

# Promoting Religious Freedom in a Secular Age: Fundamental Principles, Practical Priorities, and Fairness for All (Wickman)



Elder Lance B. Wickman  
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## Introduction

1. This is an important conference. We need to meet together with the common purpose of preserving religious freedom and then discuss and debate both first principles and hard practical choices. We need to be better informed. We need to become more skilled in our ability to explain what religious freedom is and why it is so important. So, I applaud you for coming, and especially those who have organized this conference and nurtured it over the years, including my beloved colleague and friend Bill Atkin, Cole Durham, Brett Scharffs, Elizabeth Clark, and too many others to mention. Thank you for all you do to defend religious freedom.
2. My topic today is the importance of upholding the fundamental right of religious liberty through the clear establishment of religious priorities and then the practical, sometimes difficult compromises with our fellow citizens whose priorities may be different than ours.

## **Religious freedom is a fundamental right of paramount importance.**

3. Any discussion of this subject must begin with the truth that religious freedom is a fundamental human right—a right that is essential to mortality’s central purpose of exercising our divinely granted moral agency to make righteous choices leading to eternal life. Religious liberty is the cocoon in which that agency is nurtured and thrives. It provides meaning and purpose to our families and relationships. It provides hope and assurance that this mortal sojourn, so often fraught with pain and sorrow, is not the end but only a step toward a glorious hereafter. It defines who and what we are— reaching deep into our very souls, our very identities. That alone justifies the protection of religious liberty as a fundamental human right.
4. Respecting religious freedom as a fundamental right means that law and society should afford sufficient space so that people and institutions of faith can live out their deepest beliefs freely and openly. As Elder D. Todd Christofferson taught just a few days ago as he spoke on religious freedom:
5. A robust freedom is not merely what political philosophers have referred to as the ‘negative’ freedom to be left alone. Rather, it is a much richer ‘positive’ freedom—the freedom to live one’s religion or belief in a legal, political, and social environment that is tolerant, respectful, and accommodating of diverse beliefs.<sup>1</sup>
6. Of course, religious freedom is not absolute. Limitations are appropriate where necessary to protect life, property, health, and safety or to prevent infringements upon the fundamental rights of others. And, as I’ll discuss later, religious freedom cannot always prevail over the right of democratic institutions to establish the basic framework of society. But any limitations should be truly necessary and not an excuse for abridging religious freedom.

## **Current threats to religious freedom are very real and deeply troubling.**

7. It is easy for pundits to dismiss concerns about religious freedom as overblown. After all, no one has repealed the First Amendment. And hasn’t the Supreme Court been ruling in favor of religious liberty even in controversial cases? You’ve heard similar arguments.
8. But make no mistake. The current threats to religious freedom are very real and growing rapidly. Eugene Volokh, a law professor at UCLA, was quoted in the New York Times as saying, “If I were a conservative Christian (which I most certainly am not), I would be very reasonably fearful, not just as to tax exemptions but as to a wide range of other programs—fearful that within a generation or so, my religious beliefs would be treated the same way as racist religious beliefs are.”<sup>2</sup>
9. Although the vast majority of Americans are willing to let others believe and worship as they choose, the sphere for the free and open exercise of religion is shrinking as society grows more indifferent toward religion and as government enforces secular values in areas once considered private. A major flash point, of course, is the ongoing sexual revolution and the increasing use of nondiscrimination laws and other coercive means to force acceptance of secular views of marriage, family, sexuality, and gender that directly conflict with profoundly important religious beliefs and ways of life. And this is occurring not just in public and commercial settings, but also with respect to religious organizations and their affiliated nonprofit organizations like religious colleges.
10. For example, a bill introduced in California’s legislature sought to deny religious colleges so-

called “Cal Grants”—basically, state Pell Grants—for invoking their federal right under Title IX to a religious exemption, and then put them on a shaming list to further pressure them to abandon their religious standards. Vigorous lobbying by religious schools have managed to get the Cal Grant piece removed for the moment, but the rest of it remains. The ability of religious colleges with honor codes to participate on equal terms with secular colleges in federal research contracts will soon be challenged, and threats are arising to their accreditation. A school district in Lynn, Massachusetts, banned the students of a local religious college from teaching in its public schools, merely because the college opposed a new executive order from the White House favoring LGBT employees. Recent debates in Congress over religious liberty protections in the federal contracting sphere included arguments that would justify outright repeal of long-standing exemptions under Title VII and the Americans with Disabilities Act for faith-based hiring by religious organizations—exemptions that previously enjoyed nearly unquestioned support.

