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DO NO HARM: EXAMINING THE MISAPPLICATION OF THE 'RELIGIOUS FREEDOM RESTORATION ACT'

HEARING

BEFORE THE

COMMITTEE ON EDUCATION
AND LABOR
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, JUNE 25, 2019

Serial No. 116–31

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Available via the World Wide Web: www.govinfo.gov
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U.S. GOVERNMENT PUBLISHING OFFICE
37–317 WASHINGTON : 2020

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C O N T E N T S

DO NO HARM: EXAMINING THE MISAPPLICATION OF THE 'RELIGIOUS FREEDOM RESTORATION ACT'

Tuesday, June 25, 2019,
House of Representatives,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:16 a.m., in room 2175, Rayburn House Office Building. Hon. Robert C. "Bobby" Scott (Chairman of the Committee) presiding.

Present: Representatives Scott, Davis, Courtney, Sablan, Bonamici, Takano, Adams, DeSaulnier, Norcross, Jayapal, Morelle, Wild, McBath, Schrier, Underwood, Hayes, Shalala, Levin, Omar, Trone, Stevens, Lee, Castro, Foxx, Roe, Thompson, Walberg, Guthrie, Byrne, Grothman, Stefanik, Allen, Smucker, Banks, Walker, Comer, Cline, Fulcher, Taylor, Watkins, Wright, Timmons, and Johnson.

Also present: Representatives Raskin, and Cohen.

Staff present: Tylease Alli, Chief Clerk; Ilana Brunner, General Counsel; Emma Eatman, Press Aide; Daniel Foster, Health and Labor Counsel; Christian Haines, General Counsel; Carrie Hughes, Director of Health and Human Services; Ariel Jona, Staff Assistant; Stephanie Lalle, Deputy Communications Director; Andre Lindsay, Staff Assistant; Jaria Martin, Clerk/Assistant to the Staff Director; Richard Miller, Director of Labor Policy; Max Moore, Office Aid; Veronique Pluviose, Staff Director; Carolyn Ronis, Civil Rights Counsel; Banyon Vassar, Deputy Director of Information Technology; Cyrus Artz, Minority Parliamentarian; Courtney Butcher, Minority Director of Coalitions and Member Services; Akash Chougule, Minority Professional Staff Member; Cate Dillon, Minority Staff Assistant; Rob Green, Minority Director of Workforce Policy; Bridget Handy, Minority Legislative Assistant; John Martin, Minority Workforce Policy Counsel; Sarah Martin, Minority Professional Staff Member; Hannah Matesic, Minority Director of Operations; Alexis Murray, Minority Professional Staff Member; Brandon Renz, Minority Staff Director; and Ben Ridder, Minority Legislative Assistant.

Chairman SCOTT. Committee on Education and Labor will come to order. Everyone is welcome. I note a quorum is present and note for the committee that Congressman Jamie Raskin of Maryland, Congresswoman Sylvia Garcia of Texas, and Congressman Steve

Cohen of Tennessee, who chairs the Subcommittee on Constitution and the Judiciary Committee, will be participating in today's hearing with the understanding that their questions will come only after all the Members of the Committee on both sides of the aisle who are present have had the opportunity to question the witnesses.

The Committee is meeting today in a legislative hearing to hear testimony on Do No Harm: The Misapplication of the Religious Freedom Restoration Act, or RFRA, pursuant to Committee Rule 7. Opening statements are limited to the Chair and Ranking Member. This allows us to hear from our witnesses sooner and provides all members with adequate time to ask questions.

I recognize myself now for the purpose of an opening statement.

Seventy-Eight years ago today, President Franklin D. Roosevelt signed Executive Order 8802, the first action to promote equal opportunity and prohibit employment discrimination in Federal contracting in the United States. The order barred private defense related contractors from discrimination, and it required certain defense related programs to be administered without discrimination as to race, creed, color, or national origin. Subsequent orders and amendments have been signed and have confirmed the principle that discrimination is prohibited when using Federal money.

Against this backdrop we examine the challenge of protecting our civil rights while maintaining our fundamental commitment to religious liberty.

Religious liberty is a fundamental American value. Our Founding Fathers knew from personal experience the dangers of governmental entanglement with religion. In 1779 Thomas Jefferson, in my home State of Virginia, introduced and helped pass the Nation's precursor to the First Amendment, which states "Our civil rights have no dependence on our religious opinions any more than our opinions on physics and geometry."

The Virginia statute on religious freedom became the foundation for our First Amendment to our Nation's Constitution, which stipulates that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The First Amendment makes clear that all Americans have the right to practice the religion of their choice, or none at all, and reflects our Country's commitment to separating religion from government or church and State.

Religion has played a vital role in our Nation's history. It has furthered social justice causes such as the abolition movement, civil rights movement, and the movement to end child labor. Although some have used religion as a pawn to justify slavery, Jim Crow, and the slaughter of our native populations and other horrific acts.

In fact, when I was growing up segregation was preached from the pulpit. Before the Supreme Court struck down the ban on interracial marriage in Loving v. Virginia, the judge and the Circuit court in Virginia, the State court, in a 1965 lower court decision, relied on his own religious beliefs to conclude, and I quote from his opinion, "Almighty God created the races, white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with this arrangement, there would be

no cause for such a marriage. In fact, the fact that he separated the races showed that he did not intend for the races to mix."

That was the basis for the original decision in Loving v. Virginia that was overturned by the Supreme Court. While some religions have been protected in the courts, others have experienced less or sometimes no protection at all. In 1990 the Supreme Court's decision in Employment Division v. Smith upheld the firing of two Native American employees for participating in ceremonial peyote smoking during personal time.

In response, Congress passed the Religious Freedom Restoration Act in 1993, on a bipartisan basis to expand protections for religious exercise. Under RFRA Congress addressed the court's 1990 decision by clarifying a government action may only infringe on a person's exercise of religion if there is a compelling governmental interest, and if it is the least restrictive means to achieve that interest.

The passage of RFRA was meant to reinstate a broader protection of free exercise rights, it was not meant to erode civil rights under the guise of religious freedom. Importantly, it did not change the First Amendment's establishment clause which ensures that government cannot elevate certain religious or moral beliefs above the law.

No sooner than RFRA was enacted the flood gates began to open and RFRA has since been used to legitimize housing discrimination against single mothers and minorities, shield church groups from paying child abuse victims, and impose extreme emotional harm on school children based on their gender identity.

Since the beginning of the Trump Administration this troublesome trend has only gotten worse. On May 4th, 2017, the Trump Administration issued an Executive Order undermining RFRA's original intent and allowing individuals to use conscious based objections to override civil rights protections.

That Executive Order directed Attorney General Sessions to issue guidance interpreting religious liberty protections in Federal law. Instead, the Attorney General issued guidance following his own personal religious beliefs, and without regard to other beliefs. The guidance has provided legal cover for the administration to permit, or even promote, government sanctioned attacks on civil rights in employment, healthcare, foster care, and other areas under the guise of religious liberty.

These attacks are spreading. For example, the Department of Education has proposed altering which institutions of higher education count as "religious" in the accrediting process in order to allow colleges with any religious affiliation to freely discriminate.

The Department of Health and Human Services misapplied RFRA to propose rolling back the Affordable Care Act's protections for patients against discrimination on the basis of race, color, national origin, sex, age, or disability.

The Administration has also eroded women's reproductive rights by moving to allow employers to skirt the ACA and deny coverage for contraception on the basis of religion.

The Trump Administration is misapplying RFRA when it allows Federal funds to be used to discriminate against families when placing foster children, and recently permitted a federally funded

organization in South Carolina to restrict placement of foster children only to evangelical Christian families. This discrimination is being used to deny taxpayer-funded placements of vulnerable refugee children in addition to the other discrimination.

Finally, the Office of Federal Contract Compliance Programs, OFCCP, is allowing Federal contractors to violate civil rights laws based upon the RFRA exemption, only without the ability to question the sincerity or legitimacy of the claim.

These examples are just a few ways the Administration has twisted RFRA to threaten basic civil rights imbedded in the Civil Rights Acts of 1964 and other protective actions.

In other words, the path of religious exemptions we are on today not only strays from President Roosevelt's original Executive Order signed 78 years ago, but it also threatens our civil rights and our democracy.

Unfortunately, history tells us that our country will only continue this dangerous trajectory unless we act.

That responsibility falls on Congress. We must pass legislation that restores RFRA's original attempt. H.R. 1450, the Do No Harm Act, would help to ensure that our right to religious liberty does not threaten fundamental civil and legal rights.

Specifically, the bill would prevent RFRA from being used to deny equal opportunity and protection against discrimination laws, workplace protections, and protection against child abuse, healthcare access coverage and services, and contracted services.

I hope that we can all agree that while religious liberty remains a fundamental value, it cannot and should not be used as a weapon to cause harm to others, but rather as a shield to protect civil rights of people of all faiths, not just a favored few.

I now recognize the distinguished Ranking Member for the purpose of making an opening statement.

[The statement by Chairman Scott follows:]

Prepared Statement of Hon. Robert C. "Bobby" Scott, Chairman, Committee on Education and Labor

Seventy-eight years ago, today, President Franklin D. Roosevelt signed Executive Order 8802, the first action to promote equal opportunity and prohibit employment discrimination in Federal contracting in the United States. The Order barred private, defense-related contractors from discrimination and required certain defense-related programs to be administered without discrimination as to, 'race, creed, color, or national origin.' Subsequent orders and amendments have been signed to confirm the principal that discrimination is prohibited when using Federal money.

It is against this backdrop that we examine the challenge of protecting our civil rights while maintaining our fundamental commitment to religious liberty.

Religious liberty is a fundamental American value. Our Founding Fathers knew from personal experience the dangers of governmental entanglement with religion. In 1779, Thomas Jefferson, in my home State of Virginia, introduced and helped pass the Nation's precursor to the First Amendment, which States, 'Our civil rights have no dependence on our religious opinions, any more than our opinions on physics and geometry.'

The Virginia statute on religious freedom became the foundation for the First Amendment in our Nation's constitution, which stipulates that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

The First Amendment makes clear that all Americans have the right to practice the religion of their choice, or none at all, and reflects our country's commitment to separating religion from government, or 'church and State.'

Religion has played a vital role in our Nation's history. It has furthered social justice causes, such as the abolitionist movement, civil rights movement, and movement to end child labor.

However, some have used religion as a pawn to justify slavery, Jim Crow, the slaughter of our native populations, and other horrific acts.

In fact, when I was growing up, segregation was preached from the pulpit. Before the Supreme Court struck down the ban on interracial marriage in Loving v. Virginia, the judge, in the circuit court in Virginia, in a 1965 lower court decision, relied on his own religious belief to conclude: 'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.'

That was the basis for the original decision in Loving v. Virginia that was overturned by the Supreme Court. And while some religions have been protected in the courts, others have experienced less, or no protection at all. In 1990, the Supreme Court's decision in Employment Division v. Smith upheld the firing of two Native American employees for participating in ceremonial peyote-smoking during personal time.

In response, Congress passed the Religious Freedom Restoration Act (RFRA)in 1993 on a bipartisan basis to expand protections for religious exercise. Under RFRA, Congress addressed the Court's 1990 decision by clarifying that government action may only infringe on a person's exercise of religion if there is compelling government interest and if it is the least restrictive means to achieve that interest.

The passage of RFRA was meant to reinstate a broader protection of free exercise rights. It was not meant to erode civil rights under the guise of religious freedom. Importantly, it did not change the First Amendment's Establishment Clause, which ensures that the government cannot elevate certain religious or moral beliefs above the law.

No sooner than RFRA was enacted, the floodgates began to open and RFRA has since been used to:

Legitimize housing discrimination against single mothers and minorities,

Shield church groups from paying child abuse victims, and

Impose extreme emotional harm on schoolchildren based on their gender identity.

Since the beginning of the Trump administration, this troublesome trend has only gotten worse. On May 4th, 2017, the Trump administration issued an Executive Order, undermining RFRA's original intent and allowing individuals to use 'conscience-based objections' to override civil rights protections.

That Executive Order directed Attorney General Sessions to issue guidance interpreting religious liberty protections in Federal law. Instead, the Attorney General issued guidance following his own personal religious beliefs and without regard to other beliefs. The guidance has provided legal cover for the administration to permit or even promote government-sanctioned attacks on civil rights in employment, health care, foster care, and other areas, under the guise of religious liberty.

These attacks are spreading. For example, the Department of Education has proposed altering which institutions of higher education count as 'religious' in the accrediting process to allow colleges with any religious affiliation to freely discriminate.

The Department of Health and Human Services misapplied RFRA to propose rolling back the Affordable Care Act's protections for patients against discrimination on the basis of race, color, national origin, sex, age, or disability. The administration has also eroded women's reproductive rights by moving to allow employers to skirt the ACA and deny coverage for contraception on the basis of religion.

The Trump administration is misapplying RFRA when it allows Federal funds to be used to discriminate against families when placing foster children and recently permitted a federally funded organization in South Carolina to restrict placement of foster children only to evangelical Christian families. This discrimination is being used to deny taxpayer-funded placements of vulnerable refugee children in addition to other discrimination.

Finally, the Office of Federal Contract Compliance Programs (OFCCP) is allowing Federal contractors to violate civil rights laws based upon a RFRA exemption, without the ability to question the sincerity or legitimacy of the claim.

These examples are just a few of the ways this Administration has twisted RFRA to threaten basic civil rights embedded in the Civil Rights Act of 1964 and other protective laws.

In other words, the path of religious exemptions we are on today not only strays from President Roosevelt's original Executive Order signed 78 years ago but threat-

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That responsibility falls on Congress. We must pass legislation that restores RFRA's original intent. H.R. 1450, the Do No Harm Act, would help ensure that our right to religious liberty does not threaten fundamental civil and legal rights.

Specifically, the bill would prevent RFRA from being used to deny:

Equal opportunity and protection against discriminatory laws;

Workplace protections and protections against child abuse;

Health care access, coverage, and services; and,

Contracted services.

I hope all of us here can agree that while religious liberty remains a fundamental value, it cannot and should not be used as a weapon to cause harm to others, but rather as a shield to protect the civil rights of people of all faiths, not just a favored few.

I now recognize the distinguished Ranking Member for the purpose of making an opening statement.

Mrs. FOXX. Thank you, Mr. Chairman. Thank you for yielding.

The First Amendment of the United States Constitution declares that Congress may make no law "respecting an establishment of religion or prohibiting the free exercise thereof."

Our Founding Fathers reiterated this principle at every stage. That people are fundamentally free and are endowed by their creator with certain inalienable rights, among these the ability to worship freely. Many of the first settlers of our country crossed the ocean in search of this very freedom that we are discussing here today.

Members present in this room come from a diverse range of social, economic, and religious backgrounds. Surely this pillar of our Nation's founding cannot be lost on us.

The right of Americans to practice freely their religion and conduct their business without unnecessary interference from the government is as important in 2019 as it was in 1620, in 1776, and 1789.

Not too long-ago, Congress reaffirmed the significance of this basic human right by passing the Religious Freedom Restoration Act of 1993. With nearly unanimous bipartisan support, RFRA stands as our Nation's primary religious liberty statute, enacted to ensure that all Americans can freely express their faith without fear of discrimination.

It recognizes the importance of all religious faiths, including religious minorities, and offers a safe haven for anyone seeking to practice their religion freely by providing a sensible balancing test that allows individuals exercising their religious beliefs a fair hearing under the law.

It is unacceptable that congressional Democrats, starting in earnest during the last administration, have consistently ignored how clear the First Amendment is in affirming religious practice as a fundamental human right. Actions by Democrat legislators in the name of political point scoring have eroded the rights protected by RFRA and harmed those who wished to exercise their Constitutional right to freedom of religion.

The Affordable Care Act and other policies of the Obama Administration have imposed countless coverage mandates for contraception and abortion coverage that attempt to force individuals to violate their religious beliefs. Small business owners and religious groups have spent tens of thousands of dollars and countless hours

defending their values and consciences. And the Supreme Court has ruled time and again that these attempts to limit religious expression are unlawful.

We have long stood as a nation set apart from other nations because of the promises and principles of our First Amendment. Our individual liberties are the envy of people across the world, and our freedom of thought and expression are the cornerstone of this democracy. Now more than ever it is vital that we safeguard these fundamental rights.

I stand with all House Republicans and any Democrats willing to put aside politics in the best interest of the people to defend religious freedom and the rights of religious minorities to worship freely.

We will continue to oppose all policies that undermine the United States Constitution and that disrespect and diminish the faith of any American.

House Republicans will also continue our steadfast support for the Religious Freedom Restoration Act and will fight any attempts to diminish or weaken the law which has served our country well for over 25 years.

