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

PRESENT:

MARTIN R. CASTRO, Chairman
ROBERTA ACHTENBERG, Commissioner (via telephone)
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
DAVID Kladney, Commissioner (via telephone)
MICHAEL YAKI, Commissioner (via telephone)

VANESSA EISEMANN, Parliamentarian
STAFF PRESENT:
MARGARET BUTLER, Acting Chief, OCRE
JENNIFER CRON HEPLER
LILLIAN DUNLAP
PAMELA DUNSTON, Chief, ASCD
YASMIN ELHADY
ALFREDA GREENE
LENORE OSTROWSKY, Acting Chief, PAU
ELOISE PLATER
JOHN RATCLIFFE, Chief, BFD
MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:
NICHOLAS COLTEN
ALEC DEULL
TIM FAY
JOHN MARTIN
CARISSA MULDER
MARLENE SALLO
ALISON SOMIN
A G E N D A

I. INTRODUCTORY REMARKS BY CHAIRMAN ..................6

II. PANEL I
--Kimberlee Colby, Senior Counsel at the
Christian Legal Society.........................9
--Ayesha Khan, Legal Director, Americans United
for Separation of Church and State.........14
--Lori Windham, Senior Counsel, Becket Fund......21
--Daniel Mach, Director, American Civil Liberties
Union, Program on Freedom of Religion
and Belief........................................28
Speakers' Remarks and Questions from
Commissioners.................................34

III. PANEL II
--Marci Hamilton, Professor, Benjamin N.
Cardozo School of Law.........................77
--Marc DeGirolami, Associate Professor, St.
John's University School of Law.............82
--Leslie Griffin, Professor, University of
Nevada Las Vegas School of Law.............88
--Michael Helfand, Associate Professor,
Pepperdine University School of Law.........93
--Alan Brownstein, Professor, University
of California at Davis Law School...........100
--Edward Whelan, President, Ethics and Public Policy Center..........................106
Speakers' Remarks and Questions from Commissioners.................................113
IV. ADJOURN MEETING........................................144
CHAIRMAN CASTRO: Okay. I'm going to call this meeting to order. Welcome.

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

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

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

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

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

During the briefing, each panelist is
going to have seven minutes to speak. After all the
panelists have made their presentations, then the
Commissioners will have the opportunity to ask
questions of them for an allotted time period.

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

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

The panelists are going to notice a series
of warning lights in front of me and facing you. When
the light turns green that means you'll have seven
minutes. When it gets to yellow that means it's really
time to wrap up. You're going to have two minutes
left. When the light turns red, you got to stop, just like the traffic lights. We will give you an opportunity to respond further in the question and answers, but we do ask that you try to stop when that red light comes on.

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

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

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

CHAIRMAN CASTRO: Great. Thank you, Commissioner.

Our first panelist is Kimberlee Wood Colby, Senior Counsel at the Center for Law and Religious Freedom of the Christian Legal Society. Our second panelist is Ayesha Khan, Legal Director of the Americans United for Separation of Church and State. Our third panelist is Lori Windham, Senior Counsel, the Becket Fund for Religious Liberty. Our fourth
panelist is Daniel Mach, Director of the American Civil Liberties Union, Program on Freedom of Religion and Belief.

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

(Chorus of yeses.)

CHAIRMAN CASTRO: Yes. Okay, thank you.

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

II. Panel I

Kimberlee Colby, Senior Counsel

Christian Legal Society

MS. COLBY: Thank you, Chairman Castro.

CHAIRMAN CASTRO: You're welcome.

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

Christian Legal Society has long believed that the pluralism essential to a free society prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech. For that reason, CLS was
instrumental in passage of the Equal Access Act of 1984 that protects the right of all students to meet for religious, political, philosophical, or other speech on public secondary school campuses.

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

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

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

The Supreme Court acknowledged the importance of recognition in its landmark 1972 decision, Healy v. James. The Court ruled that the First Amendment required a public college to recognize
the Students for a Democratic Society. The Court rejected the college's argument that it would be endorsing the SDS's sometimes violent political agenda if it recognized the group. Recognition, the Court said, is not endorsement.

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

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

Non-discrimination policies are intended to protect religious students, not prohibit them from campus. It is common sense, not discrimination, for a religious group to require its leaders to agree with its religious beliefs. But last year, Vanderbilt University administrators excluded 14 Catholic and
Evangelical Christian groups from campus because they required their leaders to share the groups’ religious beliefs. If I could have the second slide.

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

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

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

That this is an ongoing national problem is demonstrated by the Supreme Court's decision in 2009 to hear Christian Legal Society v. Martinez. Unfortunately, in its decision the Court explicitly
avoided addressing the issue of non-discrimination policies, instead addressing an “all-comers” policy unique to Hastings College of Law. The state law school denied recognition to CLS law students because Hastings claimed that their religious requirements for leaders and voting members violated its non-discrimination policy. During litigation, however, Hastings discovered a new “all-comers” policy that prohibited any group from requiring its leaders to agree with its beliefs.

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

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

Of course, many colleges have recognized that non-discrimination policies and religious liberty
are entirely compatible. If I could have the next
slide. And these colleges have embedded robust
protection for religious liberty within their non-
discrimination policies. And these slides, if I could
have the next slide, are examples of those policies at
the University of Texas and the University of Florida.

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

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

II. PANEL I

AYESHA KHAN, LEGAL DIRECTOR,

AMERICANS UNITED FOR SEPARATION

OF CHURCH AND STATE

MS. KHAN: Good morning. My name is Ayesha
Khan. I am the Legal Director at Americans United for Separation of Church and State, where I oversee a litigation program designed to advocate for a healthy separation between religion and government.

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

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

In *Christian Legal Society*, we argued that universities have a strong interest in barring exclusionary policies by on-campus organizations because a principal purpose of providing those organizations with meeting space and financial assistance is to teach the interpersonal and leadership skills that come from working
collaboratively alongside people of different races, genders, and religion. We argued that this interest was especially important because educational opportunities have historically been denied to many students on account of their race, religion, gender, or sexual orientation.

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

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

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

The school sought to take advantage of a
Ministerial exception, a Court-created doctrine that exempts religious entities from non-discrimination statutes under the theory that religious institutions should be able to select their ministers and other key personnel without governmental involvement.

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

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

These two cases represent only the tip of the vast iceberg of situations in which religious groups and individuals have sought exemptions from anti-discrimination provisions. Landlords throughout the country have refused to rent property to persons living together out of wedlock claiming an exemption from anti-discrimination ordinances prohibiting discrimination on the basis of marital status.
Business owners and students enrolled in counseling programs have sought exemptions from statutes or policies prohibiting discrimination on the basis of sexual orientation. Muslim taxicab drivers in Minnesota who wanted to avoid transporting passengers who were carrying alcohol sought an exemption from an anti-discrimination ordinance requiring them to transport all passengers. Pharmacies and religious non-profits have sought exemptions from statutes designed to give women equal access to medications. And if one looks even more broadly at all of the situations in which religious individuals have sought exemptions from various legal requirements, the circumstances broaden further still.

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

Parents have sought exemptions from compulsory education laws, for vaccination
requirements, and requirements that children attend
certain classes or read certain materials as part of
receiving a public school education.

