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Prohibiting the Free Exercise Thereof: The Affordable Care Act and Other Threats to
Institutional Religious Freedom

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Thank you very much for the introduction. I am honored to deliver the 2013 Kuyper Lecture. I'll express my thanks now, far in advance, to my respondents—although perhaps after they speak I won't be quite so happy about their service of critique! And I thank you in the audience for coming. The title of my talk mentions the health care law but I hope that as we go along in my talk and in the responses you will see that we are dealing, in truth, with a very broad dimension of the walk of Christian faithfulness to which we are all called.

I will begin with a short passage from Abraham Kuyper and an item from the *New York Times*. It may be a surprise, but these two very different sources point us in the same direction.

Abraham Kuyper, of course, is well-known as a theologian, political leader, creator of organizations, and a theorist of the structure of society. But he was also a prolific writer of meditations on Scripture. In his devotion on Matthew 22, where Jesus states the two great commandments, Kuyper wrote this: “Love for God with all your soul, all your heart, and all your mind, may yet stop at the feelings, or be confined to the ideal, but when you must love God also *with all your strength*, then it claims your actual life, your whole personal existence, all the output of your person and life.”¹

Kuyper goes on to explain that strength refers to all of your talents and gifts, all of “the powers and qualifications” you have, all of your resources and influence. And it is through all of these means of *making a material difference in the world* that God asks us to show our love for him.

Now to the *New York Times* piece, a column by David Brooks entitled, “The Orthodox Surge.”² Brooks is writing about the contemporary flourishing in New York City of the Orthodox and Hasidic Jewish communities, despite—or rather because of—their attachment to ancient biblical teachings. The column talks about Pomegranate, the “luxury kosher grocery store” in Brooklyn. “It looks like a really nice Whole Foods [store],” Brooks says, with long aisles loaded with a profusion of enticing products. And “pervasive” throughout the store, he reports, are “the specialty products designed around this or that aspect of Jewish law.” “[D]airy-free cheese puffs.” “[P]recut disposable tablecloths so that you don't have to use scissors on the Sabbath.” Sponges that don't retain water so that on the Sabbath you don't have to do the work of squeezing out the water. And so on.

¹ Abraham Kuyper, *To Be Near Unto God*, trans. John Hendrik de Vries (Presbyterian and Reformed Publishing, paperback, 1979), “With All Thy Strength,” pp. 250-55.

² March 7, 2013.

Isn't that striking! In the midst of New York City is this flourishing community of people whose faith means so much to them that it has resulted in a religiously distinctive grocery store and religiously distinctive shopping. Even when shopping for cheese puffs, tablecloths, and sponges, these people insist that their faith, their religious convictions, must be honored. Here is a determined effort to show love of God and His ways not just through feelings, thinking, in the heart, but with all of their strength—because loving God with all of our strength, as Kuyper said, “claims your actual life, your whole personal existence, all the output of your person and life.”

Kuyper's meditation and the Pomegranate store remind us that religion—that is, a life of obedience to God—is not only a matter of worship, of prayer, of private devotions. It is not even just a matter of personal religious exercise, but it extends to and should shape every aspect of our lives—including the ways we serve our neighbors, not only in acts of benevolence but also in the operation of a supermarket.

You will recall that Kuyper elsewhere referred to this same idea in his memorable phrase: “[T]here is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over *all*, does not cry: ‘Mine’!”³

Now, I want to talk with you this evening about strong and growing pressures in our society to press religious faith out of public life and into private corners, pressures to confine religion to worship and remove it from guiding the ways people of faith serve their neighbors through faith-based service organizations and through companies of conviction. That is, the growing contemporary pressure to confine Christ's sovereignty to just a few square inches—the square inches of houses of worship, your family life, your devotions.

But we should start where we are: a nation full of an astonishing range of organizations created to put into practice one or another religious or moral or philosophical conviction about life—organizations designed to serve others but in particular ways, guided by particular visions and passions. That's what we see in the story of the Pomegranate luxury kosher grocery store. It is what we see around us this evening: the visible example of Calvin College as an institution of higher education that boldly and openly is Christ-centered as it educates, researches, and speaks to the world. And Calvin and Pomegranate are just two of thousands and thousands of such organizations—distinctive schools, hospitals, companies, emergency shelters, and so many more.

