

TESTIMONY
BEFORE THE HOUSE COMMITTEE ON OVERSIGHT & GOVERNMENT REFORM
ON
RELIGIOUS FREEDOM & THE FIRST AMENDMENT DEFENSE ACT

BY
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Mr. Chairman and Members of the Committee:

Just over a year ago, five members of the United States Supreme Court declared that the federal constitution includes a fundamental right to marry a person of the same sex. Dissenting in the *Obergefell* decision, Justice Samuel A. Alito, Jr., explained the threat it presented to people of faith:

[This decision] will be used to vilify Americans who are unwilling to assent to the new orthodoxy I assume that those who cling to old beliefs will be able to *whisper* their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.¹

UCLA law professor Eugene Volokh similarly commented:

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.²

Opponents of religious freedom are committed to making Justice Alito and Professor Volokh’s statements a reality. And, bolstered by *Obergefell*, governments across the United States feel emboldened to force individuals and organizations to forego their convictions on marriage and human sexuality in order to remain in the public square.

We are witnessing nothing less than the beginning of an ideological cleansing of public life in America. Congress must act to stop the marginalization of many Americans by passing the First Amendment Defense Act (“FADA”).

Consider the case of Alliance Defending Freedom client and Wyoming Judge Ruth Neely. For over 14 years, Judge Neely has served in two judicial positions in Pinedale, Wyoming, population 2,030, winning the respect and admiration of her community. Like many tens of millions of her fellow Americans, Judge Neely’s religious faith teaches her that marriage is the union of one man and one woman for life. When same-sex marriage was legalized by a federal court in Wyoming, a local reporter, who appears to have known that Judge Neely was religious, telephoned her at home and asked her whether she was “excited” to perform same-sex marriages. Judge Neely told him

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting) (emphasis added).

² Laurie Goodstein and Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, New York Times (June 24, 2015), <http://www.nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html> (last visited July 6, 2016).

the truth: due to her sincerely held religious beliefs about marriage, she could not solemnize same-sex unions.

After the local Pinedale paper ran a story on Judge Neely's statement of her beliefs about marriage, the Wyoming Commission on Judicial Conduct and Ethics launched an inquiry and brought a complaint against her for publicly disclosing her beliefs. Following a summary investigation and hearing process wherein the Commission played the roles of investigator, prosecutor, judge, and jury, the Commission concluded that Judge Neely should be removed from office. The matter now sits with the Wyoming Supreme Court, which has the power to affirm or reject the Commission's recommendation.

Notably, nothing about the law of Wyoming *requires* Judge Neely to solemnize marriages—the law gives her authority in one of her judicial positions to perform weddings *if she chooses*. The other position she holds does not include the authority to solemnize weddings. But, according to the Wyoming Commission, that does not matter. In the Commission's view, the fact that Judge Neely stated her religious beliefs about marriage when questioned by a reporter renders her unfit to serve as a judge in both of her positions. The government has set up a religious litmus test for public office: those who believe that marriage is the union of a man and a woman need not apply (unless, of course, they hide their personal convictions).

Consider also the case of Alliance Defending Freedom client Kelvin Cochran, former fire chief for the City of Atlanta. Mr. Cochran, a devout man of faith, wrote a book to inspire men to fulfill their purpose as husbands, fathers, and community leaders. A few pages of the book address biblical morality and the Bible's teaching on marriage. When the book was brought to the attention of the Mayor of Atlanta and a member of the City Council, Mr. Cochran's employment was first suspended and then terminated—all because he expressed beliefs about marriage that he shares with millions of people of faith around the globe.

And then there is Dr. Eric Walsh, a California physician and former director of public health who accepted a job in Georgia as a district health director.³ When Georgia health department officials learned that Dr. Walsh had delivered a number of sermons on his own time in which he spelled out orthodox Seventh-day Adventist positions on topics including human sexuality and marriage, they split the sermons between health department employees, scrutinized his religious views, and took notes.⁴ Two days later, Dr. Walsh was informed that a termination letter was on its way.⁵

³ David French, *Georgia Bureaucrats Listed to a Doctor's Sermons, and Then Fired Him*, National Review Online (April 20, 2016), <http://www.nationalreview.com/article/434297/eric-walsh-georgia-public-health-doctor-fired-christian-beliefs> (last visited July 7, 2016).

