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CHURCH, STATE & THE TRUMP ADMINISTRATION

President Donald Trump has repeatedly pledged to be a staunch defender of religious liberties. Nevertheless, his campaign promises, as well as statements made by him and his cabinet appointees, suggest that Trump holds a limited and deeply flawed understanding of religious freedom, among other constitutional rights and guarantees. While members of the new administration will act quickly and aggressively to advance certain conservative Christian religious tenets by limiting the rights of LGBTQ communities and curtailing access to reproductive health care, the President has promised to significantly restrain the rights of religious minorities by imposing a Muslim immigration ban, increase profiling and policing of Muslim communities, and closing houses of worship. The Vice-President, Attorney General and other appointees hold particularly distorted understandings of the Establishment Clause of the First Amendment, threatening to capture government for religious interests and implement theocratic policies beyond anything we've seen in recent history.

As we prepare to meet these new and serious threats to religious liberty and other fundamental rights, this paper offers an outline of areas where the Trump administration may violate the letter and spirit of the First Amendment by expressing a state preference for certain religions or religious beliefs, limiting the rights of religious minorities, or granting religious accommodations that harm other private citizens.

Religious & Civil Rights of Muslims

While Trump and many of his cabinet appointees have spoken out on the importance of religious freedom, they have also taken deeply troubling steps to restrict the religious rights and civil liberties of religious minorities, particularly Muslims. President Trump has at times called for a ban on Muslims entering the United States,¹ the profiling of Muslim Americans,² the creation of a national Muslim registry,³ and the closing of

¹ CAMPAIGN WEBSITE OF DONALD J. TRUMP, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>

² CBSNEWS.COM, *Face the Nation Transcripts June 19, 2016: Trump, Lynch, LaPierre, Feinstein*, (June 19, 2016) <http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/>.

mosques.⁴ His language and rhetoric have sometimes veered towards the sinister; on the campaign trail, Trump has said that “Islam hates us,”⁵ has repeatedly told a false anecdote about a U.S. General shooting Muslims with bullets dipped in pig’s blood,⁶ and responded to a question about how a Muslim registry would differ from the registration of Jews in Nazi Germany with “you tell me.”⁷

During Trump’s first week in office, hours after issuing a statement for Holocaust Remembrance Day, Trump signed an Executive Order (EO) that would instate a partial Muslim ban by suspending the entire U.S. Refugee Admissions Program (USRAP), stopping the resettlement of Syrian refugees, declaring the entry of Syrian nationals “detrimental to the interests of the United States,” and suspending the entry of persons from certain Muslim-majority countries.⁸ While written in ostensibly neutral language, several provisions of the order are clearly intended to protect Christians while excluding Muslims. In fact, Trump explicitly stated that the EO would prefer Christians during an interview with the Christian Broadcasting Network the day he issued the Order.⁹

While the USRAP is suspended, Trump’s EO nevertheless allows admittance of refugees on a case-by-case basis if the Secretaries of State and Homeland Security determine that their admission “is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution.” Further, when and if the USRAP is reinstated, the Order directs the agencies to “prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.” The Order directs the agencies “where necessary and appropriate” to “recommend legislation to the President that would assist with such prioritization,” and requires the State department to submit two reports to the President “on the progress of the directive... regarding prioritization of claims made by individuals on the basis of

³ Trip Gabriel, *Donald Trump Says He’d ‘Absolutely’ Require Muslims to Register*, N.Y. TIMES, (Nov. 20, 2015) <https://www.nytimes.com/politics/first-draft/2015/11/20/donald-trump-says-hed-absolutely-require-muslims-to-register/>; Aaron Blake, *Trump Says We’ve Known His Muslim Ban and Database Plans ‘All Along.’ But We Still Don’t — Not Really*, THE WASHINGTON POST (Dec. 21, 2016) https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/the-evolution-of-donald-trump-and-the-muslim-database/?utm_term=.0e369f6f90b5.

⁴ Nick Gass, *Trump: ‘Absolutely No Choice’ But To Close Mosques*, POLITICO (Nov. 18, 2015) <http://www.politico.com/story/2015/11/trump-close-mosques-216008>.

⁵ Theodore Schleifer, *Donald Trump: ‘I think Islam Hates Us’*, CNN.COM (MAR. 10, 2016) <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

⁶ Tessa Berenson, *Trump Repeats False Pig’s Blood Story at California Rally*, TIME.COM (Apr. 29, 2016) <http://time.com/4312131/donald-trump-pigs-blood-muslim-story/>.

⁷ Trip Gabriel, *Donald Trump Says He’d ‘Absolutely’ Require Muslims to Register*, N.Y. TIMES, (Nov. 20, 2015) <https://www.nytimes.com/politics/first-draft/2015/11/20/donald-trump-says-hed-absolutely-require-muslims-to-register/>.

⁸ *Full Executive Order Text: Trump’s Action Limiting Refugees Into the U.S.*, N.Y. TIMES (Jan. 27, 2017) <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html>.

⁹ David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CHRISTIAN BROADCASTING NETWORK (Jan. 27, 2017) <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees>.

religious-based persecution.” There is no Constitutionally-legitimate reason why the U.S. should prioritize the entry particular religious groups, or determine that the entry of certain religious believers is or is not in the “national interest.”

Several of President Trump’s cabinet appointments have made comments in support of his anti-Muslim proposals. During a confirmation hearing before the Judiciary Committee, Senator Jeff Sessions, Trump’s pick for Attorney General, claimed to oppose an explicit ban on Muslims as a religious group. However his opinion on banning immigration from majority-Muslim countries was less clear and he has previously said he was open to a Muslim ban.¹⁰ Moreover, in December of 2015, Sessions was one of only four members of the Senate Judiciary committee to vote *against* a proposed amendment to an antiterrorism bill that would oppose placing a religious test on those entering the country.¹¹ In a lengthy statement, Sessions argued that excluding immigrants based on religious beliefs could in some circumstances be logical and moral. He stated “[a]n argument has been made by some that we should prioritize resettling Muslim immigrants in the region and prioritizing the entry of persecuted Christians; this measure would forbid such considerations.”¹² Sessions defended this vote during his confirmation hearing, arguing that “many people do have religious views that are inimical to the public safety of the United States.”¹³ He acknowledged, however, that a registry explicitly targeting Muslims “would raise serious constitutional problems” under the First Amendment.¹⁴

Other appointees have been similarly vague in their support for or opposition to Trump’s proposals. Michael T. Flynn, whom Trump has selected as National Security Advisor, originally supported both a Muslim ban and registry according to some news sources,¹⁵

¹⁰ Eric Lichtblau, *Jeff Sessions, as Attorney General, Could Overhaul Department He’s Skewered*, N.Y. TIMES (Nov. 18, 2016) <http://www.nytimes.com/2016/11/19/us/politics/jeff-sessions-donald-trump-attorney-general.html>.

¹¹ This amendment states, “It is the sense of the Senate that the United States must not bar individuals from entering into the United States based on their religion, as such action would be contrary to the fundamental principles on which this Nation was founded.” Rebecca Shabad, *In Rebuke of Donald Trump, Senate Panel Rejects Religion-Based Bans*, CBS NEWS (Dec. 10, 2015) <http://www.cbsnews.com/news/in-rebuke-of-donald-trump-senate-panel-says-u-s-must-not-ban-people-based-on-religion-muslims/>.

¹² *Sessions Delivers Remarks in Opposition to Global “Right to Migrate” Amendment* (December 10, 2015), <http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=186AEDE2-B813-4741-A1B1-C3759DFDD2C5>. Somewhat ironically, Sessions has used faith-based arguments to express his belief that the U.S. should be permitted to use religious tests in admitting immigrants. Speaking at the “Road to Majority” conference in June of 2016, he claimed that “the idea that nations don’t set laws, establish who can and can’t enter, is not biblical in my opinion.” See Right Wing Watch Blog, *Jeff Sessions: My Immigration Position is the “Biblical” One*, YOUTUBE (June 10, 2016), <https://www.youtube.com/watch?v=tD6Z-TEdQqA>.

¹³ *Key Capitol Hill Hearings Session Muslim Ban*, YOUTUBE (January 10, 2017), https://www.youtube.com/watch?v=vIF0Jopm9_M.

¹⁴ Jonathan Easley & Lydia Wheeler, *Live Coverage of Sessions Confirmation Hearing*, THE HILL (Jan. 10, 2017) <https://origin-ny1.thehill.com/homenews/senate/313469-live-coverage-of-sessions-confirmation-hearing>.

¹⁵ Matt Apuzzo & Mark Landler, *With National Security Choices, Trump Builds Team to Bulldoze Status Quo*, N.Y. TIMES (Nov. 18, 2016) <https://www.nytimes.com/2016/11/19/us/politics/flynn-sessions-trump-administration.html> (“General Flynn favors an immigration ban and has expressed support for the idea of forcing Muslims in the United States to register with the government”); Mariam Khan, *Donald Trump*

but has attempted to describe the ban in narrow terms.¹⁶ Reince Priebus, Trump's Chief of Staff, expressed support for a thinly-veiled Muslim ban based on nationality rather than expressly on religion.¹⁷ While Priebus denied that Trump would instate a Muslim registry, he also said he was "not going to rule out anything."¹⁸ In a hearing, General John Kelly, who has been confirmed as the Homeland Security Secretary, said he was "not a lawyer" but seemed to agree that putting mosques under generalized surveillance and registering Muslims would raise Constitutional issues; however in response to a question about targeting persons from majority-Muslim countries, Kelly said only that he does not believe it is "appropriate to focus on something like religion as the only factor" in counter-terrorism or law enforcement efforts.¹⁹ Kelly also seemed to oppose the reinstatement of National Security Entry-Exit Registration System (NSEERS), a Bush-era registration program for immigrants from almost entirely Muslim-majority countries, "unless there was some really compelling reason." Nikki Haley, who has been confirmed as Trump's ambassador to the United Nations and is considered one of the President's more moderate appointments, offered only lukewarm opposition to the registry, stating "I don't think there should be any registry based on religion."²⁰

Many of Trump's appointees have used flagrantly Islamophobic rhetoric. Senator Sessions has called Islam a "toxic ideology."²¹ Flynn, among many incendiary statements, has called Islam a "cancer" and tweeted that fear of Muslims is "rational."²² In the wake of the Boston marathon bombing in 2013, Representative Mike Pompeo, who has been confirmed as Central Intelligence Agency (CIA) director, called Muslim leaders

National Security Adviser Mike Flynn Has Called Islam 'a Cancer', ABC NEWS (Nov. 18, 2016) <http://abcnews.go.com/Politics/donald-trump-national-security-adviser-mike-flynn-called/story?id=43575658> ("Flynn has said he agreed with Trump's initial proposal to temporarily ban Muslims from entering the United States").