This is a very Kuyperian structure for a society, a Kuyperian social architecture in which private organizations are free to flourish while at the same time reflecting and embodying particular conceptions of what is good. It is possible because religious freedom has not been confined to freedom of worship or to only an individual freedom of religious exercise, but instead has also extended to organizations that serve the public.

What arrangement of society, what kind of rights, does it take for Christians and people of other faiths to be able to live consistently with their deepest convictions in society—in civil

³ James D. Bratt, ed., *Abraham Kuyper: A Centennial Reader* (Wm. B. Eerdmans and Paternoster Press, 1998), p. 488.

society and in the business world?⁴ Well, for that, we need both a negative and a positive freedom.

We need, sometimes, the negative freedom to opt out of activities that are otherwise required of everyone, a freedom of conscience that excuses us from participating in some activity that we are convinced is seriously wrong, even if others in our society are sure it is very right and important.

Yet to live faithfully we need more than a negative freedom *not to participate*. We also need a *positive freedom*: the freedom to turn our best convictions into the practical service of others in particular ways we believe will honor God and help the flourishing of our neighbors. And if those convictions are not the convictions widely shared in our society, than our positive freedom to be different has to be a *freedom to create distinctive new organizations*, organizations different than those created by others.

How can an organization be a vehicle to put into practice a wholehearted commitment to some particular vision of the good, some specific understanding of how best to love God and neighbor? We can name three ways a commitment to a particular conception of the good should come to expression. The organization should be able to manifest a *faith-shaped identity* that can be seen in its mission statement, the symbols it uses, the people who serve on its board of directors. Even more important, the organization should be able to have a distinctive inner-life that might feature *faith-shaped standards* for employment, a particular schedule of employee benefits, certain staff practices, or perhaps spiritual formation retreats. And it is vital that the organization can have a *faith-influenced set of services*: it will offer spiritual counseling as well as psychological counseling; it will not perform abortions but will refer for adoption; it will refuse to make certain products or it will be careful to adopt some specific production methods.

We can see those three dimensions of distinctiveness in organizations all around us, most clearly in parachurch organizations like Calvin College, Catholic Charities, Bethany Christian Services, gospel rescue missions, and many others, but also in the Pomegranate kosher grocery store and in other companies that are inspired and shaped by faith.

But note carefully: organizations can be distinctive in these ways—they can be vehicles to put our convictions about God into practice in service of our neighbors—only if the government honors and protects their freedom to be different. Federal, state, municipal, and county rules affect organizations at every turn: the imperatives of employment law; the requirements of licensing for the organization and for its professional staff; rules about how clients must be treated and who must be counted as a client; restrictions attached to government funding; standards that must be met to obtain tax-exempt status; and much more.

⁴ See my “Beyond the Right of Conscience to Freedom to Live Faithfully [Keynote Address],” *Regent University Law Review* 24, no. 2 (2011-2012), pp. 351-368.

For the organization to be able to exemplify—to testify to and to put into practice—its vision, even though that vision differs from what much of society thinks is best, the government must not compel it to follow the society’s vision instead of its own. There must be a robust institutional freedom of conscience, freedom for the organization to depart from what is otherwise required of other organizations at work in the same area of service.

And we can thankfully say that, to a great extent, government policy in our country has respected this institutional freedom to be different—that is why our society, our communities, are populated by such a diverse and flourishing set of nonprofit organizations and businesses.

And now we will turn from this very positive past and present for institutional religious freedom to the deeply troubling trends that are undermining our diverse civil society, seeking to confine religion to worship, to individual religious exercise, to private life—fencing religion off from private organizations that serve the public.

To my mind, this is the most significant religious freedom challenge in our country in our time—to struggle against these restrictive trends in order to preserve the freedom of faith-based organizations to serve the public in a countercultural way, to follow what they believe God calls them to do even when those practices differ from the popular consensus.

So consider with me the big controversy that has flared up over a single, comparatively small, feature of the health care reform law adopted in 2010, the Affordable Care Act. That one hugely controversial provision is the HHS contraceptives mandate. The mandate is the requirement that employee health plans must include all federally approved contraceptive drugs, devices, services, and education. This mandate has sparked sermons, marches, letters to the editor, and phone calls to Congress and the federal government. It has prompted hundreds of thousands of comments on proposed regulations and also a number of congressional bills. And it has provoked an unprecedented number of lawsuits against the federal government—currently 54 cases with over 160 plaintiffs:⁵ businesses and nonprofit organizations, Catholic groups and Protestants. Religious hospitals and universities. A publisher of Bibles. Businesses that say they try to conduct all of their operations consistent with their religious convictions.

