation, most of which
7 were never designed to be claimed by parties of same-
8 sex marriages, and religious liberty.

9 Unless robust protections for religious
10 liberty are adopted and maintained, religious people
11 and institutions will face a wave of private civil
12 litigation under anti-discrimination laws, including
13 on public accommodations, housing, and employment.
14 Adoption of same-sex marriage without robust
15 protections for religious liberty will also subject
16 religious people and institutions to a variety of
17 penalties imposed by the federal, state, and local
18 governments, including exclusion from government
19 facilities, loss of licenses or accreditation,
20 disqualification from government grants and contracts,
21 loss of tax exemptions, and loss of educational and
22 employment opportunities.

23 Now, as a broader guide to picking through
24 how to reconcile non-discrimination principles and
25 civil liberties, I offer some general considerations

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1 in my written testimony. I'll outline them briefly in
2 the remaining time.

3 First, traditional liberalism
4 distinguishes between the rules that the government
5 must follow and the rules that apply to the conduct of
6 ordinary citizens. It's one thing to impose a broad
7 regimen of fair conduct on governmental actors, but
8 non-discrimination requirements imposed on ordinary
9 citizens must pass a higher bar in order to justify
10 their intrusion on civil liberties, which include
11 religious liberty, free speech, freedom of
12 association, and a general autonomy to act within
13 broad bounds as they see fit without interference from
14 the government.

15 Second, the paradigmatic and strongest
16 case of a wrongful basis of discrimination is race.
17 We abhor discrimination on the basis of race because
18 we recognize that a person's race does not detract
19 from or add to his stature as being made in the image
20 and likeness of God.

21 Third, other bases of discrimination
22 commonly prohibited under federal law are
23 qualitatively different from race. We regard sex-
24 segregated restrooms very differently from race-
25 segregated restrooms, for example.

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1 I'm out of time now, so I'll leave the
2 rest to discuss with you in the questions session, but
3 I do want to emphasize there's an urgent need to
4 rethink when and how non-discrimination norms ought to
5 apply, and to provide robust protections for civil
6 liberties. Thank you.

7 **QUESTIONS FROM COMMISSIONERS**

8 CHAIRMAN CASTRO: I'm going to ask a
9 question, then I see Commissioner Kirsanow. Is there
10 anyone on the phone?

11 (No response.)

12 CHAIRMAN CASTRO: Okay. Mr. Whelan, you
13 said a lot of very interesting things to me, that are
14 interesting to me that you said. One was that there's
15 a progressive dystopia that diversity makes everyone
16 the same. I would challenge that remark. I think it's
17 quite the opposite, so could you explain yourself?

18 MR. WHELAN: Well, without understanding
19 your confusion about it, I'm not sure I can clarify
20 that.

21 CHAIRMAN CASTRO: How could diversity make
22 everyone the same? Diversity values the differences in
23 all of us.

24 MR. WHELAN: Well, Mr. Chairman, in the
25 name of diversity there seems to be camouflage for

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1 imposing all sorts of requirements on people. They
2 require that they act the same, that institutions be
3 the same. You were here for the discussion earlier of
4 *Christian Legal Society v. Martinez*. This shouldn't be
5 an unusual concept to you.

6 The point is --

7 CHAIRMAN CASTRO: I want you to explain it
8 as unusual to me.

9 MR. WHELAN: Well, maybe it's -- I'm glad,
10 maybe that's refreshing and can catch your attention.

11 The point is that in this country, in a
12 country of pluralism, people have generally been
13 understood to be able to lead their own lives, pursue
14 their own values, but there's a desire here in the
15 name of progressivism to progress towards some
16 dystopia where everyone must think and act the same,
17 and belong to clubs that have identical rules, and be
18 subject to the exact same set of norms, and be
19 penalized, and stigmatized, and marginalized if they
20 don't comply. I think it's rather clear that's where
21 many people intend to take this country.

22 CHAIRMAN CASTRO: And you mentioned there's
23 a hostility by the Obama Administration to the
24 religious; yet, the Administration created an
25 exemption on the contraception issue. Is that being

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1 hostile to the religious --

2 MR. WHELAN: Well, sir, as you know, the
3 initial exemption that was offered was incredibly
4 narrow. The Administration has backed off of that and
5 has made it slightly broader, but it's still the case
6 that it does not begin to address the full range of
7 people who have religious objections to this HHS
8 mandate.