¹⁶ *Top US General Defends Donald Trump*, AL JAZEERA UP FRONT (May 19, 2016), <http://www.aljazeera.com/programmes/upfront/2016/05/top-general-defends-donald-trump-160519081014660.html>.

¹⁷ Patrick Temple-West, *Priebus: Citizens of Certain Countries Will Be Barred*, POLITICO (NOV. 20, 2016) <http://www.politico.com/story/2016/11/priebus-certain-foreigners-will-be-barred-from-us-231681>.

¹⁸ Christina Coleburn, *Reince Priebus on Muslim Registry: 'Not Going to Rule Out Anything'*, NBC NEWS (Nov. 20, 2016) <http://www.nbcnews.com/meet-the-press/priebus-muslim-registry-not-going-rule-out-anything-n686391>.

¹⁹ *Gen. Kelly Discusses Muslim Registry and Refugees*, WALL STREET JOURNAL VIDEO (Jan. 10, 2017), <http://www.wsj.com/video/gen-kelly-discusses-muslim-registry-and-refugees/572638DB-A368-4C4E-8830-11DABCD20519.html>.

²⁰ Ben Kamisar, *Haley: No Muslim Registry Under Trump Administration*, THE HILL (Jan. 18, 2017) <http://thehill.com/homenews/senate/314808-haley-no-justification-for-muslim-registry>.

²¹ Matt Apuzzo & Mark Landler, *With National Security Choices, Trump Builds Team to Bulldoze Status Quo*, N.Y. TIMES (Nov. 18, 2016) <https://www.nytimes.com/2016/11/19/us/politics/flynn-sessions-trump-administration.html>

²² Mariam Khan, *Donald Trump National Security Adviser Mike Flynn Has Called Islam 'a Cancer'*, ABC NEWS (Nov. 18, 2016) <http://abcnews.go.com/Politics/donald-trump-national-security-adviser-mike-flynn-called/story?id=43575658>; *Dana Priest, Trump Adviser Michael T. Flynn On His Dinner With Putin and Why Russia Today Is Just Like CNN*, THE WASHINGTON POST (Aug. 15, 2016) https://www.washingtonpost.com/news/checkpoint/wp/2016/08/15/trump-adviser-michael-t-flynn-on-his-dinner-with-putin-and-why-russia-today-is-just-like-cnn/?utm_term=.b29c7210a764.

“potentially complicit in these acts”²³ for failing to condemn them—despite the fact that many Muslim leaders and groups immediately did so.²⁴ Representative Pompeo said that the supposed silence of Muslim leaders “casts doubt upon the commitment to peace by adherents of the Muslim faith.” At a Christian rally in 2015, Pompeo used fear-mongering rhetoric about terrorism by Muslims, claiming “this evil is all around us” and admitting, “sometimes they’ll call us Islamophobes or they’ll say we’re bigoted. I’ve had each of those bestowed upon me. I’ve been called a tool of the Jews. But it will never dissuade me and I hope none of you from... proclaiming this is an exceptional nation and that Jesus Christ is my savior.”²⁵ Secretary of Housing and Urban Development (HUD), Ben Carson, has made numerous Islamophobic statements, including claiming that Islam is not a religion but a “life organization system”²⁶ and comparing Syrian refugees to “a rabid dog running around your neighborhood.”²⁷ Comments by cabinet appointees that refer to Islam as a political ideology or otherwise not a religion are troubling, as they suggest that Islam should not receive First Amendment protections.

Muslim communities have faced numerous impositions on their civil rights under the Bush and Obama presidencies, including the maintenance of the widely-criticized no-fly list²⁸ and discriminatory surveillance of Muslim Americans.²⁹ At the same time, the Department of Justice (DOJ), Equal Employment Opportunity Commission (EEOC), and other federal agencies have brought numerous suits to defend Muslims from discrimination, including a recently-filed DOJ suit against a New Jersey town that denied zoning approval for a mosque.³⁰ This year, the U.S. Army agreed to make

²³ United Voices for America, *Congressman Mike Pompeo Anti-Muslim Bigotry from House Floor*, YOUTUBE (July 25, 2013), <https://www.youtube.com/watch?v=PaEXDqtCV5w>.

²⁴ Letter from Council on American-Islamic Relations, to Mike Pompeo, House Representative from Kansas (June 12, 2013), available at <http://www.cair.com/images/letters/Pompeo-letter.pdf>.

²⁵ Summit Church, *Summit Church God and Country Rally 2015*, YOUTUBE (Jul 8, 2015) <https://www.youtube.com/watch?v=sO0opXYM52w>.

²⁶ Patrick Caldwell, *Ben Carson Says Islam Is Not a Religion But a "Life Organization System"*, MOTHER JONES (Jan. 29, 2016) <http://www.motherjones.com/politics/2016/01/ben-carson-islam-not-religion>; Eric Bradner, *Ben Carson again explains concerns with a Muslim president*, CNN.COM (Sept. 27, 2015) <http://www.cnn.com/2015/09/27/politics/ben-carson-muslim-president-sharia-law/>; Nick Gass, *Carson: Muslims Who Embrace American Values Have to Be 'Schizophrenic'*, POLITICO (FEB. 16, 2016) <http://www.politico.com/story/2016/02/ben-carson-muslims-schizophrenic-219319>.

²⁷ Nolan D. McCaskill, *Ben Carson Compares Syrian Refugees to Dogs*, POLITICO (Nov. 19, 2015) <http://www.politico.com/story/2015/11/ben-carson-syria-refugee-dogs-216064>.

²⁸ Hugh Handeyside, *The Broken No-Fly List Process Needs Fixing*, AMERICAN CIVIL LIBERTIES UNION (Oct. 2, 2014) <https://www.aclu.org/blog/broken-no-fly-list-process-needs-fixing>.

²⁹ *Report Says FBI, NSA Spied On American Muslims*, NPR.ORG (July 9, 2014) <http://www.npr.org/sections/thetwo-way/2014/07/09/330214841/report-says-fbi-nsa-spied-on-american-muslims>.

³⁰ U.S. DEPARTMENT OF JUSTICE, *Justice Department Files Suit Against Bernards Township, New Jersey, Over Denial of Zoning Approval for Mosque* (Nov. 22, 2016) <https://www.justice.gov/opa/pr/justice-department-files-suit-against-bernards-township-new-jersey-over-denial-zoning>; U.S. DEPARTMENT OF JUSTICE, *North Carolina Man Sentenced for Using Force Against Muslim Woman to Obstruct Her Free Exercise of Religion on an Airplane* (Oct. 18, 2016) <https://www.justice.gov/usao-nm/pr/north-carolina-man-sentenced-using-force-against-muslim-woman-obstruct-her-free-exercise>; U.S. DEPARTMENT OF JUSTICE, *Minnesota Man Pleads Guilty to Hate Crime for Mailing Threatening Letter to Islamic Center* (Nov. 20, 2016) <https://www.justice.gov/opa/pr/minnesota-man-pleads-guilty-hate-crime-mailing->

accommodations to its dress and grooming policies to permit Muslim and Sikh servicemen and women to wear beards, turbans, and hijabs (albeit after a lawsuit was filed by religious liberty groups).³¹ And in December 2016, the Obama administration announced that it was dismantling NSEERS, which had been suspended since 2011.³² Trump's campaign promises, as well as his cabinet's hostile language towards Muslims, threaten to vastly increase governmental restrictions on Muslims' civil and religious rights while demonstrating little commitment to fighting discrimination against Muslims.

Nearly all of Trump's anti-Muslim proposals would raise significant First Amendment and other constitutional questions. The First Amendment forbids the government both from expressing a preference for any religious denomination or sect and from weighing in on exclusively theological questions.³³ Further, houses of worship are entitled to extremely strong Constitutional protections against government interference.³⁴ Any act to single out Muslims for discriminatory treatment, attempt to legally define a "Muslim" for immigration purposes, or place special restrictions on Mosques and other Islamic institutions threatens both Free Exercise and Establishment Clause violations by restricting Muslims' right to practice their religion and expressing official skepticism or disapproval of Islam. Such acts are also likely to raise challenges under the Equal Protection Clause and Due Process Clause of the Fifth Amendment.

While Trump's recent Executive Order banning many Muslim immigrants leaves open the confounding question of what constitutes a religious "minority", it is clear from both the face of the Order and the context around its creation that Trump's actions are intended to discriminate based on religious belief. President Trump has pledged to instate a Muslim ban throughout his campaign, and he has now taken a significant step to fulfill this promise. At its core, the Establishment Clause of the First Amendment forbids the

threatening-letter-islamic-center; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Selected List of Pending and Resolved Cases Alleging Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities* (last updated Jan. 2016)
https://www.eeoc.gov/eeoc/litigation/selected/religion_nationalorigin.cfm

³¹ Emma Green, *Coming Soon to the U.S. Army: Turbans, Beards, Hijabs, and Dreadlocks*, THE ATLANTIC (Jan. 4, 2017) <https://www.theatlantic.com/politics/archive/2017/01/coming-soon-to-the-us-army-turbans-beards-hijabs-and-cornrows/512204/>.

³² Kevin Liptak & Shachar Peled, *Obama Administration Ending Program Once Used to Track Mostly Arab and Muslim Men*, CNN.COM (Dec. 22, 2016) <http://www.cnn.com/2016/12/22/politics/obama-nseers-arab-muslim-registry/>.

³³ *See, e.g.*, Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion... favoring neither one religion over others nor religious adherents collectively over nonadherents") (internal citations omitted); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (Holding that "First Amendment values are plainly jeopardized" when litigation "is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies...the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.").

³⁴ *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission, 132 S. Ct. 694 (2012).

U.S. government from determining which religions or religious beliefs are or are not acceptable, desirable, or American. This Order violates that crucial limitation.

Reproductive Justice & Sexual Liberty

In the name of religious liberty, Trump’s cabinet threatens to advance particular religious viewpoints about sexual and reproductive morality. Several appointees have claimed that ensuring access to reproductive healthcare, including contraception, infringes on religious freedom. This is mistaken; to the contrary, allowing religious groups to impose their beliefs on others by denying them access to affordable health care limits religious pluralism and may amount to a constitutional violation. Trump himself has an ambiguous record on abortion, although he currently claims to oppose legal abortion and has promised to appoint anti-choice justices to the Supreme Court and restrict abortion rights through legislation.³⁵ One of his first actions upon assuming office was to reinstate a greatly-expanded version of the global gag rule, which forbids international organizations from performing or providing information about abortion if they receive U.S. health funding.³⁶ He also supports religious exemptions that would allow certain actors to use their personal religious beliefs to limit access to reproductive health care, or to discriminate against those who have had sex outside the confines of a different-sex marriage.³⁷ In addition, many of Trump’s cabinet appointees have a long and extreme history of anti-choice views, and have expressed support for broad religious accommodations related to sexual and reproductive health and choices.

