REMARKS OUTLINE

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THE MISSION OF THE AMERICAN HINDU COALITION (AHC)

- The American Hindu Coalition (AHC) is a nonprofit and nonpartisan organization representing Hindus, Buddhists, Jains, Sikhs, and related minority faiths in advocacy before Federal and State governments.
- In its many advocacy initiatives, the organization strives to build coalitions with diverse communities inclusive of race, religion, national origin, and sexual orientation.
- Religious freedom, including the right to live, speak, and act according to one's religious beliefs, peacefully and publicly, is an essential advocacy platform.
- From the perspective of the organization, faith pluralism is firmly rooted in America today, as is the right to not practice any faith at all. Still, two priority concerns of the membership remain:
    - First, the importance of faith in the public sphere, the values it instills, our connectivity to fellow citizens of other faith denominations, and the government infringement of the protections of the protections guaranteed by the First Amendment Free Exercise Clause.
    - Second, discriminatory laws and policies that disadvantage the minority faith groups represented by the American Hindu Coalition membership, which are in violation of the Fourteenth Amendment Equal Protection Clause.

WHAT IS DIFFERENT AND UNIQUE ABOUT OUR CONSTITUTION?

- No other Constitution secures the rights of individual citizens and limits the power of the national government to the enumerated text of the Constitution. The power to choose our path in life, thus permanently shifted from one of government determination to one of our own choosing; generations of immigrants of every race and national origin have prospered because of it.
- Now, if you will allow me to paraphrase the **Declaration of Independence**.
    - We know that Colonial America fostered faith pluralism despite the dominance of the Church of England. But the importance of this document severing ties with a Monarchist State is, that for the first time in human history, citizenship is based on our natural rights, entitled to at birth, and endowed by our Creator.
    - Our natural rights, among which are life, liberty, and property, are distinct from any other person's rights and are unalienable; these rights cannot be interfered with either by Government or another person; implied is that any such interference will result in legal harm and thus a matter for petition to the government to redress our grievances.

- **Act for Establishing Religious Freedom**: A historical understanding of the First Amendment can be best gleaned from its immediate predecessor, enacted by the Virginia State Assembly on January 16, 1786, specifically protecting all minority religions against Anglican rule.
    - The Act de-established the Church of England in Virginia and guaranteed the freedom of minority religions, including Christians of all denominations, "Jews, Muslims, and Hindus."
- **First Amendment**: Long before the Fourteenth Amendment, the First Amendment not only guaranteed the equality of minority religions against infringement by a dominant national religion, it also inextricably linked the freedoms of religion, speech, press, and the right to assembly with a right to petition the government for redress of grievances.
    - The **Establishment Clause** is based on Colonial Americans' fear of the Monarchy's coercive religious orthodoxy and its financial support for a national religion through force of law and threat of penalty. To wit, the Establishment Clause does not forbid government from advancing religion, so long as it does not play favoritism between religions.
    - The **Free Exercise Clause** prohibits laws that interfere with religious practice, regardless of whether the faith observance is in private or in the public square. Contrary to French laws mandating **laïcité**, which require an absolute separation of Church and State, invocations and faith observances in public ceremonies have been conspicuous and pervasive since our nation's founding.
- **Palko V. Connecticut (1937):**
    - The Supreme Court ruled against applying to the states the federal double jeopardy provisions of the Fifth Amendment. But a majority opinion written by Justice Cardozo also laid the foundation for the "Preferred Position" of the First and Fourteenth Amendments in a hierarchy of constitutional rights and, therefore, entitled to greater protection.
    - Justice Cardozo argued that these rights are not only the "very essence of a scheme of ordered liberty," but that they compose "the matrix, the indispensable condition, of nearly every other form of freedom." Thus, the strict scrutiny standard applies to any infringement of these rights, ignoring the normal presumption of constitutionality.

BALANCING ACT BETWEEN RELIGION AND THOSE WHO DO NOT PRACTICE A FAITH

- **Lemon v. Kurtzman (1971)**:
    - The Supreme Court decision, known as the "Lemon Test," advanced a novel legal theory that is not in the text of the Constitution but noted in a private letter written by Thomas Jefferson: there exists a "wall of separation between Church and State."
    - Referencing this phrase from our third President, the Court incorrectly applied the Establishment Clause to prohibit the use of public funds in any sectarian or religious schools.
    - The Lemon Test further violates First Amendment Free Exercise Rights, even as the nation no longer faces the threat of government favoritism of one religion over another.