9 Further, as I spell out in my testimony,
10 whether you look at the effort to shrivel religious
11 liberty abroad to a narrow concept of religious
12 worship, whether you look at the amazing position that
13 the Department of Justice took in its brief in the
14 *Hosanna-Tabor* case where it said to the astonishment
15 of all nine Supreme Court Justices that religious
16 organizations had no more right to choose their
17 leadership than a social club has to choose its.

18 Look across the board. This is an
19 Administration that I believe is deeply hostile to
20 traditional religious believers, and that hostility
21 manifests itself in action after action.

22 Again, on the HHS mandate the question has
23 to be why can't this goal of increasing contraceptive
24 access be done through other means? Why select the
25 means that is most restrictive of the religious

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1 liberty of objecting employers? And, of course, we see
2 what this paves the way for. This paves the way for
3 requiring people to take part in abortion; otherwise,
4 they will not get their -- you laugh. You know, this
5 is part of the agenda. To take part in abortion or
6 they won't be licensed as medical doctors. I'm not
7 sure what you think is funny about that.

8 (Simultaneous speech.)

9 CHAIRMAN CASTRO: -- to ask you, and then
10 I'll give it to Commissioner Kirsanow. You indicated,
11 as well, that if we're allowed to go down this route
12 of hostility towards religious groups that -- and not
13 allowing these exceptions that they would be inundated
14 by lawsuits. The only way I would see there would be
15 such an inundation is if, in fact, they're making
16 hiring decisions based on race, gender, disability,
17 not on religious issues. So, are you suggesting that
18 that's what's going on right now, such that they would
19 be inundated because if they're making decisions based
20 on religion they shouldn't be getting sued in this
21 avalanche of lawsuits that you refer to as a dire
22 consequence.

23 MR. WHELAN: I can't imagine on what basis
24 you think that's the case. Professor Brownstein, I
25 believe in his comments, clearly indicated that he

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1 anticipates some lawsuits. Perhaps we differ on the
2 scope of those, but I spell out in detail in my
3 written testimony exactly how it can be expected. And
4 no one contends that the fact that you are acting for
5 religious reasons is under existing law some sort of
6 blanket protection for whatever you do. No one
7 contends that. Indeed, you'll hear from the witnesses
8 on the other side exactly the opposite. They probably
9 take a very narrow reading not just of the Free
10 Exercise Clause, but of the Religious Freedom
11 Restoration Act.

12 So, I don't quite understand -- you know,
13 we have the case that I discuss in my testimony of
14 Elane Photography where it's undisputed that the
15 photographers refuse for religious reasons to
16 photograph the same-sex commitment ceremony.

17 If your premise were correct, they
18 wouldn't have faced this \$6,600 fine from the Human
19 Rights Commission, so with respect, you simply don't
20 understand the background law here.

21 CHAIRMAN CASTRO: Well, thank you for your
22 opinions. Mr. Whelan -- I mean, Commissioner Kirsanow
23 and Commissioner Gaziano, anyone on the phone?
24 Commissioner Kirsanow, please proceed.

25 COMMISSIONER KIRSANOW: I just want to

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1 thank all the panelists for their comments, very
2 thoughtful, very illuminating. And I appreciate all of
3 you talked about the tension between non-
4 discrimination law --

5 CHAIRMAN CASTRO: Your microphone is not
6 working, Commissioner.

7 COMMISSIONER KIRSANOW: That's not the only
8 thing that's not working. But in any event,
9 considerable tension. I want to for a moment go back
10 to something I mentioned in the previous panel, and
11 that is it seems to me that, to some extent in the
12 discourse that we have broadly in this country with
13 respect to the tension between the two concepts, there
14 is always the presumption that we have equal actors
15 here. And that is that today, in the main, non-
16 discrimination law is the spear -- or the enforcement
17 of non-discrimination seems to be the spear of -- the
18 state, a state actor. And right now, in the main, not
19 all the time but in the main, we're talking about
20 religious liberties as the spear of individual actors.
21 And we don't have equal actors, so the tension I think
22 or the presumption of a tension is one that is a bit
23 flawed.

24 Blacks in this country didn't originally
25 gain equality from the state. The state was oppressing

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1 Blacks, or implementing, or expediting, or encouraging
2 the exploitation of Blacks. It was religious groups
3 and movements that germinated the whole conception of
4 Black equality from the Abolitionist Movement, to the
5 Civil Rights movement. Martin Luther King was informed
6 by religion, obviously. We wouldn't have the kind of
7 non-discrimination laws we have today but for
8 religion.