And yet that outpouring of protest is a real irony, because the federal government is aware that Catholics and others have moral objections to artificial birth control or to emergency contraceptives that may act as abortifacients. And so the government wrote into the federal regulations an exemption from the mandate for all “religious employers.” Thanks to that exemption, “religious employers” who have moral concerns about the contraceptives are free to exclude them from their health insurance plans, without any penalty—even though the government believes it is vitally important that women gain easier access to contraceptives. (I might add: this need for an exemption should have persuaded the federal government to devise a method other than employer health plans to provide that expanded access to contraceptives.)

⁵ To follow the cases, check the HHS Mandate Information Central page on the Becket Fund for Religious Liberty website, <http://www.becketfund.org/hhsinformationcentral>.

So, if there is this exemption, why all the protest from religious organizations? The problem is how narrow the definition of a religious employer is, so that most religious organizations don't fit into the definition and thus are not exempt. And the related, and even bigger, problem is what the definition says about the federal government's views about religious freedom outside the walls of houses of worship.

Here's the federal government's definition of a religious organization that is exempt from the contraceptives mandate.⁶ The definition has four characteristics and an organization must match all four of them. (1) The organization must fit a particular tax code definition that applies only to churches and their closely controlled affiliates (2) The organization must hire mainly people of its own religion. (3) The organization must mainly serve people of its own religion. And (4) The main purpose of the organization must be to "inculcate religious values." (More recently, the government has proposed eliminating all but the first criterion, but it does not intend to expand the definition or the exemption beyond churches.)

So what kind of organization fits this definition of a "religious employer"? Well, not any religious organization that goes beyond worship and Bible teaching, beyond "inculcating religious values." And not any organization that serves the public and not only its own members. Only churches and the integrated auxiliaries of churches fit the definition. Excluded from the definition are all faith-based service organizations. No matter what their convictions are about the morality of the contraceptives and emergency contraceptives, Catholic hospitals and health clinics, Gospel rescue missions, k-12 Christian schools, evangelical colleges, Teen Challenge residential alcohol and drug treatment programs, and every other kind of faith-based service organization is not eligible for the exemption.

In short, organizations that serve the community and that are not focused on prayer and worship are for those very reasons not regarded as religious enough to fit into the government's category of religious employer. Isn't that astonishing? As the spokeswoman for the US Conference of Catholic Bishops exclaimed, "Jesus himself couldn't pass muster," because of who and how he helped. And you will recall that Jesus held out the Good Samaritan as our example of caring for our neighbors as we should. Yet the Good Samaritan did not only pray for the injured man but arranged for material help. And the very point of the story is that the Good Samaritan cared for the injured man even though the man was of a different religion.

And yet, by the federal definition, if an organization does what Jesus says by giving a cup of cold water to anyone who needs it, including those of other or no religion, then it has put itself outside the category of religious employer. In fact, to fit into the exempt category, an organization has to violate the rules of the federal government's own faith-based initiative—which requires groups that receive federal dollars to serve everyone in need, without turning away those of other religions. A religious organization that serves the public thereby becomes ineligible for the exemption from the mandate, no matter how deep its concerns about promoting contraceptives and abortifacients.

⁶ Stanley Carlson-Thies, "Which Religious Organizations Count as Religious? The Religious Employer Exemption of the Health Insurance Law's Contraceptives Mandate," *Engage*, 13, no. 2 (July 2012), pp. 58-64.

You may know that the federal government has been trying to undo its mistake in creating such a narrow definition and exemption. It has proposed what it calls an “accommodation” for faith-based hospitals, schools, and charities. Here is the proposed accommodation. An objecting religious organization can buy for its employees health insurance that does not include some or all of the contraceptives. And then the insurance company must “automatically” give each of those same employees a separate health plan that covers exactly the contraceptives that the employer has insisted must not be in its health plan! The same accommodation applies to a religious college that wants its student health plan to reflect the institution’s views about biblical sexual standards: Yes, the school can arrange for student health plans that do not cover contraceptives—and then the insurance company must write individual health plans for each of those same students that provides free access to exactly those same contraceptives. The only relief is if the college self-insures its student health plan, but that may not be possible for smaller schools. A group of Catholic colleges said that, because of this, they were facing a “federally-coerced dilemma.”⁷ Either they provide no student health insurance at all, or else they must violate their convictions about contraceptives.