Lastly, it is good to see Congressman Kennedy and Congressman Johnson join us here today. As we all know, Congressman Kennedy's legislation to limit the scope and application of RFRA is solely within the jurisdiction of the Judiciary Committee. As such, Congressman Kennedy's time, in particular, would likely be better spent speaking before our colleagues on that committee. Regardless, I thank both of my colleagues in advance for their testimony, and I hope we can all work together to protect the Constitution of the United States.

Mr. Chairman, I would like to make a small point of personal privilege. I have two young men from the 5th District in North Carolina shadowing me today, Reed Ballis and Lucas Schneider. And they have a particular interest in this hearing today and I welcome them to the hearing. With that, Mr. Chairman, I yield back.

[The statement by Mrs. Foxx follows:]

Prepared Statement of Hon. Virginia Foxx, Ranking Member, Committee on Education and Labor

The First Amendment of the United States Constitution declares that Congress may make no law "respecting an establishment of religion, or prohibiting the free exercise thereof." Our founding fathers reiterated this principle at every stage: that people are fundamentally free, and are endowed by their Creator with certain inalienable rights, among these, the ability to worship freely. Many of the first settlers of our country crossed the ocean in search of this very freedom that we are discussing here today. Members present in this room come from a diverse range of social, economic, and religious backgrounds —surely, this pillar of our Nation's founding cannot be lost on us. The right of Americans to practice their religion freely and conduct their business, without unnecessary interference from the government, is as important in 2019 as it was in 1620, in 1776, and in 1789.

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Chairman SCOTT. Thank you. Without objection all other members who wish to insert written statements into the record may do so by submitting them to the committee clerk by Monday, July 8th, 2019, in the normal format.

I will now introduce our witnesses for our first panel. Congressman Mike Johnson represents Louisiana's 4th Congressional District. He is the Ranking Member of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Judiciary Committee. He also serves on the House Natural Resources Committee and is Chair of the Republican Study Committee.

Joe Kennedy, III, represents the 4th Congressional District of Massachusetts, a member of the House Energy and Commerce Committee. He has helped lead Congress on core issues of economic equity, particularly in healthcare and mental health. He also serves as Chair of the Congressional Transgender Equality Task Force.

Let me just say we appreciate both of you for being here today. You are fully aware of the procedures and testimony and the lighting system. And so we will first recognize Representative Johnson.

STATEMENT OF THE HONORABLE MIKE JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. JOHNSON. Thank you, Chairman Scott, Ranking Member Foxx, and all the Committee members. Appreciate the opportunity to be with you this morning.

Let me begin this morning just by saying I genuinely appreciate the intellect and the sincerity and the pure intentions of my good friend, Joe Kennedy. We have talked about this at some length, as well as my other good friends and Democratic colleagues who are co-sponsors and supporters of this bill.

That said, I am here today to urge opposition to this legislation because I am convinced it would eviscerate one of the most important and widely regarded laws that has ever been passed by the Congress, and that is the Religious Freedom Restoration Act, or RFRA, as we call it.

I did want to just make a quick remark. I do find it a bit curious that we are here instead of over in our Subcommittee on Judiciary. I am looking at my chairman up there, Mr. Cohen. We would have a good time with this. But it is here for whatever reason, so I found out about it yesterday and I came to be a part of it.

I bring you today first-hand knowledge and experience of the benefits and importance of the Religious Freedom Restoration Act because prior to my election to Congress I served for nearly 20 years as a Constitutional law attorney and religious liberty defense litigator.

For more than 25 years now RFRA has helped secure the fundamental right of Americans to live and work according to their sincerely held religious beliefs. We can never lose sight of the importance of this protection.

For so many reasons we know, religious liberty is often referred to as our First Freedom. The founders listed it first in the Bill of Rights because they understood the right to believe and to act upon that belief is essential to who we are as Americans, but more fundamentally than that, who we are as human beings.

When that premise was placed in some doubt by a decision of the Supreme Court in 1990's Employment Division v. Smith, Congress responded with a truly bipartisan effort that was led by giants on both sides of the aisle. Ironically, Senators Ted Kennedy and Orrin Hatch, and then-Representative Chuck Schumer.

The 1993 Religious Freedom Restoration Act received overwhelming support also from more than 60 national religious and civil liberties organizations from across the philosophical and political spectrum. The bill passed unanimously in our House and received only three dissenting votes in the Senate.

It was celebrated and signed by President Bill Clinton, who hailed the "Broad coalition of Americans who came together to make this bill a reality."

The reason all those diverse groups came together was because the Smith decision had caused great alarm around the country. In that case the Supreme Court ruled against two Native Americans who were terminated from their jobs because they failed a drug test after using peyote in a traditional religious ceremony. As you might expect, many of the conservative and religious groups, and even many Members of Congress who voted for RFRA didn't personally agree with the religious practices of the peyote users. In fact, the House Judiciary Committee itself specifically disclaimed support for any particular practices that RFRA might be used to uphold.

But the personal views of the lawmakers was not the point. Everyone, both liberal and conservative, recognized that even the sincerely held religious beliefs of small minority groups are important for us to protect. RFRA supporters understood that one day it could be their own religious beliefs and practices that would be unpopular and face government scorn and restriction.

So RFRA was created to provide a very reasonable balancing test, and this is the key. It is a balancing test in our civil rights law. It preserves, and seeks to preserve, both religious liberty and the rule of law. As Senator Ted Kennedy said, the lead Senate sponsor, he explained at that time "The act creates no new rights for any religious practice or any potential litigant."

RFRA merely protects the right of every American, regardless of their political belief system or their religious belief system, to have a fair court review any time the government takes an action that forces them to violate their deeply held religious beliefs.

Simply put, as it has been stated already, the balancing test provides that the government cannot substantially burden the exercise of religious belief unless the government can prove that the burden serves a compelling government interest that is accomplished by the least restricted means.

It is important to emphasize again that all RFRA provides is a fair hearing, it doesn't determine any outcome. In fact, as attorney Matthew Sharp has pointed out in his written statement for the committee today, in the quarter century since RFRA was enacted, people who have sought protection for their religious practices under the statute have only been successful in 16.3 percent of appellate court opinions, and 17.6 percent of district court opinions. In other words, the government almost always wins. The Do No Harm Act that you are hearing today was originally drafted and filed in the immediate wake of the Burwell v. Hobby Lobby decision in 2014. As you know, in that case the Supreme Court recognized a very narrow exemption and held that the contraceptive mandate provision in the Obama Care statute could not be used to force the owners of a specific closely held business to violate their sincerely held religious convictions.

Critics of the Hobby Lobby decision insisted that the decision would "open the flood gates," to all sorts of new claims under RFRA and to "impose Christian values on America and use religious freedom as a new license to discriminate."

That simply has not happened. In fact, as the Becket Religious Liberty Defense Organization has pointed out, "A recent comprehensive empirical study of religious freedom cases, post Hobby Lobby, reveals that religious minorities remain significantly over represented in religious freedom cases, and Christians remain significantly under represented."

Scholars in a 2018 Law Review article documented that "Lawsuits filed post Hobby Lobby similarly found that Hobby Lobby has not had a dramatic effect on government win rates and religious exemption challenges nor have religious claims undergone a dramatic expansion in volume following the case. If anything, the volume of these cases appears to be slightly decreasing as a percentage of overall reported case."

It is worthy of note too that Becket highlights the fact that several of the 21 States that have adopted and maintained State level RFRA statute since the 1990's, like Connecticut and Illinois for example, are listed among the most favorable States for LGBT protections.

As I told my friend Joe Kennedy on the House floor last night, I know he and my other good friends who are co-sponsors of this bill are very sincere and well-intended. But so are the countless supporters of the RFRA statute and the religious minorities who rely upon it to preserve their most basic and inalienable rights and their right to provide essential goods and services to their communities.

In a government of, by, and for the people are constant challenges to maintain a balance of the competing interests in society. The balance test of RFRA, it was originally championed and enacted by the leaders of the Democratic party, has served our Nation well. The legislation proposed today would eviscerate that tried, true, and cherished legal protection and effectively repeal it.

Ironically, the Do No Harm Bill would cause great harm and immediate risk to the religious people and the thousands of religious organizations of all faiths in this country who provide the essential food, clothing, shelter, counseling and social services, jobs and well-being for millions upon millions of Americans.

I urge my colleagues to proceed here with great caution. And let us work together, as they have in previous Congresses, to uphold and maintain the critically important RFRA statute in its current form. It works, and it should not be changed.

I thank you, Mr. Chairman, I yield back.

Chairman SCOTT. Thank you. And I note you mentioned the question of jurisdiction. This Committee has jurisdiction over matters related to equal employment opportunities like the EEOC, has jurisdiction over many health and human services programs, particularly those in child adoption. And the South Carolina case that I mentioned specifically used RFRA to deny opportunities. So all of those social services programs and the discrimination in those programs are within the jurisdiction of this Committee.

Representative KENNEDY.

STATEMENT OF THE HONORABLE JOSEPH P. KENNEDY, III, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. KENNEDY. I thank the Chairman for holding this important hearing and for his decades of leadership on this issue and so many issues with regards to our civil rights. And I want to thank the Ranking Member as well for her comments, and my colleagues on both sides of the aisle for attending today's important hearing, and my good friend Congressman Johnson for his dedication to these issues, for his engagement last night and over the course of the past several weeks, and his commitment to try to work together to discuss some of these issues as well.

In 1993 Congress passed the Religious Freedom Restoration Act with an overwhelming bipartisan support, in response to Employment Division v. Smith. Which saw two Native Americans fired

from their jobs and denied unemployment after they consumed a controlled substance outside of work as part of their religious faith.

For these Native Americans, and other religious minorities like them, RFRA was meant to be a shield that protects. Because Native Americans should be free to practice their religion, because Jewish children should be able to wear yarmulkes in public schools that prohibit them. Because restrictions on facial hair should contain exceptions for those of the Muslim faith.

However, over the years RFRA has morphed from a shield of protection to a sword of infringement. Allowing employers to undermined basic workplace protections, organizations to stonewall child labor investigations, and health providers to deny needed care for victims of sexual abuse.

The Supreme Court's 2014 ruling in Burwell v. Hobby Lobby opened the doors for these flood gates even further, providing a path for corporations to cite their faith in discriminating against their employees.

Since then we have witnessed an administration that has laid the foundation for discrimination in the name of religious liberty at every conceivable opportunity. Right now the Trump Administration is fighting to make it easier for women to be denied critical contraceptive coverage on the basis of an employer's religious and moral beliefs.

The Department of Justice issued a memorandum to all Federal agencies and departments permitting employers to use their religious beliefs to discriminate in employment, even with publicly funded dollars.

Earlier this year the Administration granted a request from South Carolina to use RFRA to waive non-discrimination requirements for State contracted child welfare agencies. That ruling allowed Miracle Hill Ministries, the State's largest foster care provider, to turn one woman, Aimee Maddona, away because she is Catholic and not Protestant.

Only a few weeks ago the Administration cited RFRA to roll back the ACA's coverage to allow discrimination in healthcare simply because a person in need of healthcare happens to be transgender or because of a woman's reproductive healthcare decisions.

It is precisely for these reasons that Congressmen Bobby Scott and I introduced the Do No Harm Act, to restore RFRA to its original purpose as a protective shield for religious minorities, to clarify that no claim of religious exemption from laws that protect against discrimination, that govern wages and collective bargaining, prohibit child labor and abuse, provide access to healthcare, or regulate public accommodations, provide social services through government contracts.

The Do No Harm Act confirms what generations of civic history, constitutional law, and American experience have proved true. If civil liberties and legal rights exist only in the absence of a neighbor's religious objection, then they are not rights, but empty promises.

The ability to freely and fully exercise sincerely held religious beliefs in this country is a liberty we all cherish. It is a bedrock foundation of this country. Across the Nation religious principle inspires countless families, organizations, and communities to cham-

pion economic justice, human dignity, common decency, and freedom.

But there is a difference between exercising religious beliefs and imposing them on others. Our Constitution fiercely protects the former and expressly prohibits the latter.

With civil liberties under attack, now is the time to affirm that the religious beliefs of one person do not supersede the civil rights of another. And that there is no religious exceptions to equal protection. It is time to restore RFRA to what it was originally intended to be.

Mr. Chairman, I yield back.

[The statement of Mr. Kennedy follows:]

Testimony by Congressman Joseph P. Kennedy, III (MA-04)

for

"Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"

I first would like to thank Chairman Scott for his tireless leadership on this issue and his staff for holding this important hearing.

In 1993, Congress passed the Religious Freedom Restoration Act with overwhelming bipartisan support in response to *Employment Division v. Smith*, which saw two Native Americans fired from their jobs and denied unemployment after they consumed a drug outside of work as part of their religious faith.

For these Native Americans and other religious minorities like them, RFRA was meant to be a shield to protect: because Native Americans should be free to practice their religion; Jewish children should be allowed to wear yarmulkes in public schools that prohibit them; fire department restrictions on facial hair should contain exceptions for those of Muslim faith.

However, over the years, RFRA has morphed from a shield of protection to a sword of infringement, allowing employers to undermine basic workplace protections, organizations to stonewall child labor investigations, and health providers to deny needed care for victims of sexual abuse.

The Supreme Court's 2014 ruling in *Burwell v. Hobby Lobby Stores* opened these floodgates even further, providing a path for corporations to cite faith in discriminating against employees.

Since then, what we have witnessed is an administration that has laid the foundation for discrimination in the name of religious liberty at every conceivable opportunity.

Right now, this administration is fighting to make it easier for women to be denied critical contraceptive coverage on the basis of an employer's religious and moral beliefs.

The Department of Justice issued memorandum to all federal agencies and Departments misinterpreting RFRA to permit employers that use their sincerely-held religious beliefs to discriminate in employment, even with publicly-funded dollars.

Earlier this year, the Trump Administration granted a request from South Carolina to use RFRA to waive non-discrimination requirements for state-contracted child welfare agencies, allowing Miracle Hill Ministries, the state's largest foster care provider, to turn one woman, Aimee Maddonna, away because she is Catholic and not Protestant.

And, only a few weeks ago, the Administration cited RFRA to roll back the ACA's Health Care Rights Law and allow discrimination in healthcare, simply because a person in need of health care happens to be transgender, or because of a woman's reproductive health care decisions.

It is precisely for these reasons Congressman Bobby Scott and I introduced the Do No Harm Act: to restore RFRA to its original purpose — as a protective shield for religious minorities — and clarify that no one can claim religious exemption from laws that protect against discrimination, govern wages and collective bargaining, prohibit child labor and abuse, provide access to health care, regulate public accommodations, or provide social services through government contracts.

The Do No Harm Act confirms what generations of civic history, constitutional law and American experience have proved true: if civil and legal rights exist only in the absence of a neighbor's religious objection, then they are not rights but empty promises.

The ability to freely and fully exercise sincerely-held religious beliefs in this country is a liberty we cherish. Across the nation, religious principle inspires countless families, organizations and communities to champion economic justice, human dignity and common decency.

But there is a difference between exercising religious beliefs and imposing them on others. Our Constitution fiercely protects the former and expressly prohibits the latter.

With civil liberties under constant attack, now is the time to affirm that the religious beliefs of one person do not supersede the civil rights of another and that there are NO religious exceptions to equal protection. It is time to restore RFRA to what it was originally intended to be.

Chairman SCOTT. Thank you. And I want to thank Congressman Johnson and Congressman Kennedy for taking the time to testify before the committee today. Your testimony is a valuable piece of the Legislative record, and I want to thank you both for being here.

We will now seat the second panel. We will delay for a minute or two as they get situated. We ask our witnesses to come forward.

I will now introduce our witnesses for the second panel. Rachel Laser is the President and CEO of Americans United for Separation of Church and State. She formerly served as the Deputy Director for the Religious Action Center for Reformed Judaism, Director of the Culture Program, a Third Way, and Senior Counsel of the National Women's Law Center.

Shirley Wilcher is the Executive Director of the American Association for Access, Equity, and Diversity. She previously served as Deputy Assistant Secretary of the Office of Federal Contract Compliance Programs during the Clinton Administration. Notably she worked for this Committee as Associate Counsel for civil rights under Chairman Augustus Hawkins.

And J. Matthew Sharp is Senior Counsel for the Alliance Defending Freedom, where he directs the Center for Legislative Advocacy. He previously served as an associate at Equites Law Alliance, PLLC.

Reverend Jimmy Hawkins serves as the Director of the Presbyterian Church (U.S.A.) Office of Public Witness in Washington, DC. For 20 years he served as a pastor of Covenant Presbyterian Church in Durham, North Carolina. He also serves as a board trustee with Union Presbyterian Seminary, has chaired several inter-faith, ecumenical, and non-profit boards.