9 On the other hand, we do have state actors
10 that have suppressed the free exercise over history
11 and we see what that has yielded in the Soviet Union,
12 in Nazi Germany, in China, in North Korea and
13 elsewhere. So, I would just observe that when we talk
14 about tension, we have to look very closely at the
15 real concern about the overwhelming strength of a
16 state actor.

17 I'm going back again to the underpinnings
18 for a number of cases that we've had like *Heart of*
19 *Atlanta Motel* where you don't have option where the
20 state acts individually very often don't have -- okay,
21 that's the observation.

22 The questions, I have two. One is, there
23 is some discussion about businesses and businesses --

24 COMMISSIONER YAKI: I totally lost you,
25 Commissioner.

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1 COMMISSIONER KIRSANOW: Mr. Yaki, can you
2 hear me?

3 COMMISSIONER YAKI: Two questions.

4 COMMISSIONER KIRSANOW: Yes.

5 COMMISSIONER YAKI: I didn't hear the
6 first one.

7 COMMISSIONER KIRSANOW: I haven't asked the
8 first question yet, Commissioner Yaki.

9 COMMISSIONER YAKI: If this is strictly a
10 dramatic pause, Commissioner Kirsanow, I apologize.

11 COMMISSIONER KIRSANOW: It is, and I'm a
12 thespian by nature.

13 (Off microphone comments.)

14 COMMISSIONER KIRSANOW: The whole issue of
15 businesses and to the extent that businesses do or
16 don't enjoy religious freedom protections, to what
17 extent -- and I think Professor Griffin, you talked
18 about this a little bit -- do businesses, whether for-
19 profit, non-profit, any profit whatsoever enjoy
20 religious protections, or do you just check your
21 religious beliefs as you leave your church, temple, or
22 synagogue? To what extent are we active religious
23 players broadly?

24 And, number two, with respect to the HHS
25 mandate, whether or not it burdens the free exercise,

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1 if the state can compel a business or an individual to
2 provide insurance that provides a service that is
3 profoundly antithetical to the strongly-held beliefs
4 of that individual, what can't the state compel the
5 individual to do? Anyone.

6 (Off microphone comment.)

7 MS. GRIFFIN: Well, I think that another
8 complicating factor when you talk about the state and
9 the businesses and private actors is that in these
10 cases there are religious individuals and religious
11 institutions so, you know, the individuals involved in
12 the Ministerial Exception cases were very religious
13 individuals who had a certain understanding of what
14 rights were protected within their organizations. And,
15 of course, the employees in these organizations have
16 some kind of individual concerns, so I think it's
17 important to say that one of the reasons the religious
18 freedom issues are complicated is because they're not
19 all on the side of the institutions. There are also
20 individuals to protect.

21 And I think what we have -- in the *Amos*
22 case, going back to we say kind of as a matter of
23 common sense and Title VII that we don't say oh,
24 religious employer, you can't discriminate on the
25 basis of religion. No, we say you can discriminate on

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1 the basis of religion to hire employees of your own
2 religion. But in the *Amos* case what Justice Brennan
3 pointed out is that, of course we accommodate religion
4 because of the Free Exercise Clause, and it doesn't
5 always violate establishment to do so. But if the
6 government were to help religious employers at the
7 expense of secular employers, that would somehow skew
8 the economic marketplace. It would go too far in terms
9 of protecting -- trying to protect religious freedom
10 because when people are in the business world, or in
11 the employment world, there's some need for everybody
12 to follow the same laws; otherwise, you set up this
13 very unequal situation between secular employers and
14 religious employers. And that has impact on the
15 economic situation, and it goes back to what I said.

16 I don't think that there's an absolute
17 religious freedom to say we want to have our own
18 employment laws. The courts have never said that you
19 can't hold religious groups to any laws, so it's that
20 sense that if you treat religious employers so
21 differently you risk the religious freedom of
22 individual employees, so I think that's the tension
23 that sometimes the state can try to protect religious
24 freedom. Right? Sometimes it violates religious
25 freedom, but sometimes states also try to protect

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1 religious freedom, and try to protect individuals
2 against discrimination.

3 MR. DeGIROLAMI: So, Commissioner, I
4 thought I would address the underlying comment and
5 then the first question.

6 The underlying comment I think is right,
7 and it in some ways speaks to why I don't think that
8 the HH -- I didn't address the HHS mandate in my
9 prepared remarks because I don't think that it really
10 has to do with a conflict between religious liberty
11 and non-discrimination.