In other words, the accommodation mechanism provides no real solution. The employees and students of faith-based organizations with deep moral objections to some or all of the contraceptives will be offered exactly those contraceptives, and they will get the contraceptives coverage precisely because they are employees or students of those objecting organizations. This is a far cry from the exemption that churches rightly have been given. Churches can just exclude the morally objectionable items. Faith-based service organizations—because they serve the public and are not inwardly oriented, because they help people materially and not only through religious teaching or worship—only get an accommodation that implicates them in the contraceptives coverage that they believe is morally wrong.

And what about faith-based businesses? No matter how morally intentional they try to be, and no matter what the convictions of the owners or the mission of the company—businesses get neither an exemption nor an accommodation. Instead, the federal government has said in its regulations and in court that by definition an organization that makes money cannot be a religious organization and cannot have any right to religious freedom.⁸ If the organization is profit-making, then it is engaged in an endeavor that has nothing to do with religion or morality. Agreeing with the government, one court has said that a business cannot be a religious employer because, after all, it does not engage in worship or prayer! Consider that: all the square inches of life where business takes place are excluded from Christ’s sovereignty. No religious freedom for any business. The government has said no religious freedom to the Hercules heating and air conditioning company, whose Catholic owners object to the contraceptives. And to the Hobby Lobby chain of stores, which stay closed on Sunday, donate millions of dollars annually to Christian ministries, employ chaplains, and do not stock certain items, for moral

⁷ Comment on the NPRM of the Cardinal Newman Society and 22 Catholic colleges and higher ed. programs, April 5, 2013.

⁸ See Mark L. Rienzi, “God and the Profits: Is There Religious Liberty for Money-Makers,” *George Mason Law Review*, 21, no. 1 (2013). Available on the Social Science Research Network.

reasons. And to Tyndale House, the major publisher of Bibles and other Christian materials. They are all just businesses. Morality and religion have no place.

In a letter organized by the Institutional Religious Freedom Alliance and sent to Katherine Sebelius, Secretary of the Dept. of Health and Human Services, a diverse group of 150 leaders and supporters of faith-based services protested the narrow “religious employer” exemption in these words: “[B]oth worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that ‘pure religion’ is ‘to look after orphans and widows in their distress’ (James 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes true religion and authentic ministry.”

And that protest should be extended to people of faith who are active in business. Businesses, too, can be dedicated to operate to the glory of God, choosing to offer certain benefits to their employees and not others, adopting particular policies in order to safeguard the environment, deciding to pay higher wages or use better-quality materials, investing some of the profits into the surrounding community. And yet, in the federal government’s three-part scheme, it is only churches that have a real claim to religious freedom, the right to avoid a government requirement if they believe the requirement violates a moral or religious principle. The many square inches occupied by businesses and religious charities are not supposed to be subject to Christ.

Is all of this just too much concern about the contraceptives mandate? After all it is only the official Catholic Church and not even most individual Catholics who object to artificial birth control, and the pro-life community isn’t of one mind that emergency contraceptives work by causing abortions. More important, the federal government claims that its narrow definition of religious employer only applies to the contraceptives mandate. Should we just relax about this?

I am sure we should *not* relax. First of all, religious freedom must protect convictions we ourselves do not hold and even convictions we are convinced are mistaken. And second, and most important: the federal assurances that the narrow definition will not be used beyond the contraceptives mandate cannot be trusted. The federal promises are just words, whereas the narrow exemption, the inadequate accommodation, and the total disregard for the moral concerns of companies are actual policies of the federal government. Beyond that, consider that the narrow definition migrated to the federal regulations from the law books of several states. But now it does not need to migrate to our national government; now it sits in federal law, serving as a precedent, ready to be used again whenever other federal departments, other federal officials, other federal policies are deciding what to do about organizations of faith that hold deep convictions that differ from the views and practices the government desires to impose via its laws and regulations.

Let me briefly remind you of another area of policy where we can see this same impulse to take away the freedom of faith-based organizations to differ from the majority’s conviction of what is right. I mean adoption and foster care services.