While Trump previously identified as pro-choice, he called himself “pro-life” on the campaign trail, at one point even suggesting that if abortion were made illegal, women who get abortions should be punished (he later rescinded the statement).³⁸ In an interview on a Christian radio show, Vice President Mike Pence was asked whether Trump would eliminate the provision of the Affordable Care Act (ACA) that requires health plans to cover contraception without cost sharing or, “at the least,” provide an exemption for religious non-profits and certain for-profit companies. He replied, “a Trump/Pence administration will be dedicated to preserving the liberties of our people including freedom of religion,” stated that “we have a long tradition in this country of

³⁵ Letter from Donald J. Trump for President, to “Pro-Life Leader” (September 2016), *available at* <https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf>.

³⁶ Molly Redden, ‘Global Gag Rule’ Reinstated by Trump, *Curbing NGO Abortion Services Abroad*, THE GUARDIAN (Jan. 23, 2017) <https://www.theguardian.com/world/2017/jan/23/trump-abortion-gag-rule-international-ngo-funding>; Michelle Goldberg, *Trump Didn’t Just Reinstate the Global Gag Rule. He Massively Expanded It*, SLATE (Jan 24, 2017) http://www.slate.com/articles/news_and_politics/politics/2017/01/trump_s_global_gag_rule_is_even_worse_than_it_seemed.html.

³⁷ CAMPAIGN WEBSITE OF DONALD J. TRUMP, *Issues of Importance to Catholics* (Sept. 22, 2016), <https://www.donaldjtrump.com/press-releases/issues-of-importance-to-catholics> (“If I am elected president and Congress passes the First Amendment Defense Act, I will sign it to protect the deeply held religious beliefs of Catholics and the beliefs of Americans of all faiths.”).

³⁸ Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes ‘Punishment’ for Women, Then Recants*, N.Y. TIMES (Mar. 30, 2016) <https://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html>.

accommodating religious belief,” and decried the Obama administration’s “heavy hand” in implementing the contraceptive mandate.³⁹

Trump has also promised to sign the First Amendment Defense Act (FADA), a bill which would prohibit the federal government from enforcing laws and regulations—such as the Pregnancy Discrimination Act, the Fair Housing Act, and health and labor protections—against religious objectors who act in accordance with the belief that sex should only take place within a different-sex marriage, and that only different-sex marriages are valid.⁴⁰ In practice, this could allow an employer to fire an unmarried woman who becomes pregnant or deny health insurance to the children of unmarried employees. It could also prevent the government from refusing to award grants—such as funding for HIV/AIDS services or care for survivors of domestic violence—to organizations that will not serve anyone who has had sex outside marriage.

Representative Tom Price, Trump’s nominee to lead the Department of Health & Human Services (HHS), is a strong opponent of reproductive rights and has supported broad religious exemptions related to sexual health and freedom. In a 2013 op-ed, he called the ACA a “constitutional violation” and “an unabashed assault on our First Amendment rights” because of the contraceptive coverage provision.⁴¹ Three years earlier, when asked by a reporter about contraceptive coverage under the ACA, Price stated “this is a trampling on religious freedom and religious liberty in this country. The President does not have the power to say that your First Amendment rights go away. That’s wrong.”⁴² He has made many similar statements in the past.⁴³

Price additionally signed a brief to the Supreme Court in support of religious nonprofits challenging the existing religious accommodation of the ACA’s contraceptive coverage

³⁹ *A Visit with Governor Mike and Karen Pence*, DR. JAMES DOBSON’S FAMILY TALK (October 5, 2016), <http://drjamesdobson.org/Broadcasts/Broadcast?i=3a5c4909-4083-4633-9436-cd2ff97b3132#>.

⁴⁰ *House of Representatives Committee on Oversight And Government Reform Hearing on H.R. 2802, the First Amendment Defense Act* (2016), (statement of Katherine Franke, Sulzbacher Professor of Law, Director, Center for Gender & Sexuality Law, Faculty Director, Public Rights/Private Conscience Project), available at http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_fada_testimony.pdf.

⁴¹ Tom Price, *A Conservative Health-Care plan Would Preserve Choice While Saving Taxpayers \$2.34 Trillion*, THE NATIONAL REVIEW (Dec. 5, 2014), <http://www.nationalreview.com/article/365507/empowering-patients-first-tom-price>; Empowering Patients First Act, S. 2519, 114th Cong. (2016) <https://www.congress.gov/bill/114th-congress/senate-bill/2519/text>.

⁴² Olga Khazan, *Tom Price: 'Not One' Woman Struggled to Afford Birth Control*, THE ATLANTIC (Nov. 29, 2016) <http://www.theatlantic.com/health/archive/2016/11/tom-price-not-one-woman-cant-afford-birth-control/509003/>.

⁴³ Price: “*This Mandate Ought to Be Reversed, the Right to Religious Freedom Protected, and the Entire Health Care Law Repealed*” (February 8, 2012), available at <https://tomprice.house.gov/press-release/price-%E2%80%9C-mandate-ought-be-reversed-right-religious-freedom-protected-and-entire-health> (claiming the contraceptive coverage requirement “directly interfere[s] with our fundamental right to religious freedom” and “is predicated upon the assumption that a person’s individual choices – and in this case one’s religious freedoms – are to take a back seat to the wishes and the will of Washington bureaucrats.”).

provision in the case *Zubik v. Burwell*.⁴⁴ The accommodation allows religious nonprofits opposed to paying for cost-free contraceptive coverage for their employees to sign an opt-out form and send it to their insurance company or the government. The insurance company then has an independent obligation to provide contraceptive coverage to the employees. The brief signed by Price argues that even signing the opt-out form infringes on the nonprofits religious rights; in adopting the accommodation, the brief claims that HHS exhibited “hostility to religious non-profits.”⁴⁵ In May 2016, the Court remanded the case without issuing a substantive decision, suggesting that the two sides attempt to find a solution that would be acceptable to the nonprofits while ensuring comprehensive coverage for employees.⁴⁶ Following this decision, HHS—along with the Department of Labor and the Treasury—went through a notice and comment period to evaluate alternatives to the existing accommodation; in December of 2016, the departments decided not to alter the accommodation, finding that “the comments reviewed... indicate that no feasible approach has been identified at this time that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage.”⁴⁷

While Trump’s administration has expressed support for broad religious exemptions to the ACA that would cut off access to contraception for many workers, they have also advocated eliminating the ACA entirely. Both Trump and Price have relentlessly attacked the health law and promised to repeal it.⁴⁸ Trump’s first action as President after being sworn in was to issue an executive order stating, “It is the policy of my Administration to seek the prompt repeal of” the ACA, and instructing agencies to “take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act.”⁴⁹ While the details of any ACA replacement plan are far from clear, Trump and his cabinet would be unlikely to support any mandatory, affordable contraceptive coverage provision, even with a broad religious exemption. When asked at his confirmation hearing whether he would commit to ensuring cost-free coverage for all FDA-approved contraceptive methods, Price would commit only to ensuring “access” to the health

⁴⁴ Brief for 207 Members of Congress as Amici Curiae Supporting Petitioners, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) available at <http://www.scotusblog.com/wp-content/uploads/2016/01/207-Members-of-Congress-Amicus-Brief.pdf>

⁴⁵ *Id.* at 34.

⁴⁶ *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (per curiam).

⁴⁷ U.S. DEPARTMENT OF LABOR, *FAQS about Affordable Care Act Implementation Part 36* (Jan. 9, 2017) <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf>.

⁴⁸ CAMPAIGN WEBSITE OF DONALD J. TRUMP, *Healthcare Reform to Make America Great Again* (last visited Jan. 22, 2017) <https://www.donaldjtrump.com/positions/healthcare-reform>; U.S. REPRESENTATIVE TOM PRICE, M.D., *Chairman Price: “The First Step to Replace is Repeal”*, (May 27, 2015) <https://tomprice.house.gov/video/chairman-price-%E2%80%9Cfirst-step-replace-repeal%E2%80%9D>; U.S. REPRESENTATIVE TOM PRICE, M.D., *Price Praises Passage of Health Care Law Repeal*, (May 16, 2013) <https://tomprice.house.gov/press-release/price-praises-passage-health-care-law-repeal>.

⁴⁹ Exec. Order, *Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal* (Jan. 20, 2017) <https://www.whitehouse.gov/the-press-office/2017/01/2/executive-order-minimizing-economic-burden-patient-protection-and>.

coverage that Americans “desire.”⁵⁰ He would not commit to ensuring that this access will be comprehensive or affordable.

As a Senator, Price proposed an ACA alternative called the “Empowering Patients First Act of 2015.” His bill includes a provision that prohibits the federal government, as well as any state and locality that receives money under the Act, from subjecting any health care provider to “discrimination” because “the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” There is no similar provision protecting health entities that *do* provide abortions from “discrimination.” Price also voted in 2015 to overturn a Washington, D.C. law that prohibited employers from discriminating against employees on the basis of their reproductive health decisions.⁵¹ During his hearing, Price claimed that he did not believe an employer should be able to fire someone for using birth control and claimed, incorrectly, that the D.C. bill was about the cost of contraception.⁵² Price is also co-sponsor of FADA, the bill that would sanction discrimination against those who have had sex outside of a different-sex marriage.⁵³

While Price stands to have the greatest impact on reproductive justice policy, other members of Trump’s team have expressed support for broad religious exemptions related to sexual and reproductive health and rights. Reince Priebus has called the contraceptive coverage requirement an “assault on religious freedom.”⁵⁴ Senator Sessions is a co-sponsor of FADA,⁵⁵ and has defended the bill since his nomination.⁵⁶ The *Zubik* amicus brief discussed above was signed by Representative Pompeo, Trump’s selection to lead the CIA, who is also a FADA co-sponsor.⁵⁷ Scott Pruitt, Trump’s pick to lead the

⁵⁰ *Health and Human Services Secretary Confirmation Hearing*, C-SPAN (Jan. 18, 2017) <https://www.c-span.org/video/?421723-1/hhs-nominee-representative-tom-price-testifies-capitol-hill&start=1201>.