12 What is at issue in the HHS mandate fight
13 is not the conscience of one individual against the
14 conscience of an institution, because RFRA applies
15 against the government. It does not apply as against
16 individual private institutions. So, the fight is
17 about whether the religious rights of the institution
18 are to yield to a government policy. The fight does
19 not have -- the legal fight under RFRA does not have
20 -- to do with the conscience rights of individuals
21 employed by those institutions because those
22 individuals are perfectly free to use their money,
23 money supplied by their employer, to purchase
24 contraception or whatever other legal products they
25 wish. So, that's why I don't take the HHS mandate

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1 fight, interesting, and provocative, and as much
2 agitation as it provokes, to really be about what this
3 panel is considering. That's one.

4 Number two, on the issue of for-profit,
5 since we're talking about the HHS mandate controversy,
6 it may be true that Title VII does what it does, but
7 RFRA is different than Title VII. RFRA talks about the
8 free exercise rights of persons, and persons are
9 defined under the United States Code to include
10 corporations. So, then the idea has to be well, we
11 need to make a distinction between for-profit
12 corporations and non-profit corporations. But, of
13 course, like individuals, corporations, businesses,
14 they operate for moneymaking purposes, and they
15 operate for other kinds of purposes. So why one would
16 think that RFRA was interested in making a distinction
17 between for-profit corporations and non-profits is a
18 mystery to me.

19 COMMISSIONER KIRSANOW: Well, you know, I
20 would agree with you that the HHS mandate issue is not
21 what we're talking about here in substance. I mean, if
22 we're going to be accurate about it, but that's what
23 the Administration says it's doing; that is,
24 protecting non-discrimination or that is engaging in
25 making sure that individuals aren't being

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1 discriminated against. So, from the standpoint of
2 their argument, it's the subject of our panel here
3 today.

4 So, I wonder if anyone can articulate for
5 me, given that we have this HHS mandate that requires
6 employers to provide insurance that provides for
7 contraceptives, abortive agents, and other activities
8 that, for example, it's not just Catholics, other
9 religions may find objectionable, or adherence to
10 certain religions may find objectionable. Are there
11 limiting principles to what the government can compel
12 an individual or an employer to do with respect to the
13 Free Exercise Clause?

14 MS. HAMILTON: Let me just make two
15 comments. First of all, I think that we need to be
16 careful not to rewrite history. Many religious groups
17 actually backed slavery at the same time others fought
18 --

19 COMMISSIONER KIRSANOW: Yes, absolutely
20 right. A few did out there.

21 MS. HAMILTON: That's right. No, no.

22 COMMISSIONER KIRSANOW: But what was the
23 germination of the Abolitionist movement?

24 (Off microphone comment.)

25 COMMISSIONER KIRSANOW: I'm sorry, and I

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1 apologize for that, but I'm not rewriting history.
2 History is clear on this issue. The Civil Rights
3 Movement is clear on this issue, and state actors were
4 the primary oppressors of blacks and other minority
5 groups. Religious groups didn't write the Chinese
6 Exclusion Act, for example.

7 CHAIRMAN CASTRO: Commissioner, let our
8 witness speak. I know it's passionate, but let's try -
9 -

10 MS. HAMILTON: Commissioner Kirsanow, I
11 understand these are hot-button issues, but historical
12 facts are critically important to learning how to
13 effect the "peaceful coexistence" that is the title
14 and apparent purpose of this event. The federal
15 Constitution and the states permitted plantation
16 owners to have slaves, and it was private entities
17 that had slaves. That's why the Thirteenth Amendment
18 applies to private individuals as well as the state.

19 The history of religion is that it is
20 often on both sides of an issue, and it is. And I
21 raise that historical fact with respect to the HHS
22 mandate because we do have a conflict between
23 discrimination and anti-discrimination principles, and
24 between religious believers on both sides of the issue
25 .

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1 The women who are employees of the
2 organizations that are arguing they shouldn't have to
3 provide contraception, this is a gender issue, as has
4 been made very, very clear. They are being subjected
5 to gender discrimination at the same time they're
6 being subjected to religious discrimination.

7 The assumption for all of those who have
8 discussed this issue so far on this panel is that we
9 are in a universe of men. We're not. Only women are
10 affected by this particular issue, and there are many
11 women who are religious and they do not share their
12 employer's religious beliefs.

13 What's happening here is that individual
14 religious people who own for-profit businesses --
15 because those are the only ones left who are subjected
16 to this -- are arguing they have a religious right to
17 impose their religious views on their religious
18 employees.

19 The vast majority of Americans do not
20 agree with the proposition that you don't use
21 contraception. The vast majority of women certainly
22 don't agree with that, so we do have a very clear
23 conflict between the potential for gender and
24 religious discrimination, and the demand of for-profit
25 organizations who have never been able to claim rights

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1 under the Free Exercise Clause before.