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

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

In Bob Jones University, the Supreme Court
addressed a situation involving schools that were
denied tax-exempt status, and they sought an exemption
under the Free Exercise and the Establishment Clause
to continue to engage in racially-discriminatory policies.

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

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

CHAIRMAN CASTRO: We'll have to conclude
now, you're a little over time.

MS. KHAN: Thank you.

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

II. PANEL I

LORI WINDHAM, SENIOR COUNSEL

BECKET FUND

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

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

Today's discussion asks whether civil liberties and anti-discrimination laws can be
reconciled. The answer is yes. In most cases, greater religious freedom and greater freedom of speech further the same interests as our anti-discrimination laws. They allow small and politically-weak groups to maintain their missions and their voices. Cases like *Hosanna-Tabor* demonstrate how we can protect both our constitutional freedoms and our diverse society.

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

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

The teacher was terminated for refusing to follow religious teachings on dispute resolution, but sued under the ADA claiming that the religious reasons were pretextual. In response, the church argued that her suit was barred by the Ministerial Exception. That legal doctrine states that courts should not interfere
in employment disputes between churches and their ministers.

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

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

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

For some, this idea might be acceptable.
Some will, doubtless, reject the notion that religious organizations should have any unique protection, but for religious believers of many different faiths the idea they would not have such rights is unthinkable. That is not only because religious freedom is singled out for special protection in our Constitution, but because for many, religion is a fundamental and organizing principle of life, commanding conscience and informing moral choices. To say that religious exercise has no unique freedoms, that religious bodies have no special rights of their own, is to plunge our government into the business of regulating religious organizations.

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

There are difficult cases on the other side of the equation, too. I'm sure we'll hear about some today where religious groups make seemingly questionable decisions and claim the shield of the
Ministerial Exception. But just as we understand that free speech means occasionally tolerating speech we would prefer to silence, so, too, free exercise means occasionally permitting action we would rather prohibit. Our Constitutional rights will not protect for us for long if they are designed to target the worst offenders, rather than to protect the freedom of each citizen.

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

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

As Justices Kagan and Alito acknowledged,
virtually every religion in the world is represented in the population of the United States. The modern Ministerial Exception is both a consequence of and a protection for religious diversity.

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

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

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

Although I'm here to address *Hosanna-Tabor*, the lessons of religious freedom promoting religious diversity can apply to other situations. The
Ministerial Exception is distinct from the larger question of religious exemptions from general laws.

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

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

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

Protection for religious freedom is fully consistent with the American tradition of democracy and respect for the Rule of Law. The idea of conscientious objections to general laws is not a new
invention; it has a long and distinguished history. The Religious Freedom Restoration Act and laws like it, passed with broad bipartisan support, provide guidance for the questions being discussed today. When we allow those with sincere religious beliefs to live their faith, even if it requires an exemption from general laws, our nation is richer for it that religious minorities are protected and religious groups are free to serve their communities and our nation. Thank you.

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

II. PANEL I

DANIEL MACH, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, PROGRAM ON FREEDOM OF RELIGION AND BELIEF

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

The issues addressed by the Commission today lie at the heart of the ACLU's mission. We at the ACLU have been fighting for the rights of conscience and religious liberty, of believers and non-believers, majority and minority faiths alike for
almost a century. At the same time, the ACLU has stood firm in opposing discrimination in this country, working for decades to secure civil rights and equality for all.

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

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

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

In assessing the exception, though, it's important to understand its reach and its limits. First, the Supreme Court in the case emphasized that
the exception applies only to suits by or on behalf of ministers themselves. Religious institutions can't assert the exception as a defense to lawsuits brought by employees who aren't ministers.

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

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

The lower courts are still in the early stages of applying the decision and its legacy remains uncertain. In recognizing the vital Ministerial Exception, the court reminded us in the case that, "The interest of society and the enforcement of
employment discrimination statutes is still, undoubtedly important."

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

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

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

Finally, it's absolutely clear that discriminatory enforcement of Hastings' policy, if say
Hastings allowed other groups to violate the policy with impunity, while punishing CLS for those same violations, that would run afoul of the First Amendment. But in the case before the Supreme Court, CLS was asking not for equal treatment but for special treatment, a preferential exemption from the Hastings policy. And the Court wisely rejected that claimed right, holding that a public university has the constitutional authority to lend its name and funds only to those groups or activities that are open to all students.

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

Now, because the policy conditioned the denial of benefits on certain conduct, the act of discriminating against some members of the law school community, and not merely on expression, the views of the student groups, the court held that the policy was viewpoint neutral. And the court also found that the
non-discrimination rule was a reasonable one, declining CLS's invitation to second-guess the university's policy decisions. Among other things, the policy promotes the basic principles of equality and fairness in the crucial context of the public university.

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

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

In the wake of the CLS decision, several state legislatures have considered and in some cases passed laws intended to undo the Supreme Court's
decision, stripping universities of the ability to adopt policies of the sort that were upheld by the court. In so doing, those bills compromise the many important interests recognized by the Supreme Court, forcing colleges and universities to underwrite discriminatory acts and limiting the educational opportunities available to students.

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

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

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

II. PANEL I

QUESTIONS FROM COMMISSIONERS

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

COMMISSIONER ACHTENBERG: Yes, please.

CHAIRMAN CASTRO: Is that Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: Indeed.

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

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

(Off microphone comment.)

COMMISSIONER KIRSANOW: -- contributed to this hearing.

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

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

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

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

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

COMMISSIONER ACHTENBERG: I can't hear.

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

MS. COLBY: As I was saying, I think that
religious liberty is too frequently taken for granted. It's a fragile thing, and it can die from neglect. It can be lost in a generation. And I think that at many college campuses there just is not an appreciation for the importance of religious liberty. And, also, I think many college administrators do not understand, and seem unwilling to understand, how the religious student groups view the college administrators' insistence that they get rid of their statement of faith, or their requirements for their religious leaders.

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

COMMISSIONER KIRSANOW: If I could just follow up. Here at the Commission we deal with discrimination issues, obviously, every single day. And there is discrimination and there's
discrimination. And when I say that, I mean that every single day in every single moment every single one of us discriminates. There's discrimination that is frankly good discrimination. I don't eat sushi from a roadside stand in Alabama that's been out there for three days. Okay? I discriminate, that's good discrimination. But then there is invidious discrimination.

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

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

MS. KHAN: I agree, actually, with Ms. Windham that it is critical for groups to be able to select their key personnel and the people who
formulate and define their message, but nothing stands in the way of that.

_Hosanna-Tabor_ recognizes that; _Christian Legal Society v. Martinez_ was not about whether they have that right, it was about whether they have that right to do it with public dollars, which would distinguish them from every other group with a singular or very specific message.

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

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

COMMISSIONER KIRSANOW: Ms. Colby wanted to respond.

CHAIRMAN CASTRO: I'm sorry. I apologize.

MS. COLBY: I just wanted to follow up on
that, that it's very important to recognize just as you were saying, there are things that are not wrongful discrimination. And I would just point the Commission to Professor Garnett's excellent chapter in the book that I reference in my written statement where he really grapples with this issue in a very helpful way.

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

CHAIRMAN CASTRO: Commissioner Achtenberg, you have the floor.

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

CHAIRMAN CASTRO: Ms. Colby.