⁵¹ 161 Cong. Rec. H2727-H2742 (daily ed. Apr. 30, 2015) *available at* <https://www.congress.gov/congressional-record/2015/04/30/house-section/article/H2727-1>.

⁵² H.R.J. Res. 43, 114th Cong. (2015) <https://www.congress.gov/bill/114th-congress/house-joint-resolution/43/text>; <https://www.c-span.org/video/?421723-1/hhs-nominee-representative-tom-price-testifies-capitol-hill&start=1201>.

⁵³ H.R.2802, 114th Cong. (2015) <https://www.congress.gov/bill/114th-congress/house-bill/2802/all-info#cosponsors>.

⁵⁴ Reince Priebus, *Obama’s Assault on Religious Freedom*, POLITICO (Feb. 8, 2012) <http://www.politico.com/story/2012/02/obamas-assault-on-religious-freedom-072617>.

⁵⁵ S.1598, 114th Cong. (2015) <https://www.congress.gov/bill/114th-congress/senate-bill/1598/all-info#cosponsors>; <https://www.congress.gov/bill/114th-congress/senate-bill/352/cosponsors>

⁵⁶ *Questions from Senator Franken* (submitted Jan. 17, 2017) *available at* <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Franken%20QFRs.pdf>

⁵⁷ Brief for 207 Members of Congress as Amici Curiae Supporting Petitioners, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) *available at* <http://www.scotusblog.com/wp-content/uploads/2016/01/207-Members-of-Congress-Amicus-Brief.pdf>; H.R.2802, 114th Cong. (2015) <https://www.congress.gov/bill/114th-congress/house-bill/2802/all-info#cosponsors>. Pompeo additionally signed another brief challenging the ACA’s contraceptive mandate in an earlier case, *Hobby Lobby v. Sebelius*. Brief for Members of Congress as Amici Curiae Supporting Respondents, *Burwell v. Hobby Lobby* 134 S.Ct. 2751 (2014) *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/13-354-bsac-Members-of-Congress.pdf>.

Environmental Protection Agency, signed a different brief on behalf of the plaintiffs in *Zubik*.⁵⁸

Access to affordable and nondiscriminatory healthcare was, of course, a key focus of the Obama administration. In addition to the contraceptive mandate, the administration also promulgated a rule to protect people who have had abortions from discrimination in healthcare—a rule that was recently struck down by a federal district court judge in Texas as a violation of healthcare provider’s religious rights (Trump’s administration may decline to appeal the decision).⁵⁹ Under Price and Trump, HHS is likely to undo many or all of the Obama administration’s policies with regard to reproductive rights and health. At a minimum, they will attempt to expand the right of religious organizations, including for-profit companies, to deny employees access to contraception and discriminate against those who have had sex while unmarried. The administration may well take more drastic action by eliminating the contraceptive mandate altogether, and Trump has promised to sign a repeal of the entire ACA.⁶⁰

Price and others’ claim that the contraceptive mandate violates the First Amendment is entirely unfounded. In *Employment Division v. Smith*, the Supreme Court, through Justice Scalia, clearly held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁶¹ The contraceptive mandate is a valid, neutral law that is intended to provide workers with necessary healthcare, not to discriminate against any particular religious belief. In fact, the overly-broad religious exemptions that Trump and his cabinet support themselves raise significant First Amendment issues. The Supreme Court has consistently held that religious accommodations amount to an Establishment Clause violation when they tend to prefer or endorse particular religious beliefs,⁶² or when they

⁵⁸ Brief for the States of Texas, Ohio, Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Kansas, Michigan, Montana, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin as Amici Curiae Supporting Petitioners, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) available at <http://www.scotusblog.com/wp-content/uploads/2016/01/20-States-LSP-Amicus.pdf>. See also Dave Davis, *Oklahoma AG Scott Pruitt Pleased With Supreme Court's Hobby Lobby Opinion*, NEWS9.COM (June 30, 2014) <http://www.news9.com/story/25905512/oklahoma-ag-scott-pruitt-pleased-with-supreme-courts-hobby-lobby-opinion>.

⁵⁹ Steve Gorman, *U.S. Judge Blocks Transgender, Abortion-Related Obamacare Protections*, REUTERS (Dec. 31, 2016) <http://www.reuters.com/article/us-usa-obamacare-idUSKBN14L0OP>.

⁶⁰ CAMPAIGN WEBSITE OF DONALD J. TRUMP, Healthcare Reform to Make America Great Again (last visited Jan. 22, 2017) <https://www.donaldjtrump.com/positions/healthcare-reform>.

⁶¹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁶² See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”) (O’Connor, J., concurring); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 305 (2000) (“Contrary to the District’s repeated assertions that it has adopted a ‘hands-off’ approach ... the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (“the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally”); *U.S. v. Lee*, 455 U.S. 252, 263 fn. 2 (1982) (Stevens, J., concurring) (“The risk that governmental approval of some and disapproval of others will be

shift the costs of the accommodation onto third parties who do not share the religious belief.⁶³ FADA and similar accommodations both tend to express a preference for certain religious tenets—namely, opposition to sex outside a different-sex marriage or marriage between same-sex partners—and shift significant harms onto third parties, who may lose health coverage, employment, and other protections and benefits.

While the Supreme Court granted a religious exemption to the ACA’s contraceptive mandate in *Burwell v. Hobby Lobby*, it specifically noted that the accommodation would not impede employees’ access to contraception.⁶⁴ Further, the exemption was granted under the Religious Freedom Restoration Act (RFRA), a broad accommodation law that applies to all religious beliefs, not just particular narrow beliefs related to sexual health and reproductive rights. To the extent that broad accommodations proposed by the Trump administration would provide special protections for certain religious beliefs about sexual morality or limit access to contraceptive coverage, they threaten Establishment Clause protections. Unfortunately, if the contraceptive mandate or the ACA is eliminated entirely rather than weakened through a broad religious exemption, it will be far more difficult to make an argument based on the Establishment Clause.

LGBTQ Discrimination

While Trump himself has claimed that he will be a “friend” to “the gays”⁶⁵ as President, he and many of his cabinet appointees support policies and beliefs that are hostile to LGBTQ equality and justice. For example, both Trump and his cabinet nominees have stated clearly that they intend to revoke LGBTQ protections established under the Obama administration through executive orders and federal agency regulations, and it has been reported that Trump will issue an Executive Order to do so shortly.⁶⁶ Despite claiming that transgender people deserve “help,” Trump has said that he intends to rescind federal protections currently in place that protect transgender people in healthcare and at

perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.”).

⁶³ See, e.g., *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985) (holding that a Connecticut statute giving workers the right to a Sabbath day of rest impermissibly advanced religion by “impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (finding that a state tax exemption for religious periodicals violated the Establishment Clause by forcing non-religious publications to “become indirect and vicarious donors” to religious entities) (internal quotations omitted); *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (upholding a religious exemption law while noting that accommodations need not be granted where they “impose unjustified burdens” on third parties or the State). See also Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

⁶⁴ *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2760 (2014).

⁶⁵ LGBTQ NATION, *Here’s Hillary’s One-Word Tweet In Response to Trump Claiming He’s ‘Friend’ to ‘The Gays’*, LGBTQ NATION (June 17, 2016) <http://www.lgbtqnation.com/2016/06/heres-hillarys-one-word-tweet-response-trump-claiming-hes-friend-gays/>.

⁶⁶ Jeff Taylor, *Sources: Trump Executive Order Allowing Anti-LGBTQ Discrimination is Coming Soon*, LGBTQ NATION (Jan. 30, 2017) <http://www.lgbtqnation.com/2017/01/sources-report-trump-executive-order-lgbtq-community-coming-soon/>.

school.⁶⁷ Both Trump and Pence have also expressed strong support for FADA, which as discussed in the previous section would prevent the federal government from taking action against any person who acts in accordance with the “religious belief or moral conviction” that marriage is between one man and one woman and that sex should only take place within such a marriage.⁶⁸ As mentioned previously, Representative Price and Senator Sessions are both co-sponsors of FADA and have adamantly supported its passage.⁶⁹ Sessions recently reiterated his support for the bill, saying he believed that the government should “protect the rights” of “those with traditional views of marriage.”⁷⁰

Attorney General nominee Sessions has made a career out of fighting against progress and equality for marginalized communities, including LGBTQ communities. While in the Senate, Sessions voted against the Employment Non-Discrimination Act (ENDA) and called the Supreme Court’s decision in *Obergefell v. Hodges*, which found that the Fourteenth Amendment guarantees a right to marry for same-sex couples, “unconstitutional.”⁷¹ In his recent confirmation hearing, Sessions conceded that the decision is settled law. However, when it was decided in 2015, he said it went “beyond what [he] considers to be the realm of reality.”⁷² Sessions also once sought to defund the National Endowment of the Arts, citing the Endowment’s funding of a lesbian film which he claimed was “obscene” and “pornographic,” largely because of its inclusion of “homosexual activities.”⁷³ He has also publicly opposed the inclusion of LGBTQ people in federal hate crimes legislation and the Violence Against Women Act, and voted against both bills while in the Senate. He has opposed reauthorization of the Runaway and Homeless Youth Act, which included an antidiscrimination clause, because it “could have discriminated against faith-based organizations.”⁷⁴

⁶⁷ Philip Rucker & Robert Costa, *Trump: Rescind Obama’s Transgender Directives, But ‘Protect Everybody’*, THE WASHINGTON POST (May 16, 2016) https://www.washingtonpost.com/news/post-politics/wp/2016/05/16/trump-rescind-obamas-transgender-directives-but-protect-everybody/?postshare=4331463435010310&tid=ss_tw&utm_term=.7ce4a35cd8ef.

⁶⁸ CAMPAIGN WEBSITE OF DONALD J. TRUMP, *Issues of Importance to Catholics* (Sept. 22, 2016), <https://www.donaldjtrump.com/press-releases/issues-of-importance-to-catholics>; Matthew Rozsa, *GOP’s Next Battle Against Gay Rights: Proposed First Amendment Defense Act Will Use “Religious Freedom” to Legalize Discrimination*, SALON (Dec. 22, 2016) <http://www.salon.com/2016/12/22/gops-next-battle-against-gay-rights-proposed-first-amendment-defense-act-will-use-religious-freedom-to-legalize-discrimination/>.

⁶⁹ The Pride, *Trump’s Cabinet Almost Uniformly Hostile Toward LGBT Rights*, THE PRIDE (Nov. 30, 2016) <https://thepridelab.com/2016/11/trumps-cabinet-almost-uniformly-hostile-toward-lgbt-rights/>.

