Kansas State Legislature, House Judiciary Committee

Written Testimony of Tim Schultz, State Legislative Policy Director for the American Religious Freedom Program at the Ethics and Public Policy Center, Washington, D.C.
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Mr. Chairman and Members of the Committee,

It is a privilege to be with you today. My name is Tim Schultz, and I serve as the State Legislative Policy Director for the American Religious Freedom Program at the Ethics and Public Policy Center in Washington, D.C. The Ethics and Public Policy Center is a 35-year-old think tank that engages the ethical and moral dimensions of public policy. Nearly eighteen months ago, EPPC created the American Religious Freedom Program, which promotes better public understandings of and policies strengthening America's foundational religious freedoms for people of all faiths.

I am also a native of Whitewater, Kansas, and a graduate of Kansas State University, and I agree with the famous Kansan who said, "There's no place like home."

Today, I have two contentions: First, we need a proper understanding and heightened protection of the free exercise of religion, both under the Free Exercise Clause of the United States Constitution and under Section 7 of the Kansas Bill of Rights. Second, the Kansas Preservation of Religious Freedom Act is a thoughtful and balanced civil rights law consistent with that proper understanding.

First, I will discuss the U.S. Constitution's Religion Clauses. Sadly, due to several decades of acrimonious anti-religious litigation, today when someone hears the words "religion" and "Constitution" the word all too likely to come to mind is "lawsuit."

Is it lawful to offer a public prayer at a high school graduation? How about at a football game? If the town square has a holiday display, is including a nativity scene constitutional? One leading U.S. Supreme Court decision suggests the nativity scene does not render the holiday display unconstitutional as long as the display also includes reindeer and a plastic Santa Claus.

Everyone has heard about such controversies based on novel interpretations of the Establishment Clause, that is, the first clause of the First Amendment. It states simply, "Congress shall make no law respecting an establishment of religion." Establishment Clause cases are driven predominately by activists, many of whom avowedly seek to "free" American society ***from*** all religion. These lawsuits have inflamed social tensions and created a sea change in the way religion is viewed in the last 40 years. Especially among some academics and other thought leaders, there is now the idea that the constitutionally demanded view is that religion is always toxic and in need of quarantine. Or, at best, religion is a private personal taste that, like wallpaper, is something that no one should ever "impose" outside the walls of her own home or place of worship.

This view is wrong and wrong-headed. The leading thinkers of America's founding generation disagreed about many things, but they were nearly unanimous that for this nation's then-experimental form of government to work, its citizens would need accountability and moral education from religious leaders and communities. They did not necessarily think that being a moral person required one to be personally pious, since many of them—

including Thomas Jefferson and Benjamin Franklin—were not religious in the traditional sense. But they wanted religion to flourish. As George Washington advised in his Farewell Address, "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports." And as then-Senator Barack Obama said in his 2006 faith-and-politics speech at a conference in Washington, D.C., "Frederick Douglas, Abraham Lincoln, William Jennings Bryan, Dorothy Day, Martin Luther King—indeed, the majority of great reformers in American history—were not only motivated by faith, but repeatedly used religious language to argue for their cause."

Similarly, the text, purpose, and historical practice associated with the U.S. Constitution's two Religion Clauses—and the related provisions in the Kansas Bill of Rights—implicitly recognize religion as serving the public good.

We need to keep this in mind when we turn to the second of the federal Religion Clauses, the Free Exercise Clause. The text commands that "Congress shall make no law … prohibiting the free exercise [of religion]."

This provision may be the single most important factor in securing America's remarkable—and remarkably peaceful—history of religious diversity. America was founded while most European nations still had government-established religions and afforded limited tolerance to dissenters. Yet when our newly declared independence led the British to launch their armada, and with our national survival at stake, the Continental Congress exempted conscientiously objecting Quakers from compulsory military service. Our whole tradition of protecting conscientious objectors by providing religious exemptions from military duty is rooted in the notion that only in the most extraordinary of circumstances should government coerce any American's religiously informed conscience.

Despite our exemplary history, as a nation we have not always lived up to our founding ideals of protecting religious freedom and rights of conscience for all. Some regions and eras of American life have witnessed open bigotry, legal sanction, and even mob violence against Jews, Catholics, Mormons, and others. As Douglas Laycock, professor of law and professor of religious studies at the University of Virginia, has pointed out, the sanctions against these groups were usually accomplished with general laws that purported to apply to everyone, but were nonetheless intended to attack a religious minority.