COMMISSIONER ACHTENBERG: All right. Thank you very much.

To Ms. Khan and Mr. Mach, could you respond to the following. Could you describe in your opinion the extent to which the historical presence of
discriminatory and anti-minority actions and admissions and activity decisions in American institutions of higher learning played a role in underscoring the reasonableness of non-discrimination policies, such as the Hastings non-discrimination policy, and the extent to which you think that influenced the court's reasoning in the Christian decision. --

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

Whether that played a role in the court's
thinking, I suspect it did. The court did say that it
could not imagine a more neutral policy than this, one
that requires all students to be accepted to all clubs
was a very inclusive environment in which kids would
be put with -- alongside people of differing views
and, thereby, sort of have a taste of democracy in
action.

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

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

MS. COLBY: This is Kim Colby.
Unfortunately, there's also a long history of
excluding religious groups from college campuses, as I
referred to in my earlier statement. So, for at least
35 years on many college campuses the religious groups have had trouble maintaining access for their religious speech. At first the excuse was the Establishment Clause. When the Supreme Court said that wouldn't work, some of the college campuses then went to non-discrimination policies. So, the history here is one that's very disturbing, and it's why we should be particularly careful. When non-discrimination policies are being used to exclude religious groups, it's just terribly ironic that in the name of “inclusion,” the religious groups are being excluded from campus.

COMMISSIONER Kladney: Excuse me, Mr. Chairman.

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

COMMISSIONER Kladney: Yes.

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

MR. MACH: Sure, just one point on that. Again, it bears repeating, and the court relied on this fact heavily in the decision; that this was not a policy that banned this group from existing. And, in fact, even with the policy in place, the group was
able to meet, hold meetings, have access to students. And, in fact, there were at least 60 groups that existed under the Hastings policy, including a number of religious groups that got recognized status as well as being able to meet. So, it's not the case that these groups were banned.

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

COMMISSIONER GAZIANO: Yes, thank you all.

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

CHAIRMAN CASTRO: Okay.

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

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

The third distinction that I'd then like to discuss is the correctness of CLS v. Martinez. It's a very disappointing decision. It is hopeful to me, of course, I don't -- it was decided on peculiar facts,
over-reading a stipulation. I don't even know, if properly litigated again, that the Supreme Court Justices who decided it would necessarily come out in the same way. But Justice Stevens, bless his heart, had some rather cramped views on religious liberty, is no longer on the Court, and I'm very thankful that if Vanderbilt continues its discriminatory policies that groups like CLS and others will take it back to the Supreme Court. So, I'd like to focus on getting that wrong-headed decision overturned.

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

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

CHAIRMAN CASTRO: If anyone needs the question read back, there's a court reporter --
COMMISSIONER GAZIANO: No, I'll --

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

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

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

This is really where Martinez got it so
wrong, but thankfully it's a very narrow decision.
Martinez ignored Healy, Widmar, and Rosenberger, and
three or four other decisions that said -- contrary to
what is being said here -- that recognition is not a
subsidy, it isn't an endorsement, it is merely the students being able to access the fees that they all are required to pay, and having the chance to reserve space on campus and to access the communication channels that all of them need to get their message out.

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

As for the cases that were mentioned, the Supreme Court I think appropriately distinguished those earlier cases. The big distinction between cases like CLS and Healy, Widmar, and Rosenberger was that in those cases there was a denial of access to a forum on the basis of viewpoint. And here the Court made very clear, and I think they got it right, that
the policies, the non-discrimination policies, target
conduct, the act of deciding who should be a member
and who should be excluded, and not the viewpoint of
those groups.

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

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

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

MR. MACH: My view is that it was properly
dismissed, and here's why. There was no evidence of
that ever happening. The Court, I think, rightly
pointed out that that argument was more hypothetical
than real. And as the Court pointed out, there were
many groups that had existed under the policy,
including a number of religious groups, and that idea of takeover had just never occurred.

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

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

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

One thing that Mr. Mach said that I wanted to correct is that, at most college campuses, the fraternities and sororities are recognized groups. This is why most colleges will not adopt an “all-comers” policy because it's clear under the Martinez decision that they have to apply that total openness -- no selecting leaders and members on any basis -- to everyone, including fraternities and sororities. It's one of the things that makes the Vanderbilt situation particularly stinging, as I already mentioned. For
whatever reason, Vanderbilt will not allow the religious groups to choose their leaders based on their religious beliefs, but it's perfectly fine, and Vanderbilt says this in its policy, for the fraternities and sororities to continue to engage in sex discrimination not only as to leaders, but as to members.

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

CHAIRMAN CASTRO: Now it's my turn to ask. So, it does seem that as Commissioner Gaziano said, at a high level there is some agreement as to certain
exceptions. I think the question really is one of, you know, where do we draw the line. And it can't be, at least in my estimation, an “I'll know it when I see it” line. I think we need to have some level of clarity. And my concern and fear is that exceptions tend to swallow the rule. And this is not a hypothetical situation, but we're already seeing things happening at the state level.

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

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

MS. WINDHAM: Mr. Chairman, if I may respond. I believe that the line was drawn very well
by Congress when it passed the Religious Freedom
Restoration Act. This is the Act, actually, that the
Kansas Act which you mentioned is modeled upon, which
states that, when religious exercise is substantially
burdened by an otherwise neutral and general law, that
the religious believer may receive an exception unless
there's a compelling government interest in the
enforcement of that law. And I believe that this is a
policy that works very well. It's a system that works
very well. It's a system that's been in place for 20
years now, and the walls have not fallen down. It is a
system that was in place prior to the Smith decision
for about 30 years as a matter of constitutional law.
So, this is a system that works very well in our
country, and has been enacted by Congress, and about
half the states now have some form of RFRA in them.
And I think it's important to note --

CHAIRMAN CASTRO: May I ask you a question?

MS. WINDHAM: Certainly.

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

MS. WINDHAM: Certainly. There's a large
body of case law on that, and really it boils down to
a case-by-case consideration. The Supreme Court said
in the Gonzales v. O Centro case, which was a RFRA case, that you have to look at each individual case. It's not enough to pass one-size-fits-all legislation and say that this is going to apply to everyone. You need to look at what are the particular circumstances, how is the particular burden falling on this religious believer, and you need to look at the government interest. What is the government interest in this particular circumstance? Can an exception be made, or are the interests so strong they can overpower them?

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

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

MR. MACH: Yes, just I think one of the questions that you asked was what does substantial add, and I think that's an important question because
some of the state legislation of the sort that you mentioned includes a prohibition on simply burdens, and not substantial burdens. And what that means is it could open the door to all sorts of claims, however incidental to religious exercise.

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

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

MS. KHAN: I think it's very hard to have one-size-fits-all rules in this area. I think we do have to trust that the courts are going to wrestle with all of the very complex not just factual but legal issues that are involved in any given instance.
So, I don't think we can sit here and say we need clarity on this because you imagine, for example, just to contrast two cases, the Amish don't want to send their kids to public school and comply with compulsory education laws. They won that right. And the court evaluated a whole host of considerations to reach the result. It didn't harm anybody to let them do this.