- **Lee v. Weisman (1992)**:
    - The Supreme Court's majority opinion, applying the Lemon Test, held that a Rabbi's invocation during a Rhode Island public school's graduation ceremony violated the Establishment Clause arguing that the prayer was coercive to those in the audience who do not practice a faith.
    - In a memorable dissent by Justice Scalia, he argued "the potential harm of "coercion" that may be felt by the nonbelievers is outweighed by the benefit of having people of many different faiths be able to come together in the "unifying mechanism" of public prayer."
- **Trinity Church Lutheran v. Comer (2017):** In a reversal of the Lemon Test, the Supreme Court ruled that the state of Missouri cannot prohibit religious schools from its state-funded playground resurfacing program. The majority opinion argued that laws restricting public funding for sectarian and religious schools and a strictly scrutinized standard applied to violations of the Free Exercise Clause.
- **The Lemon Test:** The Lemon Test, while diminished in importance, has yet to be overruled by the Supreme Court. Government assistance to sectarian or religious schools, such as purchasing textbooks and supplies, is prohibited. Public schools are also barred from hosting a variety of faith-conscious activities, such as offering silent prayer in classrooms or organizing faith-based after-school clubs, which had been commonly practiced in our nation's history. Tax-payer funded vouchers for sectarian or religious schools remain controversial.

GOVERNMENT INTERFERENCE IN THE FREE EXERCISE OF RELIGION

- **Sherberg v. Verner (1963)**: the Supreme Court ruled that a state law denying unemployment benefits to individuals who do not work on Saturdays violated the Free Exercise right of Seventh Day Adventists who cannot work on Saturdays, the Sabbath day for Adventists.
- **Goldberg v. Weinberger (1986):** The Supreme Court held that the military's ban on wearing any hat (other than the official one) while on duty did not violate the Free Exercise Right of an Orthodox Jewish soldier's religious practice of wearing a yarmulke.
- **Employment Division of Oregon v. Smith (1990):**
    - The Supreme Court ruled that the State of Oregon law denying state benefits for violation of the state's drug laws did not interfere with the Free Exercise of right of Native Americans who use peyote (a controlled narcotic) in their religious practice.
    - The Majority Opinion by Justice Scalia concluded that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and applicable.
    - Justice O'Connor, writing in concurrence, argued that prosecuting anti-drug laws, if neutrally applied, is a legitimate governmental interest under a Strict Scrutiny judicial review applied to all Free Exercise Rights cases.
- **Religious Freedom Restoration Act of 1993** (RFRA) - Prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion *even if the burden results from a rule of general applicability*, except that the government may burden a person's exercise of religion only if it

demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

- **Fulton v. City of Philadelphia (2021):**
  - The U.S. Supreme Court ruled that the City of Philadelphia violated the Free Exercise right of the Catholic Social Service (CSS). CSS, a religious foster care contractor, was required to certify same-sex couples foster parents in compliance with the City's anti-discrimination laws, which is against the organization's religious beliefs.
  - The Court held that:
    - The City's anti-discrimination laws failed the "general applicability" standard of Smith (1990) because the City's contract provision left room for case-by-case exceptions by City officials.
    - City Officials' refusal to contract with a religious agency failed to survive the strict scrutiny standard applied to all Free Exercise Right cases.
  - The Court's ruling based on a narrow contract provision limited the ability of faith-based employers to exempt themselves from anti-discrimination laws based upon claims of religious liberty.
  - In his concurrence, Justice Alito states that many laws can be interpreted as failing the "general applicability" test, as such analysis is complex and fact specific.

RELIGIOUS ACCOMODATIONS AND RELIGION AS A PROTECTED CLASS IN THE WORKPLACE

- **1964 Civil Rights Act:** Statutorily guarantees the protections of the Fourteenth Amendment's Equal Protection Clause and prohibits discrimination on the basis of race, color, religion, national origin, or sex, designated as "protected characteristics."
  - **Title VI:** Prohibits discrimination based on protected characteristics for federally funded programs, activities, or benefits.
  - **Title VII:** Prohibits discrimination based on protected characteristics in employment practices or opportunities by private employers with fifteen or more employees.
- **US Military's Policy on Religious Accommodations (2014):** The U.S. military changed its policy on religious accommodations for its officers and enlisted personnel, effective January 22, 2014. Upon request of permission, the US military now allows yarmulke or Sikh turban or Muslim beard when these are religious beliefs and practices.
- **Burwell v. Hobby Lobby Stores, Inc. (2014):** The Supreme Court extended the Free Exercise right to closely held corporations and the statutory protections of the 1993 Religious Freedom Restoration Act (RFRA).
- The Court held that:
  - A closely held corporation may refuse to cover contraceptives in its employee health plans, required by the 2010 Affordable Care Act ("ACA"), if doing so violated the corporation owner's Free Exercise right.
  - The ACA's contraceptive mandate were a substantial burdened on the free exercise rights of corporations, as the law neither demonstrated a compelling government interest nor allowed a less restrictive means of doing so.