2 This is a culture war, there's no question
3 about it, but I think we need to be very careful in
4 understanding that the target of the study that the
5 Obama Administration did was on women's health. This
6 is about women, and we're dealing with rather rank
7 gender discrimination.

8 I'm going to have to disagree with Mr.
9 Whelan at treating gender discrimination as something
10 we don't need to worry about. That's what this is all
11 about.

12 MR. WHELAN: If I may?

13 CHAIRMAN CASTRO: Go ahead, Mr. Whelan.

14 MR. WHELAN: Can you hear me fine, or do I
15 need to speak --

16 CHAIRMAN CASTRO: You have to speak up.

17 MR. WHELAN: May I have the mic?

18 MS. HAMILTON: Oh, sure.

19 CHAIRMAN CASTRO: And then after Mr. Whelan
20 speaks, we're going to go to Commissioner Gaziano. Are
21 there any Commissioners on the phone that want to ask
22 a question? Speak up now.

23 COMMISSIONER ACHTENBERG: Mr. Chairman, is
24 someone speaking?

25 CHAIRMAN CASTRO: Mr. Whelan is about to

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1 respond, but I just want to make sure --

2 COMMISSIONER ACHTENBERG: I can't hear
3 anything.

4 CHAIRMAN CASTRO: Okay.

5 MR. WHELAN: Can you hear me now? Okay. I'd
6 like to first address Commissioner Kirsanow's question
7 about businesses and religious beliefs.

8 As it happens, Catholic University Law
9 Professor Mark Rienzi has recently published a
10 comprehensive article, "God and the Profits: Is there
11 religious liberty for money-makers?" in which he
12 spells out that yes, indeed, those who operate
13 businesses have religious rights in the way they
14 carry out their businesses. And I think it's best to
15 really understand the ultimate right here is deriving
16 from that of the individual.

17 And, of course, we see that one of the
18 leading free exercise cases, *Sherbert v. Verner*,
19 involved an individual who went out into the working
20 world as an employee and didn't lose her rights
21 because she was in the working world. I don't see why
22 an employer any more should not have any rights.

23 Now, I emphasize to say that one has
24 religious liberty rights isn't to answer the question
25 of whether those rights prevail in a particular

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1 conflict, but as others have pointed out, and I think
2 it's clear that under the Religious Freedom
3 Restoration Act the rights extend to individuals and
4 how they carry out their work, and to businesses
5 whether they're non-profits or for-profits.

6 Professor Hamilton stated that the only
7 ones left subject to the mandate are businesses. That
8 is not correct. For starters, the whole proposed
9 accommodation that would go beyond the narrow
10 exemption is still only that, a proposed
11 accommodation, and many people find it deeply
12 unsatisfactory. But even that proposed accommodation
13 will extend only to religious non-profits, not to the
14 entire range of other non-profits. Of course, more
15 broadly, you know, most Americans, most religious
16 people fall outside the narrow categories that the
17 Obama Administration claims it's going to address.

18 In terms of this being gender
19 discrimination, again as my point is made clear, if
20 the Obama Administration wanted to address this issue
21 without dragooning religious employers to be a vehicle
22 there is a very easy way to do that, so the question
23 is why force objecting employers to be the means?

24 And I think that goes to Commissioner
25 Kirsanow's second question, what can't the state

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1 compel? Well, if the mandate is upheld in its
2 application to objecting employers that paves the way
3 for virtually anything, I think.

4 COMMISSIONER KIRSANOW: Professor Helfand
5 had -- it looked like he was wanting to say something.

6 (Off microphone comments.)

7 MR. HELFAND: I did want to address the
8 first -- Commissioner Kirsanow's first question
9 regarding institutions. This is something I tried to
10 highlight in my remarks, and it's something that
11 definitely worries me, the kind of for-profit/not-for-
12 profit distinction. One gets the sense at certain
13 moments that when this distinction is imposed it seems
14 to assume some sort of bifurcated self, like
15 individuals are religious when they're at home, but
16 when they enter the workforce they kind of -- they
17 stop being religious. They live these kind of dual
18 lives where they're sometimes religious and sometimes
19 not religious. And I think it misses the way in which
20 religion and commerce are becoming increasingly
21 integrated in a variety of ways here, religious
22 contracts that people form, various ways in which
23 people use private law in order to effectuate their
24 religious interests.