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

CHAIRMAN CASTRO: Ms. Colby wants to --

MS. COLBY: Well, I just want to tell you something you already know, and you're the experts on, which is that it's a very common practice for non-discrimination laws to include exemptions for religious people. So, we've had experience with this,
Title VII probably being the best example of this. But it is a long part of our tradition to be balancing these two concerns. We've had practice with it, and we don't always get it perfectly, but it is a big part of our heritage not to go one way or the other, but to give these religious exemptions. That's why I included as examples of best practices the University of Texas and the University of Florida's policies. They have very robust non-discrimination policies, but they also insert a sentence saying religious groups get to choose their leaders according to their religious beliefs, and so they have the best of both worlds.

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

COMMISSIONER HERIOT: Okay. I thought about not saying anything during this briefing because I think these areas are very, very difficult, and to some extent probably intractable. I have a lot of sympathy for Ms. Colby's point. I do believe that these religious organizations on campus have been wronged. I also have quite a bit of sympathy for the
Chairman's point, because it would be nice to have rather clear law in this area.

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

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

CHAIRMAN CASTRO: Ubiquitous?

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

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

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

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

I know in some of the work I've done, I've
been able to at least get the universities to adopt a viewpoint-neutral mechanism for allocating the fees which they did not have --

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

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

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

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

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

CHAIRMAN CASTRO: Ms. Kahn.

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

CHAIRMAN CASTRO: Ms. Windham.

MS. WINDHAM: I think that the policy you propose is very sensible and might eliminate some of these problems, but I think that Commissioner Gaziano's point is also well taken here. We've been
arguing a lot about funding, but what was really most important to the CLS group was the ability to reserve meeting rooms, have a table, reach out to new students at a new student fair, those sort of actions. So, the funding policy -- having a different sort of funding structure, or no funding structure -- might help but it would not eliminate the entire problem.

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

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

CHAIRMAN CASTRO: Okay. Commissioner Kirsanow.

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

As I mentioned at the outset, we received a number of comments from a variety of student organizations that were very aggressive in noting that
they're being substantially burdened, at least in
their estimation, by their various universities. One
of the organizations, there was a University Christian
Fellowship, for example, submitting a number of
comments about the fact that they're essentially being
forced off campus, essentially they are being -- their
mission has been diluted because of the requirements
placed on them by the university, so this is not an
ephemeral and kind of nebulous concern. And it goes
beyond the funding issue.

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

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

In the case of student religious
organizations, we've got a finite group of five or
six, maybe 50 students, college students who are arguably discriminating by selecting certain individuals or adhering to a particular set of beliefs versus the state actor that does the discriminating. When the state does the discriminating and you can look at, you know, the theories underpinning cases like --

(Background noise.)

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

CHAIRMAN CASTRO: Ms. Windham.

MS. WINDHAM: Thank you, Mr. Chairman. I would agree with that. I think that's an important point, and I think it's important to note that when you are putting a thumb on the scale so to speak on the side of the non-state actor, you are allowing
small, and new, and unpopular groups the ability to
gain a foothold, the ability to form to spread their
message, and to make arguments in a public square.

CHAIRMAN CASTRO: Ms. Khan.

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

COMMISSIONER KIRSANOW: We also have to get
to what is a subsidy. As Commissioners Gaziano and
Heriot talked about, you know, you could argue that
the mere recognition or -- mere, but because the
permission of the use of rooms, whether it be
electronic rooms, or chat rooms, whether it be
physical rooms versus actual dollars, and whether
those dollars, for example, come from student fees,
which fees are non-negotiable. You must compel, you
must give to Caesar these fees. Caesar then dispenses
it to all except the one organization that has a
religious component to it, yet they are still
compelled to subsidize everybody else. So, I agree
with you. I mean, there is a number of gradations
there, no bright lines; but, again, when there's a
close question, and given the constitutional concerns
with respect to religious freedom and the ability to
obliterate unpopular views by the state, doesn't it
make more sense to err on the side of the non-state
actor in close questions?

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

MS. COLBY: We have approximately 90
chapters around the country, but obliterate is not too
strong a word. As I've already said, at Hastings there
is no CLS chapter because of this. Other organizations
have also suffered the end of an organization on a
particular campus whenever that group has been
derecognized.

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

So, again, the law for 40 years has been
what the student groups are saying in these fora,
whether it's the SDS or the Christian Legal Society,
is not endorsed, or sponsored, or subsidized by the
university just because it's occurring on campus,
because that's where the students' world is.

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

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

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

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

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

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

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

Groups are singled out and the condition is based on conduct of those groups, the act of
deciding whom the groups want to exclude. It is not on
the basis of viewpoint. And Rosenberger makes clear
that if the rule were we're going to fund all groups
but those with a religious viewpoint, then that would
be unconstitutional. That is not what the rule in CLS
was. It was not we are going to allow this for groups
with a certain viewpoint, but not groups with other
viewpoints. It is solely targeted on the acts of those
groups. And the Supreme Court has made clear that acts
are not shielded from regulation merely because they
express a discriminatory idea or philosophy.

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

COMMISSIONER ACHTENBERG: Thank you, Mr.
Chairman. I'd like to turn our attention if I might to
the Hosanna-Tabor case, and specifically I'd like to
ask Ms. Kahn about whether or not the concern that I
now have as I appreciate the articulated principles in
that case that there may become some kind of chilling
effect upon the rights of employees of religious
organizations who wish to report internal misconduct,
whether there might be some misinterpretation or some
intended interpretation such that they might believe their conduct is protected and come to learn that it is not. Might this lead to misunderstanding of whether or not a licensed professional may have an obligation to report? Could you discuss both the positive and negative implications of the kinds of distinctions that were articulated in that case from your points of view?

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

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

I think there's lots of factual questions that concern me about the breadth of that exception. So, yes, I can imagine a chilling effect in terms of
not just reporting misconduct, but filing litigation because of the risk that you would be considered a minister and, therefore, have no coverage whatsoever. And mind you, remember that the Ministerial Exception doesn't just cover religious discrimination, it covers every kind of discrimination. So, it exempts religious organizations from complying with race discrimination rules, gender discrimination rules, national origin discrimination rules. It is carte blanche to engage in discrimination of the most rank sort with respect to somebody who falls into the category of a minister.

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

CHAIRMAN CASTRO: Ms. Windham.

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

The Supreme Court said, and I quote from page 710, "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." There's nothing in Hosanna-Tabor that suggests something like a
mandatory, criminal mandatory reporting statute would be invalid, or that it would be prohibited. There's nothing in *Hosanna-Tabor* to prohibit non-ministerial employees from still bringing actions against religious organizations. So, I think it's important to note that this decision is appropriate. It is appropriately limited and it protects the rights of religious organizations to maintain their identities and to be true to their religious missions.

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

COMMISSIONER GAZIANO: Two quick points, and I'm not sure that anyone needs to react. First of all, I wanted to thank Commissioner Heriot who I interrupted. I wanted to wholeheartedly endorse her suggestion that we should eliminate the money and eliminate that part of the problem. It sounds like a great idea. But in addition to the meeting -- the essential nature of meeting rooms on campus and internet to collaborate, I wanted to also mention the ability to host outside speakers like the four of you is an essential part of at least a club whose mission it is to supply an outlet for learning on or the promotion of particular political, ideological, or
religious views. And that's the sense in which the all-comers policy is seen as neutral is ridiculous.