⁷⁰ *Questions from Senator Franken* (submitted Jan. 17, 2017) available at <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Franken%20QFRs.pdf>.

⁷¹ Chad Petri, *Senator Sessions on Gay Marriage*, NEWS 5 WKRG.COM (June 29, 2015) <http://wkrg.com/2015/06/29/senator-sessions-on-gay-marriage/>.

⁷² THE HOUSTON CHRONICLE, *In Wake of Gay Marriage Decision, Cruz Pushes ‘Retention’ Elections for Supreme Court Justices*, (July 22, 2015)

⁷³ HUMAN RIGHTS CAMPAIGN, *Jeff Session: A History of Anti-LGBTQ Actions* (2016) <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Session-Report-Rev.pdf>; 143 Cong. Rec. S9303-S9332 (daily ed. Sept. 15, 1997) available at <https://www.congress.gov/congressional-record/1997/9/15/senate-section/article/s9303-5>.

⁷⁴ *Questions from Senator Franken* (submitted Jan. 17, 2017) available at <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Franken%20QFRs.pdf>.

Under the Obama administration, the DOJ has made considerable efforts to protect the rights of LGBTQ communities. Under Attorney General Loretta Lynch, for example, the DOJ brought a lawsuit against the state of North Carolina following the state's passage of House Bill 2.⁷⁵ Among other things, this law eliminates local antidiscrimination protections for LGBTQ people and requires transgender people in government buildings to use the restroom of the gender they were assigned at birth.⁷⁶ The DOJ also joined other federal agencies in issuing guidance on the applicability of Title VII of the Civil Rights Act of 1964⁷⁷ and Title IX of the Education Amendments of 1972 to transgender people.⁷⁸ The DOJ has consistently defended the inclusion of protections based on sex stereotyping and gender identity under the ACA, and joined the Department of Education (DOE) in issuing guidance to schools to ensure that transgender students are protected from discrimination under Title IX.

Throughout his campaign for President, Ben Carson—who would be charged with enforcing the Fair Housing Act as HUD secretary—argued that he would ground his role as a government official in his own religious principles, which he contends are in direct conflict with preventing discrimination against LGBTQ people (among other groups).⁷⁹ For example, despite the Supreme Court's holding in *Obergefell*, Carson has stated emphatically that he does not support same-sex marriage, calling it an “extra right” and the LGBTQ people seeking it, “abnormal.”⁸⁰ During his run for president, he strongly supported Kim Davis, the infamous Kentucky county clerk who refused to issue marriage licenses to same-sex couples, arguing that it conflicted with her religious beliefs and that LGBTQ people should not be able to force their “way of life upon everybody else.”⁸¹ Carson's support for Davis indicates how he might approach conflicts between religious liberty and civil rights as Secretary. He has also stated that Congress should fire federal judges who support marriage equality and pass a law to nullify the Supreme Court's

⁷⁵ David A. Graham, 'State-Sponsored Discrimination': Loretta Lynch Takes on North Carolina's Bathroom Bill, THE ATLANTIC (May 9, 2016) <http://www.theatlantic.com/politics/archive/2016/05/state-sponsored-discrimination-loretta-lynch-takes-on-north-carolinas-hb2/481986/>.

⁷⁶ Avianne Tan, *North Carolina's Controversial Anti-LGBT Bill Explained*, ABC NEWS (Mar. 24, 2016) <http://abcnews.go.com/US/north-carolinas-controversial-anti-lgbt-bill-explained/story?id=37898153>.

⁷⁷ U.S. DEPARTMENT OF JUSTICE, *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims* (Dec. 18, 2014) <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>.

⁷⁸ U.S. DEPARTMENT OF JUSTICE, U.S. *Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students* (May 13, 2016) <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights>.

⁷⁹ Ashe McGovern, *Ben Carson's "Judeo-Christian Nation" Vision Threatens Housing Equality*, PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT (Jan. 12, 2017) <http://blogs.law.columbia.edu/publicrightsprivateconscience/2017/01/12/ben-carsons-judeo-christian-nation-vision-threatens-housing-equality/>.

⁸⁰ Dawn Ennis, *Ben Carson: 'Abnormal' Trans People Don't Deserve 'Extra Rights'*, THE ADVOCATE (Jan. 12, 2016) <http://www.advocate.com/election/2016/1/12/ben-carson-transgender-people-are-abnormal-denounces-extra-rights>.

⁸¹ *Carson on Kim Davis Case: 'This Is a Judeo-Christian Nation'*, FOX NEWS INSIDER (Sept. 9, 2015) <http://insider.foxnews.com/2015/09/09/megyn-kelly-interview-ben-carson-kim-davis-jailing-surge-polls>.

marriage equality decision, comparing LGBTQ people to those who practice bestiality and pedophilia.⁸²

Finally, Carson has stated numerous times that transgender people's desire to be legally recognized as their authentic selves is the "height of absurdity,"⁸³ and that gender is a biological fact,⁸⁴ despite contrary consensus from the country's leading medical associations⁸⁵ and the lived experiences of actual transgender people. His statements indicate a belief that transgender people should not be recognized as their authentic selves under the law. LGBTQ people have gained significant housing protections under the Obama administration. In 2012, HUD released urgently needed regulations to ensure LGBTQ people have equal access to housing and housing-related services,⁸⁶ and in 2016, it extended those protections to emergency homeless shelters that were not previously covered.⁸⁷ Carson's nomination signals a threat to these protections.

Despite not having a voting record in Congress or a state legislature, nominee for Secretary of Education, Betsy DeVos, has made significant contributions towards undermining LGBTQ equality. For example, in 2012 DeVos and her husband personally donated \$200,000 to Michigan's ballot measure to ban same-sex marriage⁸⁸ and her family members have collectively donated hundreds of thousands of dollars to other anti-LGBTQ efforts, including to support Proposition 8 in California.⁸⁹

Tom Price's nomination to become Secretary of HHS calls into question the permanency of vital LGBTQ protections in healthcare promulgated under the Obama administration. In Congress, Price's voting record has indicated hostility to LGBTQ rights, grounded in his personal religious beliefs. For example, Price voted against the Matthew Shepard and

⁸² Trip Gabriel, *G.O.P. Hopes for Unity May Be Upset by Ben Carson*, N.Y. TIMES (Dec. 21, 2014) <https://www.nytimes.com/2014/12/22/us/politics/gop-hopes-for-unity-may-be-upset-by-ben-carson.html>; Andrea Ayres-Deets, *Ben Carson Compares Homosexuality to Bestiality and Pedophilia*, POLICY.MIC (Mar. 30, 2013) <https://mic.com/articles/31809/ben-carson-compares-homosexuality-to-bestiality-and-pedophilia#.sxZ22UnVv>.

⁸³ Eugene Scott and Ashley Killough, *Ben Carson Compared Being Transgender to Changing Ethnicities*, CNN.COM (July 19, 2016) <http://www.cnn.com/2016/07/19/politics/ben-carson-transgender/>.

⁸⁴ Michael Walsh, *Ben Carson on Transgender Identity: 'A Leopard Can't Change its Spots'*, YAHOO NEWS (July 19, 2016) <https://www.yahoo.com/news/ben-carson-on-transgender-identity-a-leopard-cant-change-its-spots-200356804.html>.

⁸⁵ NATIONAL CENTER FOR TRANSGENDER EQUALITY, *Background Information on Trans Health Care Discrimination and Coverage for Transition-Related Care* (2015) http://www.transequality.org/sites/default/files/docs/HHS_1557Rule_Backgrounder.pdf.

⁸⁶ 24 CFR Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982, *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity* (Feb. 3, 2012) https://www.hudexchange.info/resources/documents/EqualAccess_FinalRule_2.3.12.pdf.

⁸⁷ Ashe McGovern, *Federally Funded Shelters Cannot Use Religious Objections to Exclude Transgender People*, PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT (Oct. 3, 2016) <http://blogs.law.columbia.edu/publicrightsprivateconscience/2016/10/03/federally-funded-homeless-shelters-cannot-use-religion-as-a-reason-to-deny-equal-access-to-transgender-people/>.

⁸⁸ Jane Mayer, *Betsy DeVos, Trump's Big-Donor Education Secretary*, THE NEW YORKER (Nov. 23, 2016) <http://www.newyorker.com/news/news-desk/betsy-devos-trumps-big-donor-education-secretary>.

⁸⁹ Trudy Ring, *Trump Picks Right-Wing Activist Betsy DeVos for Secretary of Education*, THE ADVOCATE (Nov. 23, 2016) <http://www.advocate.com/politics/2016/11/23/trump-picks-antigay-activist-betsy-devos-secretary-education>; Mayer, *supra* note 88.

James Byrd Hate Crimes Prevention Act and (citing concerns about “religious views, and rights of conscience”) against allowing LGBTQ people to serve openly in the military.⁹⁰ He voted against ENDA⁹¹ and was a co-sponsor of a constitutional amendment to define marriage as between one man and one woman.⁹² Following the *Obergefell* decision, Price said it was “not only a sad day for marriage, but a further judicial destruction of our entire system of checks and balances.”⁹³ Price has also called the Obama administration’s guidance protecting transgender students “absurd” and an “overreach of power.”⁹⁴

Disturbingly, of the few statements that Trump and his appointees have made in support of LGBTQ communities, several have merely attempted to direct hatred towards Muslims. At the 2016 Republican National Convention, Trump mentioned LGBTQ people only when he recalled the Pulse nightclub shooting, stating “wonderful Americans were savagely murdered by an Islamic terrorist,” and promising “As your president, I will do everything in my power to protect our LGBTQ citizens from the violence and oppression of a hateful foreign ideology.”⁹⁵ During a speech on immigration, Trump explained that the U.S. should instate an “ideological certification” process on immigrants, asking “about respect for women and gays and minorities.”⁹⁶ In defending the prospect of screening immigrants based on religious belief, Senator Sessions—a lifelong opponent of LGBTQ rights—claimed, “It is appropriate to be aggressive in our vetting. Questions can be asked: do you believe in religious freedom, do you believe in sharia law or the Constitution, and do you respect minorities such as women and gays.”⁹⁷ An anti-Muslim Executive Action currently under consideration by President Trump states that the U.S. should not admit immigrants “who would oppress members of one

⁹⁰ Price Statement on “Don’t Ask, Don’t Tell” Repeal, VOTESMART.ORG (last visited Jan. 23, 2017) <https://votesmart.org/public-statement/576891/price-statement-on-dont-ask-dont-tell-repeal#.WIEJkrYrLGI>.