11. The big fight over the HHS contraceptive mandate could easily have been avoided with a modicum of sensitivity by government officials for the needs of religious colleges and groups like the Little Sisters of the Poor. In fact, the justices on the Supreme Court quickly came up with a practical solution that would protect the interests of all involved— one that federal officials could have adopted years ago but chose not to.
12. On other fronts, ethics and licensing bodies are already seeking to discipline professionals who espouse traditional sexual mores. It may soon be hard to be a faithful Church member who openly believes in the family proclamation and to be a psychologist, social worker, or even a lawyer. Openly holding such beliefs is already difficult socially within professional circles, but it may soon be difficult as a matter of ethics and licensing. I’m aware of a recent situation where a state occupational board opened a formal investigation into an LDS counselor for things he said as a member of his stake high council.
13. Then there are all the clashes that can arise in the context of expansive public accommodations laws, both for faith-based organizations and private owners.
14. And, as Professor Volokh suggested, it is now virtually certain that theories once used to deny tax-exempt status to racist organizations eventually will be invoked to challenge the tax-exempt status of churches that as a matter of doctrine reject same-sex marriage or have sexual worthiness standards. And I could go on.
15. At its broadest level, the biggest risk may not be legal but social. Powerful cultural forces seek to characterize those with traditional beliefs as bigots. The risk is that traditional believers and their religious institutions may eventually be relegated to pariah status—officially recognized as “equal citizens” while in practical reality marginalized and penalized for their faith.

## **The First Amendment protects core elements of the fundamental right to religious freedom but does not answer all religious freedom questions.**

16. Now, in saying all this, I don’t want to be alarmist. It’s not time to head for the hills with your food storage strapped to your back! The First Amendment remains a bulwark against outright oppression. It prevents the legal establishment of a national religion. It protects an absolute right to believe any religion your conscience dictates and to belong to any church that will have you. It strongly protects the right of individuals to worship “how, where, or what they may.”<sup>3</sup> It protects the right to express religious beliefs in word and writing and to pass your faith on to your children. It protects the right to form a church and to determine its doctrines

and establish its membership and leadership criteria without interferences from the government. The Constitution bans religious tests for public office, enshrining an ideal that influences public policy even in the private realm. There is unanimous support on the Supreme Court for the principle that, absent the most compelling reasons, government cannot target a religious practice no matter how unpopular it may be.

17. So, there is no question the First Amendment protects core elements of the fundamental right to religious freedom.
18. But the First Amendment's broad language leaves unclear how the fundamental right to religious freedom applies to numerous other areas of life. For example:
19. Does the First Amendment afford a church the right to build a much-needed meeting-house in a neighborhood despite restrictive zoning laws, even if it will increase traffic?
20. Does it afford a religious doctor the right not to perform a medical procedure that violates his conscience?
21. Does it afford religious schools and colleges the right to receive governmental assistance, contracts, and grants on equal terms with secular schools and colleges?
22. Does it afford religious business owners the right to hire only people of their own faith or to choose the health benefits they provide to their employees or to refuse some services despite nondiscrimination laws?
23. Does it afford parents the right to homeschool their children with little or no government oversight?
24. Does it guarantee the tax deductibility of contributions to churches and other religious organizations?
25. The truth is, we don't know the answers to these and numerous other questions about religious freedom. And if you asked James Madison, who basically wrote the First Amendment, he wouldn't know either. What he and the other Framers thought they were doing when they proposed the First Amendment to their new Constitution—which of course applied only to the federal government—was preventing a national church and more or less maintaining the existing state of religious affairs.
26. But I can imagine Madison saying something along the lines of what Justice Scalia wrote in *Employment Division v. Smith*: "Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."
27. Justice Scalia was saying, in other words, that even though the First Amendment may not protect every right that is important to religious people, a nation and culture that respect religious freedom should naturally be willing to do more than the bare minimum the Constitution requires. It should be willing to enact laws and create compromises that afford believers and religious institutions the space they need to live according to their deepest beliefs.