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

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

I participated in ideological clubs where there are schisms, and it is unreasonable to think that one of the groups that is fighting for control of that organization wouldn't employ outsiders who have
nothing to do with the original purpose of the mission
to subvert those organizations.

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

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

(Laughter.)

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

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

I don't know if anyone is seriously saying
that we ask the student group to give up their belief
in Jesus Christ, Allah, the Talmud or anything like
that. What I do know from my own experience from being
in student government and being in university settings
and dealing with the issues of resource allocation and
recognition that I think there is a distinction. I
support the reasoning of Justice Ginsberg in that
we're talking about -- and I don't support this sort of Trojan horse idea that access to meeting rooms is a lot different than access to funding. I think that any time -- when you talk about meeting rooms, you're talking about essentially the confirming and use of government and public facilities for the benefit of a specific group because invariably there's janitorial, lighting, other kinds of things, whether it's the maintenance of the web page, server, anything like that. And then when you put it in with conduct that is strictly prohibited by our Constitution among other documents, that universities have the ability, almost have an obligation to insure that those scarce resources are not being misused in a way to actively engage in prohibited conduct. And I don't believe that you can change the way these -- anyone thinks, but I do believe that you cannot support the way that a group will act. And I see very little problem with the Martinez decision in that regard, and look forward to Panel II.

CHAIRMAN CASTRO: Okay. Well, thank you, Commissioner. Thank you, panelists. We appreciate your thoughtful contributions to this subject, and we will, of course, take a bit of a 10-minute break so that we can get the second panel in place, change out the
microphone. And we hope that you'll stick around for
the second part, and we'll be back in 10 minutes.

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

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

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

So, let me now having said that begin to
introduce our current panel. Thank you. Our first
panelist is Marci Hamilton, the Paul R. Verkuil Chair in Public Law at the Benjamin Cardozo Law School, Yeshiva University. Our second panelist is Marc DeGirolami, Associate Professor at St. John's University School of Law. Our third panelist is Leslie C. Griffin, the William S. Boyd Professor of Law at the University of Nevada, Las Vegas, Boyd School of Law. Our fourth panelist is Michael Helfand, Associate Professor at Pepperdine University School of Law, and Associate Director of the Diane and Guilford Glazer Institute for Jewish Studies. And our fifth panelist is Alan Brownstein, the Boochever and Bird Chair for the Study and Teaching of Freedom and Equality at the University of California, Davis School of Law. Our sixth panelist is Edward Whelan, President of the Ethics and Public Policy Center.

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

(Chorus of yeses.)

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

III. PANEL II

MARCI HAMILTON, PROFESSOR,
MS. HAMILTON: Good morning.

CHAIRMAN CASTRO: Good morning.

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

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

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

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

---

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
www.nealrgross.com
to the Supreme Court I hope that, one, you will not pre-decide any case that involves a child sex abuse victim. And, two, I hope you will not adopt the autonomy theory that has been proposed by various amicus briefs.

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

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

The Supreme Court held that there's a constitutional right under the First Amendment for a religious organization to avoid the application of the
laws which this Commission is charged with guarding, the civil rights laws.

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

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

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

If you have narcolepsy and you go back to work and you're told you can't go to work because they don't want you, a church now has the right to say too...
bad, the Americans with Disabilities Act doesn't apply
to us, and neither does the ADEA the Discrimination in
Employment Act involving age.

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

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

The biggest problem for religious
organizations, of course, is that humans run them.
Humans make bad decisions, and they discriminate on
the basis of race and gender. I think it's extremely
unfair for an employee to join a religious
organization and not be informed that he or she is
not going to have rights under the anti-discrimination
laws. And, therefore, it should be a requirement as
part of the hiring that they disclose whether or not
this religious organization is going to treat this employee as a minister who, therefore, will not be afforded civil rights against the organization, or as an ordinary employee who retains their rights under the civil rights laws.

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

CHAIRMAN CASTRO: Thank you, Ms. Hamilton.

Mr. DeGirolami.

III. PANEL II

MARC DeGIROLAMI, ASSOCIATE PROFESSOR,

ST. JOHN'S UNIVERSITY SCHOOL OF LAW

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

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

The wish to resolve a conflict can sometimes mask the complexity and the depth of the conflict. And I think that an over-eager desire to resolve conflict can obscure the possibility that conflicts are part of every person's existence, they're part of every institution's existence, they are part of the existence, the experience of polities, generally. So, we've been asked to consider certain kinds of conflicts, conflicts between and among rights. And underlying each of those rights are multiple values, the right to religious liberty includes conventional values that one generally hears
about like liberty, and autonomy, with apologies to Professor Hamilton, and equality, but also less conventional values like piety, and asceticism, and charity, and devotion, and self-control, and obedience.

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

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

So, we might be able to agree, and I take it that this was the theme of the earlier panel today.
We might be able to agree at a very high level of abstraction that equal treatment means the absence of unjust discrimination, but what counts as unjust discrimination is open to an array of conflicting interpretations. And those interpretations are underwritten by conflicting values.

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

Nothing that I've said, of course, negates the importance of compromise, and I agree entirely that certain interests, interests, for example, in securing the physical safety of the weak, are so important that they should always trump conflicting interests. But apart from those extreme cases which I believe are extreme cases and should be treated as
such, compromise does not mean harmony, compromise
does not mean the relaxation of tension.

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

A reasonable person knows this, those with zealous feelings deplore the mess and push for resolution in which their opinions are dominant. That is why in my prepared remarks I highlighted and praised the Supreme Court's opinion in the Hosanna-Tabor case, because rather than elevate a single value like neutrality, or non-discrimination, or equality, or liberty to supreme constitutional status and what would have been a misguided effort to solve the conflict, the court kicked off its opinion by
exploring some of the rich history of religious 
liberty. It adopted a traditional mode of
constitutional interpretation. It identified the ways
in which a particular conception of church autonomy is
fundamental to our own distinctive tradition of
religious freedom. And it held rightly that the best
way to judge whether and how the values underwriting
the Ministerial Exception apply as they interact and
inevitably conflict with non-discrimination norms is,
and here I agree with Professor Hamilton, highly
particularized.

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

CHAIRMAN CASTRO: Ms. Griffin, you have the
III. PANEL II

LESLIE GRIFFIN, PROFESSOR,
UNIVERSITY OF NEVADA, LAS VEGAS

SCHOOL OF LAW

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

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

(Off microphone comments.)

MS. GRIFFIN: Religious freedom and equality are two of our most cherished constitutional norms. Today, however, some interpretations of religious freedom undermine equality, leaving anti-discrimination principles and religious freedom on a collision course. This is especially true of legislation that has been drafted to protect religious liberty, but that may, instead, license individuals and even corporations to discriminate in the name of religion.
The Supreme Court has long held that religious beliefs are absolutely protected by the First Amendment, but that religious actions are not. Religious conduct must yield to the law and its protection of all citizens. That principle was endorsed by the Supreme Court in the Bob Jones case when it said that free exercise didn't entitle Bob Jones to a tax exemption if it discriminated on the basis of race.

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

State courts have also endorsed this principle in the cases upholding laws that require employers to provide contraceptive insurance to their employees. The highest courts of California and New York ruled that state legislation promoting women's access to contraception does not violate the rights of religious employers. Those courts properly applied the Supreme Court's leading free exercise precedent,
Employment Division v. Smith, to deny Catholic Charities' request that it be exempted from the law's application.