⁴ *Id.*

⁵ *Id.*

The cases of Judge Neely, Mr. Cochran, and Dr. Walsh demonstrate the stakes of the present battle over religious liberty. The ever-increasing push to slander as “bigots” the countless Americans who adhere to the reasonable and honorable view that marriage is the union of one man and one woman threatens not just religious liberty and our expressive freedoms, but all of our treasured civil liberties.

When we find ourselves deprived of our ability to participate meaningfully in public life for holding views at odds with the prevailing government orthodoxy, freedom itself is a chimera.

Religious freedom is not the gift of the state or the product of social compromise. It is an inalienable, pre-political right that rests securely in our dignity as humans. It ensures we can all search for the meaning of life and then peacefully live consistent with the answers we find. Religious liberty benefits all Americans, the religious and non-religious alike.⁶

Research shows that the extent to which a country protects religious freedom is linked to vibrant democracy, freedom of the press, and rising economic and social well-being.⁷ This same research reveals that other civil liberties find themselves tightly bound with religious freedom.⁸ The loss of religious freedom signals the loss of other freedoms too.

Years ago, what Judge Neely, Chief Cochran, and Dr. Walsh have had to endure would have been unthinkable. But now, the unthinkable is reality.

It is a time for choosing. Will *this* Congress safeguard religious and expressive freedoms, or will it facilitate discrimination toward Americans who simply seek to peacefully live their lives according to their belief about marriage? Will Congress ensure that the government continues to be freedom’s greatest protector, or will it stand aside as opponents of religious freedom expand their liberty-thwarting efforts from the states to the federal government and into all areas of public life?

In a country as diverse as America, there will always be a multitude of convictions, ideas, and beliefs. And the test of liberty is what happens when we disagree about important topics. Members of Congress can and should preserve Americans’ first freedoms and our ability to engage in the marketplace of ideas consistent with our core religious beliefs or moral convictions about marriage. Congress can do this by enacting FADA.

⁶ Robert P. George and Katrina Lantos Swett, *Religious Freedom Is About More Than Religion*, The Wall Street Journal (July 25, 2013), <http://www.wsj.com/articles/SB10001424127887324783204578624510558738282> (last visited July 8, 2016).

⁷ See Brian Grim and Roger Fink, *The Price of Freedom Denied: Religious Persecution and Conflict in the 21st Century* (2011) at 61-88.

⁸ See *id.*

In the wake of *Obergefell*, FADA is also necessary to protect against imminent threats to nonprofit religious educational institutions, churches, and social-welfare organizations. These institutions tirelessly educate and serve America's families including the poor and vulnerable.

The story of Gordon College on the outskirts of Boston provides a good example. Gordon College is an evangelical Christian institution. It, like most orthodox Christian schools, has a policy that defines marriage as the union of one man and one woman, and requires students and employees to limit sexual activity to marriage.

Prior to President Obama's issuance of Executive Order 13672 banning sexual-orientation discrimination by federal contractors, Gordon's president, Michael Lindsay, together with a number of other Christian leaders, signed a letter dated July 1, 2014, asking the President to include a religious exemption. The letter stated:

We have great appreciation for your commitment to human dignity and justice and we share those values with you. With respect to the proposed executive order, we agree that banning discrimination is a good thing. We believe that all persons are created in the divine image of the creator, and are worthy of respect and love, without exception. Even so, it still may not be possible for all sides to reach a consensus on every issue.⁹

This exercise of President Lindsay and Gordon College's right to petition the government prompted activist groups to target the school and its religious views. In September, the New England Association of Schools and Colleges—Gordon College's accreditor—announced that it was giving Gordon College one year to ensure that its policy was “nondiscriminatory.”¹⁰

The revocation of its accreditation would severely harm an institution like Gordon College. Indeed, the Department of Education requires that schools participating in federal student loan programs be accredited.¹¹ Loss of accreditation would thus mean that Gordon students could not obtain federally subsidized student loans.

