

REPORT

from the Capital

BJC supports workplace religious accommodation in Supreme Court brief

BJC, diverse coalition say Muslim woman's hijab can be worn at work

WASHINGTON — Employers have a duty to reasonably accommodate the religion of employees and avoid discrimination against prospective employees, according to a brief filed at the U.S. Supreme Court and signed by the Baptist Joint Committee.

The BJC joined the General Conference of Seventh-day Adventists and 13 other groups, including the National Association of Evangelicals, American Civil Liberties Union, Christian Legal Society and American Islamic Congress, in a friend-of-the-court brief defending a person's right to wear a religiously-mandated headscarf while at work.

The case, which will be argued in February, involves Samantha Elauf, who was denied a retail job because of her headscarf (called a "hijab"). Elauf believes her Muslim faith requires her to wear a hijab, and she has worn one since she was 13 years old.

The brief makes clear that this case is not just about an individual's desire to wear religious garb. "Protection of religiously motivated conduct in the employment setting is highly important to believers of virtually all stripes, and to the religious bodies to which they belong," according to the brief.

"In many employment contexts, an individual's religious needs can be met more easily than an employer first assumes," said BJC General Counsel K. Hollyn Hollman. "This case is about making sure prospective employees are not categorically disqualified from work opportunities based upon religion."

In her job interview for the Abercrombie Kids store, run by Abercrombie & Fitch, Elauf wore her usual hijab. The interviewer neither inquired about it nor suggested that wearing one would be prohibited and rated Elauf as someone who should be hired. But, a higher-ranking employee said the head-



scarf would violate Abercrombie's "Look Policy" that prohibits "caps" – a term that is not defined. Elauf was not offered a job, and the Equal Employment Opportunity Commission sued Abercrombie on Elauf's behalf.

Title VII of the Civil Rights Act prohibits employers from discriminating against job applicants or employees based on religion. The brief signed by the BJC notes that federal law banning religious discrimination in employment requires employers to "reasonably accommodate" all aspects of an employee's religious practice if it can do so without causing an "undue hardship" on the business.

Conflicts between work and religion are common, but they can often be resolved through conversation between employer and employee. The brief says the issue at the heart of this case is "how to ensure that employers as well as employees have adequate incentives to initiate and participate in such problem-solving dialogue."

The brief says Title VII's prohibition on religious discrimination is necessary to protect religious belief and conduct. "[O]utward displays of one's faith are usually evident during job interviews, and compromise can often be found" when there is incentive to do so.

The Supreme Court will hear oral arguments in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.* on Feb. 25. The brief is available at BJCOnline.org/Abercrombie.

—BJC Staff Reports

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7 ways religious affiliation has (and hasn't) changed in the new Congress

Republicans took full control of Capitol Hill when the 114th Congress was sworn in Jan. 6, but even with a political shift, there will be little change in the overall religious makeup of Congress, according to a new analysis from the Pew Research Center.

Here are seven ways the religious makeup of Congress has (and has not) changed:

1) More than nine-in-10 members of the House and Senate (92 percent) are Christian; about 57 percent are Protestant while 31 percent are Catholic. The new Congress will include at least seven members who are ordained ministers.

2) Protestants and Catholics continue to be overrepresented as members of Congress. As of 2013, 49 percent of American adults are Protestant and 22 percent are Catholic, according to a new Pew Research Center analysis.

3) The biggest difference between Congress and other Americans is the number of people who say they are religiously unaffiliated. Just 0.2 percent of Congress say they are religiously unaffiliated, compared with 20 percent of the general public. In fact, the only member of Congress who publicly identifies herself as religiously unaffiliated is sophomore Rep. Kyrsten Sinema, D-Ariz.

4) Jews continue to have greater representation in Congress (5 percent) than most Americans (2 percent), but there are five fewer Jewish members in the new Congress than there were in 2005-2006. Of the 301 GOP House and Senate members sworn in this month, only one — Rep. Lee Zeldin of

New York's 1st District — is a Jew. The 113th Congress also had just one Jewish Republican, former House Majority Leader Eric Cantor, R-Va., who lost his primary race last year.