We appreciate all the witnesses for being here today and look forward to your testimony. Let me remind the witnesses that your written statements will appear in full in the hearing record pursuant to committee Rule 7d and committee practice. Each of you is asked to limit your oral presentation to a 5-minute summary of your written statement.

Let me remind you that it is unlawful to willfully falsify statements to Congress, and since you know that we won't swear you in.

Before your testimony, please remember to press the button on the microphone in front of you so that it will turn on and members can hear you. As you begin to speak the light will turn green. After 4 minutes the light will turn yellow to signal that you have 1 minute remaining. When the light turns red it indicates your time has expired and we would ask you to wrap up as quickly as possible.

We will let the entire panel make presentations before we move to member questions. When answering a question, please remember to once again turn your mic on.

Ms. LASER.

STATEMENT OF RACHEL LASER, J.D., PRESIDENT & CEO, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Ms. LASER. Good morning, Chairman Scott, Ranking Member Foxx, and committee members. Thank you for the opportunity to testify on this critical issue.

Last winter I met Aimee Maddona. Aimee, her husband and three kids want to open their home to children in foster care. Aimee was thrilled when after going through an intensive screening process, Miracle Hill Ministries said her family was just what they were looking for. But then they had one more question. What church do you attend?

They asked because Miracle Hill only accepts Evangelical Protestants. Aimee couldn't pass that test because she's Catholic. Neither could Beth Lesser, who was turned away because she's Jewish. Nor could Eden Rogers and Brandy Welch, a same-sex Unitarian couple also rejected.

Despite accepting $600,000 in Federal and State taxpayer money, Miracle Hill imposes a religious litmus test on potential parents and volunteers.

This discriminatory policy denies children in the foster care system the love and families they need. Miracle Hill says religious freedom allows them to engage in this blatant religious discrimination. The Trump Administration agrees, and has used RFRA to exempt Miracle Hill from complying with the Federal Anti-Discrimination Law. But this isn't what RFRA was intended to do.

RFRA was enacted in 1993 in response to the Supreme Court's Employment Division v. Smith opinion. Faith groups, legal experts, and civil liberties groups, including Americans United, came together across political divides to preserve religious freedom protections, especially for religious minorities. Allowing RFRA to be used to harm others also violates the Establishment Clause of the First Amendment.

The government can't make you pay the cost of my religious exercise because that's preferring my faith to yours.

Unfortunately, the Trump Administration is ignoring the intent and constitutional limitations on RFRA. It's weaponizing RFRA to undermine civil rights protections, deny people access to healthcare and government services, and even deny children loving homes. This harms LGBTQ people, women, the non-religious, and religious minorities the most.

RFRA, a statute designed as a shield to protect, is now being used as a sword to harm others. The Trump Administration has cited RFRA to create harmful religious exemptions, and more are coming.

In addition to the South Carolina foster care waiver, employers are now allowed to deny their employees insurance coverage for birth control promised them by the ACA. And a Labor Department directive expands the ability of Federal contractors to cite religion to discriminate in hiring.

Efforts to use religion to undermine Civil Rights protections are nothing new. In 1968, the Supreme Court rejected arguments that a restaurant owner could refuse to serve Black patrons because it was "The will of God." Federal appeals courts, as recently as the

1990's, rejected Christian schools' claims that religious freedom allowed them to give married men larger benefits and salaries than women.

Today we must continue to reject efforts to use religion to justify discrimination, and Congress can help. First, it should conduct oversight hearings on the Administration's misuse of RFRA. And second, Congress should pass the Do No Harm Act, a simple yet critical bill designed to restore RFRA to its original intent. It will preserve the law's power to protect religious freedom while clarifying it may not be used to harm others.

Under the Do No Harm Act, RFRA would still provide protections, like ensuring Sikh service members can wear articles of faith while in uniform. RFRA couldn't be used, however, to allow a government funded homeless shelter to turn away a transgender person or to allow a homeowner's association to exclude non-Christians.

Our country is strongest when we are all free to believe or not as we see fit, and to practice our faith without harming others. Like Aimee Maddona said, if you don't protect the rights of everybody it sets a precedent that will eventually touch on you.

[The statement of Ms. Laser follows:]

Testimony of Rachel Laser,
President and CEO, Americans United for Separation of Church and State

Before the
U.S. House Committee on Education and Labor

Hearing on
"Do No Harm: Examining the Misapplication of the Religious Freedom Restoration Act"

June 25, 2019

Chairman Scott, Ranking Member Foxx, and members of the Committee, thank you for the opportunity to testify before you today on behalf of Americans United for Separation of Church and State.

Founded in 1947, Americans United is a nonpartisan advocacy and educational organization dedicated to preserving the constitutional principle of church-state separation, which is the foundation of religious freedom for all Americans. We fight to protect the right of individuals and communities to practice religion—or not—as they see fit without government interference, compulsion, support, or disparagement, so long as they do not harm others. We have more than 120,000 members and supporters across the country.

Thank you for holding this hearing and shining a spotlight on the increasing misapplication of the Religious Freedom Restoration Act (RFRA). RFRA was intended to be a shield to protect religious freedom, particularly for religious minorities. Today, however, RFRA is being used as a sword to undermine civil rights protections, deny people access to healthcare and government services, and even deny children loving homes. This misapplication of RFRA hurts LGBTQ people, women, the nonreligious, and religious minorities the most, but all of us are at risk.

This misuse of RFRA also erodes real religious freedom. For example, the law is currently being used to turn away qualified people from taxpayer-funded jobs and from fostering children in need because they are deemed the "wrong" religion. Under the guise of *religious liberty*, RFRA is being used to promote *religious discrimination*.

The threat of allowing religious discrimination to masquerade as religious freedom became even clearer to me this winter, after I met Aimee Maddonna, a devout Catholic and mother of three. Aimee's father was in the foster system and wanted to make the lives of other kids in the system

better, so he opened his home, and Aimee grew up with many foster brothers and sisters. Now, as Aimee is raising her own family, she wants to open her home to kids in foster care as well.

Aimee was thrilled when Miracle Hills Ministries, a local foster care agency, told her that her family would be a good fit. But after inquiring about what church Aimee attends, Miracle Hills rejected her because they only allow volunteers and mentors who are Evangelical Protestant Christians.

Despite accepting $600,000 of federal and state taxpayer money last year alone, Miracle Hill imposes a religious litmus test on potential parents and volunteers.

Aimee couldn't pass Miracle Hill's test because she's Catholic. Neither could Beth Lesser or Lydia Currie, who were denied the opportunity to mentor children because they are Jewish. Miracle Hill also rejected Eden Rogers and Brandy Welch, a same-sex Unitarian couple, who wanted to open their home to children in foster care.

By discriminating against qualified potential parents and volunteers, Miracle Hill punishes children in South Carolina's foster care system. It denies them relationships with mentors. It also reduces the number of qualified foster and adoptive parents who are able to open their homes to these children, making it even more difficult for these children to find a loving home.

Perversely, Miracle Hill says it has a religious freedom right to engage in this blatant religious discrimination. And instead of enforcing the federal regulation that prohibits this kind of discrimination, the Trump Administration has used RFRA to exempt Miracle Hill and similar providers in South Carolina from complying with the law. This is just one example of the Administration's systematic misuse of the Religious Freedom Restoration Act.

I. The History of RFRA Through to the Trump Administration

RFRA was born of good intentions: Congress, with the support of a broad coalition of progressive and conservative groups, enacted RFRA to protect religious freedom, especially for religious minorities. In the two decades since, however, many have misconstrued and exploited the law in ways that would harm and deny the rights of others.

In 1990, in an opinion written by Justice Scalia, the Supreme Court ruled in *Employment Division of Oregon v. Smith*[1] that neutral and generally applicable laws do not violate the Free Exercise Clause of the First Amendment of the U.S. Constitution—even if they result in a substantial burden on religious exercise. People from many faiths and denominations, legal experts, and civil liberties advocates across the political spectrum saw this as a drastic change that would lessen constitutional protection for the free exercise of religion, particularly for people who belong to minority faiths. Americans United joined this broad coalition to advocate for a congressional response to the *Smith* decision, and in 1993, Congress passed RFRA.

[1] 494 U.S. 872, 890 (1990).

In accordance with RFRA, the government may not place a substantial burden on religion unless it has a compelling government interest and the law is the least restrictive way of achieving that interest.

The three years of discussion and debate leading up to RFRA's passage centered on how to protect minority religious practices from government proscription, such as ensuring Jewish children could wear yarmulkes in public schools or Muslim firefighters could have beards. But it is important to remember that RFRA was intended to reflect the state of the law before *Smith*: to provide heightened but not unlimited protections for religious exercise. Had anyone argued that RFRA was designed to allow some to use religion to undermine the rights of others, the broad coalition would have fallen apart.

Soon after enactment of RFRA, however, commercial landlords with religious objections to cohabitation outside of marriage argued that the RFRA standard granted them the right to ignore housing discrimination laws and refuse housing to unmarried couples.[2] This prompted concern by some of RFRA's leading proponents, including Americans United, that the federal law could be used as a defense to thwart civil rights claims. In fact, after the Supreme Court held in 1997 that RFRA could not apply to the states,[3] Congress attempted to pass a new bill[4] that would have applied the RFRA standard to the states, but the bill could not pass because of concerns that it would be used to justify discrimination.

Efforts to use RFRA to cause harm did not stop with the landlord cases. RFRA was soon used to refuse counseling to patients in same-sex relationships;[5] avoid ethics investigations;[6] obstruct criminal investigations;[7] shield religious organizations from bankruptcy and financial laws, which effectively denied compensation to victims of sexual abuse;[8] and thwart access to health

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[2] *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000); *Smith v. Fair Emp. & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Ala. 1994); *Attorney Gen. v. Desilets*, 636 N.E. 2d 233 (Mass. 1994).

[3] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[4] Religious Liberty Protection Act, S. 2081 (2000) & H.R. 1691 (1999), 106th Congress; S. 2148 & H.R. 4019, 105th Congress (1998).

[5] *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012) (arguing that offering counseling to individuals in a same-sex relationship burdened a counselor's religious exercise).

[6] *Doe v. La. Psychiatric Med. Ass'n*, No. 96-30232, 1996 WL 670414 (5th Cir. Oct. 28, 1996) (using federal RFRA to challenge an ethics investigation by the Louisiana Psychiatric Medical Association).

[7] *In re Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (claiming that RFRA prohibits government from compelling grand jury witness to testify against rabbi); *United States v. Town of Colorado City*, No. 3:12-CV-8123-HRH, 2014 WL 5465104 (D. Ariz. Oct. 28, 2014) (arguing that RFRA prohibited Department of Justice from compelling witness testimony in civil-rights lawsuit against city).

[8] *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015) (arguing that RFRA should shield archdiocese from bankruptcy laws that would make more funds available to pay victims of sexual abuse).

clinics.[9] In states with RFRAs that mirror the federal RFRA, the statutes have been invoked to avoid licensing requirements[10] and resist lawsuits over sexual abuse by clergy members.[11]

The misapplication of RFRA reached new heights when the George W. Bush Administration's Office of Legal Counsel asserted that RFRA can be used to circumvent employment nondiscrimination protections that apply to federal grant programs.[12] According to the memorandum opinion, faith-based grant recipients have a religious freedom right to impose a religious litmus test on who they will hire for federally funded jobs. This OLC memo continues to be used to justify employment discrimination in programs like the Violence Against Women Act, the Workforce Innovation and Opportunity Act, the Juvenile Justice and Delinquency Prevention Act, and Head Start, despite the clear language in each statute prohibiting such discrimination.

Then in 2014, the Supreme Court, in *Burwell v. Hobby Lobby Stores*,[13] held that a large, closely held, for-profit corporation could use RFRA to deny its employees benefits that are guaranteed by law. In the case, Hobby Lobby, a craft chain store that employs more than 37,000 people,[14] argued that the religion of the company's owners prohibited it from providing its employees with health insurance that covers FDA-approved methods of contraception without cost sharing, which was required under the Affordable Care Act. In an unprecedented ruling, the Court, for the first time, used RFRA to grant a for-profit corporation a religious exemption, allowing Hobby Lobby's owners to impose their religious beliefs on its company's employees. The opinion resulted in a RFRA test that is unbalanced: it is now easier to demonstrate a substantial burden on religious exercise and harder for the government to prove a law is narrowly tailored.

Unfortunately, attempts to use religion to undermine civil rights are nothing new. In *Newman v. Piggie Park Enterprises, Inc.*,[15] a business owner refusing to serve African Americans argued his religious beliefs "compel[led] him to oppose any integration of the races"[16] and that the Free Exercise Clause gave him a right to violate Title II of the Civil Rights Act.[17] The Supreme Court

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[9] *E.g.*, *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (challenging Freedom of Access to Clinic Entrances Act under RFRA).

[10] *Youngblood v. Fla. Dep't of Health*, No. 06-11523, 2007 WL 914239 (11th Cir. Mar. 28, 2007) (claiming health inspection of school operated by church violated Florida RFRA); *McGlade v. State*, 982 So. 2d 736 (Fla. Dist. Ct. App. 2008) (claiming that law requiring midwifery license burdened religious exercise).

[11] *E.g.*, *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHDX07CV125036425S, 2013 WL 3871430 (Conn. Super. Ct. July 8, 2013) (arguing that Connecticut RFRA precludes claims against Church for negligent supervision and retention of alleged abuser).

[12] Office of Justice Programs, Civil Rights Division, U.S. Dep't of Justice, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013 Frequently Asked Questions (Apr. 9, 2014), http://bit.ly/2mgP18s (citing Office of Legal Counsel, Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act (June 29, 2007), http://bit.ly/1FVrMiK).

[13] 573 U.S. 682 (2014).

[14] Hobby Lobby, Our Story, https://bit.ly/2X4680M.

[15] 390 U.S. 400 (1968) (per curiam).

[16] *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *aff'd*, 390 U.S. 400 (1968) (per curiam).

[17] 42 U.S.C. § 2000a *et seq.* (the principal federal public accommodations law).

rejected his claim as "patently frivolous."[18] And in *Bob Jones University v. United States*[19] a university sought to use religion to justify its racially discriminatory admission policies. The Court rejected this argument and upheld the nondiscrimination requirements that apply to tax-exempt organizations, explaining that the government's interest in preventing the harm caused by race discrimination in education "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[20]

Religious schools have also argued that because their religions teach that only men can be "heads of households," they have a right to give men better salaries and benefits than similarly situated women.[21] The courts also rejected these claims, explaining that schools were not exempt from equal pay laws and Title VII of the Civil Rights Act, which bars employment discrimination on the basis of sex, simply because the discrimination was based on religious beliefs.

Today, we must similarly reject efforts to use religion to undermine civil rights and harm others.

II. RFRA's Reach Is Limited by the Establishment Clause

The broader a religious exemption, the more likely it is to violate the Establishment Clause of the First Amendment. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,[22] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."[23]

The Establishment Clause prohibits the government from granting religious exemptions that would detrimentally affect any third party.[24] Thus, when crafting an exemption, the government

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[18] *Piggie Park Enters.*, 309 U.S. at 402 n.5.

[19] 461 U.S. 574, 602 n.28 (1983).

[20] *Id.* at 604.

[21] *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397-99 (4th Cir. 1990) (Fair Labor Standards Act's requirement of equal pay for women did not violate employer's free exercise rights); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1367-69 (9th Cir. 1986) (employer's religious beliefs about proper gender roles did not support free-exercise exemption from Equal Pay Act and Title VII).

[22] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

[23] *Corp. of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). As an initial matter, an accommodation must lift an identifiable government-imposed burden on free exercise rights. *See, e.g., County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 601 n.51 (1989) ("[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion"); *Texas Monthly v. Bullock*, 489 U.S. 1, 15 (1989) (plurality op.) (accommodation must "remov[e] a significant state-imposed deterrent to the free exercise of religion"); *Wallace v. Jaffree*, 472 U.S. 38, 84 (1985), (O'Connor, J., concurring) (an accommodation must lift a "state-imposed burden on the exercise of religion").

[24] *E.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not "impose unjustified burdens on other[s]"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not "impose substantial burdens on nonbeneficiaries").

"must take adequate account of the burdens" an accommodation places on nonbeneficiaries[25] and ensure it is "measured so that it does not override other significant interests."[26] In short, the government may not make a person bear the costs of another person's religion because that would be forcing one person to support someone else's religious beliefs.