25 And there's one case in particular that --

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1 right near where I live, recently kind of -- just the
2 litigation just got started up, a school that -- a
3 church that wholly owns a school. The school itself is
4 a for-profit, and the school itself, Little Oaks
5 Elementary School, the school itself asks its teachers
6 to sign a statement of faith before they sign a
7 contract. And two of their former employees refused to
8 sign the statement of faith, and then they threatened
9 to sue under the state's non-discrimination act.

10 Now, this seems a little bit strange to
11 me. It happens to be that California's non-
12 discrimination act only protects not-for-profits, and
13 yet there seems to be really good reason to protect
14 this school. It's wholly owned by a church. It's very
15 up front about exactly what it's trying to do. It's
16 trying to provide a religious education to its
17 students. It's so up front that it says it in a piece
18 of paper to each of its employees, and if you believe
19 the California Anti-Discrimination Act or you believe
20 those that say we should have a per se rule against
21 protecting for-profits, you would say this school
22 shouldn't be protected. To me, that seems wrong, and
23 that we need some sort of other method to determine
24 what the institutions are that are exercising
25 religion.

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1 I tried to articulate a particular view of
2 how we do that. I think to some degree we should be
3 eyeballing to what extent the institution looks
4 religious. I mean, there are some of the plaintiffs in
5 the contraception mandate litigation that now have
6 prayer for their employees once a week, or if you're a
7 Christian book seller, there are other indications
8 that even if you're in the for-profit space that
9 you're really religious. You can have people sign
10 statements of faith, and these are ways to clearly
11 convey what it is you're trying to do. And in those
12 circumstances, you begin to wonder whether or not the
13 First Amendment protections should have a little more
14 bite.

15 And that's what I tried to argue both in
16 my statement to the Commission and my statements here
17 today. Per se rules are bad news in this space. We
18 should be thinking about what it is every institution
19 is trying to do. It's easier if we can make clear
20 rules. We can say just only for not-for-profits, that
21 may make our life easier, but the Constitution isn't
22 about making easy rules.

23 CHAIRMAN CASTRO: Professor Brownstein, and
24 then we'll go to Commissioner Gaziano, and anyone on
25 the phone.

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1 MR. BROWNSTEIN: I just have a couple of
2 comments. One, the profit/non-profit distinction is
3 based in part on Justice Brennan's opinion in *Amos*.
4 And I think he's using it as a shorthand to try to
5 come up with some kind of predictable rule that would
6 suggest when the balance favors religious liberty and
7 when it favors the rights and interests of
8 discriminated-against individuals. It's arbitrary,
9 it's imprecise.

10 On the other hand, there are real costs
11 with uncertainty, as well, where no one really knows
12 what their rights are, and whether or not they would
13 be vulnerable to suit because the legal rules are so
14 unclear that we can't predict whether you're violating
15 the rule or not.

16 The other point I'd like to make is that
17 there are ways to think about these issues which don't
18 suggest we should be identifying winners or losers or
19 asking, are we going to protect religious liberty or
20 not. But we could be asking how we go about protecting
21 religious liberty without unreasonably burdening third
22 parties.

23 In my view, religious liberty is a public
24 political good. And when the government acts in a way
25 to protect a public political good, it incurs some

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1 obligation and duty to mitigate the costs of that good
2 so they don't fall unreasonably on some narrow class
3 of individuals. It's like the Takings Clause. If we
4 build a road through your house, we all have to pay
5 for that property. You don't bear that loss alone. So,
6 if we're going to accommodate religious liberty in a
7 way that imposes severe burdens on certain
8 individuals, the employees of religious institutions,
9 for example, they don't get the benefits that other
10 people receive, then we should be thinking about how
11 do we provide those benefits? How do we mitigate the
12 cost of protecting religious liberty?

13 And, conversely, if in protecting
14 religious liberty we provide some secular benefit,
15 some privilege or advantage to the religious
16 institution or individual, we should think of some way
17 of offsetting that so that we aren't creating an
18 unfair privilege for religion that disfavors people
19 who aren't religious.

20 So, I think there are ways to
21 conceptualize this problem that do not avoid the
22 conflict, but it softens it, and it allows for a
23 possibility for reconciliation.

24 CHAIRMAN CASTRO: Thank you. Commissioner
25 Gaziano.

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1 COMMISSIONER GAZIANO: Well, I'm going to
2 begin with a comment on the last, and then get to my
3 other real question.

4 First of all, I think I'm uncomfortable
5 with the government testing the seriousness or the
6 deeply-held nature of any religious conviction. I
7 think the test needs to be whether it's sincerely held
8 for whether you can raise the religious liberty, and
9 that's the only one.