After convening a working group and engaging in several months of self-study and internal discussion, Gordon College reaffirmed its core principles and its criticized policies. In late April 2015, the New England Association of Schools and Colleges decided not to revoke Gordon's accreditation, but not without setting off months of turmoil and anguish as Gordon was left to question what the future might hold given this newfound antagonism towards its beliefs.¹² Its threats represent the ominous arc of the current political and cultural trajectory.

⁹ Letter to President Obama (July 1, 2014), quoted in David French, *The Persecution of Gordon College*, National Review Online (Feb. 2, 2015), <http://www.nationalreview.com/node/413119/print> (last visited June 30, 2016).

¹⁰ See David French, *Gordon College Keeps Its Faith and Its Accreditation*, National Review Online (May 1, 2015), <http://www.nationalreview.com/node/417788/print> (last visited June 30, 2016).

¹¹ Federal Student Aid Webpage, Department of Education, Accreditation, <https://studentaid.ed.gov/sa/prepare-for-college/choosing-schools/consider#accreditation> (last visited July 5, 2016).

¹² See *id.*

In addition to protecting religious schools' accreditation and the ability of their students to receive federal financial aid, FADA would also ensure that the federal government cannot subject students to discrimination or otherwise treat them unequally in an educational program because of their belief that marriage is the union of one man and one woman.¹³ This protection is necessary because universities throughout the country have already begun taking adverse actions against students for operating consistent with their belief that marriage is between one man and one woman.

For example, in the fall of 2008, Alliance Defending Freedom client Jonathan Lopez attended Los Angeles City College and was enrolled in a speech class. That fall, California voters passed Proposition 8, which amended the state's constitution to define marriage as a legal union between one man and one woman. The day after the vote, Jonathan's speech professor came to class, slammed his papers on his desk, announced to the class that anyone who voted for Proposition 8 was a "fascist bastard," and then dismissed the class.

In Jonathan's next assignment, a short informative speech about the topic of his choice, Jonathan shared his faith story and addressed important elements of his religious beliefs, including his beliefs about marriage. Jonathan's professor erupted again, declared the speech over, and dismissed the class. In the days that followed, the professor continued to harass Jonathan and told him that he was going to make it his mission to expel him from the school, forcing Jonathan to take legal action. Jonathan's case vividly illustrates the hostility that those in public schools have displayed toward the belief that marriage is the union of husband and wife.

The case of Alliance Defending Freedom client Emily Booker is disturbingly similar. During Emily's time at Missouri State University, she received an assignment to write a paper expressing her support for same-sex families. When she explained that she could not perform the assignment due to her sincere religious beliefs, her professor filed a grievance against her which led to a faculty hearing where Emily was interrogated about her faith. As a condition of graduation, she was forced to sign a contract vowing to "close the gap" between her faith and the views of her social work program. Again, Emily's story shows that the government has begun engaging in a pattern of hostility toward students who want to live consistent with their religious convictions on marriage.

The California legislature's recent attempts to enact Senate Bill 1146 demonstrate the very real assault against faith-based colleges, universities, and their students. If enacted, this law would strip religious colleges that receive public funding of an exemption that allows them to require faculty

¹³ See First Amendment Defense Act at Section 3(b)(4) (forbidding the federal government from taking action to "withhold, reduce, exclude, terminate, or otherwise make unavailable or deny any entitlement or benefit under a Federal benefit program, including admission to, equal treatment in, or eligibility for a degree from an educational program"). The United States Supreme Court recently construed the language "otherwise make unavailable or deny" in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* to support the existence of disparate-impact liability under the Fair Housing Act. 135 S. Ct. 2507, 2519 (2015). Similarly here, FADA's use of the phrase "otherwise make unavailable or deny" in Sections 3(b) (3), (4), and (5) ensures that the bill's prohibition of discriminatory action "on the basis" of a religious belief or moral conviction about marriage extends to situations where government action disparately impacts a person or persons who hold such beliefs regardless of the government's purported nondiscriminatory motives.