In *Estate of Thornton v. Caldor*, the United States Supreme Court (in an 8-1 opinion) struck down a Connecticut law granting employees "an absolute and unqualified right not to work on their Sabbath."[27] In ruling that the law violated the Establishment Clause, the Court focused on the fact that the right not to work was granted "no matter what burden or inconvenience this imposes on the employer or fellow workers."[28] The law provided "no exception," and no account of "the imposition of significant burdens."[29] The "unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses," and is unconstitutional.[30]

In *Cutter v. Wilkinson*,[31] the Court upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA),[32] RFRA's sister statute. The Court explained that "[p]roperly applying RLUIPA" includes taking adequate account of other significant interests.[33] The Court distinguished RLUIPA from the Connecticut Sabbath law in *Caldor*, concluding that RLUIPA, unlike the Sabbath law, did not "elevate accommodation of religious observances over an institution's need to maintain order and safety."[34] This principle applies equally to RFRA, which contains the same legal test and congressional purpose as RLUIPA.[35]

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[25] *Cutter*, 544 U.S. at 720; *see also Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985).
[26] *Cutter*, 544 U.S. at 722.
[27] 472 U.S. 703, 710-11 (1985).
[28] *Id.* at 708-09.
[29] *Id.* at 710.
[30] *Id.*
[31] 544 U.S. 709 (2005); *see also Hobbie v. Unemp't. Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987) (holding that granting state-funded unemployment compensation to a person who was laid off because she could not work on the Sabbath did not violate the Establishment Clause because it, unlike the Sabbath law in *Caldor*, did not single out religious employees as the only persons entitled to such treatment).
[32] 42 U.S.C. §§ 2000cc - cc-5.
[33] *Cutter*, 544 U.S. at 722.
[34] *Id.*
[35] Compare 42 U.S.C. § 2000bb-1, with 42 U.S.C. § 2000cc-1. *See generally Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006). Accordingly, courts rely on RFRA and RLUIPA cases interchangeably in interpreting and applying the statutes. *Grace United Methodist Church*, 451 F.3d at 661; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226-27 (11th Cir. 2004). Furthermore, RFRA itself makes clear that it does not affect the Establishment Clause and is bound by the well-understood confines of the Establishment Clause. *See* 42 U.S.C. § 2000bb-4 ("Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "'Establishment Clause'")). Congress never contemplated that RFRA would afford exemptions or accommodations that impose material harms on third parties. *See, e.g.*, 139 Cong. Rec. S14,350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy ("The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail, just as not every claim prevailed prior to the *Smith*

The Court acknowledged the limitations imposed by the Establishment Clause yet again in *Burwell v. Hobby Lobby Stores, Inc.*[36] In holding that RFRA afforded certain employers an accommodation from the Affordable Care Act's contraceptive coverage requirement, the Court concluded that the accommodation's effect on women who work at those companies "would be precisely zero."[37] In his concurrence, Justice Kennedy emphasized that an accommodation must not "unduly restrict other persons, such as employees, in protecting their own interests."[38] Indeed, every member of the Court reaffirmed that the burdens on third parties must be considered.[39]

Despite this clear constitutional command and the intended meaning of RFRA when it passed with broad support, the Trump Administration is promoting an interpretation of RFRA that allows religion to be used to harm and discriminate against others.

III. The Trump Administration Department of Justice Guidance and New Infrastructure

The misuse of RFRA has grown graver under the Trump Administration. Stretching the already flawed reasoning in the Bush OLC memo and the *Hobby Lobby* ruling even further, this Administration has adopted an even more extreme interpretation of RFRA. And it is systematically applying this interpretation to the regulations and policies of every federal agency. As a result, numerous Trump Administration policies allow RFRA to be used to discriminate and harm others—and we expect more to come.

In May 2017, President Trump signed a "religious freedom" executive order, instructing then-Attorney General Jeff Sessions to "issue guidance interpreting religious liberty protections in federal law."[40] Sessions issued the guidance in October 2017. A blueprint for discrimination, the guidance offers extreme interpretations of RFRA.

For example, the guidance asserts that although the government may have a compelling interest in preventing race discrimination, "it may not be able to do so with respect to other forms of discrimination."[41] It then highlights cases that imply the government lacks a compelling interest in prohibiting discrimination against women and on the basis of sexual orientation.[42] This interpretation doesn't just tip the scales in favor of those seeking a religious exemption, it

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decision."); 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (RFRA "does not require the Government to justify every action that has some effect on religious exercise").

[36] 573 U.S. 682 (2014).

[37] *Id.* at 727.

[38] *Id.* at 737-40 (Kennedy, J., concurring).

[39] *See id.* at 693; *id.* at 739 (Kennedy, J., concurring); *id.* at 745 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

[40] Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668 (Oct. 26, 2017), *available at* https://bit.ly/2xtbG3H.

[41] *Id.* at 49,678.

[42] *Id.*

also makes clear that the Trump Administration has no interest in enforcing existing nondiscrimination provisions in the face of religious freedom claims. Indeed, the guidance even asserts that RFRA "might *require* an exemption or accommodation for religious organizations from antidiscrimination laws"—even when that organization accepts government funds.[43]

The guidance also undermines the Establishment Clause mandate that the government may not grant a religious exemption that causes harm to others. The guidance states that "burdens imposed on third parties are relevant to the RFRA analysis" but "do[] not categorically render an exemption unavailable."[44]

The far reaching consequences of the guidance cannot be understated. It "guide[s] all administrative agencies and executive departments in the execution of federal law"[45] and all Department of Justice (DOJ) attorneys must "adhere to the interpretative guidance" and implement it in litigation.[46]

To further entrench the guidance, the Administration is creating an infrastructure that ensures its harmful interpretation of RFRA is incorporated into administration policies and procedures. In January 2018, for example, the Department of Health and Human Services (HHS) published directives to create a new "Conscience and Religious Freedom Division" of the Office for Civil Rights. The division is tasked with enforcing the Administration's drastic interpretation of RFRA throughout all HHS programs.[47] Among other things, it can "conduct RFRA compliance reviews of departmental programs and activities" and "accept and investigate complaints" from individuals and entities alleging a failure to comply with RFRA.[48] Essentially, the Administration has transformed HHS's Office for Civil Rights, which has always enforced nondiscrimination protections, into an office that sanctions discrimination in the name of religion.

Also in January 2018, DOJ updated its Attorneys' Manual and directed the designation of a religious point of contact in all U.S. Attorney's offices.[49] The designee "will ensure that the Attorney General's Memorandum is effectively implemented" and "will be responsible for working directly with the leadership offices on civil cases related to religious liberty, ensuring that these cases receive the rigorous attention they deserve."

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[43] *Id.* (emphasis added).
[44] *Id.* at 49,670.
[45] *Id.* at 49,668.
[46] Dep't of Justice, Office of the Attorney General, Memorandum for Component Heads and U.S. Attorneys: Implementation of Memorandum on Federal Law Protections for Religious Liberty (Oct. 6, 2017), https://bit.ly/2WZDg9Q.
[47] Dep't of Health & Human Servs., Office of the Secretary: Office of Civil Rights; Statement of Delegation, 83 Fed. Reg. 2804 (Jan. 19, 2018), https://bit.ly/2N3sw5P.
[48] *Id.*
[49] Dep't of Justice, Office of Public Affairs, Justice Department Announces Religious Liberty Update to U.S. Attorneys' Manual and Directs the Designation of Religious Liberty Point of Contact for All U.S. Attorney's Offices (Jan. 31, 2018), https://bit.ly/31G9ENg.

Then, in July 2018, DOJ created a "Religious Liberty Task Force" to "identify new opportunities for the Department to engage with the issue of religious liberty" and "continue the Department's ongoing work to implement the Religious Liberty Memorandum and the implementation memorandum."[50] The Task Force undermines one of the key goals of the DOJ: the agency meant to "uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society,"[51] is now tasked with using religion to undermine these very same civil rights.

IV. New and Troubling Trump Administration Policies

The DOJ guidance laid the groundwork for the creation of a slew of troubling policies across the Administration in foster care, healthcare, government contracting, and more.

A. Discrimination in Taxpayer-Funded Foster Care Programs

After receiving complaints that Miracle Hill Ministries, the state's largest foster care agency, refused to work with non-evangelical Protestant volunteers and potential parents like Aimee Maddonna, the South Carolina Department of Social Services (DSS) investigated. It concluded that Miracle Hill was violating both state and federal nondiscrimination laws and policies that prohibit discrimination with government dollars.[52]

When South Carolina Governor Henry McMaster found out about the violation, he did not denounce the religious discrimination. Instead he issued an executive order specifically to allow state-funded foster care agencies to continue applying religious tests on potential foster families.[53] Recognizing he lacked the authority to waive federal nondiscrimination laws, however, McMaster also wrote to HHS, requesting that it grant faith-based foster care agencies in South Carolina a religious exemption.[54]

On January 23, 2019, the Trump Administration granted that exemption.[55] Using a gross misinterpretation of RFRA, the administration set out a new policy that allows taxpayer-funded child placement agencies to turn away potential parents and volunteers who cannot meet a religious test—in violation of a federal nondiscrimination provision.

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[50] Dep't of Justice, Office of the Attorney General, Memorandum for Heads of Dep't Components: Religious Liberty Task Force (July 30, 2018), https://bit.ly/2XrUawZ.
[51] Dep't of Justice, Civil Rights Div., About the Division, https://bit.ly/2fxQUac.
[52] Letter from Jacqueline Lowe, Licensing Director, South Carolina Department of Social Services Child Placing Agency and Group Home Licensing, to Beth Williams, Miracle Hill Ministries (Jan. 26, 2018).
[53] S.C. Exec. Order No. 2018-12, 42-4 S.C. Reg. 11-12 (March 13, 2018).
[54] Letter from Henry McMaster, Governor of South Carolina, to Steven Wagner, Acting Assistant Secretary, U.S. Department of Health and Human Services Administration for Children and Families (Feb. 27, 2018), https://bit.ly/2KtY0zP.
[55] Letter from Steven Wagner, Principal Deputy Assistant Secretary, U.S. Department of Health and Human Services Administration for Children and Families, to Henry McMaster, Governor of South Carolina (Jan. 23, 2019), https://bit.ly/2Ejqhn7.

This waiver turns RFRA on its head—it uses RFRA to disqualify individuals from participating in government programs solely because of their religion. It harms children, prospective parents and volunteers, and all taxpayers whose dollars are being used to support this discrimination. It also threatens core civil rights and religious freedom protections. The government should never fund religious discrimination and never make vulnerable children pay the price.

Children in foster care have been entrusted to the state for care, stability, and safety. Adoption and foster care agencies that accept government funds to serve these children have a duty to act in the best interests of each child. Using a religious litmus test to reject qualified and caring parents who want to volunteer, foster, and adopt, makes it even more difficult for these children to find loving homes.

In addition, the exemption clearly harms potential parents who are rejected from the government program. No qualified parent should be denied the opportunity to provide a loving home to children in need because they are the "wrong" religion.

Despite being subject to two lawsuits,[56] including one Americans United is litigating on behalf of Aimee Maddonna, HHS is expected to issue new regulations that will extend this policy nationwide.[57]

B. Discrimination in Healthcare

Women clearly benefit from increased access to contraception.[58] In addition to reducing unintended pregnancies and the need for abortion, access to contraception reduces adverse health outcomes and allows women to best make decisions that affect everything from their education and livelihoods to their family and relationships. Cost, however, can impede women from choosing the most effective but most expensive methods (such as an intrauterine device (IUD), which can cost up to $1,000) or from accessing contraception at all. Studies show that the costs associated with contraception, even when small, lead women to forgo it completely, to choose less effective methods, or to use it inconsistently.[59]

To further women's equality, improve access to healthcare, and address gender discrimination in health insurance, the Affordable Care Act (ACA) ensures most insurance plans cover

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[56] Americans United represents Aimee Maddonna, *Maddonna v. U.S. Dep't of Health and Human Servs.*, No. 6:19-CV-00448-TMC (D.S.C. filed on Feb. 15, 2019); and the ACLU, Lambda Legal, the ACLU of South Carolina, and the South Carolina Equality Coalition represent Eden Rogers and Brandy Welch who were rejected by Miracle Hill because they are Unitarian and a same-sex married couple, *Rogers v. U.S. Dep't of Health and Human Servs.*, No. 6:19-CV-01567-TMC (D.S.C. filed on May 30, 2019).

[57] Sam Baker & Jonathan Swan, *Scoop: Trump's Plan to Let Adoption Agencies Reject Same-Sex Parents*, Axios, May 24, 2019, https://bit.ly/2HAqoO4.

[58] While women are the primary target of these regulations, we recognize that denying reproductive health care and insurance coverage for such care also affects people who do not identify as women, including some gender non-conforming people and some transgender men.

[59] Guttmacher Inst., A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions 5 (Sept. 2009), http://bit.ly/1bGLNzX.

contraceptives without cost-sharing. As a result, more than 62 million women currently have coverage for all FDA-approved contraceptive methods.[60] Trump Administration rules, however, put this access at risk for countless women.

Subject to lawsuits under RFRA[61] and various regulatory changes, the religious exemptions that apply to insurance coverage for contraception have changed repeatedly over the last several years, allowing more employers to opt-out of providing insurance coverage for contraception.

On October 6, 2017, the Administration, using its extreme interpretation of RFRA, published new regulations to change the religious exemption once again. The new sweeping exemption allows employers and universities to cite religious or moral objections to contraceptives as justification to violate the ACA requirement that they provide their employees or students insurance coverage for birth control. Unlike under prior rules, there is no alternative way for women to access this critical healthcare with no cost-sharing. As a result, women are facing harm.

For example, Alicia Wilson Baker is a pro-life Christian and an ordained minister.[62] Her husband, Josh, is also a Christian. They had each decided to wait until marriage to have sex. When she and Josh got engaged, they knew they would not be ready to have children right away: they were on a tight budget as they struggled to pay off student loans and save for a home. They researched birth control options and on the advice of her doctor, chose an IUD. They were shocked to get a $1200 bill because they knew the Affordable Care Act requires health plans to cover birth control—at no additional cost. Alicia's insurance company, however, had a religious objection to covering her birth control. As Alicia explained,

> "Nothing in our faith disapproves of birth control. We were making prudent and responsible decisions for our family. But our beliefs and our decisions were overridden by the religious beliefs of an insurance company."

In the days leading up to their wedding and for several months after, Alicia fought with her insurance company, sending appeal after appeal. In the end, she and Josh scraped together the money to pay the bill, but they had to use money they had set aside to pay off student loans and buy their first home together. This was stressful enough for Alicia and Josh, but imagine when the choice is between birth control and putting food on the table or staying in school.

Alicia addressed this misuse of religious freedom.

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[60] *See* Nat'l Women's Law Center, New Data Estimate 62.4 Million Women Have Coverage of Birth Control without Out-of-Pocket Costs (Sept. 2017), http://bit.ly/2iUgDRd.
[61] *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (per curiam).
[62] Testimony of Alicia Baker, Nomination of Hon. Brett M. Kavanaugh, Sept. 7, 2018, https://bit.ly/2Y4q8MZ.

> "As a Christian, I am against such broad interpretations of religious freedom. It is not right that employers may be allowed to use religion to avoid following the laws of the land. I fear that some will use this reasoning not to protect religion, but as a way to discriminate."

She explained, "As a person of deep faith, I would never impose my religious beliefs on anyone—and no one else should either. My religious beliefs are separate from the law. And that's how it should be."

Several lawsuits have been filed to challenge the harmful and unconstitutional Trump Administration regulations, including one filed by Americans United, National Women's Law Center and the Center for Reproductive Rights.[63] Two federal courts have put these rules on hold.[64]

On June 14, 2019, the same office behind these discriminatory rules proposed another regulation that would allow religion to dictate healthcare. Under the proposed rule, religiously affiliated hospitals and health insurance companies, for example, could exempt themselves from complying with the provision of the Affordable Care Act that bars sex discrimination in healthcare.[65] A clinic could turn someone away because because they are pregnant and unmarried, because they have had an abortion, or because of their gender identity or sexual orientation. The proposed rule's exemption is based in part on RFRA.