        - The Free Exercise Right of for-profits should be in parity with nonprofits such as Churches that do have First Amendment protections.
- **Groff v. DeJoy (2023):** The Supreme Court held that the 1964 Civil Rights Act, Title VII required employers to accommodate the religious faith of employees, except when it would impose an "undue hardship in the conduct of the employer's business."
    - The Court rejected its earlier ruling in *Transworld Airlines, Inc. v. Hardison* (1977) which allowed religious accommodation by employ only if doing so needed a "de minimus" effort by the employer.
    - The Court's rationale was that "de minimus" effort, or too small to be meaningful, downplayed the employer's responsibilities under Title VII and failed the strict scrutiny standard of review required of violations of Free Exercise rights.
    - Writing for the majority, Justice Alito stated the following:
        - "Undue hardship" requires far more than willingness to incur "de minimus" costs. Instead, the requested religious accommodation must pose "substantial costs" to the employer or is "something hard to bear," or very burdensome.
        - Title VII made it illegal for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privilege [of] employment, because of such individual's … religion."
        - The Hardison (1977) decision, relying on the "now abrogated" Lemon Test, incorrectly interpreted a Title VII adverse employment action as violation of the Establishment Clause and an entanglement of government in religion because Hardison's request for accommodation to attend Church service on Saturdays, which observed Sabbath on Saturdays.
        - Noting the Amicus Briefs filed by a wide array of minority religions, including the American Hindu Coalition, the "de minimus" standard "has blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market."
- **Students for Fair Admission (SFFA) v. President of Harvard College and SFFA v. University of North Carolina (UNC) (2023):** The Supreme Court held that race-conscious college admission violated the Fourteenth Amendment's Equal Protection rights and also Title VI of the1964 Civil Rights Act in its discriminatory practices against Asian American applicants. The application of Title VI is due to University of North Carolina (UNC) being a public university and Harvard accepting federal funding for its many activities. The Court ruling reversed its earlier decision in *Grutter v. Bollinger* (2003) which allowed race as a factor in college admission.
    - "Asian Americans," who are of diverse race and ethnicity, are majority Hindu, Buddhist, Sikh, or Jain. American Hindu Coalition is a coalition partner of the Students for Fair Admission with two of its leadership serving on the SFFA Board.
    - The Court held:
        - In order for race-based classification to survive constitutional challenge, it must pass strict scrutiny review, which weighs a compelling government interest and that narrowly tailored rules to achieve that interest.
        - The interests asserted by Harvard and UNC — such as "training future leaders in the public and private sectors" and "producing new knowledge

stemming from diverse outlooks" — were not "sufficiently coherent for purposes of strict scrutiny." Additionally, the means that Harvard and UNC chose were not narrowly tailored to the interests they pursued.
        - Justice Thomas, in his concurrence, wrote: "it is not even theoretically possible to 'help' a certain racial group without causing harm to members of other racial groups," defended the idea of a "colorblind Constitution" and stated that "all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities."
    - While the decision in this case does not extend to private employers covered by Title VII of the Civil Rights Act, the Court's application of the Equal Protection Clause of the Fourteenth Amendment is noteworthy. Future cases that arrive on the Supreme Court's docket, particularly involving corporate DEI and ESG initiatives, must pass muster under the strict scrutiny standard. Such cases will apply strict scrutiny review of race-neutrality of the employment program or practices at issue.
- **Courtney Rogers v. Compass Group USA, Inc. (2023)** [case pending before the United States District Court, Southern District of California]: Courtney Rogers, a devout Christian human resources employee was fired for refusing to administer the employer's DEI policies citing has "sincerely held religious beliefs, based on deeply held religious, moral, and ethical convictions, that people should not be discriminated against because of their race." The Compass personnel decisions, including mentoring and training programs, were based on race and gender preferences. The plaintiff, Courtney Rogers, was for bringing the discriminatory practice to her supervisor's attention, which is specifically prohibited by Title VII of the 1964 Civil Rights Act.