⁹¹ HUMAN RIGHTS CAMPAIGN, *Congressional Scorecard: Measuring Support for Equality in the 110th Congress* (last visited Jan. 26, 2017) http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/Congress_Scorecard-110th.pdf; Maggie Garrett, *Is Discrimination The Price We’ll Pay For Trump’s HHS Secretary?*, AMERICAN UNITED FOR SEPARATION OF CHURCH AND STATE (Nov. 29, 2016) <https://www.au.org/blogs/wall-of-separation/is-discrimination-the-price-we-ll-pay-for-trump-s-hhs-secretary>.

⁹² H.J.R. Res. 22, 110th Cong. (2008) <https://www.congress.gov/bill/110th-congress/house-joint-resolution/22/cosponsors>.

⁹³ Robert Pear, *Tom Price, Obamacare Critic, Is Trump’s Choice for Health Secretary*, N.Y. TIMES (Nov. 28, 2016) <http://www.nytimes.com/2016/11/28/us/politics/tom-price-secretary-health-and-human-services.html>.

⁹⁴ Greg Bluestein & Tamar Hallerman, *The Growing Bathroom Backlash from Georgia Republicans*, ATLANTA JOURNAL-CONSTITUTION (May 16, 2016) <http://politics.blog.ajc.com/2016/05/16/the-growing-bathroom-backlash-from-georgia-republicans/>.

⁹⁵ Chris Johnson, *Trump Makes History With LGBT Inclusion In Acceptance Speech* WASHINGTON BLADE (July 22, 2016) <https://www.washingtonblade.com/2016/07/22/trump-makes-history-lgbt-inclusion-acceptance-speech/>.

⁹⁶ Philip Bump, *Here’s What Donald Trump Said in His Big Immigration Speech, Annotated*, THE WASHINGTON POST (Aug 31, 2016) https://www.washingtonpost.com/news/the-fix/wp/2016/08/31/heres-what-donald-trump-said-in-his-big-immigration-speech-annotated/?utm_term=.36cc991bf442.

⁹⁷ Elise Cooper, *Sen. Jeff Sessions: Trump Is Right on Muslim Immigration Ban*, THE AMERICAN THINKER (June 22, 2016) http://www.americanthinker.com/articles/2016/06/sen_jeff_sessions_trump_is_right_on_muslim_immigrati_on_ban.html.

race, one gender, or sexual orientation.”⁹⁸ While Trump’s support for FADA and cabinet appointees suggests that his administration will roll back LGBTQ rights, the President may occasionally adopt LGBTQ-friendly rhetoric where it reinforces his Islamophobic beliefs and proposals.

As in the reproductive rights context, the First Amendment does not sanction laws or regulations that endorse particular religious viewpoints, nor may the state offer religious exemptions that harm private third parties. The Supreme Court has twice held that religious beliefs do not provide an exemption from antidiscrimination laws.⁹⁹ Should Trump or his appointees institute LGBTQ-related policies that have a primarily religious purpose or effect, or grant religious accommodations that harm LGBTQ people, they risk violating the Establishment Clause.

Education

Trump’s administration is likely to support diverting government funds to private religious schools through the adoption of voucher programs, as well as weakening church-state protections in public schools. Initially, Trump sought to appoint Jerry Falwell, Jr., president of the conservative Evangelical institution Liberty University, as Secretary of the Department of Education (DOE). Falwell—whose University teaches creationism¹⁰⁰ and who has been criticized for anti-Muslim remarks¹⁰¹—declined the offer. Trump’s current nominee, Betsy DeVos, is a longstanding advocate for school voucher programs, which give taxpayer funds to students to pay for tuition at private and religious schools.¹⁰² While such measures are controversial in education circles, they can also pose First Amendment questions.

The chief aim of some—though not all—voucher proponents is to divert funds from secular public schools to religious, primarily Christian schools. There is some evidence that DeVos sees vouchers as a means of advancing her religious faith. At a 2001 Christian summit called “The Gathering,” DeVos and her husband spoke extensively

⁹⁸ THE WASHINGTON POST, *Read the Draft of the Executive Order on Immigration and Refugees* (Jan. 25, 2017) <http://apps.washingtonpost.com/g/documents/world/read-the-draft-of-the-executive-order-on-immigration-and-refugees/2289/>.

⁹⁹ *Bob Jones University v. U.S.*, 461 U.S. 574 (1983) (finding that Congress could deny tax exemptions based on a religious University’s ban on interracial dating, despite the fact that this policy was religiously motivated); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 fn. 5 (1968) (dismissing a free exercise challenge to the Civil Rights Act as “patently frivolous.”).

¹⁰⁰ LIBERTY UNIVERSITY, *Center for Creation Studies* (last visited Jan. 26, 2017) <http://www.liberty.edu/academics/arts-sciences/creation/>.

¹⁰¹ Sarah Pulliam Bailey, *Jerry Falwell Jr.: ‘If More Good People Had Concealed-Carry Permits, Then We Could End Those’ Islamist Terrorists*, THE WASHINGTON POST (Dec. 5, 2015) https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/05/liberty-university-president-if-more-good-people-had-concealed-guns-we-could-end-those-muslims/?utm_term=.110d6d5cfb4b.

¹⁰² Emma Brown, *Trump picks Billionaire Betsy DeVos, School Voucher Advocate, As Education Secretary*, THE WASHINGTON POST (Nov. 23, 2016) https://www.washingtonpost.com/local/education/trump-picks-billionaire-betsy-devos-school-voucher-advocate-as-education-secretary/2016/11/23/c3d66b94-af96-11e6-840f-e3ebab6bcdd3_story.html.

about their work in education policy as an extension of their religious practice.¹⁰³ In response to a question from the moderator as to why the couple does not simply fund Christian schools rather than pushing for education reform more broadly, DeVos explained that she wished to “to confront the culture in which we all live today in ways which will continue to help advance God’s kingdom but not to stay in our own little faith territory.”¹⁰⁴ She later elaborated that her political activities were motivated by a desire “to impact our culture in ways that are not the traditional funding the Christian organization route, but that really may have greater Kingdom gains in the long run by changing the way we approach things, in this case the system of education in the country.”¹⁰⁵ Further, DeVos noted that private donations alone simply *couldn’t* sufficiently fund religious schools—“[t]here are not enough philanthropic dollars in America to fund what is currently the need” to compete with government money that is “not well spent.”¹⁰⁶

In an e-mail to a reporter, a Trump transition team spokeswoman stated that “Mrs. DeVos believes in the legal doctrine of the separation of church and state.”¹⁰⁷ Privately, however, DeVos has indicated that she has qualms with secular education. At The Gathering, in response to a question regarding a return to church-dominated education in the U.S., DeVos stated “I think for many years the church in general has felt that it’s important for the children of the congregation to be in the schools to make a difference but in fact I think what’s happened in many cases in the last couple of decades is that the [public] schools have impacted the kids more than the kids are able to impact the schools. Young children need to have a pretty solid foundation to be able to combat the kind of influences that they’re presented with almost on a daily basis.”¹⁰⁸

DeVos also has extensive ties to organizations that oppose the separation of church and state.¹⁰⁹ For example, DeVos served for ten years on the board of the Acton Institute for the Study of Religion and Liberty,¹¹⁰ a conservative think tank that supports Christian influence in government, including in education. The Dick and Betsy DeVos Family Foundation has contributed over a million dollars to the Institute, whose website contains numerous articles arguing that a commitment to secular public education is in fact

¹⁰³ *Betsy and Dick DeVos Talk About Reforming Education at a Gathering of Wealthy Christians in 2001*, POLITICO (Dec. 2, 2016) <http://www.politico.com/video/2016/12/betsy-and-dick-devos-talk-about-reforming-education-at-a-gathering-of-wealthy-christians-in-2001-061697>; Benjamin Wermund, Trump's education pick says reform can 'advance God's Kingdom', POLITICO (Dec. 2, 2016) <http://www.politico.com/story/2016/12/betsy-devos-education-trump-religion-232150>.

¹⁰⁴ *Betsy and Dick DeVos Talk About Reforming Education at a Gathering of Wealthy Christians in 2001*, *supra* note 103.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Kristina Rizga, *Betsy DeVos Wants to Use America’s Schools to Build “God’s Kingdom”*, MOTHER JONES (Jan. 17, 2017) <http://www.motherjones.com/politics/2017/01/betsy-devos-christian-schools-vouchers-charter-education-secretary>.

¹⁰⁸ *Betsy and Dick DeVos Talk About Reforming Education at a Gathering of Wealthy Christians in 2001*, *supra* note 103.

¹⁰⁹ Rizga, *supra* note 107.

¹¹⁰ *Id.*

discriminatory and anti-Christian.¹¹¹ The Foundation also supports numerous conservative organizations that are anti-LGBTQ, anti-choice, and pro-religion in government.¹¹² In addition to her philanthropic activities, DeVos has investments in K12, Inc., a for-profit online school that offers both public and private school options. DeVos's husband has stated that while K12's curriculum is "designed for a full public school environment," it is "reflective" and "very clearly consistent with...our shared Christian worldview."¹¹³ In an interview, K12's founder stated that the program is "centered in the Judeo-Christian tradition, we do not ignore faith and religion, we do not ignore the arguments against evolution, because there are some."¹¹⁴

Since her nomination, Betsy DeVos has not spoken extensively about her beliefs regarding church-state conflicts in schools, including whether she supports comprehensive sex education, whether she will implement LGBTQ antidiscrimination policies, how she believes evolution should be taught, or the role of religion in public schools generally. Her answers to questions during her Senate nomination hearing were vague. For example, when asked about whether she would permit school districts to adopt curriculums that include "junk science" on climate change and creationism, DeVos answered only that she supports the teaching of "great science" that "allows students to exercise critical thinking."¹¹⁵ Twice, DeVos was asked about her and her family's donations to anti-LGBTQ religious and political groups, and Senator Tammy Baldwin asked DeVos what she would say to youth and families to assure them that she would

¹¹¹ Tony Olek, *Controversial Christianity: Understanding Faith and Politics*, THE ACTON INSTITUTE (Aug. 3, 2011) <http://acton.org/pub/commentary/2011/08/03/controversial-christianity-understanding-faith-and-politics> ("A church that acts as or controls the state is not in accordance with Christ's message, but a church that *informs* the state is. If the role of the state is to allow for and to promote the freedom and well-being of its citizens, then it has only to benefit from the Christian understandings of truth, freedom and God's undying love for the world."); Kishore Jayabalan, *The Perversion of the Establishment Clause*, THE ACTON INSTITUTE (Dec. 2, 2015) <http://acton.org/pub/commentary/2015/12/02/perversion-establishment-clause> (in support of allowing school employees to pray with students); Rev. Robert A. Sirico, *Choice Brings Peace*, THE ACTON INSTITUTE (July 3, 2002) <http://acton.org/pub/commentary/2002/07/03/choice-brings-peace> (opposing the "forced secularization of public schools, such that religion is not permitted to be part of the curriculum in any way"); Rev. Phillip W. De Vos, *Bigotry: A Threat to Parental Choice*, THE ACTON INSTITUTE (Aug. 7, 2002) <http://acton.org/pub/commentary/2002/08/07/bigotry-threat-parental-choice> (opposing state constitutional amendments that limit State funding of religious schools); Dr. Ronald Nash, *America's Public Schools: Crisis and Cure-Chapter 4*, ACTON INSTITUTE (last visited Jan. 23, 2017) <http://acton.org/public-policy/educational-choice/americas-public-schools-crisis-chapter-4> (in support of voucher plans, and decrying the "militant secularism" of public schools, including "the banning of school prayers, Bible readings, and Christian programs" as well as "the adoption of a moral and intellectual relativism that affects every aspect of school life, resulting in public schools that are "anarchic, drug-ridden, politicized, and permissive.").

