U.S. COMMISSION ON CIVIL RIGHTS

Washington, DC 20425
Official Business
Penalty for Private Use $300

Visit us on the Web: www.usccr.gov

U.S. COMMISSION ON CIVIL RIGHTS

# PEACEFUL COEXISTENCE:

## RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES

BRIEFING
REPORT

SEPTEMBER 2016

# FINDINGS AND RECOMMENDATIONS

## Findings

1. Civil rights protections ensuring nondiscrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence.

2. The U.S. Supreme Court has recently reaffirmed the foremost importance of civil liberties and civil rights, including non-discrimination laws and policies, in three significant cases.

In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the U.S. Supreme Court applied the limited public forum and viewpoint neutrality doctrines in upholding the University of California Hastings Law School's denial of recognition - and provision of public resources to - a student group which failed to comply with school policy preventing recognized groups from discriminating on the basis of religion. Under *Christian Legal Society v. Martinez*, public colleges still may choose to recognize religiously-based student groups which practice discriminatory policies, but they are not required to do so.

In *EEOC v. Abercrombie and Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015), when it held that, under Title VII of the Civil Rights Act of 1964, employers may not refuse to hire an individual in order to avoid needing to provide a religious accommodation which would not impose undue hardship upon the employer. This case recognizes the tenet that religious freedom is, in itself, a civil liberty.

In *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the U.S. Supreme Court recognized that the Fourteenth Amendment grants the civil liberty of full marriage equality to same-sex couples throughout the nation. Prior to this ruling, during the Commission's briefing, panelist and University of California Davis Law School professor Alan Brownstein referred to governmental recognition of marriage equality as a "moral necessity."

3. Religious exemptions to the protections of civil rights based upon classifications such as race, color, national origin, sex, disability status, sexual orientation, and gender identity, when they are permissible, significantly infringe upon these civil rights.

4. The First Amendment's Establishment Clause constricts the ability of government actors to curtail private citizens' rights to the protections of non-discrimination laws and policies. Although the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act (RFRA) limit the ability of government actors to impede individuals from practicing their religious beliefs, religious exemptions from non-discrimination laws and policies must be weighed carefully and defined narrowly on a fact-specific basis.

5. With regard to federal government actions, RFRA protects only First Amendment free exercise rights of religious practitioners and not their Establishment Clause freedoms. Prior to RFRA's enactment, the U.S. Supreme Court had held in *Employment Division v. Smith*, 494 U.S.

872 (1990), that the First Amendment "had never been held to excuse [an individual's religiously motivated conduct] from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." This holding strengthened nondiscrimination laws and policies against actors who asserted religious justification for civil rights discrimination. RFRA now supercedes *Smith* as a controlling source of federal authority. Some states have enacted statutes modeled after RFRA which impact state-level nondiscrimination civil liberties and civil rights protections.

6. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), the U.S. Supreme Court recently affirmed the narrowness of the analytical framework within which claims of government interference with the free exercise of religion must be construed under RFRA. The Court also affirmed that meticulous factual inspection is necessary in the process of adducing - or rejecting - RFRA exceptions to civil liberties and civil rights protections.

7. The Commission endorses the briefing panelists' statements as summarized at page 21 of the Report in support of these Findings.

(1) schools must be allowed to insist on inclusive values; 2) throughout history, religious doctrines accepted at one time later become viewed as discriminatory, with religions changing accordingly; 3) without exemptions, groups would not use the pretext of religious doctrines to discriminate; 4) a doctrine that distinguishes between beliefs (which should be protected) and conduct (which should conform to the law) is fairer and easier to apply; 5) third parties, such as employees, should not be forced to live under the religious doctrines of their employers [unless the employer is allowed to impose such constraints by virtue of the ministerial exception]; 6) a basic [civil] right as important as the freedom to marry should not be subject to religious beliefs; and 7) even a widely accepted doctrine such as the ministerial exemption should be subject to review as to whether church employees have religious duties.

Further, specifically with regard to number (2) above, religious doctrines that were widely accepted at one time came to be deemed highly discriminatory, such as slavery, homosexuality bans, and unequal treatment of women, and that what is considered within the purview of religious autonomy at one time would likely change.

## Recommendations

1. Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.

2. RFRA protects only religious practitioners' First Amendment free exercise rights, and it does not limit others' freedom from government-imposed religious limitations under the Establishment Clause.

3. In the absence of controlling authority to the contrary such as a state-level, RFRA-type statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holdings of *Employment Division v. Smith*, which protect religious beliefs rather than conduct.

4. Federal legislation should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.

5. States with RFRA-style laws should amend those statutes to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA must guarantee that those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.

# COMMISSIONERS' STATEMENTS AND REBUTTALS

## Chairman Martin R. Castro Statement

**"The government of the United States is not, in any sense, founded on the Christian religion." —*John Adams***

The phrases "religious liberty" and "religious freedom" will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.

Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others. However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality. In our nation's past religion has been used to justify slavery and later, Jim Crow laws. We now see "religious liberty" arguments sneaking their way back into our political and constitutional discourse (just like the concept of "state rights") in an effort to undermine the rights of some Americans. This generation of Americans must stand up and speak out to ensure that religion never again be twisted to deny others the full promise of America.