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

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

Now, the employers are currently losing their free exercise claims as they should under Smith,
but the courts have been mixed on the results under
the Religious Freedom Restoration Act which prohibits
the federal government from substantially burdening a
person's exercise of religion. And although RFRA was
passed to promote civil liberties, its interpretation
now potentially harms the rights of third parties.

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

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

So, if running a for-profit business or
providing insurance coverage to employees become the
exercise of religion, and if companies large and small
can receive special exemptions from the laws, there's
little chance that the anti-discrimination laws can survive.

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

Now, as the court stated in Lee in refusing to exempt the Amish from the Social Security taxes laws, some religious practices must yield to the common good. Every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. And I think that's one of the dangers right now in the Hosanna-Tabor case. As everybody has acknowledged, Hosanna-Tabor is a very fact-specific case, and can be read very narrowly; and, yet, it also can start to be read very broadly to suggest that you need more and more institutional religious freedom. So, there's a risk of interpreting Hosanna-Tabor to conflict with all those
There's another constitutional reason I think why it's dangerous to accommodate any religious employer at the expense of not only their employees but other secular employers. Giving an economic preference to religious corporations and individuals should violate the Establishment Clause. So, free exercise is not an absolute right. Sometimes it has to yield to equality and disestablishment if anti-discrimination norms are to be protected. Thank you.

CHAIRMAN CASTRO: Thank you. Mr. Helfand.

III. PANEL II

MICHAEL HELFAND, ASSOCIATE PROFESSOR,
PEPPERDINE UNIVERSITY SCHOOL OF LAW

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

In my written statement to the Commission, I focused on the extent to which religious institutions should be afforded the constitutional right to direct their own internal affairs free from government interference. In my comments today I'd like to address three questions.
First, why is it that we value religious institutions as part of our constitutional order? Second, what constitutional protection should be afforded religious institutions because of this value? And then, third, what limitations should we place on these constitutional protections? Let me begin with the value of religious institutions.

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

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

More narrowly, many people conclude that they can only accomplish their religious goals by joining with others who share their own core faith commitments. This is precisely why the Supreme Court originally understood the value of religious institutions as based upon the "implied consent" of
their membership. Because individuals voluntarily join religious institutions to pursue religious objectives, the institution is granted by the implied consent of the membership the authority to make rules and develop doctrine that promotes those goals. In turn, individuals can utilize religious institutions as a resource to develop their own vision of what it means to live a good life. But religious institutions can provide this infrastructure only so long as they can speak on matters of religious faith and doctrine free from government intervention.

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

This autonomy stems from the implied consent of a religious institution's membership which authorizes the institution to make rules and develop doctrine that promotes shared religious objectives. And religious institutions must, therefore, be protected from governmental attempts to hijack their internal decision making process.
Now, the logic underlying the constitutional value of religious institutions provides a blueprint for determining the scope of constitutional protections afforded them. To see how, consider the Department of Health and Human Services' promulgation of the so-called Contraception Mandate, which protects the reproductive rights of women by requiring covered employers to include contraception methods in employees' insurance policies. However, in enacting this policy, the Department of Health and Human Services has provided limited exemptions to religious organizations who believe complying with the mandate will require them to violate their religious consciences. Accordingly, this debate pits two competing and important values against each other: enhancing reproductive rights and protecting religious conscience.

Approaching this dilemma from the vantage point of implied consent immediately focuses our attention on the following question; did the employees in question implicitly grant their employer authority to make rules aimed at achieving religious objectives? Thus, for an employer to receive an exemption as a religious employer would require that the employees were cognizant of the employer's religious objectives.
and, therefore, impliedly consented to the authority of the employer to make rules to achieve those goals.

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

By contrast, institutions that do not make their religious objectives clear to others cannot lay claim to constitutional protections predicated on the implied consent of their members. The key to an implied consent analysis is that it focuses on the factual context of each employer. What such analysis eschews is the inflexible criteria adopted by the HHS to determine what employers receive exemptions as religious employers. Most notably, an implied consent approach wholly rejects the categorical claim that for-profit organizations cannot be exempted from the contraception mandate on the assumption that such organizations do not exercise religion. Instead, using implied consent as our guide we should inquire whether a particular employer, whether a non-profit or for-
profit, openly and obviously pursues religious objectives in a manner clear to its employees.

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

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

Individuals ask religious institutions to make rules and develop doctrine that help the membership achieve lofty religious objectives, but individuals do not ask religious institutions to make decisions premised on fraud or collusion.
The Supreme Court, however, has expressed unwillingness to impose these side constraints on religious institutions, worrying that doing so would require courts to investigate internal religious matters in violation of the Establishment Clause. But it may be high time to revisit that conclusion.

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

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

In sum, religious institutions must be afforded constitutional protection to decide matters
of faith and doctrine because they provide the infrastructure for individuals to pursue religious objectives in concert with others. For this reason, individuals are deemed to impliedly consent to the authority of religious institutions to make internal decisions that achieve these religious goals.

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

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

III. PANEL II

ALAN BROWNSTEIN, PROFESSOR,
UNIVERSITY OF CALIFORNIA AT DAVIS LAW SCHOOL

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

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

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

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

Also, religion and sexual orientation have a merged identity and conduct dimension to them. It makes no sense to tell devout Catholics that they are protected as to their religious identity but are prohibited from practicing Catholicism. It is similarly senseless to protect the identity of gays and lesbians while prohibiting their right to sexual intimacy. Neither gays, nor lesbians, nor devoutly religious individuals can reasonably be required to separate their conduct from their identity. Religion
is no more an easily-discarded so-called life style
than is an orientation toward sexual intimacy.

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

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

Similarly, protecting the liberty interest
of both religious adherents and same-sex marital
couples requires the mutual recognition of the right
to be wrong in the other group's eyes. Personal
autonomy rights are meaningless if they can only be
exercised in approved ways. There is no gold standard
that defines the scope of fundamental rights by only
protecting what the majority deems to be the best
religions or the best kinds of sexual intimacy.

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

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

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

Another model analogizes accommodations
for religious objectors to same-sex marriage to
conscience clauses for health care providers who
refuse to perform abortions. I reject this analogy, as
well. Narrow and limited accommodations focused on a specific set of health care procedures have little relevance to religious objections to ongoing relationships that may endure for decades.

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

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

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

This model won't give us hard and fast answers to every accommodation question, but it does suggest an approach to guide the evaluation of
proposed accommodations. For example, the model would protect non-profit religious institutions far more than it would protect commercial businesses. Title VII's exemption of non-profit religious organizations from the statute's prohibition against religious discrimination in hiring would apply to discrimination in the hiring of gays and lesbians, and arguably to the denial of spousal benefits to the non-employed spouse of the same-sex couple.

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

And, again, this model provides a framework for beginning a discussion about reconciling religious liberty and the right of same-sex couples to marry. It isn't a final answer to all of the issues that arise in this area, but in this very heated and
disputed area of life and law, having a place to begin
the discussion is no small matter. Thank you.

CHAIRMAN CASTRO: Mr. Whelan.