10 Now, I'll put off to the side, of course,
11 that my -- where I think the line should be drawn, but
12 I was really taken, Professor, since you commented on
13 the correct pronunciation of my name, help me with the
14 emphasis on your's.

15 MR. DeGIROLAMI: It's DeGirolami.

16 COMMISSIONER GAZIANO: DeGirolami, okay,
17 good. One Italian-named person to another.

18 I was particularly taken with your
19 discussion of why conflict is helpful, essential,
20 positive, and desirable. I would add that it's
21 particularly all of those things with regard to
22 teenagers and young adults who are forming their --
23 learning to resolve -- work through conflicts. So,
24 I'm going to -- although, I find all these other
25 issues interesting, I'm going to focus Ahab-like on

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1 the white whale we must kill that is *CLS v. Martinez*.
2 So, I'm going to offer you the following softball to
3 try to hit out of the park.

4 Let us assume that there are public high
5 schools and colleges with predominant Orthodox views.
6 In one era it was pro-segregationist and anti-gay,
7 maybe in another era -- let's pretend it's today --
8 it's anti-big or pro big government, pro environmental
9 extremism, you know, secular anti-religious. Okay,
10 let's assume that's kind of -- you know, there's a
11 prevailing Orthodoxy.

12 Is it going to be better for the students
13 in the nation for the educational institution,
14 particularly those public and federally funded, to
15 choose the neutral policy that no students can meet in
16 any meeting rooms, that the meeting rooms are just for
17 the faculty to express the Orthodoxy of the day to the
18 hapless students who must listen.

19 Option two, the university comes up with a
20 cramped and possibly intentionally narrow, and
21 possibly not even intentionally narrow, all-comers
22 policy that allows the Ultimate Frisbee team to meet,
23 but places special burdens on any student organization
24 that is organized to promote the learning of a
25 particular ideological, political, religious belief.

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1 Or three, that those institutions adopt
2 policies like the University of Texas, the University
3 of Miami, I believe it was, that allow robust oases of
4 freedom and free association within the student or
5 the university or high school environment. And, of
6 course, when you're done, if anyone else wants to try
7 to take a swipe at my softball.

8 MR. DeGIROLAMI: Yes, the softball has
9 actually got a little bit of spin on it, and I may
10 strike out. And I may strike out because -- and this
11 actually comes back to one of the points that I think
12 Commissioner Heriot was making in the last panel, the
13 question which I'm going to rope in had to do with
14 well, wouldn't it better if we just said that the
15 university should stay out of this kind of stuff with
16 respect to money, at least, that it should not compel
17 anybody to sponsor any of these organizations. And
18 maybe with respect to what Commissioner Gaziano is
19 talking about, that means even rooms, or facilities,
20 or TVs, or the like.

21 And nobody on the panel that preceded ours
22 came out with any kind of resistance to that view, and
23 I'm going to express a little resistance. I think that
24 part of what a university is and is about isn't just
25 free speech. Anybody can speak whenever they want. A

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1 university is a place of learning, of a particular
2 kind of learning, and everything that the university
3 does from the kinds of courses that it offers, to the
4 professors that it chooses, to the students that it
5 selects, to the groups that it decides whether to
6 sponsor, whether to permit on the grounds of the
7 campus or not is about its own expression, expressing
8 its own views about what's worthwhile and what's not
9 worthwhile. And that's a valuable function of
10 universities.

11 We want our universities to do that. We
12 want them to stimulate not just chaotic speech, but we
13 want them to stimulate the sort of speech, the sort of
14 thought that happens at a university. So, while I have
15 my problems with the *CLS v. Martinez* decision, I'm not
16 sure that the answer is just a kind of free-for-all
17 approach that any speech is just as good as any other
18 at universities. Universities are particular kinds of
19 institutions. They're educational institutions, and we
20 want our university, our state university
21 administrators thinking about the sort of speech that
22 is valuable, and that ought to go on there.

23 CHAIRMAN CASTRO: We have time for one more
24 question. Do any of the Commissioners on the phone
25 want to ask a question?

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1 (No response.)

2 CHAIRMAN CASTRO: Hearing none, any of the
3 Commissioners here?

4 COMMISSIONER GAZIANO: Could I just ask a
5 follow-up then?

6 CHAIRMAN CASTRO: Sure.

7 COMMISSIONER GAZIANO: I think I agree with
8 everything you said, but what -- I suppose the only
9 two slight caveats are that there are student speech
10 rights and associational rights at issue also. And a
11 university can certainly try to guide, encourage, and
12 to a certain extent, but I don't think it's neutral if
13 a university tries to ban all such speech but its own.
14 It may be a very fine -- its speech may be very
15 wonderful, but to me that's not necessarily neutral.