## **Ambiguity in the meaning of the First Amendment is not a defect but rather part of a constitutional design that establishes a framework for citizens to resolve disputes.**

28. This ambiguity in the meaning of the First Amendment is not a defect but rather part of the constitutional design. In his famous dissent in *Lochner v. New York*, Justice Oliver Wendell

Holmes reminded the Court's majority that while the Constitution certainly protects property and contract rights, it does not embody an all-encompassing economic theory. Rather, Justice Holmes said, the Constitution "is made for people of fundamentally differing views."<sup>4</sup>

29. Just as the property and contract provisions of the Constitution do not answer all questions about property and contract rights, so too the religion clauses of the First Amendment do not resolve many difficult religious freedom conflicts.
30. One thing getting lost in all the talk on both sides about absolute rights is an understanding that in this setting the United States Constitution does two things. First, it secures the core of our most basic rights. And second, it establishes a democratic process for resolving difficult issues of rights and social policy so that, as Justice Holmes said, "people of fundamentally differing views" can live together in peace. Sometimes we seem to think that the Supreme Court ought to decide all the really important issues by turning every- thing into a "right" and then balancing out competing rights in the way it thinks best. But such thinking only cheapens our democracy and our citizenship. The Founding Fathers intended our system of representative democracy to be a framework for resolving fundamental clashes of opinions about matters of vital importance, not just about where to locate the town post office.
31. In its better moments, the Supreme Court has endorsed this constitutional vision. Our constitutional "system," the court wrote in 1986, "was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people."<sup>5</sup>
32. Justice Kennedy, writing for the Supreme Court, recently affirmed much the same vision:
33. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. . . . The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.<sup>6</sup>
34. So, while the right to religious freedom is certainly fundamental, its application to many controversial issues is often unclear and thus often left to the political process. I don't agree with the holding of the Smith decision, but Justice Scalia was surely right when he wrote, "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."<sup>7</sup>
35. I sometimes fear that we have relied too much on the Constitution to do the hard work of citizenship for us. The Constitution—including the First Amendment—was never intended to make us lazy citizens, to absolve us from the duty and imperative to be vigilant in defense of our religious rights and interests. Rather, the Constitution's fundamental purpose was to establish a system of government for finding sustainable compromises allowing us to live within the broader society. As citizens of this nation, we have a duty to work with our fellow countrymen to find workable solutions to vexing problems—including clashes of rights and fundamentally competing interests. The Lord said, "Blessed are the peacemakers."<sup>8</sup> It is our Christian duty to find ways to make peace. And making peace sometimes requires that we make compromises—not compromises on our doctrines, beliefs, or moral standards, of course, but compromises in the application of religious freedom to the practical realities of life in this diverse nation.

## Setting Priorities and Seeking Peace

36. In my view, those of us who care deeply about religious freedom have two important responsibilities if we want to also be peace- makers. First, we must set priorities, so we are

clear about what is core to religious freedom and what is less vital. Only then can we understand where compromises can be struck. Second, we must learn how to get involved politically, socially, and professionally to both defend religious freedom as a fundamental right and to make appropriate compromises in the interest of fairness to others and peace. I want to touch on both these responsibilities.

37. First, setting religious freedom priorities. Some may be shocked to hear this, but not all religious freedoms are equally important. This is an obvious point, but it is an important one for clear thinking. If you had to make a choice, for example, between the freedom to pray with your family in your home and the freedom to hire only people of your own faith in your big business, I think it's obvious which one you would choose. While both involve religious liberty, one is more essential than the other. Although it can limit the free exercise of religion, barring big business owners from hiring only people of their own faith has been the law for decades. But barring someone from praying in his own home would be an intolerable act of tyranny.
38. So, in a pluralistic nation where religious people and institutions find themselves competing for influence with others having much different priorities and interests, sometimes we have to make hard choices. We have to prioritize. Defenders of religious freedom have to decide what is closer to the essential core of religious freedom and what is more peripheral. To do otherwise risks weakening our defense of what is essential. If everything that could even loosely be considered "religious" is treated as equally important, then effectively nothing religious is important.