C. Expanding Federal Contractors' Ability to Use Religion to Discriminate in Hiring

On this day in 1941, President Franklin D. Roosevelt ordered federal agencies to condition defense contracts on an agreement not to discriminate based on race, creed, color, or national origin.[66] This was the first action taken by the government to promote equal opportunity in the workplace for all Americans, and the start of our longstanding, national commitment to barring private organizations from discriminating in hiring using federal funds. In subsequent executive orders, Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Obama expanded these protections. Indeed, Executive Order 11246, signed by President Lyndon B. Johnson in 1965, prohibits discrimination in virtually all government contracts.[67] Today, this executive order prohibits almost all businesses that contract with the federal government—covering workers that collectively represent approximately one-fifth of the entire labor force— from engaging in

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[63] *Irish 4 Reproductive Health v. U.S. Dep't of Health and Human Servs.*, No. 3:18-CV-00491-PPS-JEM, 2018 WL 7893367 (N.D.Ind. filed on Oct. 11, 2018).
[64] Order Granting Mot. Prelim. Inj., *California v. U.S. Dep't of Health and Human Servs.*, No. 4:17-CV-05783-HSG (N.D. Cal. Jan. 13, 2019); Order Granting Mot. Prelim. Inj., *Pennsylvania v. Trump*, No. 2:17-CV-04540-WB (E.D. Pa. Jan. 14, 2019).
[65] Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019).
[66] Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).
[67] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

discrimination on the basis of race, color, religion, sex, national origin, sexual orientation, and gender identity.

Unfortunately, these employment protections for which we as a nation can be proud, have been tarnished. President George W. Bush amended Executive Order 11246 to permit religiously affiliated nonprofit organizations that receive government contracts to discriminate on the basis of religion in employment.[68]

This exemption should be rescinded: taxpayer-funded discrimination, in any guise, is antithetical to basic American values. If an organization requests and receives government funding, it should not be allowed to discriminate against qualified job applicants based on who they are or what house of worship they attend.

Instead of rescinding the exemption, however, the Trump Administration is expanding it. On August 10, 2018, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a new directive[69] that makes it easier for federal contractors to use religion to justify employment discrimination, especially against women and LGBTQ workers. It is expected that the Department of Labor will issue proposed regulations to implement the directive this summer that, in the name of RFRA, will extend the existing exemption for non-profit contractors to for-profit contractors. The anticipated regulation is also likely to broaden the current exemption, which had only permitted faith-based organizations to prefer co-religionists, to allow discrimination againstother protected classes beyond religion.

V. What Congress Can Do

These many misuses of RFRA demonstrate why today's hearing is so important. Congress must continue to conduct oversight and shine a light on the Administration's harmful policies.

In addition, Congress should pass the Do No Harm Act, H.R. 1450. The purpose of the bill is to restore the RFRA to its original intent. It would preserve the law's power to protect religious liberty while clarifying that it may not be used to harm others. It honors the core American values of religious freedom and equal protection.

Under the bill, people could still invoke RFRA in the cases it was intended to cover. For example, a Sikh airman could still use RFRA to challenge regulations that would otherwise bar him from serving with a beard, turban, and unshorn hair. Or a Muslim officer could use RFRA to challenge regulations that would prohibit her from wearing a hijab during her training and service.[70] RFRA, however, could not be used in ways that harm other people, including to:

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[68] Exec. Order No. 13,279, 67 Fed. Reg. 77,139 (Dec. 12, 2002) ("to prefer individuals of a particular religion when making employment decisions relevant to the work connected with its activities").
[69] Dep't of Labor, Office of Fed. Contract Compliance Programs Directive 2018-03 (Aug. 10, 2018), https://bit.ly/2ntYKYa.
[70] *See* Aleksandr Sverdlik, *Air Force Approves Historic Religious Accommodation for Active Sikh Airman*, ACLU Blog,(June 6, 2019), https://bit.ly/2Fnzzju; Letter from ACLU, ACLU of Michigan, & Hammoud,

trump nondiscrimination laws; evade child labor laws; undermine laws guaranteeing equal pay and benefits; deny access to healthcare; refuse to provide government-funded services under a contract; or refuse to perform duties as a government employee.

For example, the Do No Harm Act would ensure RFRA could not be used by a taxpayer-funded homeless shelter to turn away a transgender person;[71] by a for-profit business to get out of the prohibitions on employment discrimination under Title VII;[72] by a hospital to trump the protections against sex discrimination in the Health Care Rights Law;[73] or to avoid testifying in a federal child labor case.[74]

The bill is focused on making clear that RFRA is a shield to protect religious exercise and not a sword to harm others and to undermine our nation's laws that protect equality.

* * *

We are a stronger nation when we protect religious freedom for all, not just for some; when we are all free to believe or not, as we see fit, and to practice our faith—without hurting others; and when the government doesn't elevate the religious beliefs of some over the rights of others. Americans United remains steadfast in our work, as we have for more than seventy years, to fight back against these threats to religious freedom.

Dakhlallah & Associates PLLC, to Lt. Gen. Christopher F. Burne, Judge Advocate General, U.S. Air Force, re Religious Accommodation for Muslim Air Force JAG Cadet (Nov. 17, 2017), https://bit.ly/2N3Mnl7.

[71] *See* Revised Requirements Under Community Planning and Development Housing Programs, Regulation Identification No. 2506-AC53 (Spring 2019).

[72] *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016), *cert. granted on different question*, No. 18-107 (U.S. Apr. 22, 2019) (holding that funeral home that fired transgender employee could use RFRA as a defense to sex discrimination claim under Title VII).

[73] *See* Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019).

[74] *See Perez v. Paragon Contractors Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572 (D. Utah Sept. 11, 2014). *See also Brock v. Wendell's Wordwork, Inc.*, 867 F.2d 196 (4th Cir. 1989) (company that arranged with a church for children to work in a vocational training program that included hazardous work was not entitled to use RFRA standard to get out of child labor laws).

Chairman SCOTT. Thank you. Ms. Wilcher.

STATEMENT OF SHIRLEY J. WILCHER, MA, J.D., CAAP, EXECUTIVE DIRECTOR, AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY (AAAED)

Ms. WILCHER. Good morning, Mr. Chairman and members of the Committee on Education and Labor. My name is Shirley Wilcher, and on behalf of my association, the American Association for Access, Equity, and Diversity, I appreciate the invitation to testify about the potential application of the Religious Freedom Restoration Act in the employment context.

We have been asked to opine on particular implications of RFRA on the enforcement activities of the U.S. Department of Labor's OFCCP, the Office of Federal Contract Compliance Programs.

Founded in 1974, my association has four decades of leadership in providing professional training to members, enabling them to be more successful and productive in their careers. It also promotes understanding and advocacy of Affirmative Action and other equal opportunity and related compliance laws to enhance the tenants of access inclusion and equality in employment, economic, and educational opportunities.

We at AAAED, we call it, remain committed to preserving the laws enacted in the 1960's and beyond that were established to promote equal opportunity for those who have been historically disadvantaged based on race, religion, sex, national origin, disability, and more recently, sexual orientation and gender identity.

We endorse the recently House passed Equality Act and urge its passage in the Senate. We also support the Do No Harm Act and this Committee's work to continue the legacy of Augustus Hawkins and other legendary members of this Committee who labored to secure employment opportunities for the increasingly diverse American workplace.

The Office of Federal Contract Compliance Programs, as you know, enforces three laws, including Executive Order 11246 that prohibit discrimination. The underlying philosophy of these Civil Rights Era laws is that Federal funds should not be used to support discrimination, they should be used to promote equal employment opportunity.

Last year the Federal Government issued and entered into 560 billion in Federal contracts. That is a lot of funding, and it is important that money be used to promote equal employment opportunity.

You know the tenants of RFRA that prohibits any agency, department, or official of the United States or any State government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability except that the government may burden a person's exercise of religion only if it demonstrates that application of a burden to the person furthers a compelling government interest and is the least restrictive means of furthering the governmental interest.

On August the 12th, the OFCCP issued a directive on the Religious Freedom Act, and it included a directive that the directive was to incorporate recent developments in the law regarding religion exercising organizations and officials. The directive also

iterated the purpose of the Administration's Executive Order to protect religious exercise, not impede it. The OFCCP staffer ordered to take these legal developments into account in their compliance activities. They must respect the right of religious peoples and institutions to practice their faith without fear of discrimination or retaliation by the Federal Government.

We have reviewed the available compliance activity of the OFCCP and found few cases involving religion. According to the Agency statistics, only one case between 2015 and 2018 in which a violation of religious day observance was identified. However, in the preamble to the final rule to the sex discrimination regulations handed down in 2016, the OFCCP addressed the issue of RFRA. And it said it declined to implement a blanket exemption from these provisions however, and there is no formal process when invoking RFRA, specifically as a basis for exemption under EO11246. However, insofar as the application of any requirement under this part would violate RFRA, each such application will not be required.

Let me emphasize that the Executive Order already requires an exemption for religious organizations, and it tracks the exemptions from the Equal Employment Opportunity Commission. But our concern is about the effects of the application of RFRA. We are particularly concerned about the impact on the LGBT community but not others.

In some respects what we saw in the South Carolina case and HHS is worrying us because it really is reminiscent of the lunch counter issues. How far do we go in the implication and the impact of that particular provision?

We are also concerned because the OFCCP, when I was at the Department of Labor, let me say, there was discrimination that I found shocking. Between 1994 and 2001 I put together what we called egregious cases to remind America that discrimination is alive and well, and that includes cases involving the Ku Klux Klan. I can elaborate later, but all of that is to say RFRA adds insult to injury, in our view, because discrimination is alive and well and there are exceptions for religious organizations.

[The statement of Ms. Wilcher follows:]

Testimony of Shirley J. Wilcher, M.A., J.D., CAAP
Executive Director
American Association for Access, Equity and Diversity (AAAED)
Hearing on "Do No Harm: Examining the Misapplication of the Religious Freedom Restoration Act"
June 25, 2019
U.S. House of Representatives
Committee on Education and Labor

Good Morning, Mr. Chairman and Members of the Committee on Education and Labor. My name is Shirley J. Wilcher and on behalf of my association, the American Association for Access, Equity and Diversity (AAAED), I appreciate the invitation to testify about the potential application of the Religious Freedom Restoration Act (RFRA) in the employment context. We have been asked to opine on the particular implications of RFRA on the enforcement activities of the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

Introduction

In 2005, I joined the American Association for Affirmative Action, now titled the American Association for Access, Equity and Diversity (AAAED) as Executive Director. Founded in 1974, AAAED has four decades of leadership in providing professional training to members, enabling them to be more successful and productive in their careers. It also promotes understanding and advocacy of affirmative action and other equal opportunity and related compliance laws to enhance the tenets of access, inclusion and equality in employment, economic and educational opportunities. A 501(c)(6) membership organization, AAAED is the oldest operating association of professionals in the Equal Opportunity profession and is a leader in equal opportunity, affirmative action, Title IX and diversity training and advocacy for professionals in higher education, private industry and government.

Our members who are equal employment opportunity professionals, Diversity managers, consultants and lawyers, Federal EEO professionals and Title IX coordinators, are on the front line every day, receiving and investigating complaints of discrimination, overseeing the development of affirmative action programs, conducting diversity training and educating or counseling managers, faculty and students regarding policies related to equal employment opportunity, sexual harassment and equal education opportunity under Title IX.

We, at AAAED remain committed to preserving the laws enacted in the 1960s and beyond that were established to promote equal opportunity for those who have been historically disadvantaged based on race, religion, sex, national origin, disability, and more recently, sexual orientation and gender identity.

We endorse the recently House-passed Equality Act and urge its passage in the Senate. We also support this Committee's work to continue the legacy of Augustus Hawkins and other legendary members of this Committee who labored to secure employment opportunities for an increasingly diverse American workforce.

On a personal note, it is a pleasure to return to the committee where I worked as Associate Counsel for Civil Rights under Chairman Augustus F. Hawkins in the 1980s. Like today, it was a challenging time for those committed to the protection of individuals from discrimination based on race, religion, gender, national origin, disability and veterans' status and other bases. There were fundamental disagreements between those of us who worked for Members of Congress and those who were sworn to uphold and enforce the civil rights laws in the Federal civil rights agencies. Affirmative action law and policy were vigorously debated and agency officials, including Equal Employment Opportunity Commission Chairman Clarence Thomas, who now sits on the U.S. Supreme Court, regularly testified before this committee.

The 1980s were also a time when this committee conducted a robust oversight program, as it is attempting to do in these times. The Committee staff embarked on comprehensive reviews of the civil rights enforcement activities of the EEOC, the Department of Education's Office for Civil Rights (OCR) and the Office of Contract Compliance Programs, U.S. Department of Labor. At the OFCCP we visited a number of the agency's regional offices, met with staff and reviewed an impressive number of documents. Thanks to the cooperation of the agencies, we were able to do our jobs. While the outcome of our investigations resulted in three committee reports that contained robust criticisms of the policies in place at that time, I believe we were able to not only reverse some of the most harmful policies but most importantly, preserve the civil rights laws for those whom these laws were intended to protect.

In the 1990s, I was asked to serve as Deputy Assistant Secretary for Federal Contract Compliance, a position due in large part, to the oversight work that we were able to accomplish while working as staff of this Committee. I was the first and only African American female director of the OFCCP and served for nearly seven years.

The Office of Federal Contract Compliance Programs (OFCCP) and RFRA

The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order (E.O.) 11246, as amended, Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended. Collectively, these laws prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Contractors and subcontractors are also prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.[1] Contractors and subcontractors are required to take affirmative action to promote equal employment opportunity.

The underlying philosophy of these civil rights-era laws is that federal funds should not be used to support discrimination; they should be used to promote equal employment opportunity.[2]

[1] OFCCP Directive 2018-03, dated August 10, 2018, (Accessed June 19, 2019) https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

[2] See, e.g., Executive Order 11246, Subpart B., section 2: Subpart B – Contractors' Agreements

Like Title VII of the Civil Rights Act of 1964, Section 202 of Executive Order 11246 provides an exemption for religious organizations, corporations, educational institutions and other entities who are contractors or subcontractors. Such entities are exempted from the requirement that they not discriminate in employment on the basis of a particular religion to perform work associated with the religious entity.[3]

The Religious Freedom Restoration Act of 1993 (RFRA), "Prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of

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SEC. 202
"Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

During the performance of this contract, the contractor agrees as follows:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause." https://www.dol.gov/ofccp/regs/statutes/eo11246.htm (Accessed, June 21, 2019)

[3] See Executive Order 11246, Sec. 204 (c): "Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order." See also: 41 C.F.R. § 60-1.5(a)(5), and part of the equal opportunity clause, see 48 C.F.R. §§ 22.807(b)(7), 52.222-26(b)(2).

See also, EEOC Questions and Answers: Religious Discrimination in the Workplace: *Religious Organization Exception*: Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. The exception applies only to those institutions whose "purpose and character are primarily religious." Factors to consider that would indicate whether an entity is religious include: whether its articles of incorporation state a religious purpose; whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether it is not-for-profit; and whether it affiliated with, or supported by, a church or other religious organization.
This exception is not limited to religious activities of the organization. However, it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.
Ministerial Exception: Courts have held that clergy members generally cannot bring claims under the federal employment discrimination laws, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act. This "ministerial exception" comes not from the text of the statutes, but from the First Amendment principle that governmental regulation of church administration, including the appointment of clergy, impedes the free exercise of religion and constitutes impermissible government entanglement with church authority. The exception applies only to employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction. Some courts have made an exception for harassment claims where they concluded that analysis of the case would not implicate these constitutional constraints. https://www.eeoc.gov/policy/docs/qanda_religion.html (Accessed, June 19, 2019).

religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." The purpose of the law as stated was:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[4]

The legislation, introduced in 1990, was therefore intended to restore the "compelling state interest" test of the constitutionality of governmental restrictions on the free exercise of religion.[5]

On August 12, 2018, the OFCCP issued a directive (Directive 2018-03) on the Religious Freedom Restoration Act. An OFCCP directive is a document intended to provide guidance to OFCCP employees and contractors. The purpose of this directive was to "To incorporate recent developments in the law regarding religion-exercising organizations and individuals."[6] The directive recounts the recent legal developments involving religious organizations:

> Recent court decisions have addressed the broad freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (government violates the Free Exercise clause when its decisions are based on hostility to religion or a religious viewpoint); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (government violates the Free Exercise clause when it conditions a generally available public benefit on an entity's giving up its religious character, unless that condition withstands the strictest scrutiny); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations).[7]

The directive also reiterates the purpose of the Administration's executive orders: to "protect religious exercise, not impede it."[8] OFCCP staff are directed to take these legal developments into account in their compliance activities. Staff are directed thusly:

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[4] Congress.Gov, H.R.1308 - Religious Freedom Restoration Act of 1993, (Accessed June 19, 2019), https://www.congress.gov/bill/103rd-congress/house-bill/1308/text

[5] Religious Freedom Restoration Act of 1990, Hearing Before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, One-Hundred First Congress, Second Session, on HR 5377, Religious Freedom Restoration Act, September 27, 1990, (Accessed on June 19, 2019), https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/05/hear-150-1990.pdf.

[6] U.S. Department of Labor, OFCCP, Directive 2018-03, August 10, 2018, (Accessed June 19, 2019), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html.

[7] OFCCP Directive 2018-3.