16 But beyond that, if it's going to open up
17 its forum, why isn't the right approach and perhaps
18 part of the learning experience to let the students
19 decide what the mix is with very, very few
20 limitations? There may be a few that we can agree on,
21 but with very, very few.

22 MR. DeGIROLAMI: No, so you agree with me,
23 I agree with you, Commissioner. I think we're in
24 agreement that with respect to the *Martinez* decision
25 specifically, I think we're in agreement based on what

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1 I heard from the earlier comments on the earlier panel
2 that when it comes to issues of equal access, there
3 are particular concerns that we might have, especially
4 at a university where a university is a particular
5 kind of institution. It's an institution that's about
6 in some ways the unfettered expression of ideas. So,
7 as you say, and I think rightly, with certain
8 limitations, and those -- figuring out just what those
9 limitations ought to be is important. I think it's to
10 the benefit -- it would be to the benefit as a general
11 matter for institutions to allow and encourage as much
12 variety of expression as possible. I agree with that.

13 CHAIRMAN CASTRO: Mr. Brownstein.

14 MR. BROWNSTEIN: Just focusing on the
15 constitutional issue that was raised in *CLS v.*
16 *Martinez*. No one in the earlier panel mentioned that
17 the court viewed this as a limited public forum. And
18 it seemed to me that was a fundamental part of the
19 court's analysis, and, also, a major part of the
20 problem.

21 Over the last 15 or 20 years, the court
22 has developed a standard of review for evaluating
23 restrictions on public access to public property that
24 has been extremely lenient and protective of state
25 decisions. The only time you get rigorous review is

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1 when the government engages in viewpoint
2 discrimination. Both content discrimination and
3 content neutral regulations are upheld on a very
4 lenient reasonableness standard of review. That was
5 the standard that was applied in *CLS v. Martinez*.

6 And what is interesting is this is the
7 first time that this standard of review has been
8 applied to a religious group, because in all of the
9 other cases the court said that the exclusion of
10 religious groups was viewpoint discrimination, and
11 accordingly strict scrutiny was applied, and strict
12 scrutiny required the invalidation of the regulation.

13 Because of that, religious groups haven't
14 really joined the fight in challenging this forum
15 analysis which allows the government to restrict
16 access to public property under a very lenient
17 standard of review unless the government acts in a
18 viewpoint discriminatory way. The positive benefit of
19 *CLS v. Martinez* is I think that's going to change. I
20 think you're going to see a lot of religious groups
21 filing amicus briefs in court and saying this was a
22 mistake. It's not only a mistake for us, it's a
23 mistake for all student groups, for all other
24 individuals who need access to public property to
25 communicate their views. We need more robust

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1 protection for people who want to speak on public
2 property. And we don't have it now under the court's
3 forum analysis, not just for religious groups, for
4 everybody.

5 CHAIRMAN CASTRO: Thank you, Mr.
6 Brownstein. Thank you all. This brings us to the end
7 of our program today, and we really very much
8 appreciate your thoughtful interaction with us, and
9 the information that you brought to us which will be
10 very helpful as we prepare our report.

11 I also want to make sure I thank our
12 staff, Jennifer Hepler from our Office of the General
13 Counsel, as well as Carissa Mulder who worked very
14 hard on making --

15 COMMISSIONER ACHTENBERG: Someone is
16 speaking and I can't hear.

17 CHAIRMAN CASTRO: Okay. I'm thanking our
18 staff. There we go, I've got a microphone now. I
19 wanted to thank Jennifer Hepler and Carissa Mulder of
20 our staff for helping put this briefing together.
21 Also, I just want to make sure that folks who are
22 listening and those here know that the briefing report
23 record will remain open for the next 30 days. If
24 panelists or members of the public would like to
25 submit materials, they can mail them to the U.S.

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2 Counsel, 1331 Pennsylvania Avenue, N.W., Suite 1150,
3 Washington, D.C. 20425 or via email to
4 publiccomments@usccr.gov.

5 **IV. ADJOURN MEETING**

6 CHAIRMAN CASTRO: It is now 12:35 and the
7 briefing of the Civil Rights Commission is now
8 adjourned. Thank you.

9 (Whereupon, the proceedings went off the
10 record at 12:35 p.m.)

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