and students to comply with various religious-based ethical standards.¹⁴ The proposed law would also limit the ability of faith-based colleges and universities to require students and staff to sign statements of faith, honor codes, or otherwise pledge to abide by biblical standards of conduct.¹⁵ If the law passes, any college with policies affirming the belief that marriage is between one man and one woman will risk losing state funding, particularly jeopardizing poor and minority students.

But students and schools should not be marginalized or closed simply because their beliefs do not accord with the current government orthodoxy. The government should ensure true tolerance by safeguarding a diversity of beliefs and not punishing those who disagree. FADA will prevent the federal government from similarly discriminating against students who believe in one-man-one-woman marriage in educational programs that receive federal funding.

Beyond colleges and universities, FADA is important to protect the conscience rights and religious liberty of social-welfare organizations, including private foster-care and adoption providers.

There are more than 1,000 private, licensed foster-care and adoption providers in the United States, many of which are faith-based organizations whose religious beliefs call them to care for vulnerable children.¹⁶ These critical social-welfare organizations are supported in part with federal funds provided through programs including the Stephanie Tubbs Jones Child Welfare Services Program,¹⁷ the Federal Foster Care Maintenance Payments Program,¹⁸ and the Adoption and Guardianship Assistance Program.¹⁹

In the wake of the *Obergefell* decision, there is a real danger that faith-based adoption and foster-care organizations with sincere convictions about marriage could find their federal funding cut off through executive action. The impact of such a move would be devastating to the welfare of many of the most vulnerable children in our society because faith-based adoption and foster-care providers currently help thousands of children find permanent homes every year. In 2007, more than 20,000 of the approximately 76,000 unrelated domestic adoptions that took place in the United States were handled by private providers, and many of those were arranged by faith-based groups. Furthermore, excluding these agencies from the marketplace would deprive birth mothers of real choices when they are deciding the type of family with whom they would like to place their child.²⁰

¹⁴ See California Senate Bill 1146 (2016), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1146 (last visited July 7, 2016).

¹⁵ See *id.*

¹⁶ Sarah Torre and Ryan T. Anderson, *Adoption, Foster Care, and Conscience Protection*, Heritage Foundation (Jan. 15, 2015), <http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection> (last visited July 5, 2016).

¹⁷ 42 U.S.C. § 621, *et seq.*

¹⁸ 42 U.S.C. § 672.

¹⁹ 42 U.S.C. § 673.

²⁰ Sarah Torre and Ryan T. Anderson, *Adoption, Foster Care, and Conscience Protection*, Heritage Foundation (Jan. 15, 2015), <http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection> (last visited July 5, 2016).

The reality of the threat to these groups' federal funding is borne out by evidence at the state level. For example, when the District of Columbia redefined marriage to include same-sex couples, government officials informed Catholic Charities that it no longer would be allowed to provide publicly funded foster-care and adoption programs in the District of Columbia as a result of the agency's inability to place children with same-sex couples.²¹ Thus, Catholic Charities was forced to close its foster-care and adoption programs.²² FADA would have prevented that and would have helped the many children served by Catholic Charities. The demise of Catholic Charities in the District of Columbia is no isolated incident. Unfortunately, the same thing happened in Massachusetts when that state's high court redefined marriage,²³ and in Illinois when civil unions for same-sex couples were legalized.²⁴

At present, the federal government might take similar action in the wake of *Obergefell*. In order to protect the ability of faith-based adoption and foster-care providers to continue serving vulnerable children and families, Congress should pass FADA. Faith-based social-welfare organizations must not be subjected to government discrimination when they seek federal funds to carry out their important work. The welfare of vulnerable children hangs in the balance.