[8] Ibid. See also Office of the Assistant Secretary for Administration and Management, US Department of Labor's statement on "The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance:" "Where a law enforced by DOL prohibits religious discrimination in employment by recipients of DOL financial assistance-2, such prohibition will be displaced by RFRA and thus will not apply to a recipient with respect to the employment of individuals of a particular religious belief to perform work connected with the carrying on by such recipient of its activities, provided that (i) such recipient can demonstrate that its religious exercise would be substantially burdened by application of the religious non-discrimination requirement to its employment practices

- They "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" and must "proceed in a manner neutral toward and tolerant of . . . religious beliefs." 3
- They cannot "condition the availability of [opportunities] upon a recipient's willingness to surrender his [or her] religiously impelled status."4
- "[A] federal regulation's restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act]."5
- They must permit "faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . [Federal] contracts."6
- They must respect the right of "religious people and institutions . . . to practice their faith without fear of discrimination or retaliation by the Federal Government."7[9]

OFCCP Compliance Activity

OFCCP conducts its compliance activities using two major functions: compliance evaluations and complaint investigations. The results of the agency's compliance activities between FY 2015 and 2019 are reported as follows:

Supply and Service Compliance Evaluations

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15 - FY18)
Scheduled*	551	785	735	1,048	2,036	1,151
Completed*	398	713	1,036	1,522	2,345	1,404
Completion Type						
Conciliation Agreement or Consent Decree	34	115	202	275	343	234
	8.5%	16.1%	19.5%	18.1%	14.6%	17.1%
EO 11246 Violation	39	127	195	258	297	219
	9.8%	17.8%	18.8%	17.0%	12.7%	16.6%
Section 503 Violation	14	36	71	99	173	95
	3.5%	5.0%	6.9%	6.5%	7.4%	6.4%
Section 4212 Violation	17	45	96	140	236	129
	4.3%	6.3%	9.3%	9.2%	10.1%	8.7%
Discrimination Violation	11	47	40	38	32	39

in the program or activity at issue, and (ii) DOL is unable to demonstrate that applying the non-discrimination provision to this recipient both would further a compelling government interest and would be the least restrictive means of furthering that interest. A determination whether a recipient of DOL financial assistance qualifies under RFRA for an exemption from a religious non-discrimination requirement in an authorizing statute or regulation will be made on a case by case basis upon request of the recipient."
https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act/guidance (Accessed June 19, 2019).

[9] Ibid.

	2.8%	6.6%	3.9%	2.5%	1.4%	3.6%
Number of Workers in Facilities Reviewed	449,260	850,443	732,235	1,038,542	1,163,072	946,073

Note: The numbers do not add up to the Completed total and the percentages do not add to 100% because cases with no violations are not summarized and the completion types are not mutually exclusive.[10]

Complaints by Employment Practice

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15-FY18)
Received	766	1,418	686	588	670	841
Closed	706	1,320	720	691	769	875

Complaints by Employment Practice (continued)

	FT 2019 (Q2)	FY 2018	FY 2017	FY2016	FY2015	Average (FY15-FY18)
Hiring	27	55	64	55	113	72
	3.8%	4.2%	8.9%	8.0%	14.7%	8.9%
Job Assignment	17	43	42	54	125	66
	2.4%	3.3%	5.8%	7.8%	16.3%	8.3%
Promotion	14	19	24	43	90	44
	2.0%	1.4%	3.3%	6.2%	11.7%	5.7%
Demotion	5	6	7	15	35	16
	0.7%	0.5%	1.0%	2.2%	4.6%	2.0%
Segregated Facilities	0	3	1	2	14	5
	0.0%	0.2%	0.1%	0.3%	1.8%	0.6%
Termination	110	175	151	174	236	184
	15.6%	13.3%	21.0%	25.2%	30.7%	22.5%
Recall	0	1	8	3	11	6
	0.0%	0.1%	1.1%	0.4%	1.4%	0.8%
Layoff	5	9	13	14	62	25
	0.7%	0.7%	1.8%	2.0%	8.1%	3.1%
Wages	70	162	62	62	111	99
	9.9%	12.3%	8.6%	9.0%	14.4%	11.1%
Seniority	0	7	10	10	44	18
	0.0%	0.5%	1.4%	1.4%	5.7%	2.3%
Harassment	83	181	114	145	205	161

[10] "OFCCP By the Numbers," https://www.dol.gov/ofccp/BTN/index.html (Accessed June 19, 2019)

	11.8%	13.7%	15.8%	21.0%	26.7%	19.3%
Job Benefits	8	14	18	24	58	29
	1.1%	1.1%	2.5%	3.5%	7.5%	3.6%
Training	0	9	13	11	47	20
	0.0%	0.7%	1.8%	1.6%	6.1%	2.5%
Retaliation	328	511	277	282	213	321
	46.5%	38.7%	38.5%	40.8%	27.7%	36.4%
Pregnancy	4	8	3	8	15	9
	0.6%	0.6%	0.4%	1.2%	2.0%	1.0%
Disabled	41	57	49	75	121	76
	5.8%	4.3%	6.8%	10.9%	15.7%	9.4%
Other*	67	158	156	127	196	159
	9.5%	12.0%	21.7%	18.4%	25.5%	19.4%

Note: The numbers by employment practice do not equal the total number of Closed because the Bases are not mutually exclusive.
*Other employment practice not listed above.

Complaints Investigated

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15 - FY18)
Investigated	51	114	104	147	114	120
Monetary Relief	$29,221	$744,792	$97,006	$203,933	$516,777	$390,627
Complainants with Monetary Relief	2	10	6	7	11	9
Monetary Relief Per Complainant	$14,611	$74,479	$16,168	$29,133	$46,980	$41,690

Complaints by Basis

		FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15 - FY18)
Received		766	1,418	686	588	670	841
Closed		706	1,320	720	691	769	875
Race		259	534	255	272	302	341
		36.7%	40.5%	35.4%	39.4%	39.3%	38.6%
Sex		109	274	161	147	190	193
		15.4%	20.8%	22.4%	21.3%	24.7%	22.3%
National Origin-Hispanic		42	84	58	41	33	54
		5.9%	6.4%	8.1%	5.9%	4.3%	6.2%
National Origin-Other		37	97	46	33	32	52
		5.2%	7.3%	6.4%	4.8%	4.2%	5.7%
Religion		32	93	34	28	25	45
		4.5%	7.0%	4.7%	4.1%	3.3%	4.8%
Color		57	118	41	39	27	56
		8.1%	8.9%	5.7%	5.6%	3.5%	5.9%

Complaints by Basis (continued)

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15 - FY18)
Sexual Orientation	27	65	14	5	3	22
	3.8%	4.9%	1.9%	0.7%	0.4%	2.0%
Gender Identity	12	20	9	11	3	11
	1.7%	1.5%	1.3%	1.6%	0.4%	1.2%
Disability	164	294	177	170	197	210
	23.2%	22.3%	24.6%	24.6%	25.6%	24.3%
Covered Veteran	89	132	124	124	125	126
	12.6%	10.0%	17.2%	17.9%	16.3%	15.4%

Note: The numbers by Basis do not equal the total number Closed because the Bases are not mutually exclusive.

A chart listing the findings of the relatively small number of complaint investigations shows that of the complaints alleging religious discrimination, most related to religious day observance. If our interpretation of the chart is correct, there were no "cause" findings in this group.[11]

viol_religious_day_observance
N
N
N
N
N
N
N
N
N
N
N
N

A review of the completed complaint investigations between FY 2015 – FY 2018, there was only one where violation of religious day observance was identified. It is noted that the complainant filed under the Basis – National Origin – Hispanic and Color.

basis_national_origin _hispanic	basis_ color	viol_ demotion	viol_ wages	viol_ harassment	viol_religious_day _ observance
Y	Y	Y	Y	Y	Y

[11] OFCCP Complaints as of 4/18/2019.

In its preamble to the Final Rule related to Discrimination Because of Sex, OFCCP specifically declined to issue a blanket rule on exemptions under RFRA but chose to review contractors' exemption requests on a case-by-case basis:

> On the subject of RFRA, the religious organization commenter asks OFCCP to clarify in the final rule that RFRA forbids application of this paragraph, as well as proposed paragraphs 60-20.7(a)(3) (regarding adverse treatment based on failure to conform to sex-role expectations by being in a relationship with a person of the same sex) and 60-20.7(b) (regarding adverse treatment based on gender identity or transgender status), to contractors with religious objections to those provisions.[91]
>
> OFCCP declines to implement a blanket exemption from these provisions because claims under RFRA are inherently individualized and fact specific. There is no formal process for invoking RFRA specifically as a basis for an exemption from E.O. 11246. Insofar as the application of any requirement under this part would violate RFRA, such application shall not be required.
>
> If a contractor seeks an exemption to E.O. 11246 pursuant to RFRA, OFCCP will consider that request based on the facts of the particular case. OFCCP will do so in consultation with the Solicitor of Labor and the Department of Justice, as necessary. OFCCP will apply all relevant case law to the facts of a given case in considering any invocation of RFRA as a basis for an exemption.[12]

This preamble also restates that the OFCCP follows the "ministerial exemption" handed down by the Supreme Court, regarding the hiring of an organization's ministers or clergy and reiterated the program's regulations, which permit religiously-affiliated contractors to favor individuals of a particular religion in employment decisions.

One way of measuring the effects of the RFRA policy followed by OFCCP is to ascertain if the bases for the complaints filed alleging discrimination on the basis of sexual orientation or gender identity reflect actions by religious organizations seeking exemption from the anti-discrimination provisions of the Executive Order. One could also inquire whether any religious exemptions have been submitted to the OFCCP and/or the Solicitor of Labor since the directive was implemented. We have not seen any records on the agency's website regarding either inquiry.

Concerns Regarding to Potential Effect of RFRA

While there are few data to date given the available compliance review and complaint information and in light of the recent issuance of Directive 2018-03, we are concerned that a deleterious outcome is possible if the directive is interpreted liberally and supersedes the nondiscrimination provisions of Executive Order 11246 and other laws enforced by OFCCP. We extend that concern to other civil rights agencies as well including the Equal Employment Opportunity Commission.

First, given the litigation that has led to the OFCCP's directive, the most vulnerable population affected by the enforcement of this policy will be the LGBTQ community. *The EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.,* case, while not an OFCCP matter, is an excellent example of how the RFRA may be invoked

[12] Federal Register, Discrimination Based on Sex, a Rule by the Federal Contract Compliance Office, June 15, 2016, https://www.federalregister.gov/documents/2016/06/15/2016-13806/discrimination-on-the-basis-of-sex (Accessed, June 21, 2019).

to justify the termination of a transgender employee.[13] The LGBTQ community is not alone however. Using the cover of religious beliefs or practices, employers may also seek exceptions to the hiring of applicants of other faiths, national origins, and virtually all bases now covered by the civil rights laws including sex, race, and disability. The question is, how broadly or narrowly will the OFCCP (and other agencies) interpret this directive and RFRA itself? This is a cause for Committee oversight both now, as the OFCCP Directive is relatively new, and in the years to come.

As the Committee is well-aware, there is reason to be concerned that actions occurring in non-employment areas may well become an issue in the employment context. Earlier this year, the Department of Health and Human Services granted to South Carolina an exemption to the nondiscrimination requirements in federally-funded child welfare programs. Families who were not of the religion of the program managers were not allowed to participate in a foster care and adoption program.[14] The basis for the exemption for this flagrantly discriminatory policy was reportedly the Religious Freedom Restoration Act.

The October 6, 2017 policy memorandum issued by the Attorney General on "Federal Law Protections for Religious Liberty" is rife with potential to trammel the civil rights protections enforced by equal employment agencies such as the OFCCP. The final provision of this expansive memorandum specifically covers federal contractors:

> **Agencies Engaged in Contracting and Distribution of Grants**
> Agencies also must not discriminate against religious organizations in their contracting or grant-making activities. Religious organizations should be given the opportunity to compete for government grants or contracts and participate in government programs on an equal basis with nonreligious organizations. Absent unusual circumstances, agencies should not condition receipt of a government contract or grant on the effective relinquishment of a religious organization's Section 702 exemption for religious hiring practices, or any other constitutional or statutory protection for religious organizations. In particular, agencies should not attempt through conditions on grants or contracts to meddle in the internal governance affairs of religious organizations or to limit those organization' otherwise protected activities.[15]

One has to ask why this memorandum was necessary when there already exist provisions for religious freedom in hiring and religious accommodations in both Title VII and Executive Order 11246? If the South Carolina exemption, and the *Hobby Lobby and R.G. &. G.R Harris Funeral Homes, Inc.* cases are instructive, there is enough potential for discrimination in the name of religious liberty to extinguish the civil rights protections that minorities and women have enjoyed since the 1960s.

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[13] R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, 884 F.3d 560 (6th Cir. 2018). The case is on appeal to the Supreme Court. See the Sixth Circuit decision in this case at: http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0045p-06.pdf (RFRA would not limit the EEOC's authority to enforce anti-discrimination laws under Title VII)

[14] Ian Thompson, ACLU, "In an Era of Religious Refusals, the Do No Harm Act Is an Essential Safeguard," February 28, 2019, https://www.aclu.org/blog/religious-liberty/using-religion-discriminate/era-religious-refusals-do-no-harm-act-essential

[15] Office of the Attorney General, Federal Law Protections for Religious Liberty, October 6, 2017, https://www.justice.gov/opa/press-release/file/1001891/download?utm_medium=email&utm_source=govdelivery (Accessed, June 19, 2019).

It is axiomatic that this nation was founded on the principle of religious liberty. It is also a fact that the principle of the separation of church and state undergirds the foundation upon which this nation stands. Moreover, religious freedom as a justification for discrimination is a centuries-old rationale, used to defend slavery, the denial of women's suffrage, Jim Crow laws, and segregation.[16] Tisa Wenger of the *Washington Post* wrote:

> "In short, religious freedom should not be granted this much power. If a bakery or an adoption agency can deny their services to same-sex couples on religious freedom grounds, then what prevents other businesses and organizations who may sincerely profess Christian white supremacy from refusing to serve African Americans or Jews, as they have done before?"[17]

Federal agencies responsible for enforcing equal employment laws should not have to defend such laws against professed encroachments based on a religious pretext. As we wrote in response to the Department of Education's Notice of Proposed Rulemaking on Title IX Sexual Harassment and Assault Regulations, "Taking a sword to a problem that requires at best a pen is not the approach we would endorse."[18]

The Religious Freedom Restoration Act must be enforced as it was intended and not used as a rationale to extirpate decades of progress in an increasingly diverse America.

Thank you for the opportunity to speak about this important matter.

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[16] See Zaid Jilani, "How Religious 'Liberty' Has Been Used to Justify Racism, Sexism and Slavery Throughout History," AlterNet, April 6, 2018, https://www.alternet.org/2015/04/how-religious-liberty-has-been-used-justify-racism-sexism-and-slavery-throughout-history/ (Accessed June 19, 2019); Henry Brinton, "In Civil War, the Bible became a weapon," USA Today, February 27, 2011, https://usatoday30.usatoday.com/news/opinion/forum/2011-02-28-column28_ST_N.htm (Accessed June 19, 2019); Larry R. Morrison, "The Religious Defense of American Slavery Before 1830," Kings College, http://www.kingscollege.net/gbrodie/The%20religious%20justification%20of%20slavery%20before%201830.pdf: "Much like their proslavery predecessors, 20th-century segregationists argued that the civil rights movement was trying to impose an alien, anti-Christian, even communistic ideology that would destroy the Christian racial order of the South,"

[17] Tisa Wenger, "Discriminating in the name of religion? Segregationists and slaveholders did it, too," Washington Post, December 5, 2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/12/05/discriminating-in-the-name-of-religion-segregationists-and-slaveholders-did-it-too/?noredirect=on&utm_term=.647ceb1d31c2 (Accessed June 19, 2019).

[18] AAAED comments regarding the Notice of Proposed Rulemaking published by the U.S. Department of Education on November 29, 2018, January 30, 2019, p.8.

Chairman SCOTT. Thank you. Mr. Sharp.

STATEMENT OF MATT SHARP, SENIOR COUNSEL, ALLIANCE DEFENDING FREEDOM

Mr. SHARP. Good morning, Chairman Scott, Ranking Member Foxx, and members of the Committee. I am Matt Sharp, Senior Counsel with Alliance Defending Freedom.

One of our Nation's greatest hallmarks is its commitment to protecting fundamental human rights, rights rooted in human dignity. Among these inalienable rights is religious freedom.

A person's religious beliefs are core to their identity, and even to their relationship with those around them. These deeply held convictions guide them and even compel their commitment to social justice and to the community.