5) Many of the nation's smaller religious groups are more proportionally reflective of the American population. Buddhists, Muslims and Hindus combined represent about 2 percent of Americans and 1 percent of Congress.

6) Two-thirds of the Republicans in the new Congress (67 percent) are Protestant, about a quarter are Catholic (27 percent) and 5 percent are Mormon.

7) Of the 234 Democrats in the 114th Congress, 44 percent are Protestant, 35 percent are Catholic, 12 percent are Jewish, 1 percent are Mormon, two are Buddhist, two are Muslim, one is Hindu and one does not identify with a particular religion.

—Sarah Pulliam Bailey, Religion News Service



Supreme Court weighs speech case involving church signs

WASHINGTON — The U.S. Supreme Court on Jan. 12 considered a tiny church's curbside sign in a case that could raise the bar on government regulation of speech and make it easier for houses of worship to advertise their services.

The Alliance Defending Freedom, the nonprofit advocacy group that represents Pastor Clyde Reed and his Good News Community Church, bills the case, *Reed v. Town of Gilbert*, as a religious rights case. But their attorney mostly argued it on free speech grounds.

"The town code discriminates on its face by treating certain signs differently based solely on what they said," attorney David A. Cortman told the justices. "The treatment we're seeking is merely equal treatment under the First Amendment."

The town of Gilbert, Arizona, outside Phoenix, allows political signs to be much larger and permits them to stay up much longer, Cortman said.

Chief Justice John Roberts noted that Cortman's case did not rely on the religious nature of the plaintiff.

"Your argument does not turn on the fact that it's a church's sign, does it?" asked Roberts. "Your argument would be the same if this is a temporary sign about where the soccer game was going to be?"

"That's right," Cortman answered.

With no more than 30 congregants, Good News Community Church has no permanent home. Each week, members planted so-called temporary directional signs — the kind in-

tended to guide people to a concert or school picnic — to help people find the church, since its location often changed.

The congregation brought suit against the town seven years ago after receiving multiple citations for failing to take its signs down within an hour, as town rules require. But the church said the same rules didn't apply to political signs or homebuilders who erected signs to entice people to look at their new houses.

"This is a speech case, not a religious rights case," said Ira Lupu, a law professor emeritus at George Washington University, who has followed the case. "The issues would be the same if the plaintiff were the operator of a weekly meeting by a secular nonprofit group to discuss books or social problems."

Philip W. Savrin, who argued for the town, said municipalities have a right to control litter and clutter on their roadsides, and he said the rules on temporary directional signs apply equally to church, events, barbecues and soccer games.

But several justices had a hard time with that argument, questioning whether a church's temporary sign was just about direction, or if it could relay messages that might put it into a different category of sign: a sign expressing an ideology or belief, for example, that would receive more favorable treatment under municipal sign laws.

The justices are expected to issue their decision by June.

—Lauren Markoe, Religion News Service and BJC Staff Reports

REFLECTIONS

New Year's resolution: Defend religious liberty?

A New Year's resolution to defend religious liberty in 2015? Yes, but let's be real.

Eric Metaxas challenges us in a recent *BreakPoint* commentary to resolve to care more about religious liberty in the upcoming year. So far, so good. The BJC does that every year. But the threats to religious liberty he mentions are mostly misleading, one-sided and cast a blind eye to the effect of the requested accommodation on people who do not share those religious views.

When defending religious liberty, we always should be vigilant both in the United States and certainly around the world where persecution of Christians and others is rampant and heartbreaking. But, when we do, we must not exaggerate the threats, be selective in the ones we identify and neglect the rights and well-being of fellow citizens of other religious traditions and those who are not religious at all.

First, take a few of the examples that Metaxas cites in his commentary:

- He laments that “Christian bakers and florists” are being told to “support” same-sex marriages or face ruinous fines. Let's be clear: All Christians do not oppose same-sex marriage. For those who do, their church or clergy are never going to be required to perform one, period. But those on the periphery of the marital enterprise occupy a more tenuous position. Running a commercial, profit-making business usually does not suggest one supports or even agrees with the religion or lifestyle of customers or how they use their bought-and-paid-for goods and services. Stated in legalese, people who bake a cake or sell flowers may not be deemed to have their religious liberty “substantially burdened” when those inanimate items, in the stream of commerce, wind up in a same-sex marriage ceremony. These business owners perhaps have a better argument when they are asked, in effect, to be more closely involved in the wedding ceremony — say, photographers, wedding planners and musicians. The outcome of such cases remains to be determined.