## **The innermost core.**

39. Let's talk, then, about what rights are at the innermost core of religious freedoms. Here our constitutional and legal traditions provide some guidance. Courts have long recognized the need for greater protections for private and intimate matters than for public or commercial ones. That makes sense, and it provides a starting point for thinking about religious freedom priorities. As a general matter, religious liberty claims are more compelling the more closely they relate to purely private, family, and ecclesiastical matters, and, conversely, less compelling the closer they get to public and governmental functions. There may be exceptions, but that's a good starting point when thinking about religious freedom priorities and potential compromises.
40. Certain freedoms are at the core of religious liberty because they lie within a fundamentally private sphere. On these freedoms there is little room for compromise. They include freedom of belief; freedoms related to family gospel teaching and worship; freedom to express your beliefs to another willing listener, such as in missionary work; and freedoms related to the internal affairs of churches, including the establishment of Church doctrine, the selection and regulation of priesthood leadership, and the determination of membership criteria. These religious freedoms fall within a zone of personal and institutional autonomy and thus are subject to little if any regulation by government. They are basically nonnegotiable.
41. The inner core includes more than just private matters. Believers are entitled to the same rights of free speech and expression in the public square as nonbelievers. That means they have the same First Amendment right as any other citizen to express their views on public streets and sidewalks; to publish their beliefs via print, radio, the Internet, and social media; to participate fully in democratic debates over matters of public policy, including controversial matters; and to petition the government for protection of their interests. These are basic freedoms inherent in American citizenship and are likewise nonnegotiable.
42. The inner core also includes the right not to be punished, retaliated against, or discriminated

against by government based on religion. No believer should be excluded from public office or employment based solely on their faith. America doesn't have religious tests for governmental positions. Similarly, there should be no religious test for working in the various professions regulated by government. For example, those with traditional beliefs regarding marriage, family, gender, and sexuality should not be excluded from being professional counselors, teachers, lawyers, doctors, and any other category of occupation where the government grants licenses. Nor should it be more difficult to establish a nonprofit religious organization than a secular nonprofit. And religious organizations should not be denied nonprofit status based on their doctrines and religious practices. Again, these basic rights to equal treatment are fundamental American freedoms and should not be open for discussion or compromise.

43. What I've just described may be called the inner core of religious freedom. Unless that core is strongly protected, there is no religious freedom as Americans have known it. These freedoms are essential to individual believers and their families in their private lives. They are also essential to prevent official persecution and to ensure that members of particular faith communities are not rendered legal and social outcasts, as Jews once were in Europe.

## **Near the core**

44. Close to this innermost core are freedoms that pertain to religiously important nonprofit functions carried on by religious organizations. This includes the freedom of religious nonprofits to have employment policies that reflect their religious beliefs, including the freedom to hire based on religious criteria. This is the freedom, enshrined in Title VII, that allows the Church to have a temple recommend standard for Church employment. Without this freedom, the ability of religious organizations to carry out their missions would be severely impaired.
45. Also in this category is the right to establish religious schools, colleges, and universities. Such institutions should have the freedom to establish student honor codes that reflect their religious teachings, including standards governing sexually appropriate conduct. And government should not use its ability to fund education to coerce or pressure religious schools into abandoning their religious standards.
46. Likewise, religious charities should have the right to conduct their good works according to the dictates of their respective faiths— without substantial interference by government and without being forced to engage in activities that are fundamentally contrary to their beliefs.
47. These freedoms are vitally important to the Church and other religious organizations. But as you can tell, they already get us into areas that are increasingly controversial because sometimes they can extend beyond the purely private or religious.

## **Moving beyond the core**

48. As we move to more commercial settings, our expectations of unfettered religious freedom must be tempered. This is not because commerce is unimportant but because it is now heavily regulated and overlaps with what for decades have been considered civil rights—such as the right not to be discriminated against in employment or denied service at a public accommodation based on certain characteristics.
49. Claims by business owners for religious freedom are strongest in small, intimate, and family business settings and correspondingly weaker in large and impersonal corporate settings. Still, businesses should not be forced to produce products or types of services that fundamentally conflict with their religious beliefs. For instance, no one could seriously contend that a

business should be required to print or distribute pornography; that principle can also apply in less obvious circumstances as well. Similarly, businesses should be able to use symbols and messages that reflect their beliefs. I understand that In-N-Out Burger prints “John 3:16” on the bottom of every cup.