From evangelical run homeless shelters or an Islamic hunger relief program to a Catholic run adoption and foster care provider, these charitable organizations should not be forced to choose between abandoning their beliefs and inspire their service or being denied fair and equal treatment by the government. Such action would not only undermine these national virtues that make us unique, but it would also have a devastating impact on some of the most disadvantaged members of society.

Children displaced by the opioid crisis in need of a loving home, survivors of sex trafficking and domestic abuse seeking shelter, the addicted longing for relief, and low-income families in dire need of a roof over their heads.

Every day people of faith serve their neighbors, offering food, clothing, shelter, and other social services. They provide jobs for thousands. And while this economic benefit of religion was recently valued at $1.2 trillion annually, we can't put a price on the countless lives forever changed by a helping hand from faith communities.

But religion's vast benefit to the whole of American society will only last so long as people of faith maintain the freedom to exercise religion, not just in their home or place of worship, but at work and in a wider community.

Unfortunately, proposals like the Do No Harm Act undermine that liberty. The Act's sole purpose is to declare open season for government regulation on broad swaths of religious exercise by individuals, houses of worship, non-profits and many more without offering any meaningful judicial scrutiny whatsoever.

The Act would impose great harm on religious minorities by conditioning their free exercise on the whims of those in power who seek to disfranchise this favored use.

But RFRA safeguards every person's ability to peacefully live, work, and act consistent with their beliefs even when those beliefs might be politically unpopular. RFRA gives those burdened by the weight of intrusive government regulations a judicial forum where their voice can be heard and relief can be sought.

For many people of faith, from Native Americans and Muslims to Rainbow Family and Rastafarians, every aspect of their lives has eternal consequences. The Muslim prisoner believes it is disrespectful to the Prophet Mohammad to shave his beard. The Jewish shop forced to open on Sundays would openly defy the Torah's command

to remember it as a day of rest. The Catholic nun mandated to pay for abortion inducing drugs would trample underfoot the sanctity of an innocent human life. And the grandmother florist told she must design a floral arrangement for a friend's same-sex wedding would dishonor a sacred institution established by God.

We may not share these beliefs but the real test of religious liberty is what happens when we disagree. Disagreement is not discrimination and it should never be treated as such. Nor should disagreement provide justification to shut the doors of the justice system to minority beliefs simply because the whims of societal acceptance have shifted direction.

Few of us here today would support the religious practices of the peyote drug users in Employment Division v. Smith or any of the other cases involving controlled substances and religious rituals. But I think we can all recognize that one day the winds may change and it can be our religious practices facing government scorn.

RFRA was crafted to take the thumb off the scales of justice, take the thumb off the scales of justice that had been used to favor government over people of faith. And restore that proper balance, one that honors the high place that religious freedom and exercise holds in our Constitutional system. It doesn't determine winners or losers. Nor does it mean that religion will prevail. RFRA simply protects the process for balancing the government's interest with individual freedom.

And that process helps to safeguard values that all of us here today hold dear. Values like diversity, like human dignity, freedom for all, and the conviction that no American should suffer discrimination at the hands of the Federal Government for publicly living out their faith.

Twenty-five years after RFRA our Nation is more diverse than ever, and we hold increasingly divergent views on beliefs ranging from marriage and abortion to immigration and the opioid crisis. And people of faith continually find themselves caught in the crossfire as their beliefs and practices are both misunderstood and subject to popular scorn.

In these times the need for RFRA has not diminished. Today RFRA is more vital than ever.

Thank you.

[The statement of Mr. Sharp follows:]

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TESTIMONY

BEFORE THE COMMITTEE ON EDUCATION AND LABOR

ON

DO NO HARM: EXAMINING THE MISAPPLICATION OF THE RELIGIOUS FREEDOM RESTORATION ACT

BY

J. MATTHEW SHARP, SENIOR COUNSEL

ALLIANCE DEFENDING FREEDOM

JUNE 25, 2019

Dear Chairman Scott, Ranking Member Foxx, and Members of the Committee:

Religion serves a positive, impactful, and vital role in American life. This impact goes far beyond economics and charitable contributions. Across our vast nation, religious organizations place vulnerable children in the arms of adoptive parents ready to give them a forever home, protect women who have known only violence and abuse, and drive college students to build homes for low-income families in dire need. But the vast benefits religion offers to the whole of society will only last so long as believers maintain the freedom to exercise religion not just in church or at home, but at work and in the wider community. Alliance Defending Freedom represents dozens of ministries that serve the public at no cost. These noble organizations are free to thrive under the protective umbrella of laws like the Religious Freedom Restoration Act, which ensures that the government does not impose an intolerable burden on their ability to serve those in need in a God-honoring way. Here are just three examples:

- For 30 years, Downtown Hope Center in Anchorage, Alaska has provided food, clothing, career training, and other services to homeless and low-income families in the community. It annually serves over 142,000 meals to needy individuals. A few years ago, the Hope Center began offering a safe shelter to women, many of whom have suffered physical, emotional, and sexual abuse or are the victims of sex-trafficking. On any given night, it provides overnight shelter to around 50 women seeking a safe and secure place to sleep. The Hope Center is a devoutly religious organization who, "[i]nspired by the love of Jesus," offers "support, shelter, sustenance, and skills to transform the[] lives" of those in need.[1] In addition to its charitable services, it offers Bible teaching and faith-based counseling and even houses a weekly church service to anyone interested in attending.
- In 1958, Clinton H. Tasker, a minister serving in a rescue mission, sensed in his heart God calling him to open a faith-based adoption ministry in New York that would care for women facing unplanned pregnancies and their children.[2] Seven years later, his dream came to fruition with the opening of New Hope Family Services. The organization provides temporary-foster placement and other adoption services. In its over 50 years of service, New Hope has helped

[1] *About Us*, DOWNTOWN SOUP KITCHEN HOPE CENTER, https://www.downtownhopecenter.org/about_us (last visited June 21, 2019).
[2] *About Us*, NEW HOPE FAMILY SERVICES, https://www.newhopefamilyservices.com/about-us/our-center (last visited June 21, 2019).

over 1,000 children find a loving family. And in 1986, New Hope added a pregnancy center to provide pregnancy tests, medical referrals, and counseling to anyone in need. The center serves approximately 700 clients per year and does so free of charge.

- Geneva College is a faith-based private college located in Beaver Falls, Pennsylvania. For over 150 years, the college has provided its diverse community of students, which now number over 1,400, with a humanities-based education focused on developing servant-leaders. To foster an attitude of service in its students, Geneva College requires all freshman to participate in community service engagement, where they volunteer at "soup kitchens, community gardens, rails to trails, building and renovation, food pantry, after school programs, community art, nursing homes and several other opportunities."[3] The college also partners with numerous community organizations, including Big Brothers Big Sisters, Habitat for Humanity, Produce to People, and Providence Care Center to provide additional service opportunities for its students.

Thousands of faith-based organizations in America—just like Downtown Hope Center, New Hope Family Services, and Geneva College—daily serve their communities in an exemplary fashion. Motivated by their faith, they offer food, clothing, shelter, counseling, and other social services; they provide jobs for thousands of Americans; and they produce goods and services that drive our economy. In a recent study, Brian J. Grim and Melissa E. Grim sought to quantify the economic value of religion in America—as reflected in the goods and services provided by faith-based individuals and organizations.[4] Their mid-range estimate was that **religious organizations contribute approximately $1.2 trillion annually** to the U.S. economy.[5] Grim concludes his study by explaining:

> The data are clear. Religion is a highly significant sector of the American economy. Religion provides purpose-driven institutional and economic contributions to health, education, social cohesion, social services, media, food and business itself. Perhaps most significantly, religion helps set Americans free to do good by harnessing the power of millions of volunteers from nearly 345,000 diverse congregations present in every corner of the country's urban and rural landscape.[6]

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[3] *Fast Facts*, GENEVA COLLEGE, https://www.geneva.edu/about-geneva/fast-facts (last visited June 21, 2019).
[4] Brian J. Grimm and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, INTERDISC. J. OF RES. ON RELIGION, Vol. 12 Article 3 (2016), *available at* https://www.religjournal.com/pdf/ijrr12003.pdf.
[5] *Id.* at 24.
[6] *Id.* at 28.

These good works are possible, in part, because for over 25 years the Religious Freedom Restoration Act[7] ("RFRA") has protected believers against laws and regulations that would force them to stop serving the general public and retreat within their walls. RFRA ensures that any person or organization of any faith—be it Native American, Muslim, Jewish, Hindu, Christian, or something else—is guaranteed an opportunity to show that a limited exemption should apply to them.

The importance of meaningful protections for religious liberty to our nation's vitality cannot be understated. One study found that countries with high levels of religious freedom performed better on indicators of global competitiveness, including education, health, innovation, and technological readiness.[8] And the benefits go far beyond mere economics to encompass a multitude of civil liberties and indicators of a healthy society:

> [R]eligious freedom in a country is strongly associated with other freedoms (including civil and political liberty, press freedom, and economic freedom) and with multiple measures of well being. They found that wherever religious freedom is high, there tends to be fewer incidents of armed conflict, better health outcomes, higher levels of earned income, prolonged democracy, and better educational opportunities for women.[9]

Countries that protect religious freedom through laws like RFRA are linked to vibrant democracies, gender empowerment, robust freedom of the press, and economic freedom. Countries without religious freedom often face more poverty, war, suppression of minorities, and violent extremism. Religious freedom serves as a linchpin to other civil liberties and human rights, including access to the justice system.

Under RFRA, every believer gets a chance to make their case in court no matter how small or obscure their faith or how far their beliefs might be outside the mainstream. RFRA is a shining example of America's protection of vulnerable minorities. It does not mean that religion always wins.

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[7] 42 U.S.C. § 2000bb *et seq.*

[8] Brian J. Grim et al., *Is Religious Freedom Good for Business?: A Conceptual and Empirical Analysis*, INTERDISC. J. OF RES. ON RELIGION, Vol 10, Art. 4 (2014) *available at* https://pdfs.semanticscholar.org/487a/b7de19b3bcfb36139c96da5c53cf518a27c2.pdf?_ga=2.23959162.191692182.1561156785-1564202042.1561156785.

[9] *Socioeconomic Impact of Religious Freedom*, RELIGIOUS FREEDOM AND BUSINESS FOUNDATION, https://religiousfreedomandbusiness.org/socioeconomic-impact-of-religious-freedom (last visited June 21, 2019).

Indeed, over 80% of the time courts rule for the government under RFRA.[10] In short, RFRA gives people of faith their day in court but it does not come with any guarantees.

The so-called "Do No Harm Act" (H.R. 1450) guts the chance for justice for millions of religious minorities in America. Rather than recognizing that pervasive government regulation may infringe free exercise and that believers deserve a chance to explain why a limited exception should apply, the "Do No Harm Act" declares that certain laws and regulations can never be challenged. It proclaims that certain religious beliefs and practices are never worth protecting, such as those held by religious health care service providers or by religious charities that receive federal funds. Rather than placing reasonable limits on government bureaucracy, the "Do No Harm Act" gives the federal agencies *carte blanche* authority to impose draconian rules on millions of religious minorities in areas ranging from employment and health care, to social services and government contracts. It means that some believers' cries will always fall upon deaf ears because Congress—the voice of the people—has declared that the gates of justice will be forever closed to them.

Faced with laws that violate their sincere beliefs and strip them of access to the courts, many religious individuals and organizations will close their doors or limit their services to fellow believers. Less outstretched arms to orphans, abused women, and families without homes is of no use to anyone. The "Do No Harm Act" is certain to harm orphans and widows, the homeless and poverty stricken, the abused and addicted as fewer doors will be open to aid them. That the "Do No Harm Act" cannot keep the promise of its name is reason enough for Congress to reject it.

History of the Religious Freedom Restoration Act

In 1993, a nearly unanimous Congress and President Clinton enacted RFRA in response to the U.S. Supreme Court's decision in *Employment Division v. Smith*[11] that weakened the decades-old protections for citizens to live and work according to their religious beliefs. RFRA was a truly bipartisan effort sponsored by congressional giants on both sides of the aisle like Senator Ted Kennedy, Senator Orrin Hatch, and then-Representative Chuck Schumer. RFRA was broadly

[10] Lucien J. Dhooge, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretative Case Law*, 27 WM. & MARY BILL RTS. J. 153, 193, 198 (2018) (finding that RFRA claims were successful in only 16.3% of appellate court opinions and 17.6% of district court opinions).
[11] 494 U.S. 872 (1990).

supported by "sixty-six national religious and civil liberties groups, ranging across the spectrum from conservative to liberal."[12] The bill quickly made its way through both chambers, receiving a 97-3 vote in the Senate and a unanimous vote in the House of Representatives before being signed into law by President Bill Clinton.

RFRA was designed to protect religious freedom from government infringement by providing a sensible balancing test to weigh two very important interests: religious liberty and the rule of law. As one of its sponsors noted, RFRA "simply restores the compelling governmental interests test."[13] Or as Senator Ted Kennedy, the lead Senate sponsor, put it, "[t]he act creates no new rights for any religious practice or for any potential litigant."[14]

RFRA ensures that every American—regardless of belief system or political power—receives a fair hearing when the government seeks to force that person to violate his or her religious beliefs. RFRA does not pick winners or losers. As the House Judiciary Committee explained in its report on RFRA:

> [B]y enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill. This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions.[15]

While RFRA originally applied to both federal, state, and local government actions, in 1997, the U.S. Supreme Court determined in *City of Boerne v. Flores*[16] that the federal RFRA did not apply to state or local governments. In an effort to protect citizens' religious freedom, 21 states have since adopted the legal balancing test employed in the federal RFRA:

STATE	YEAR	STATE	YEAR
Alabama	1999	Mississippi	2014
Arizona	1999	Missouri	2003
Arkansas	2015	New Mexico	2000

[12] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 244 (1994).
[13] *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong., 2d Sess. 1 (1992) (statement of Rep. Edwards, Subcomm. Chairman).
[14] *Religious Freedom Restoration Act of 1991: Hearings on S. 2969 Before the Subcomm. on the Judiciary*, 102nd Cong. 2 (1992) (statement of Sen. Kennedy).
[15] *H. Comm. on the Judiciary, Religious Freedom Restoration Act of 1993*, H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993).
[16] 521 U.S. 507 (1997).

Connecticut	1993	Oklahoma	2000
Florida	1998	Pennsylvania	2002
Idaho	2000	Rhode Island	1993
Illinois	1998	South Carolina	1999
Indiana	2015	Tennessee	2009
Kansas	2013	Texas	1999
Kentucky	2013	Virginia	2007
Louisiana	2010		

It is notable that the list of states with a RFRA includes both "blue states" like Connecticut, Illinois, and Rhode Island, "red states" like South Carolina, Tennessee and Texas, and "purple states" like Pennsylvania and Virginia. So just as the federal RFRA was a truly bipartisan initiative when enacted in 1993, state-level protections for religious liberty have proven to be a bipartisan issue that can unite Democrats, Republicans, and Independents alike.[17] All these statutes require is that religious believers have the chance to seek relief from government regulations that infringe their religious exercise.

RFRA's Protections for Diverse Religious Minorities

RFRA protects every person against government overreach, regardless of whether they are a Republican or Democrat, liberal or conservative, gay or straight. While RFRA is not designed to predict any given outcome, it gives every person—no matter their faith—a fair day in court if government action has infringed their freedom to believe and act in accordance with their beliefs. Once a party demonstrates that they have a sincere, religious belief[18] that is being substantially burdened by a government action,[19] the burden shifts to the government to prove that its actions serve a compelling government interest and there is no less restrictive means by which to serve that

[17] A similar bipartisan movement to protect religious freedom occurred almost immediately after *Roe v. Wade.* Within 5 years of the decision, Congress passed the Church Amendment and "virtually all of the states had enacted conscience clause legislation." CONG. RESEARCH SERV., RL34703, *The History and Effect of Abortion Conscience Clause Laws* 3 (2005).

[18] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 n.28 (2014) ("To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.").