- Metaxas decries the plight of the owners of Hobby Lobby being told by the Obama administration they must provide employees with a drug they believe induces abortions. He also says that religious ministries like the Catholic Little Sisters of the Poor and religiously affiliated institutions of higher learning, such as Wheaton College, should also be relieved of obligations to participate in the Affordable Care Act.

But, news flash: Hobby Lobby won! And it was no small victory. Indeed, two decades ago no one thought that large, for-profit corporations would be deemed

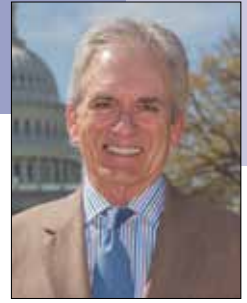
capable of exercising religion and permitted to assert the benefits of the 1993 Religious Freedom Restoration Act. Moreover, even religiously affiliated nonprofits and colleges have been extended an accommodation to opt out of the program and, so far, received favorable attention by the courts.

- Metaxas properly points to the incident of the mayor of Houston subpoenaing the sermons of pastors. But, a stern letter to the mayor signed by many religious leaders and religious liberty advocates, including myself, quickly engendered a retraction of the subpoena.

Second, all of the issues Metaxas mentions — as well as many others who lament the decline of religious liberty in America — deal only with the free exercise of religion. Yes, free exercise is critically important. It is guaranteed in the First Amendment. But the First Amendment also bans the establishment of religion. We must enforce both of these clauses for religious freedom to be fully protected. As soon as government starts to advance religion or take sides in religious disputes favoring one religion over another, someone's religious liberty is denied. Examples of the diminution of the Establishment Clause include: government-sponsored religious exercises in the form of legislative prayer, usually Christian prayers, that the Court recently upheld in *Town of Greece v. Galloway*; taxpayer funding of religious ministries and religious education; and government-sponsored religious symbols, such as crosses and crèches depicting the birth of Jesus. We must not cleave the First Amendment into an either/or proposition. Both no establishment and free exercise!

Third, certainly religious exercise should be accommodated robustly when only the rights of the religious claimant are involved. But where the well-being and rights of other citizens are thereby compromised or prejudiced — arguably, for example, the workers at Hobby Lobby who desire contraception coverage — then government (and the courts in particular) must balance the rights in conflict and render a decision that seeks a win-win result as far as is possible. Religious liberty must be accommodated, but with a watchful eye to ensure that others are not harmed. The old saw is true: the right to swing my fist ends where your nose begins.

So, yes, resolve to defend religious liberty in 2015. But when we do, we must be careful to protect everyone's religious liberty, be as concerned about government trying to help religion as hurt it, and make sure Citizen B does not have to suffer because of Citizen A's religious protection in our vibrant, religiously plural constitutional democracy.



J. Brent Walker
Executive Director

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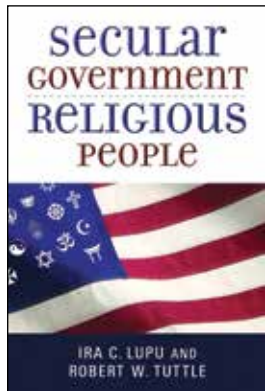
**WE HAVE DONE MIGHTY THINGS
THANKS TO YOU.**





K. Hollyn Hollman
General Counsel

Understanding religious liberty through the lens of limited government



During my tenure at the BJC, I have had the privilege to learn from and collaborate with some of the country's brightest church-state scholars. Among those I admire and who have provided valuable assistance to the BJC in our efforts to promote religious liberty are Ira C. "Chip" Lupu and Robert W. Tuttle of The George Washington University Law School.

In addition to inspiring passion for religious liberty among their countless students, Lupu and Tuttle have published on a wide variety of church-state issues and influenced a number of significant policy debates. They are among the very best church-state specialists when it comes to explaining complex ideas with clarity.