III. PANEL II

EDWARD WHELAN, PRESIDENT,

ETHICS AND PUBLIC POLICY CENTER

MR. WHELAN: Thank you, Chairman.

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

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

In implementing President Obama's
signature health care legislation, the Department of
Health and Human Services announced last year that it
will require many employer-provided health insurance
plans to include in the preventive services that they
cover all FDA-approved forms of contraception, including those contraceptives that sometimes operate as abortifacients.

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

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

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

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

Even more troubling than the Obama Administration's violations of RFRA is the fact that its conduct was willful and deliberate. Before it finalized the HHS mandate, the Administration received
thousands and thousands of comments explaining the impact the mandate would have on employers who have religious objections. Without conducting any review of the legality of the mandate under RFRA, the Administration bulldozed ahead. At the very least it did so despite the mandate's impact on objectors, but there's ample reason to believe that the Obama Administration found it desirable to trample the consciences of many Americans, for as I outlined in my written testimony, the HHS mandate is part of a broader pattern of the Obama Administration's hostility to the religious liberty of traditional religious believers.

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

The American tradition of broad religious liberty has operated to minimize the instances in
which Americans have understood their religious identities and duties to be in conflict with their identities and duties as citizens. By instead dragooning objecting employers to be their vehicle for increasing access to contraceptives and abortifacients, the Obama Administration is putting many Americans to a grave test of conscience, and it is doing so gratuitously for an end that could be easily accomplished through other means.

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

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

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

Now, as a broader guide to picking through how to reconcile non-discrimination principles and civil liberties, I offer some general considerations
in my written testimony. I'll outline them briefly in
the remaining time.

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

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

Third, other bases of discrimination commonly prohibited under federal law are
qualitatively different from race. We regard sex-
segregated restrooms very differently from race-
segregated restrooms, for example.
I'm out of time now, so I'll leave the rest to discuss with you in the questions session, but I do want to emphasize there's an urgent need to rethink when and how non-discrimination norms ought to apply, and to provide robust protections for civil liberties. Thank you.

QUESTIONS FROM COMMISSIONERS

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

(NO response.)

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

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

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

MR. WHELAN: Well, Mr. Chairman, in the name of diversity there seems to be camouflage for
imposing all sorts of requirements on people. They require that they act the same, that institutions be the same. You were here for the discussion earlier of Christian Legal Society v. Martinez. This shouldn't be an unusual concept to you.

The point is --

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

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

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

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

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

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

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

Again, on the HHS mandate the question has to be why can't this goal of increasing contraceptive access be done through other means? Why select the means that is most restrictive of the religious
liberty of objecting employers? And, of course, we see what this paves the way for. This paves the way for requiring people to take part in abortion; otherwise, they will not get their -- you laugh. You know, this is part of the agenda. To take part in abortion or they won't be licensed as medical doctors. I'm not sure what you think is funny about that.

(Simultaneous speech.)

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

MR. WHELAN: I can't imagine on what basis you think that's the case. Professor Brownstein, I believe in his comments, clearly indicated that he
anticipates some lawsuits. Perhaps we differ on the scope of those, but I spell out in detail in my written testimony exactly how it can be expected. And no one contends that the fact that you are acting for religious reasons is under existing law some sort of blanket protection for whatever you do. No one contends that. Indeed, you'll hear from the witnesses on the other side exactly the opposite. They probably take a very narrow reading not just of the Free Exercise Clause, but of the Religious Freedom Restoration Act.

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

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

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

COMMISSIONER KIRSANOW: I just want to
thank all the panelists for their comments, very
thoughtful, very illuminating. And I appreciate all of
you talked about the tension between non-
discrimination law --

CHAIRMAN CASTRO: Your microphone is not
working, Commissioner.

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

Blacks in this country didn't originally
gain equality from the state. The state was oppressing
Blacks, or implementing, or expediting, or encouraging the exploitation of Blacks. It was religious groups and movements that germinated the whole conception of Black equality from the Abolitionist Movement, to the Civil Rights movement. Martin Luther King was informed by religion, obviously. We wouldn't have the kind of non-discrimination laws we have today but for religion.

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

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

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

COMMISSIONER YAKI: I totally lost you, Commissioner.
COMMISSIONER KIRSANOW: Mr. Yaki, can you hear me?

COMMISSIONER YAKI: Two questions.

COMMISSIONER KIRSANOW: Yes.

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

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

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

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

(Off microphone comments.)

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

And, number two, with respect to the HHS mandate, whether or not it burdens the free exercise,
if the state can compel a business or an individual to provide insurance that provides a service that is profoundly antithetical to the strongly-held beliefs of that individual, what can't the state compel the individual to do? Anyone.

(Off microphone comment.)

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

And I think what we have -- in the Amos case, going back to we say kind of as a matter of common sense and Title VII that we don't say oh, religious employer, you can't discriminate on the basis of religion. No, we say you can discriminate on
the basis of religion to hire employees of your own
religion. But in the Amos case what Justice Brennan
pointed out is that, of course we accommodate religion
because of the Free Exercise Clause, and it doesn't
always violate establishment to do so. But if the
government were to help religious employers at the
expense of secular employers, that would somehow skew
the economic marketplace. It would go too far in terms
of protecting -- trying to protect religious freedom
because when people are in the business world, or in
the employment world, there's some need for everybody
to follow the same laws; otherwise, you set up this
very unequal situation between secular employers and
religious employers. And that has impact on the
economic situation, and it goes back to what I said.

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

MR. DEGIROLAMI: So, Commissioner, I thought I would address the underlying comment and then the first question.

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

What is at issue in the HHS mandate fight is not the conscience of one individual against the conscience of an institution, because RFRA applies against the government. It does not apply as against individual private institutions. So, the fight is about whether the religious rights of the institution are to yield to a government policy. The fight does not have -- the legal fight under RFRA does not have -- to do with the conscience rights of individuals employed by those institutions because those individuals are perfectly free to use their money, money supplied by their employer, to purchase contraception or whatever other legal products they wish. So, that's why I don't take the HHS mandate.
fight, interesting, and provocative, and as much agitation as it provokes, to really be about what this panel is considering. That's one.

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

COMMISSIONER KIRSANOW: Well, you know, I would agree with you that the HHS mandate issue is not what we're talking about here in substance. I mean, if we're going to be accurate about it, but that's what the Administration says it's doing; that is, protecting non-discrimination or that is engaging in making sure that individuals aren't being
discriminated against. So, from the standpoint of their argument, it's the subject of our panel here today.

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

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

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

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

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

(Off microphone comment.)

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

CHAIRMAN CASTRO: Commissioner, let our witness speak. I know it's passionate, but let's try –

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

The history of religion is that it is often on both sides of an issue, and it is. And I raise that historical fact with respect to the HHS mandate because we do have a conflict between discrimination and anti-discrimination principles, and between religious believers on both sides of the issue.
The women who are employees of the organizations that are arguing they shouldn't have to provide contraception, this is a gender issue, as has been made very, very clear. They are being subjected to gender discrimination at the same time they're being subjected to religious discrimination.

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

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

The vast majority of Americans do not agree with the proposition that you don't use contraception. The vast majority of women certainly don't agree with that, so we do have a very clear conflict between the potential for gender and religious discrimination, and the demand of for-profit organizations who have never been able to claim rights
under the Free Exercise Clause before.