¹¹² CONSERVATIVE TRANSPARENCY, *Dick and Betsy DeVos Family Foundation* (last visited Jan. 26, 2017) <http://conservativetransparency.org/org/dick-and-betsy-devos-family-foundation/> (collecting information about contributions by the Dick and Betsy DeVos Family Foundation to organizations including crises pregnancy centers, Focus on the Family, and the Foundation for Traditional values).

¹¹³ *Betsy and Dick DeVos Talk About Reforming Education at a Gathering of Wealthy Christians in 2001*, *supra* note 103.

¹¹⁴ *Bill Bennett's Online Schoolhouse*, BELIEFNET (last visited Jan. 23, 2015) <http://www.beliefnet.com/love-family/parenting/2001/10/bill-bennetts-online-schoolhouse.aspx>.

¹¹⁵ *Education Secretary Confirmation Hearing*, C-SPAN (Jan. 17, 2017) <https://www.c-span.org/video/?421224-1/education-secretary-nominee-betsy-devos-testifies-confirmation-hearing>.

“use [her] position as Secretary to support LGBT students of students with LGBT families.” While DeVos responded that she “fully embrace[d] equality” and believes that “all students, no matter their age, should be able to attend a school and feel safe and be free of discrimination,” she did not utter the phrases “LGBT,” “sexual orientation,” or “gender identity” and did not clearly indicate any actions she would take to prohibit or discourage such discrimination. Further, DeVos suggested that donations to anti-LGBTQ organizations may have been made “18 or 20 years ago.”¹¹⁶

Other members of Trump’s cabinet also support expanding government funding of faith based schools and allowing religion in public schools. As Governor of Indiana, Mike Pence adopted a voucher program that greatly increased funding of religious schools in that state.¹¹⁷ As a Representative, Pence voted in favor of resolutions permitting school prayer during the “War on Terror,”¹¹⁸ co-sponsored a resolution in support of “God Bless America” displays in public schools,¹¹⁹ and spoke in favor of teaching creationism in public schools.¹²⁰ Jeff Sessions repeatedly voted in favor of voucher programs while in the Senate.¹²¹ Both Pence and Tom Price voted to remove the authority of the Supreme Court to decide whether the phrase “under God” in the Pledge of Allegiance violated the First Amendment.¹²² At a rally in 2015, Mike Pompeo decried government efforts to “rip faith from our schools and diminish the education that comes as a result of God not being in that classroom.”¹²³

First Amendment issues in education are complex, and whether a particular program or curriculum violates the Establishment Clause varies greatly depending on the circumstances. Aid programs that direct funds to individuals, who may use them at

¹¹⁶ *Id.* (“You may be confusing some other family members in some of those contributions. Also, looking at contributions from 18 or 20 years ago.”)

¹¹⁷ Stephanie Mencimer, *Mike Pence’s Voucher Program in Indiana Was a Windfall for Religious Schools*, MOTHER JONES (Dec. 2, 2016) <http://www.motherjones.com/politics/2016/11/mike-pence-voucher-program-religious-schools>.

¹¹⁸ H. Con. Res. 239, 107th Cong. (2001), Final Results for Roll Call <http://clerk.house.gov/evs/2001/roll445.xml>.

¹¹⁹ H. Con. Res. 248, 107th Cong. (2001) <https://www.congress.gov/bill/107th-congress/house-concurrent-resolution/248/cosponsors>.

¹²⁰ 148 Cong. Rec. Page H4527 (Daily ed. July 11, 2002) <https://www.congress.gov/congressional-record/2002/7/11/house-section/article/h4527-1?q=%7B%22search%22%3A%5B%22%5C%22mike+pence%5C%22%22%5D%7D&resultIndex=190> (“The truth is it [evolution] always was a theory, Mr. Speaker. And now that we have recognized evolution as a theory, I would simply and humbly ask, can we teach it as such and can we also consider teaching other theories of the origin of species?”).

¹²¹ *Jess Sessions on Education*, ON THE ISSUES (last updated Apr. 24, 2016) http://www.ontheissues.org/Social/Jeff_Sessions_Education.htm.

¹²² *Mike Pence on Education*, ON THE ISSUES (last updated Feb. 1, 2016) http://www.ontheissues.org/Governor/Mike_Pence_Education.htm; *Tom Price on Education* ON THE ISSUES (last updated Mar. 9, 2016) http://www.ontheissues.org/GA/Tom_Price_Education.htm.

¹²³ Michelle Goldberg, “*This Evil Is All Around Us*”: *Trump’s Pick for the CIA, Mike Pompeo, Sees Foreign Policy as a Vehicle for Holy War*, SLATE (Jan. 12, 2017) http://www.slate.com/articles/news_and_politics/politics/2017/01/mike_pompeo_trump_s_pick_for_the_cia_wants_a_holy_war.html; ¹²³ Summit Church, *Summit Church God and Country Rally 2015*, YOUTUBE (Jul 8, 2015) <https://www.youtube.com/watch?v=sO0opXYM52w>.

private or parochial schools, have largely been upheld in the face of Establishment Clause challenges.¹²⁴ Nevertheless, any new federal programs that encourage states to divert large amounts of money for sectarian education may overstep the bounds of the First Amendment. Further, the Court has been far less willing to tolerate religion in public schools. The Court has held that it is unconstitutional for the government to single out particular subjects—such as evolution—for special treatment because they conflict with certain religious beliefs,¹²⁵ for legislatures or public schools to encourage prayer,¹²⁶ for public school convocation ceremonies to include clergy-led prayer,¹²⁷ and for public school classrooms to display the ten commandments,¹²⁸ and it has upheld the ability of a public University to impose a nondiscrimination policy on religious clubs.¹²⁹ Should the DOE under DeVos take steps to encourage religious education—either in public or private schools—she may overstep the bounds of the Establishment Clause.

Repeal of the Johnson Amendment

During his campaign and since his election, Trump has vowed to end a policy that leaders of the religious right have adamantly opposed for years—the Johnson Amendment. This amendment to the tax code was passed by Congress in 1954 and prohibits 501(c)(3) tax-exempt, non-profit organizations, including houses of worship, from intervening in partisan politics by endorsing or opposing candidates for public office. In his nomination speech at the Republican National Convention, which adopted a repeal of the amendment into its official platform, Trump called the law a “threat” to religious institutions, and committed to having it repealed in order to “protect free speech for all Americans.”¹³⁰

Trump has stated that he views the amendment’s repeal as important to both his political and religious legacy. In a speech to a group of Christian conservatives, Trump said “I think maybe that will be my greatest contribution to Christianity—and other religions—is to allow you, when you talk religious liberty, to go and speak openly, and if you like somebody or want somebody to represent you, you should have the right to do it.”¹³¹

¹²⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (rejecting an Establishment Clause challenge to a Cleveland program that provided tuition aid for students to attend a participating public or private school of their parent’s choosing); *Mueller v. Allen*, 463 U.S. 388 (1983) (rejecting an Establishment Clause challenge to a Minnesota program authorizing tax deductions for educational expenses, including private school tuition, even though 96% of beneficiaries were parents of children in religious schools); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986) (rejecting an Establishment Clause challenge to a scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (rejecting an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children attending in religious schools).

¹²⁵ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

¹²⁶ *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

¹²⁷ *Lee v. Weisman*, 505 U.S. 577 (1992).

¹²⁸ *Stone v. Graham*, 449 U.S. 39 (1980).

¹²⁹ *Christian Legal Society v. Martinez*, 561 U.S. 661 (2011).

¹³⁰ *Full Text: Donald Trump 2016 RNC Draft Speech Transcript*, POLITICO (July 21, 2016) <http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>.

¹³¹ Michelle Boorstein & Julie Zauzmer, *Thrilling Christian Conservative Audience, Trump Vows to Lift Ban on Politicking, Appoint Antiabortion Judges*, THE WASHINGTON POST (June 22, 2016)

Absent from Trump’s talking points, however, is the recognition that religious institutions, and any other tax-exempt organization, may freely lobby officials and engage in partisan campaigning if they relinquish their tax-exempt status. Although a bill to repeal the Amendment has been introduced and defeated several times by Congress, Republican Congressman Walter Jones of North Carolina recently re-introduced a bill to repeal the Johnson Amendment. The bill is currently in committee and has not yet received a vote from the House.¹³² If it does pass both chambers of Congress, however, it seems clear that Trump will sign it into law, and houses of worship will be free to act like Political Action Committees while maintaining their preferred tax status.

Religious Government Expression

President Trump and his cabinet appointees appear to be supportive of government religious expression and have endorsed the far right’s belief that separation of church and state constitutes mistreatment of Christians. Certain conservative groups have for years argued that the State should be permitted to adopt and endorse majoritarian religious beliefs, values, and symbols, and that rigorous enforcement of the Establishment Clause to protect all believers from state approval or disapproval is unnecessary and offensive to Christians.¹³³ This argument has gotten the most public attention and support in the form of the alleged “War on Christmas”—the belief that government and private entities’ efforts to recognize religious plurality during the holiday season amount to an attack on Christmas and Christians. President Trump has encouraged this mythology. At a rally in October 2015, Trump promised “If I become president, we’re going to be saying Merry Christmas at every store... You can leave happy holidays at the corner.”¹³⁴ After his election, Trump told his supporters, “When I started 18 months ago, I told my first crowd

https://www.washingtonpost.com/news/acts-of-faith/wp/2016/06/20/how-can-trump-win-the-many-undecided-evangelicals-we-asked-them/?utm_term=.2e12bbcea1e7.