In *Secular Government, Religious People*, they present a theoretical framework for understanding religious liberty that unifies much of their earlier work and provides a valuable new resource for lawyers, teachers and students of religious liberty. Their book is a clearly written overview of the religious liberty landscape through a lens that offers a convincing approach for understanding the Founders' vision and protecting religious liberty today. While it is not an introductory work for a novice, it is accessible to attorneys and non-attorneys interested in the subject matter. One helpful contribution to the scholarship is its respectful challenge to some widely held ideas about certain aspects of religious liberty law, such as the government's role in providing religious exemptions. They provide explanations of cases and competing views among the justices to support their thesis and to illustrate other threads in religious liberty law, while respectfully pointing out differences of opinions within the scholarly community.

The title aptly describes the fundamental aspect of religious liberty at the heart of the book. The U.S. Constitution provides for a secular government that protects religious liberty by separating government and religion. Indeed, a good way to understand the separation of church and state is simply to recognize the character of civil government and its limited jurisdiction.

As historic Baptists are well aware, the Founders' experience involved establishments of religion that declared and enforced orthodox beliefs, imposed taxes to support churches and compelled attendance at worship. Lupu and Tuttle explain that nonestablishment marks a radical break with religion, withdrawing religion from the jurisdiction of civil gov-

ernment. "Under the nonestablishment principle, the government does not promote religious worship, oversee religious indoctrination, or exercise religious authority. Instead that responsibility belongs solely to the people and their voluntary religious communities." Those who seek a robust role for religion in society, however, should not be discouraged by this arrangement since "the government [is not signaling] hostility to religion ... [but] recognition of its own boundary ... fully consistent with respect for activities that lie outside that boundary."

In chapters addressing church autonomy, government funding of religion, religious expression in the public schools and other topics, the authors explore and explain how this constitutional limit on government creates space within which religious individuals and institutions can flourish. They assert that the core of religious liberty — freedom of and from worship, individually and in assembly with others; the right to disseminate a religious message and seek to persuade others; the right of religious groups to be treated equally with others under the law — is primarily a product of the space created by nonestablishment norms. Lupu and Tuttle put it this way: "The Free Exercise Clause is about the free character of the people's faith. The Establishment Clause is about the limited character of the government created by those people."

The authors demonstrate that this nonestablishment principle runs throughout our constitutional history and case law. They assert it is a far better framework for protecting religious liberty than one that relies on competing claims between those who want to be free from government-supported religion and those who want government to reflect the religious views of the majority. Instead of being based on a theory of rights, they explain nonestablishment as a structural barrier that keeps government out of religion. While a secular government can respond to its religious people, it has no jurisdiction to advance or align itself with religion.

Though the BJC may differ with the authors in some matters, particularly with regard to whether and to what extent government may or must provide religious exemptions, we embrace the value of the central idea that "religion constitutes a jurisdictional limit on civil government." We applaud this contribution to church-state scholarship and appreciate its potential to create continued respect for and protection of religious liberty.

BJC names staff counsel

Jennifer Hawks, a native of Germantown, Tennessee, is the staff counsel for the Baptist Joint Committee.

A graduate of Mississippi College and the University of Mississippi School of Law, Hawks earned a Master of Divinity degree from George W. Truett Theological Seminary at Baylor University.

Before coming to the BJC, Hawks was the director of advocacy and outreach services for the Family Abuse Center in Waco, Texas, where she conducted a legal clinic and led educational programs. She previously worked for two judges in the state of Mississippi and served as a staff attorney for the Mississippi Department of Human Services.

Hawks also served in both paid and volunteer ministry positions in Tennessee, Mississippi and Texas. She has published papers in the journal of the Texas Baptist Historical Society and *Baptist History & Heritage Journal*. She is a member of the state of Texas and state of Mississippi bars.



Hawks

BJC welcomes spring semester intern

Shelby Randle of Houston, Texas, is one of the spring semester interns at the Baptist Joint Committee, working alongside the staff in Washington, D.C. A junior at Baylor University in Waco, Texas, she is pursuing a Bachelor of Arts degree in international studies. The daughter of J. Grady and Donna Randle, she is a member of Tallwood Baptist Church in Houston. Randle plans to attend law school after graduation.