Finally, FADA is necessary to shield churches and religious schools from the government's coercive power to tax. In the wake of *Obergefell*, churches and religious schools are a vulnerable target for those who seek to expand the size and scope of the federal government. But we must never forget that the power to tax is the power to destroy.

This threat is particularly imminent. Arguing before the Supreme Court in the *Obergefell* case, the Solicitor General of the United States was asked whether a religious school that opposes same-sex marriage might lose its tax-exempt status should the Supreme Court redefine civil marriage to include same-sex couples. The Solicitor General responded that "[i]t's certainly going to be an issue."²⁵

²¹ See *Same-sex 'marriage' law forces D.C. Catholic Charities to close adoption program*, Catholic News Agency (Feb. 17, 2010), http://www.catholicnewsagency.com/news/same-sex_marriage_law_forces_dc_catholic_charities_to_close_adoption_program/ (last visited July 5, 2016) ("Although Catholic Charities has an 80-year legacy of high quality service to the vulnerable in our nation's capital, the D.C. Government informed Catholic Charities that the agency would be ineligible to serve as a foster care provider due to the impending D.C. same-sex marriage law.").

²² See *id.*; Julia Duin, *Catholics end D.C. foster-care program*, Washington Times (Feb. 18, 2010), <http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/> (last visited July 5, 2016) ("The Archdiocese of Washington's decision to drop its foster care program is the first casualty of the District of Columbia's pending same-sex marriage law").

²³ See 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*, 27 Children's Legal Rights Journal 1 (2007).

²⁴ See Waymon Hudson, *Illinois Catholic Charities Ends Adoption Lawsuit*, Huffington Post, (Nov. 15, 2011), http://www.huffingtonpost.com/waymon-hudson/illinois-catholic-charities-adoption_b_1094723.html (last visited July 5, 2016).

²⁵ Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

This admission by the Solicitor General is more than a little troubling because it confirmed that, absent legislative action by Congress, the Internal Revenue Service (“IRS”) may move to revoke the tax-exempt status of religious schools and churches.

To understand just how serious and real the threat to religious institutions’ tax-exempt status truly is, one must understand precisely why the IRS would feel justified in taking action. In *Bob Jones University v. United States*, the United States Supreme Court concluded that “an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”²⁶ The Court then looked to its decision in *Brown v. Board of Education*,²⁷ as well as “myriad Acts of Congress and Executive Orders,” to find a “firm national policy” against racial segregation and discrimination in education.²⁸ The Court held that a religious educational institution “engaging in practices affirmatively at odds with” a firm national policy—in that case, the school’s racially discriminatory admissions policy—is not “charitable” within the meaning of Section 501(c)(3) and therefore is not entitled to tax-exempt status.²⁹

In the wake of the *Obergefell* decision, there is a real and growing danger that the IRS will attempt to wrongly extend the holding of *Bob Jones University* to revoke the tax-exempt status of religious institutions, including churches and schools that adhere, as a matter of religious principle, to the definition of marriage as between one man and one woman. The IRS would do this by purporting to discover a so-called “firm national policy” against organizations operating consistent with that reasonable and widely held religious and moral belief.

But unlike the racially discriminatory policies at issue in *Bob Jones University*, the view that marriage is between a man and a woman is a respectable, long-held belief that lies at the very core of each of the Abrahamic religions. Indeed, there can be no legitimate comparison whatsoever between that decent view and the moral repugnancy of racial discrimination. The civil-rights movement fought a true and dangerous evil, and did so at great consequence to those brave enough to stand for the principle that all men are created equal and endowed by their Creator with inherent rights to life, liberty, and the pursuit of happiness. The victims of racism suffered terrible violence and degradation for hundreds of years in America, first on slave plantations and then, following a bloody civil war to end that dreadful and immoral institution, found themselves subject to further degradation in the form of segregation, Jim Crow laws, and violence at the ends of the ropes of lynch mobs and the fire hoses of racist government officials. Comparing the evils of racism to the grievances of those who wish to silence individuals and institutions who believe in gender-diverse marriage slanders millions of good and respectable Americans who seek only to peacefully live consistent with their religious beliefs or moral convictions.