Fortunately, in the World War II era the U.S. Supreme Court began to more vigorously protect the rights of religious minorities against government encroachment and religious majoritarianism. In a series of cases decided from the late 1930s through the mid-1940s, for example, the Court applied the First Amendment to recognize protections for the religious freedom and rights of conscience of the Jehovah's Witnesses faith community.

This was also the beginning of the period when the expansion of the modern administrative state increasingly brought government action into collision with religious exercise. Thus, in a free-exercise case that laid the foundation for robust free-exercise protection for almost three decades, the U.S. Supreme Court in *Sherbert v. Verner* (1963) applied to South Carolina's eligibility requirements for unemployment compensation a test that is very similar to the Kansas Religious Freedom Protection Act's compelling governmental interest test.

South Carolina had denied unemployment benefits to a woman who refused to work on Saturday, her faith tradition's Sabbath. The Court said that accommodating Adeil Sherbert's less-common practice of Saturday

Sabbath observance did nothing more than reflect the governmental obligation of neutrality in the face of religious differences. Keep in mind that this decision was rendered by the famously progressive Warren Court.

The *Sherbert* standard did not mean that those claiming that government violated their religious freedoms always won in court—far from it. It simply meant that government had to have an exceedingly important reason not to exempt and protect sincere differences of religious belief and practice and had to narrowly tailor public policy to protect the free-exercise rights of people of faith.

Unfortunately for the rights of religious minorities, in 1990 the U.S. Supreme Court abandoned the *Sherbert* standard in a case called Employment Division v. Smith. As Congress later stated in the Religious Freedom Restoration Act of 1993 (RFRA), the Supreme Court "virtually eliminated the [former] requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." In the language of RFRA, Congress also described the flaw in the *Smith* approach that often proves fatal to religious freedom, that is, "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."

Faith and policy leaders from all walks of American life decried the *Smith* decision and lamented its potential impact on the freedoms of all religious Americans. In testimony before Congress, Nadine Strossen, then-president of the American Civil Liberties Union, called *Smith* the "Dred Scott of the First Amendment." It is no surprise, then, that the ACLU expressly supported Congress's proposal to reinstate the compelling governmental interest test by enacting RFRA. The ACLU was joined in its support by faith-based groups ranging from the Anti-Defamation League to the Christian Legal Society to the U.S. Conference of Catholic Bishops.

In the end, Congress responded to *Smith* by passing RFRA with overwhelming bipartisan support. The Act received only three 'no' votes in the Senate and none in the House. The version that passed was first introduced by Senator Ted Kennedy, and one of its leading supporters was then-Senator Joe Biden. In fact, Vice President Biden introduced the very first version of RFRA in a previous session of Congress.

President Bill Clinton signed RFRA into law. He said in his signing statement that the Supreme Court's abandonment of the compelling governmental interest test in *Smith* was a problem for which an "extraordinary measure was clearly called for." RFRA, President Clinton said, "reverses the Supreme Court's decision [in] Employment Division against Smith and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision." In sum, the federal Religious Freedom Restoration Act simply returned the state of the law to the pre-*Smith* standard, requiring that government may substantially burden a person's religion only if it uses the least restrictive means of furthering a compelling governmental interest.

Congress intended RFRA to protect Americans' religious free exercise from being subjected to unjustifiable burdens either by the federal government or by any state government. However, when the U.S. Supreme Court ruled in 1997 that Congress lacked the power to apply this federal law to actions by state or local governments, 27 states responded by incorporating the proper, more protective free-exercise standard into state law, either through positive enactment or through a state supreme court decision.

Our nation now has a successful 20-year history with RFRA, the federal act that provides protections almost identical to those the Kansas Preservation of Religious Freedom Act proposes. In fact, this is the legal standard that has prevailed for most of the past 50 years.

But Kansas is among the minority of states that do not provide its citizens with the same protections as they have against violations of religious freedom by the federal government. Citizens of Kansas do not enjoy the same protection for their free exercise of religion that citizens of 27 other states enjoy. A resident of Kansas City, Kansas, has less protection for his or her religious freedom than a resident of Kansas City, Missouri; residents of Topeka have less protection than residents of Oklahoma City.

Mr. Chairman and Members of the Committee, I commend your efforts to bring Kansas religious-freedom law in line with the law of the majority of the country. Versions of this measure have been endorsed by dozens of faith communities, both large and small. It has been broadly supported by members of both parties. Thank you for taking steps to ensure that Kansans of all faiths continue to enjoy robust rights to the free exercise of religion for many generations to come.