Randle

Hollman to co-teach Georgetown Law church-state seminar

Holly Hollman has been named adjunct professor of law at Georgetown University Law Center in Washington, D.C., in addition to her roles as general counsel and associate executive director of the BJC.

Hollman is co-teaching the Church-State Law Seminar this spring, which focuses on the major shifts in church-state law over the past decades and key issues the Supreme Court will face in the next several terms.

The seminar is led by Hollman and Mark Chopko, partner and chair of the Nonprofit and Religious Organizations Practice Group at Stradley, Ronon. For more than 20 years, Chopko served as the general counsel for the U.S. Conference of Catholic Bishops.

Hollman succeeds Rabbi David Saperstein as the co-instructor of the seminar, who was recently confirmed to be the U.S. Ambassador-at-Large for International Religious Freedom.

Saperstein sworn in as international religious freedom ambassador

WASHINGTON — Rabbi David Saperstein is the State Department's ambassador-at-large for international religious freedom. The Senate confirmed his nomination with a 62-35 vote on Dec. 12, and he assumed his duties Jan. 6. He is the first non-Christian to hold the job.



Saperstein

Saperstein, who led the Reform Jewish movement's Washington office for 40 years, focusing on social justice and religious freedom issues, was nominated by President Barack Obama in July.

"Religious freedom faces daunting and alarming challenges worldwide," Saperstein said at his confirmation hearing in September. "If confirmed, I will do everything within my abilities and influence to engage every sector of the State Department and the rest of the U.S. government to integrate religious freedom into our nation's statecraft and foreign policies."

Saperstein will head the State Department's Office of International Religious Freedom, where he will be tasked with monitoring religious freedom abuses around the world.

Saperstein was the first chair of the U.S. Commission on International Religious Freedom, which was created as a watchdog group in the same act of Congress that created the ambassador-at-large position. In 2009, he was appointed by Obama to the first White House Council on Faith-Based and Neighborhood Partnerships.

BJC Executive Director Brent Walker applauded Saperstein's nomination to the post in July, noting that he brings both theological training and legal expertise to the position, as well as "a passion for religious liberty both in the United States and around the world."

"The United States' commitment to the cause of international religious liberty will be in good hands under Rabbi Saperstein's tutelage," Walker said, noting his own collaborations with Saperstein over the years. "The Religious Action Center of Reform Judaism and the Baptist Joint Committee have worked in partnership for decades in the fight for religious freedom. Rabbi Saperstein and I served as co-chairs of the Coalition to Preserve Religious Liberty, and, in 2006, Rabbi Saperstein was the inaugural lecturer for the Baptist Joint Committee's annual Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State."

Saperstein, 67, is the fourth person to hold the job, which was created by Congress in 1998. He succeeds the Rev. Suzan Johnson Cook — the first African-American and woman to serve in the position — who resigned in October 2013, saying that she needed to earn more to support her family.

—Religion News Service and BJC Staff Reports



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REPORT

from the Capital

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Introducing the James Dunn Legacy Circle

The Baptist Joint Committee for Religious Liberty is pleased to announce the formation of the James Dunn Legacy Circle, honoring those benefactors whose estate gifts ensure the BJC's mission and ministry have a future.

The BJC chose to name our planned giving program after James Dunn in order to recognize his important role in our history. Dunn, who served as the BJC's executive director from 1981-1999, established the BJC's endowment in the 1990s and currently serves as its president. Dunn and his wife, Marilyn, have an estate plan that bequests a generous gift in their will. There are two easy ways to make a planned gift to the BJC and become a member of the James Dunn Legacy Circle:



religious liberty even after you are gone. All bequests over \$5,000 go into the BJC's endowment, generating income in perpetuity.

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- Lessen the burden of estate taxes on your family.
- Know your gift will continue to ensure

Members of the James Dunn Legacy Circle will receive recognition in *Report from the Capital* and on the BJC's website, invitations to special events, and a lapel pin.

If you have included the BJC in your estate plans or would like more information about naming us as a beneficiary of a will or retirement plan, please visit BJCOnline.org/planned-giving and fill out the simple form. You may also contact Development Director Taryn Deaton at 202-544-4226 or by sending an email to LegacyCircle@BJCOnline.org.