²⁶ 461 U.S. 574, 586 (1983).

²⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁸ *Bob Jones University*, 461 U.S. at 593.

²⁹ *Id.* at 598-99.

Contrary to what the illegitimate comparison to racism suggests, the belief that marriage is the union of one man and one woman for life is a decent and honorable one that has been held by people of diverse cultures, races, and faiths for virtually all of human history. People on both sides of the aisle agree that those who hold this belief are good and honest people. Indeed, it's a belief that President Obama publicly expressed as recently as 2008 when, during an interview with Pastor Rick Warren, the President stated, "I believe that marriage is the union between a man and a woman. For me as a Christian, it's also a sacred union. God's in the mix."³⁰ Congress should thus take action to protect the rights of the myriad people and institutions that hold this respectable belief.

The danger to the tax-exempt status, accreditation, and federal funding of nonprofit religious institutions is clear, present, and growing. Together with those specific threats, the free exercise and expression rights of Americans are under assault. The opponents of religious freedom seek to relegate those who believe in one-man-one-woman marriage to an undeserved ignominy, and they have shown that they are more than willing—and, in fact, eager—to use the power of government to do it.

A free people in a representative democracy must never countenance the censorship of public life by public officials in any part of government, no matter how well-intentioned they may claim to be. If we do not vigorously oppose those who seek to censor the public square now, we will soon find all of our freedoms and our nation's diversity in great jeopardy. By passing FADA, Congress will not only enact important protections for institutions and individuals, but also delegitimize the actions of those who seek to suppress religious freedom. And it will confirm that the view of marriage held by many tens of millions of Americans is and continues to be decent, honorable, and worthy of respect in the public square.

³⁰ Robin Phillips, *DOMA and the Definition of Marriage*, Examiner.com (March 26, 2011), <http://www.examiner.com/article/doma-and-the-definition-of-marriage> (last visited July 7, 2016).

Committee on Oversight and Government Reform
Witness Disclosure Requirement – “Truth in Testimony”
Required by House Rule XI, Clause 2(g)(5)

Name: Kristen K. Waggoner

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

None.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

Alliance Defending Freedom. I serve as Senior Vice President of U.S. Legal Advocacy.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.

I certify that the above information is true and correct.

Signature:

Date:

7.6.16

Kristen K. Waggoner



Kristen Waggoner

**SENIOR COUNSEL AND SENIOR VICE
PRESIDENT OF U.S. LEGAL ADVOCACY**

Kristen Waggoner serves as senior counsel and senior vice president of U.S. legal advocacy with Alliance Defending Freedom. In this role, Waggoner supervises a team of more than 60 attorneys and legal staff who specialize in civil liberties litigation and education. She joined Alliance Defending Freedom in 2013.

Waggoner has extensive experience in civil litigation, employment, education, nonprofit, and constitutional law. After clerking with Washington Supreme Court Justice Richard B. Sanders and interning with U.S. Representative Linda Smith, Waggoner joined Ellis, Li & McKinstry, a Seattle law firm, where she became a partner in 2004. Waggoner's clients primarily included private schools and universities, churches, denominations, and other nonprofit organizations, and she served on the firm's management, compensation, pro bono, and hiring committees. Waggoner is Peer Review Rated AV® Preeminent™ in Martindale-Hubbell. She has made numerous media appearances including *CNN*, *CBS Sunday Morning*, and *ABC's This Week with George Stephanopoulos*, as well as appearances on *Fox News* and other networks.

Waggoner earned her J.D. from Regent University School of Law and her BA from Northwest University, both with honors. She is admitted to practice in Washington, Oregon, Arizona, and Florida, and is admitted to many federal courts, including the U.S. Supreme Court.