Have you been following the news? In 2006, Boston Catholic Charities decided it could no longer provide adoption services.⁹ In 2010, Catholic foster care and adoption services in Washington DC were closed. In 2011, in Illinois, the foster care contracts that for decades had been awarded to Catholic Charities agencies and to the Evangelical Child and Family Agency in Wheaton were taken away. In other states, for now, officials are glad to work with Catholic and Protestant adoption and foster care services, but one day activists may insist that the government force shut the doors of those agencies.

What is happening? Over the past decade and more, in order to eliminate wrongful discrimination against gay people and to expand the homes available for kids needing a temporary or permanent new family, the fifty states generally have opened up adoption and foster care to gay persons and couples.

But some states have gone a radical step further than this. They have adopted rules forbidding every private adoption and foster care agencies from “discriminating” on the basis of sexual orientation or marital status when they select families and place children. There is even a trend to make it illegal to consider religion when selecting families. All of this may sound like simple justice and equal treatment. The actual consequences, though, are not positive.

Agencies that wish to serve gay persons, indeed, that specialize in doing so, already exist, and government agencies themselves, of course, are required to serve equally everyone who turns to them for help. But the broad antidiscrimination policies cause great difficulty for faith-based agencies that have what they consider to be a biblically wise view of what helps children to flourish. Whether or not they oppose gay adoptions, they do *favor* placing children for adoption or foster care with a Christian couple, a married mother and father. And they have the trust of churches and can encourage believers to undertake the challenging tasks of foster parenting or adoption. And they may be trusted like no other agency by a young mother who had decided she must give up her child for adoption.

By making it illegal for private agencies to have a policy of conforming to what they consider to be biblical sexual, marriage, and family standards in their operations, states have driven out of operation Catholic and evangelical agencies, thus decreasing diversity and making it more difficult, not easier, for families and children to be matched up. When diverse agencies are permitted, then there is broad service, good for gay persons and everyone else; if, instead, in the name of equal treatment a sweeping anti-discrimination standard is applied to all of the private agencies, actual diversity and the number of agencies is reduced.

Here is a an astonishing fact of our age of over-zealous anti-discrimination action, of state-imposed uniformity. For 2,000 years, one of the marks of faithfulness of the church of Jesus Christ has been its care for orphans, along with other vulnerable people. And yet in our day of supposed tolerance and diversity, a growing number of Christian adoption and foster-care

⁹ Daniel Avila, “Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals.” *Children’s Legal Rights Journal*, 27, no. 3, pp. 1-47.

agencies, in our country and elsewhere in the world, are having to close their doors, to abandon this historic Christian way of serving the needy and honoring God's commands.

And there is every reason to expect more such conflicts between the wisdom of society that the government wants to enforce and the countercultural views of various communities of faith. Some members of Congress want to pass a federal law that would apply to all the states the broad anti-discrimination requirements that have already driven Catholic and Protestant agencies out of adoption and foster care services in several states. Earlier we considered the federal government's insistence with the HHS contraceptives mandate that real religion is what happens in churches so that the religious exercise of faith-based service organizations and of companies of conviction need not be fully honored. And recall that the narrow definition of "religious employer" chosen for the contraceptives mandate now sits in federal law, ready to be used in other policies.

There are other reasons to be concerned that the restrictive trends will only grow. Just consider these few points. More and more people in places of influence misunderstand religion or oppose it. Our society is increasingly post-Christian in its understanding and moral values—an important change even if the past consensus was thin and hypocritical. We are becoming more religiously diverse—and that diversity encourages legislators to regard secularism as the only valid guide for public activities while shoving religious differences into private life. And governments—federal, state, and local—are extending uniform rules over more and more of private life and civil society.

So, just as our society is becoming more and more diverse with regard to religions and other systems of deep conviction, our governments are spreading forth more and more rules that require uniformity of practice. Just think of that: more and more rules that insist on uniform, non-religious, standards—this push for enforced uniformity can only create more clashes with faith-based organizations that seek to remain faithful to their religious identity and mission.

We need to go in the other direction, back in the Kuyper direction of true pluralism and diversity. As Christian citizens, working in the realm of public policy and regulations for organizations, we just must accept that our society is not a moral monoculture but rather includes multiple faiths and multiple moral codes. Respect for each other requires giving each other, and each others' organizations, a robust freedom to live by conviction. And that freedom should be respected by government. Just consider: whenever there are distinctive organizations, say a pro-life hospital or a Christian college, that means that there is in our society some distinctive vision of flourishing, some group of employees who want to serve in these organizations and not others, and all of those clients or students who desire to be served in this way and not others. Rather than treat all of those organizations, employees, clients, and students as if they shared the same vision of sin and good, harm and flourishing, the government should acknowledge and accept the differences.