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

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

MR. WHELAN: If I may?

CHAIRMAN CASTRO: Go ahead, Mr. Whelan.

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

CHAIRMAN CASTRO: You have to speak up.

MR. WHELAN: May I have the mic?

MS. HAMILTON: Oh, sure.

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

COMMISSIONER ACHTENBERG: Mr. Chairman, is someone speaking?

CHAIRMAN CASTRO: Mr. Whelan is about to
respond, but I just want to make sure --

COMMISSIONER ACHTENBERG: I can't hear anything.

CHAIRMAN CASTRO: Okay.

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

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

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

Now, I emphasize to say that one has religious liberty rights isn't to answer the question of whether those rights prevail in a particular
conflict, but as others have pointed out, and I think it's clear that under the Religious Freedom Restoration Act the rights extend to individuals and how they carry out their work, and to businesses whether they're non-profits or for-profits.

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

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

And I think that goes to Commissioner Kirsanow's second question, what can't the state
compel? Well, if the mandate is upheld in its application to objecting employers that paves the way for virtually anything, I think.

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

(Off microphone comments.)

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

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

Now, this seems a little bit strange to me. It happens to be that California's non-
discrimination act only protects not-for-profits, and
yet there seems to be really good reason to protect
this school. It's wholly owned by a church. It's very
up front about exactly what it's trying to do. It's
trying to provide a religious education to its
students. It's so up front that it says it in a piece
of paper to each of its employees, and if you believe
the California Anti-Discrimination Act or you believe
those that say we should have a per se rule against
protecting for-profits, you would say this school
shouldn't be protected. To me, that seems wrong, and
that we need some sort of other method to determine
what the institutions are that are exercising
religion.
I tried to articulate a particular view of how we do that. I think to some degree we should be eyeballing to what extent the institution looks religious. I mean, there are some of the plaintiffs in the contraception mandate litigation that now have prayer for their employees once a week, or if you're a Christian book seller, there are other indications that even if you're in the for-profit space that you're really religious. You can have people sign statements of faith, and these are ways to clearly convey what it is you're trying to do. And in those circumstances, you begin to wonder whether or not the First Amendment protections should have a little more bite.

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

CHAIRMAN CASTRO: Professor Brownstein, and then we'll go to Commissioner Gaziano, and anyone on the phone.
MR. BROWNSTEIN: I just have a couple of comments. One, the profit/non-profit distinction is based in part on Justice Brennan's opinion in Amos. And I think he's using it as a shorthand to try to come up with some kind of predictable rule that would suggest when the balance favors religious liberty and when it favors the rights and interests of discriminated-against individuals. It's arbitrary, it's imprecise.

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

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

In my view, religious liberty is a public political good. And when the government acts in a way to protect a public political good, it incurs some
obligation and duty to mitigate the costs of that good so they don't fall unreasonably on some narrow class of individuals. It's like the Takings Clause. If we build a road through your house, we all have to pay for that property. You don't bear that loss alone. So, if we're going to accommodate religious liberty in a way that imposes severe burdens on certain individuals, the employees of religious institutions, for example, they don't get the benefits that other people receive, then we should be thinking about how do we provide those benefits? How do we mitigate the cost of protecting religious liberty?

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

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

CHAIRMAN CASTRO: Thank you. Commissioner Gaziano.
COMMISSIONER GAZIANO: Well, I'm going to begin with a comment on the last, and then get to my other real question.

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

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

MR. DeGIROLAMI: It's DeGirolami.

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

I was particularly taken with your discussion of why conflict is helpful, essential, positive, and desirable. I would add that it's particularly all of those things with regard to teenagers and young adults who are forming their -- learning to resolve -- work through conflicts. So, I'm going to -- although, I find all these other issues interesting, I'm going to focus Ahab-like on
the white whale we must kill that is CLS v. Martinez.

So, I'm going to offer you the following softball to try to hit out of the park.

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

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

Option two, the university comes up with a cramped and possibly intentionally narrow, and possibly not even intentionally narrow, all-comers policy that allows the Ultimate Frisbee team to meet, but places special burdens on any student organization that is organized to promote the learning of a particular ideological, political, religious belief.
Or three, that those institutions adopt policies like the University of Texas, the University of Miami, I believe it was, that allow robust oases of freedom and free association within the student or the university or high school environment. And, of course, when you're done, if anyone else wants to try to take a swipe at my softball.

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

And nobody on the panel that preceded ours came out with any kind of resistance to that view, and I'm going to express a little resistance. I think that part of what a university is and is about isn't just free speech. Anybody can speak whenever they want. A
university is a place of learning, of a particular kind of learning, and everything that the university does from the kinds of courses that it offers, to the professors that it chooses, to the students that it selects, to the groups that it decides whether to sponsor, whether to permit on the grounds of the campus or not is about its own expression, expressing its own views about what's worthwhile and what's not worthwhile. And that's a valuable function of universities.

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

CHAIRMAN CASTRO: We have time for one more question. Do any of the Commissioners on the phone want to ask a question?
(No response.)

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

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

CHAIRMAN CASTRO: Sure.

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

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

MR. DeGIROLAMI: No, so you agree with me, I agree with you, Commissioner. I think we're in agreement that with respect to the Martínez decision specifically, I think we're in agreement based on what
I heard from the earlier comments on the earlier panel that when it comes to issues of equal access, there are particular concerns that we might have, especially at a university where a university is a particular kind of institution. It's an institution that's about in some ways the unfettered expression of ideas. So, as you say, and I think rightly, with certain limitations, and those -- figuring out just what those limitations ought to be is important. I think it's to the benefit -- it would be to the benefit as a general matter for institutions to allow and encourage as much variety of expression as possible. I agree with that.

CHAIRMAN CASTRO: Mr. Brownstein.

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

Over the last 15 or 20 years, the court has developed a standard of review for evaluating restrictions on public access to public property that has been extremely lenient and protective of state decisions. The only time you get rigorous review is
when the government engages in viewpoint discrimination. Both content discrimination and content neutral regulations are upheld on a very lenient reasonableness standard of review. That was the standard that was applied in CLS v. Martinez.

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

Because of that, religious groups haven't really joined the fight in challenging this forum analysis which allows the government to restrict access to public property under a very lenient standard of review unless the government acts in a viewpoint discriminatory way. The positive benefit of CLS v. Martinez is I think that's going to change. I think you're going to see a lot of religious groups filing amicus briefs in court and saying this was a mistake. It's not only a mistake for us, it's a mistake for all student groups, for all other individuals who need access to public property to communicate their views. We need more robust
protection for people who want to speak on public
property. And we don't have it now under the court's
forum analysis, not just for religious groups, for
everybody.

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

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

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

CHAIRMAN CASTRO: Okay. I'm thanking our
staff. There we go, I've got a microphone now. I
wanted to thank Jennifer Hepler and Carissa Mulder of
our staff for helping put this briefing together.
Also, I just want to make sure that folks who are
listening and those here know that the briefing report
record will remain open for the next 30 days. If
panelists or members of the public would like to
submit materials, they can mail them to the U.S.
Commission on Civil Rights, Office of the General Counsel, 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C. 20425 or via email to publiccomments@usccr.gov.

IV. ADJOURN MEETING

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

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