50. But the ability of secular businesses to deny employment or services to those whose lifestyles they consider immoral will often be limited. While In-N-Out Burger should have the right to put scriptural messages on its cups, it cannot expect to refuse service to non-Christians or LGBT persons.
51. Hence, the commercial setting is an area where defenders of religious freedom sometimes must be willing to make prudential compromises. Not every aspect of your business will be able to reflect your religious beliefs in the same way your home or religious congregation can. Preserving the ability of business owners to conduct every aspect of their businesses according to their religious beliefs will be impossible. And the Church itself is not in a position to fight that fight if doing so comes at the expense of more core religious freedoms. Protecting those core freedoms must remain the priority, or we risk losing even them.

## **The outer circle**

52. Finally, there are zones where claims for religious freedom are much weaker and will be very difficult to defend. Some of these pertain to government services, where officials are required by law to perform certain functions. In these areas, religious beliefs should be reasonably accommodated, but other governmental interests may significantly limit the degree of accommodation. For instance, if it is your job to perform marriages for the county clerk’s office and no one else can easily take your place, then your freedom to refuse to perform marriages that are contrary to your religious beliefs may be very limited.
53. Still, a government that respects religious liberty should accommodate the religious needs of its civil servants to the greatest extent reasonable. Appropriate accommodations should also be made for religious dress and, where possible, Sabbath observance.
54. In summary, as I see things, there is a hierarchy of religious freedoms and we have no choice but to set priorities. Those that relate to private and ecclesiastical contexts or are part of the basic rights of all citizens, are the most essential and least subject to compromise, while those that relate to commercial and governmental settings will of necessity require greater pragmatism and compromise. Please understand that in labeling some freedoms part of the “core” of religious liberty, I am not suggesting that freedoms outside that core are unimportant or not worth defending. What I am suggesting is that if we want to preserve religious freedom and live in peace in a society that is increasingly intolerant of faith, then we will have to be very clear about what matters most and make wise compromises in areas that matter less, because if we don’t, we risk losing essential rights that we simply cannot live without.

## **Defending Religious Freedom—Lift Where You Stand**

55. I said earlier that those who care about religious freedom must first set priorities and then, second, learn how to get involved to defend religious freedom and make appropriate compromises in the interest of fairness and peace. I turn now to this second imperative—how to get involved in the defense of religious freedom.
56. Recently Elder Christofferson spoke at the Freedom Festival here in Provo about how ordinary citizens can defend religious freedom. He outlined a simple four-part approach that applies to all of us:

57. First, become informed. You are doing that today and throughout this conference. To defend religious freedom, we need wisdom— indeed, inspired wisdom. And that requires knowledge. So it is vital that we become informed about what religious freedom means; what freedoms are most essential; what competing social interests exist; how society and our friends, neighbors, and children view religious freedom; what challenges religious freedom faces; and how those challenges will affect real people living real lives. We must become informed.
58. Second, learn to speak up with courage and civility. This is a fine line. On the one hand, we cannot be intimidated into silence by intolerant voices that claim to represent progress and open-mindedness. That tired bromide is getting old; such voices do not represent progress, and we cannot allow it to silence us. But by the same token, we must state our views with genuine civility. This isn't the time for anger. So, when you speak up, speak calmly. Smile a bit. Seek true understanding. Acknowledge legitimate points. And explain why the freedoms you defend are so important to you, your family, and your church—make it personal. Stand firmly for principle while understanding that in some areas we will have to compromise to protect our most vital freedoms.
59. Third, as President Uchtdorf would say, “Lift where you stand.”<sup>9</sup> You don't need to run for Congress or the legislature to make a difference. And the Church doesn't need you to undertake lawsuits on its behalf. What is needed is for you to get involved in the political, community, professional, and business organizations around you and to express your concern and support for religious freedom. The time for an insular focus on just our own families and congregations is gone. We have to get involved in the community organizations around us and encourage them to be respectful and supportive of religious freedom, even when that means accommodating to some extent beliefs and practices we don't like.
60. Finally, at all times, be an example of the believers so that others will see your good works, experience your genuine friendship, and be sympathetic toward your concerns about religious freedom. As Elder Christofferson said:
61. “Americans tend to respect and protect what they believe is good. So let us show them the highest and best in our faiths—our willingness to love and serve others, to build strong families, to live honorable lives, to be good citizens. As our fellow citizens see the goodness of your faith, ‘they will want to listen to you and understand when you say your religious freedom is being abridged. They may not agree with you, or even understand entirely the issue that is so important to you. But if they know you and respect you because you are a true [example of the believers], they will be far more inclined to work toward a solution that respects [essential] religious freedoms.’ ”<sup>10</sup>