The government must honor institutional religious freedom, and not just individual religious freedom or freedom of worship. It needs to have a policy of institutional pluralism rather than a policy of uniformity. It should acknowledge a general right for organizations to be

distinctive in moral vision and religious conviction and practice, rather than expect moral uniformity with only the occasional exemption.

Let me conclude. The *Washington Post* newspaper last week carried the story of a courageous Muslim woman in Baltimore, Maryland, Asma Hanif.¹⁰ Poor and without specialized training, she nevertheless has a heart to confront injustice and to care for victims, and she has opened a shelter for Muslim women who have suffered domestic violence. It is reputed to be the only such shelter in the United States. It is perfectly sensible, isn't it, that it is exclusively for Muslim women: it specifically accommodates their need to pray five times a day and their special diet. And it must be important to the victims who come to the shelter that Asma Hanif understands Islamic teaching about men and women and knows Muslim customs and expectations.

The *Washington Post* article notes that the shelter receives no government funding. No doubt it is not eligible for funding because of its so-called discriminatory policies. Its Muslim-only approach might even run afoul of public accommodation law, anti-discrimination rules, or federal or state housing rules. And yet here is a distinctive organization that has special value exactly because it is designed to help some people and not others, exactly because it is religiously compatible for some, though not for others. The government ought to protect its distinctive practices, not undermine them.

I would like to close with a prayer for government and a challenge to us, as Christian believers.

As the religious freedom challenges have grown in our time, I have been drawn to a statement of Paul's in his first letter to Timothy—I Timothy 2:1-4. You'll remember it:

“I urge, then, first of all, that petitions, prayers, intercession and thanksgiving be made for all people—for kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness. This is good, and pleases God our Savior, who wants all people to be saved and to come to a knowledge of the truth.”

Isn't that striking? What is it we should ask for when we pray for those in authority, when we pray for government? We are not told to pray for Christian dominance in society, but only for the freedom to live in a Christian manner ourselves. We are told to pray that we may be free to live “peaceful and quiet lives in all godliness and holiness.” That is, we should pray that even if our views are not the government's views, we may still live in accordance with our convictions, without being harassed because of that life of obedience. We should pray that the government protects our freedom to live as we are convinced God calls us to live, not only in our personal lives and in our worship, but also in our businesses and in our nonprofit service organizations.

¹⁰ Robert Samuels, “Asma Hanif, founder of Muslim women's shelter, finds herself in need of care,” April 19, 2013.

And we should, I think, challenge ourselves. Are we—not just in worship and devotions but in businesses and in schools and inner-city missions and health clinics—are we in fact conducting affairs “in all godliness and holiness”? We don’t need religious freedom at all if we have assimilated so much to our culture that we are no different than anyone else, our organizations little different than other organizations.

But if we do love God with all of our hearts, minds, souls, and also strength, then we will have distinctive convictions and practices about what is good and about how best to serve others. And then we will require a robust institutional as well as individual freedom to be different—exactly so that we can make our best uncommon contribution to the common good.

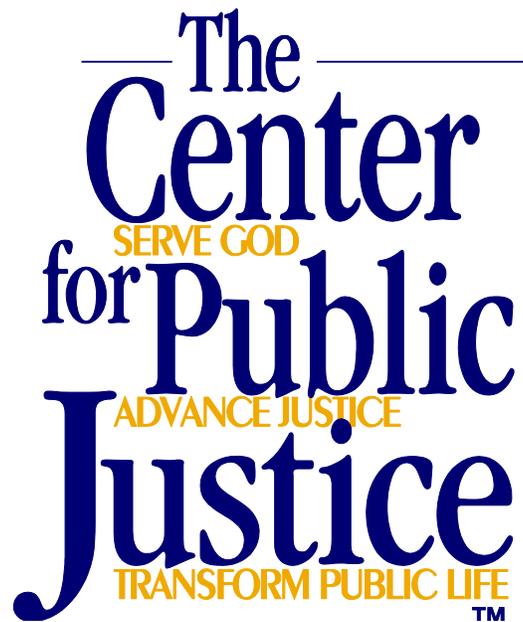
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