¹³² H.R. 172, 115th Cong. (2017) <https://www.congress.gov/bill/115th-congress/house-bill/172>.

¹³³ See, e.g. Daniel L. Dreisbach, *The Mythical "Wall of Separation": How a Misused Metaphor Changed Church-State Law, Policy, and Discourse*, THE HERITAGE FOUNDATION (June 23, 2006) <http://www.heritage.org/research/reports/2006/06/the-mythical-wall-of-separation-how-a-misused-metaphor-changed-church-state-law-policy-and-discourse> (“Today, the wall is the cherished emblem of a strict separationist dogma intolerant of religious influences in the public square. Federal and state courts have used the “wall of separation” concept to justify censoring private religious expression (such as Christmas crèches) in public fora; stripping public spaces of religious symbols (such as crosses)”; Erik W. Stanley, *Supreme Court Limits Ability of ACLU and its Allies to File Lawsuits under the Establishment Clause*, ALLIANCE DEFENDING FREEDOM (Apr. 5, 2011) <http://www.adflegal.org/detailspages/blog-details/allianceedge/2011/04/05/supreme-court-limits-ability-of-aclu-and-its-allies-to-file-lawsuits-under-the-establishment-clause> (“For decades, we have been witnesses to an unprecedented assault on religion in the public square, aided by the Supreme Court who has allowed the ACLU and its allies to file lawsuits against anything the government does that in any way touches religion. These cases have removed prayer, Bible reading, and the Ten Commandments from schools, removed the Ten Commandments from courthouses across the nation, struck down prayer at school football games...”); Matt Barber, ‘Separation’ Nonsense From Lying Secularists, LIBERTY COUNSEL ACTION (last visited Jan. 23, 2017) https://www.libertycounselaction.org/content/home/37140/separation_nonsense_from_lying_secularists (“Anti-Christian extremist groups like the ACLU, the Freedom From Religion Foundation and People for the American Way hate God. They also hate America.”).

¹³⁴ M.J. Lee, *Donald Trump’s Pledge: ‘We’re Gonna Be Saying Merry Christmas’*, CNN.COM (Oct. 22, 2015) <http://www.cnn.com/2015/10/21/politics/donald-trump-iowa-rally/>.

in Wisconsin that we are going to come back here some day and we are going to say 'Merry Christmas' again... So, Merry Christmas everyone."¹³⁵

However, Trump's support for the notion that majoritarian religious beliefs should be more explicitly represented in government goes far beyond his "War on Christmas" rhetoric. In an interview with the Christian Broadcasting Network, he claimed "the Christians are being treated horribly because we have nobody to represent the Christians. Believe me, if I run and I win, I will be the greatest representative of the Christians they've had in a long time."¹³⁶ In a speech to a gathering of pastors in Florida, Trump remarked, "if you look at what's happening to Christianity, and you look at the number of people going to churches... it's on this kind of a climb of slow and steady in the wrong direction."¹³⁷ At several rallies while on the campaign trail, Trump has told supporters "we will be one people under one God—one people, under one God, under one God."¹³⁸ At the Values Voter Summit in September 2015, he posited, "imagine what our country could accomplish if we started working together as one people under one God."¹³⁹ The idea that Americans should worship "one God" is deeply antithetical to the core meaning of religious liberty.

Other Trump appointees have also been supportive of religious government expression. As a Representative, Vice President Pence co-sponsored a resolution expressing support for designating a "Ten Commandments Weekend," and "encourag[ing] citizens of all faiths and religious persuasions to reflect on the important impact that the Ten Commandments have had on the people and national character of the U.S.,"¹⁴⁰ one of his many problematic positions on church-state issues.¹⁴¹ While running for president, Ben Carson condemned the idea of separation of church and state,¹⁴² and he has written that "secular progressives have succeeded de facto in redefining part of the Constitution."¹⁴³

¹³⁵ Liam Stack, *How the 'War on Christmas' Controversy Was Created*, N.Y. TIMES (Dec. 19, 2016) https://www.nytimes.com/2016/12/19/us/war-on-christmas-controversy.html?_r=0.

¹³⁶ THE BRODY FILE, *Donald Trump Tells Brody File: As President 'I will Be the Greatest Representative of the Christians They've Had in a Long Time'*, CBN NEWS (May 20, 2015) <http://blogs.cbn.com/thebrodyfile/archive/2015/05/20/donald-trump-tells-brody-file-as-president-i-will.aspx?mobile=false>.

¹³⁷ Jeff Nesbit, *Donald Trump Vowed to Close the Gap Between Church and State* (Aug. 15, 2016) TIME.COM <http://time.com/4452309/trumps-evangelical-voters/>.

¹³⁸ Sarah McCammon, *What Does Trump's Promise Of A Nation 'Under One God' Really Mean?*, NPR.ORG (Sept. 18, 2016) <http://www.npr.org/2016/09/18/494367803/what-does-trumps-promise-of-a-nation-under-one-god-really-mean>.

¹³⁹ *Id.*

¹⁴⁰ H. Res. 211, 112th Cong. (2011) <https://www.congress.gov/bill/112th-congress/house-resolution/211/cosponsors>.

¹⁴¹ Rob Boston, *Picking Pence: Trump Veep Choice Has Cozy Relationship With The Religious Right*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (Jul. 15, 2016) <http://www.au.org/blogs/wall-of-separation/picking-pence-trump-veep-choice-has-cozy-relationship-with-the-religious>.

¹⁴² Ben Wolfgang, *Ben Carson Blasts Separation of Church and State, Announces Break from Campaign*, WASHINGTON TIMES (Feb. 1, 2016) <http://www.washingtontimes.com/news/2016/feb/1/carson-blasts-separation-church-and-state-announce/>.

¹⁴³ Ben Carson, *Still One Nation Under God*, TOWNHALL (Feb. 12, 2014) <http://townhall.com/columnists/drben Carson/2014/02/12/still-one-nation-under-god-n1793430>.

Mike Pompeo has called the U.S. a “Judeo-Christian nation” and claimed “to worship our lord and celebrate our nation at the same place is not only our right, it is our duty.”¹⁴⁴

Jeff Sessions has been particularly vocal about his view of the First Amendment. In his confirmation hearing, Senator Sessions expounded that “religious freedom is a great heritage of America. We respect people’s religion. We encourage them to express themselves and to develop relationships with the higher power as they choose.”¹⁴⁵ However, in 2006, Sessions introduced legislation to attempt to maintain a 29-foot cross on government property in California.¹⁴⁶ While speaking in favor of a resolution supporting public displays of the Ten Commandments, Sessions stated “The Founders devised a Constitution that depended on religion serving as a civilizing force in societal life. John Adams, our second President, and one of the intellectual forces behind the formation of our Nation, said that ‘our Constitution was designed for a moral and religious people only.’”¹⁴⁷ Sessions has argued that the Establishment Clause of the First Amendment has been read too broadly, even going so far as to say during a Senate speech in 2016 that states may establish an official religion.¹⁴⁸

The Supreme Court has upheld certain narrow government expressions that it has deemed primarily secular rather than religious, or which provide a non-discriminatory platform for diverse religious expressions.¹⁴⁹ However it has not hesitated to strike down expressions that clearly serve to show a preference for a particular religious faith.¹⁵⁰ While Trump and his appointees may, of course, express their own personal religious affiliation, should they seek to communicate an official endorsement of Christianity, or the belief that Americans should worship “one God,” they will be in violation of Establishment Clause.

Supreme Court

President Trump obviously stands to have an enormous impact on the makeup of the Supreme Court, an issue that will affect every topic discussed above. One Supreme Court seat has remained vacant since Justice Scalia’s death in February of 2016, and three

¹⁴⁴ Summit Church, *Summit Church God and Country Rally 2015*, YOUTUBE (Jul 8, 2015) <https://www.youtube.com/watch?v=sO0opXYM52w>.

¹⁴⁵ Attorney General Confirmation Hearing, Day 1 Part 1, C-SPAN.ORG (Jan. 10, 2017) <https://www.c-span.org/video/?420932-1/attorney-general-nominee-jeff-sessions-testifies-confirmation-hearing&live&start=6052>.

¹⁴⁶ *Sen. Jeff Sessions Introduces Bill to Protect Mount Soledad Veterans Memorial* (Jul. 19, 2006) <http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=d58185f6-7e9c-9af9-7311-431c1616076e>.

¹⁴⁷ *Floor Statements: Display of the Ten Commandments* (Mar. 19, 1997) <http://www.sessions.senate.gov/public/index.cfm/floor-statements?ID=adb9120e-7e9c-9af9-7ebe-04856d3931c6>.

¹⁴⁸ Matt Apuzzo, *Jeff Sessions, in His Own Words*, N.Y. TIMES (Jan. 8, 2017) <https://www.nytimes.com/interactive/2017/01/08/us/politics/jeff-sessions-on-the-issues.html>.

¹⁴⁹ *Van Orden v. Perry*, 545 U.S. 677 (2005); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

¹⁵⁰ *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

additional members of the Court are above the age of 75. The past eight years has already seen a weakening of Establishment Clause norms in some cases, including *Town of Greece v. Galloway*¹⁵¹ and *Burwell v. Hobby Lobby*.¹⁵² At the same time, the Court has read the Religious Freedom Restoration Act and the Free Exercise Clause to provide a more expansive right to religious accommodations in cases including *Hobby Lobby* and *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.¹⁵³ This trend of minimizing Establishment Clause protections while expanding a right to individual religious accommodations could accelerate greatly with the appointment of new, deeply conservative justices. Most immediately, the Court will be deciding *Trinity Lutheran v. Pauley* this term—a case that will determine whether it is constitutionally permissible for the government to withhold funding from religious institutions.¹⁵⁴ It is also possible, if not likely, that the Court will hear a case in the near future on whether there is a right for religious individuals or institutions to discriminate on the basis of sexual orientation or gender identity. With a more conservative bench, the balance may easily tilt towards a breakdown in church-state separation and a prioritization of religious exemptions over equality rights.

¹⁵¹ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

¹⁵² *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014).

¹⁵³ *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012).

¹⁵⁴ Elizabeth Reiner Platt, *Playing In the Joints—Supreme Court to Hear Trinity Lutheran*, PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT (Jan. 20, 2016) <http://blogs.law.columbia.edu/publicrightsprivateconscience/2016/01/20/playing-in-the-joints-supreme-court-to-hear-trinity-lutheran/>.