## Compromises

62. Finally, some thoughts on compromises. As we face difficult social and legal issues, where other interests are competing with religious freedom, we need to be prepared to make wise compromises in areas that, although important, may not be core to religious freedom. Frankly, we have no choice. When such conflicts arise, we should think in terms of “fairness for all,” a phrase the Church has used in a number of settings.
63. What does “fairness for all” mean? At bottom, it means that every person—including people of faith and their religious communities—should have enough space to live according to their core beliefs so long as they don't harm the fundamental rights of others. It means pluralism. It means a fair opportunity for each person to participate in society, professions, the job market, and commerce. It means looking for less-burdensome alternatives when accomplishing important objectives. It means balancing competing interests so that as many people as

possible can live as equal citizens according to their deepest values and needs.

64. Such balancing is not a precise science. No one can have all they want. It requires dialogue, understanding, goodwill, principled stances, hard compromises, and a willingness to adjust so that our laws and communities make space for everyone. It requires—as the Savior required—that we be peacemakers.

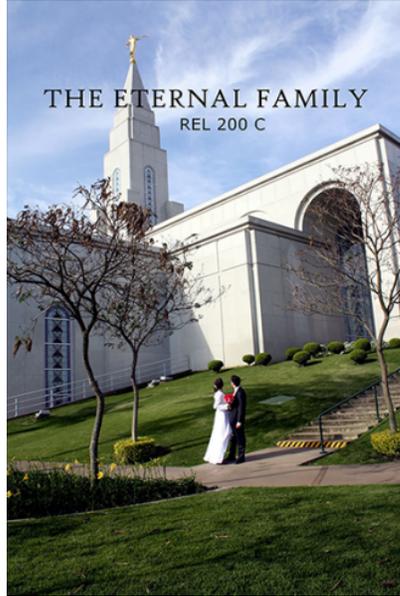
## Conclusion

65. This is a tall order, to be sure. I know some believe religious freedom should never have to compromise. I know some believe we should stand and fight on every front. Such feelings are visceral and emotional, and I understand them. But if we do that—if we merely give vent to our emotions—in the current cultural environment, we risk losing everything. And we risk failing to follow the example of Christ. Wisdom, fairness, and love for our religious freedoms require that we engage with our fellow citizens, reaching across serious cultural divides, and find common ground so that everyone can live together in freedom and peace. I hope we will all do our part to achieve that lofty goal. Thank you.

## Notes

1. Elder D. Todd Christofferson, *A Celebration of Religious Freedom* (São Paulo, Brazil, Apr. 29, 2015), available at <https://books.byui.edu/-ndoL>.
2. Laurie Goodstein & Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, N.Y. Times, June 24, 2015.
3. Articles of Faith 1:11.
4. *Lochner v. New York*, 198 U.S. 45, 76 (1906) (Holmes, J., dissenting).
5. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (emphasis added).
6. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636-37 (2014).
7. *Smith*, 494 U.S. at 890.
8. Matthew 5:9.
9. Dieter F. Uchtdorf, “Lift Where You Stand,” *Ensign* or *Liahona*, Nov. 2008, 53-56.
10. Elder D. Todd Christofferson, 2016 Provo Freedom Festival Address, quoting D. Todd Christofferson, *Watchmen on the Tower: Religious Freedom in a Secular Age*, Clark Memorandum 11 (Spring 2015).

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