[19] *Id.* at 691 ("[W]e must decide whether the challenged HHS regulations substantially burden the exercise of religion....").

interest.[20] Thus, RFRA simply provides a means for balancing a religious individual's or organization's religious exercise against the government's compelling interest in restricting that activity.[21]

For example, because of RFRA's balancing test:

- Native American kindergartener Adriel Arocha's right to wear his hair long, as his religion required, was vindicated. He had been told by school administrators to cut the long hair or tuck it into his shirt.
- A Philadelphia outreach ministry was able to continue serving the homeless in a city park, as they had done for two decades, after the city attempted to ban this activity.
- The U.S. Supreme Court held that the government could not force Mennonite owners of a Pennsylvania wood furnishings manufacturing company to purchase and provide what they saw as abortion-inducing drugs and devices in violation of their sincerely held beliefs that all human life is sacred and deserving of protection.
- The City of Fort Lauderdale was prevented from prohibiting a gentleman from operating a program to feed the homeless.
- Lipan Apache religious leader Robert Soto's right to possess eagle feathers, which are central to his religion, was vindicated. He faced criminal charges for possessing the feathers, which the federal government confiscated, but has since returned.
- Orthodox Jewish prisoner Bruce Rich was able to receive kosher meals, a diet mandated by his faith, which the prison had initially denied him.
- Muslim prisoner Abdul Muhammad won the right to grow the ½ inch beard his faith required. The prison had refused to allow his beard, even though beards were permitted for non-religious reasons.
- Two Christian evangelists, who were peacefully sharing their faith and handing out religious materials on a public sidewalk in San Antonio, were given a fair opportunity in court to build their case for the freedom to share their faith.

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[20] *Id.* at 691-92.

[21] *Id.* at 735-36 ("But Congress, in enacting RFRA, took the position that 'the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'") (quoting 42 U.S.C. § 2000bb(a)(5)).

- Philemon Homes, a faith-based halfway house for prisoners, was allowed to continue offering its ministry after the local city council changed the city's zoning law to try to shut it down.
- Courts have found that interests in public safety can still be honored, while not simultaneously offending the religious beliefs of many Amish communities, by allowing the Amish to hang lanterns and reflective duct tape on their horse-drawn buggies, instead of the typical orange reflective triangles.

But even this long list does not represent the true scope of religious minorities who have been served by RFRA. In 2018, Professor Lucien Dhooge conducted a comprehensive analysis of every opinion by a federal court involving a RFRA claim, focusing on the identity of the parties, the type of case, and the outcome.[22] Finding a total of 127 federal court opinions involving non-incarcerated individuals, Prof. Dhooge's research demonstrated that—contrary to many of the misconceptions surrounding RFRA—the law is protecting the religious freedom of a diverse group of religious individuals and organizations.

First, approximately 70% of all federal RFRA claims in these federal court opinions were brought by individuals, and approximately 15% of the claims were brought by places of worship.[23] The remaining 15% of cases were brought by non-profit organizations, educational institutions, and for-profit businesses.[24] Notably, there have been only three (3) federal court opinions involving a RFRA claim brought by a for-profit corporation.[25]

Second, RFRA is truly utilized by a diverse group of religious minorities. The religious affiliations of individuals in federal court opinions involving a RFRA claim includes: Islam, Native American, Roman Catholicism, Judaism, Society of Friends (Quaker), Sikhism, Humanism, Rainbow Family, Rastafarianism, Tien Tao, Protestant, and many, many more.[26]

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[22] Dhooge, *supra* note 10.
[23] *Id.* at 172.
[24] *Id.*
[25] *Id.* Because of the numerous virtually identical legal challenges caused by the contraceptive mandate's infringement on religious liberty, Prof. Dhooge chose to consolidate all of those cases into the two U.S. Supreme Court opinions that provided final resolution to all affected parties. *Id.* at 159 n.29.
[26] *Id.* at 168 n.63; 171, n.75.

Finally, practically no RFRA claims involved LGBT individuals:

> [O]nly four claims concerned issues related to the LGBTQ+ community. This is hardly proof that RFRA has served as a means by which to deprive members of the LGBTQ+ community of their rights.[27]

Professor Christopher Lund reached the same conclusion in his analysis of both federal and state RFRA cases, finding that "[t]he majority of RFRA and state RFRA cases have little to do with discrimination or sexual morality or the culture wars."[28] Rather, as intended by Congress, RFRA is used primarily by individuals and places of worship—composed of dozens of diverse religious minorities—to afford targeted, reasonable protections to people of faith seeking relief from government regulations that (intentionally or not) burden their religious exercise.

Indeed, even a brief survey of cases like *Hobby Lobby* demonstrates that the Supreme Court struck the right balance between protecting religious liberty and providing healthcare. Hobby Lobby, Conestoga Wood Specialties, and the other claimants sought—and ultimately received—a very narrow exemption to providing a handful of specific contraceptives that they believe resulted in an abortion.[29] "[T]he Court did not strike down the HHS mandate wholesale. Thus, this law continues to apply to all other covered employers, but with surgical exemptions for a limited group of religious objectors."[30] Nor did the ruling mean that Hobby Lobby employees were barred from having access to free or low-cost contraceptives. "RFRA simply requires that the government find a different way to provide it," rather than forcing religious employers to fund it in violation of their religious convictions.[31]

Nor has *Hobby Lobby* led to a dramatic expansion in RFRA cases, contrary to many claims that the ruling would lead to a mountain of lawsuits on behalf of businesses and corporations seeking to impose their religious beliefs on their employees. The facts show that RFRA is hardly ever asserted by a for-profit business. As referenced above, only three federal court opinions involving RFRA claims were brought by for-profit businesses. "The small number of claims [by businesses] … does not pose

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[27] *Id.* at 212.
[28] Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 164 (2016).
[29] *Hobby Lobby Stores, Inc.*, 573 U.S. at 701.
[30] Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1611 (2018).
[31] Lisa Mathews, *Free Exercise and Third-Party Harms: Why Scholars Are Wrong and RFRA Is Right*, 22 TRINITY L. REV. 73, 107 (2016).

the existential threat asserted by RFRA opponents."[32] After conducting an exhaustive study, Prof. Dhooge explained that the low number of cases involving businesses "undercut[s] the fear that the U.S. Supreme Court's holding in *Burwell v. Hobby Lobby Stores, Inc.* provides such organizations with a ready-made weapon with which to engage in widespread discrimination."[33]

A separate analysis of RFRA lawsuits filed post-*Hobby Lobby* similarly found that "*Hobby Lobby* has not had a dramatic effect on government win rates in religious exemption challenges, nor have religious claims undergone a dramatic expansion in volume following Hobby Lobby. If anything, the volume of these cases appears to be slightly decreasing as a percentage of all reported cases."[34] These findings "are not consistent with the notion that religious objections are dramatically increasing in volume, or are much more likely to prompt a court to strike down government action under RFRA after *Hobby Lobby*."[35]

Recent actions by the Trump Administration are consistent with furthering RFRA's intended purpose of providing targeted, reasonable protections for religious individuals and organizations against burdensome government regulations:

- The U.S. Attorney General's October 6, 2017 guidance on "Federal Law Protections for Religious Liberty" recognized that "religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting and programming."[36] It reaffirmed that RFRA applies to both individuals and organizations and that the government cannot second-guess whether a particular religious practice is mandated by a person's faith.[37] And the guidance directed all agencies to "review their current policies and practices to ensure that they comply with all applicable federal laws and policies regarding accommodation for religious observance and practice...."[38]
- Following this directive from the Attorney General, the U.S. Department of Health and Human Service Administration for Children and Family informed South Carolina Governor

[32] Dhooge, *supra* note 10, at 174.
[33] *Id.* at 188.
[34] Barclay, *supra* note 29 at 1599–1600.
[35] *Id.* at 1644.
[36] Office of the Attorney General, *Memorandum re: Federal Law Protections for Religious Liberty* at 1 (Oct. 6, 2017).
[37] *Id.* at 4.
[38] *Id.* at 7.

Henry McMaster that Miracle Hill Ministries, a South Carolina adoption provider, was exempt from a federal regulation that prevents providers from "selecting among prospective foster parents on the basis of religion."[39] The agency found that "subjecting Miracle Hill to the religious nondiscrimination requirement in [45 CFR] § 75.300(c) (by requiring South Carolina to require Miracle Hill to comply with § 75.300(c) as a condition of receiving funding) would be inconsistent with RFRA."[40]

- In March 11, 2019, the U.S. Department of Education announced that it "will no longer enforce a restriction barring religious organizations from serving as contract providers of equitable services solely due to their religious affiliation."[41] This ensures that religious organizations cannot be discriminated against as they seek to provide services to school districts.[42]
- The U.S. Department of Health and Human Services announced its "final conscience rule that protects individuals and health care entities from discrimination on the basis of their exercise of conscience in HHS-funded programs."[43] It found that the rule merely "provides for the enforcement of the federal conscience and anti-discrimination laws as Congress enacted them," laws such as the Church Amendments, Weldon Amendments, and RFRA.[44]

None of these administrative actions broke new ground nor expanded RFRA beyond its well-recognized scope. Instead, they served as the very course-corrections that RFRA requires when a

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[39] Letter from Steven Wagner, Principal Deputy Assistant Secretary, U.S. Dep't of Health and Human Services Admin. for Children and Families to South Carolina Gov. Henry McMaster (Jan. 23, 2019) *available at* https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf.

[40] *Id.* at 3.

[41] Press Release, U.S. Dep't of Education, U.S. Department of Education Finds ESEA Restriction on Religious Organizations Unconstitutional, Will No Longer Enforce, (Mar. 11, 2019) *available at* https://www.ed.gov/news/press-releases/us-department-education-finds-esea-restriction-religious-organizations-unconstitutional-will-no-longer-enforce.

[42] The Dep't of Education's announcement was heavily influenced by the U.S. Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), which held that eligible recipients of government funding cannot be disqualified because of their religious identity.

[43] Press Release, U.S. Dep't of Health and Human Services, HHS Announces Final Conscience Rule Protecting Health Care Entities and Individuals, (May 2, 2019) *available at* https://www.hhs.gov/about/news/2019/05/02/hhs-announces-final-conscience-rule-protecting-health-care-entities-and-individuals.html.

[44] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23225 (May 21, 2019).

government regulation—even one adopted with good intentions—imposes a substantial burden on the ability of religious minorities to exercise their faith.

Gutting RFRA Will Harm Religious Minorities

Rather than continuing the federal government's current efforts to reaffirm existing protections for religious minorities, the "Do No Harm Act" is explicitly hostile towards certain individuals and organizations who hold minority beliefs and engage in faith-based activities that are unpopular or politically incorrect at the moment. It is no exaggeration to say that the bill takes a sledgehammer to religious liberty and America's long history of protecting minority rights. Indeed, the Act's sole purpose is to declare open-season for government regulation of broad swaths of religious exercise by individuals, churches, mosque, temples, synagogues, ministries, and non-profits—without any meaningful judicial scrutiny whatsoever. Such government efforts to target certain beliefs and faith-based conduct for censure may well violate the First Amendment. Government does not generally have the discretion to suppress a few types of free exercise it dislikes.

We generally protect people of faith who devoutly believe that they are going to be called to give an account of their actions to a higher power. For many religious people, every aspect of their lives, including what they do at home, work, and their place of worship has consequences that echo not just now but through all eternity. As Professor Douglas Laycock, a law professor at the University of Virginia School of Law and one of our nation's leading scholars on RFRA, wrote:

> Those seeking exemption believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates. Some believe that assisting with an abortion or a same-sex wedding would destroy that relationship forever. They believe that they are being asked to do serious wrong that will torment their conscience for a long time after, perhaps forever. These are among the harms religious liberty is intended to prevent....[45]

The "Do No Harm Act" sends an unmistakable message to the American people: when the government tramples on people of faith, when it prohibits them from living out their beliefs at school, work, or volunteering at a local charity they support, when it confines faith to hidden thoughts or prayers and forbids it from actually impacting citizens' lives, our

[45] Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to Nejaime and Siegel*, 125 YALE L.J. FORUM 369, 378 (2016).

legal system will not even permit you to plead your case. For these people of faith are so odious that the gates of justice have been closed to them. It is difficult to imagine a form of religious hostility that would be more explicit or contrary to the First Amendment, which every Member of Congress has taken an oath to uphold.[46]

As just one example, a women's shelter like Downtown Hope Center has policies that—consistent with its religious convictions and its desire to provide a safe environment for women—do not allow biological males to sleep in its communal sleeping facilities. The Hope Center's women's shelter consists of one room with mattresses set three to five feet apart from one another. Even though the Hope Center serves meals, provides clothing, laundry facilities, and job skills training to men and women during the day, its religious commitment to help battered and abused women requires it to provide a safe space for women to sleep and change without men being present.

But under the "Do Not Harm Act," the Hope Center could be forced to admit men into its female-only sleeping facility pursuant to a law like the proposed Equality Act, which prohibits even non-profit organizations from maintaining private facilities designated solely for biological women. The Hope Center's sincere religious beliefs and practical ability to help homeless women—many of whom have been abused and would refuse overnight accommodation if a male were present—would make no difference. Without a RFRA defense to this substantial burden on the Hope Center's ability to operate in a manner that protects women and honors its religious commitments, the Hope Center would be forced to shut its shelter down, leaving women out in the cold on subzero Alaskan nights.

The same would hold true for faith-based adoption providers like New Hope Family Services in New York and Miracle Hill in South Carolina. These faith-based organizations make-up a small minority of the child welfare providers in any given state. But with over

[46] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.'") (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)).

400,000 children in our nation's foster-care system,[47] we need as many nonprofits as possible helping to place children in a loving home. Yet under current federal proposals (like H.R. 3114) that would require adoption providers to abandon their religious beliefs that children thrive best in a home with a married mother and father (often as a condition of receiving federal funding), New Hope Family Services and Miracle Hill may be forced to shut down altogether. Under the "Do No Harm Act," faith-based providers would no longer have the opportunity to demonstrate in court why their God-honoring sincerely-held religious beliefs should be accommodated under RFRA's balancing test.

Harms like these will extend far beyond just the social-services context to impact medical rights of conscience, religious educational institutions, and even places of worship:

- Doctors, nurses, and pharmacists who have religious objections to providing or facilitating abortions, sterilizations, or assisted suicide could be compelled to do so if a government policy requires medical personnel to provide these services.
- The growing number of doctors and psychologist with concerns about providing minors who experience gender dysphoria with hormone-replacement drugs and cosmetic surgery that could render the children sterile—minors who lack the capacity to understand and consent to the life-altering consequences of such treatments—could be forced to provide services that they believe are harmful to their patients. One group of physicians has already challenged Section 1557 of the Patient Protection and Affordable Care Act (42 U.S.C. § 18116), which had been interpreted to require the provision of such treatments. A Texas federal district court issued an injunction against Section 1557, finding that the medical providers had demonstrated a likelihood of success on their claim that "the challenged Rule violates RFRA."[48]
- Private, religious schools and colleges (like Geneva College) with employment policies or student codes of conduct that reflect their deeply-held beliefs on life, marriage, and human sexuality could be compelled to abandon these religious precepts as a condition

[47] U.S. Department of Health and Human Services, Administration for Children and Families, *The AFCARS Report* (Oct. 20, 2017) *available at* https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf (estimating 437,465 children in foster care on September 30, 2017).
[48] *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016).

of receiving federal education grants. Many of these schools benefitted from the shield RFRA affords when they were ordered to provide what they view as abortion-inducing drugs and procedures as part of their employee and student health care plans. Yet under the "Do No Harm Act," the shield that preserves the freedom of these institutions to be authentically religious and to pass on their religious heritage to the next generation would be stripped away, leaving these private religious schools defenseless to all manner of federal regulation.

- Even houses of worship could suffer harm if they, for example, declined to allow their facilities to be used to celebrate a same-sex wedding or if they were subject to a law requiring them to hire people of other faiths for non-ministerial positions. A proposal like the Equality Act or an amendment to remove the religious exemption in Title VII could result in either of these scenarios. And if the "Do No Harm Act" was enacted, places of worship would be stripped of RFRA as defense to such unconscionable government actions.

Simply put, the "Do No Harm Act" does exactly the opposite of what it promises. By stripping away any RFRA defense to a broad category of existing and future federal laws and regulations that impact how religious minorities live, work, serve, and worship, individuals and organizations will inevitably find themselves defenseless to challenge even baseless encroachments on the free exercise of their faith.

Conclusion

Pervasive government regulation is a fact of modern life. And in a nation as diverse as ours, all of those laws have serious consequences for the free exercise of religion. Some of those consequences are foreseeable but many are not, as minority faiths' tenets are largely unknown and are not well represented in the political process. RFRA currently makes every federal law and regulation subject to a possible targeted exemption if it imposes a substantial burden on the religious exercise of a religious individual or organization. As a result, RFRA requires Congress to factor religious liberty into its legislative calculus and courts to give believers a chance to be heard when a law seriously dampers the exercise of their faith. That is a good thing because freedom of religion—along with freedom of speech, of the press, and others enshrined in our Bill of Rights—are cornerstones of our

democracy. We want the government to safeguard minorities and respect individual rights. The alternative is the tyranny of the majority, a form of totalitarianism America has long rejected.

But under the "Do No Harm Act," massive categories of laws—both currently existing and those to be enacted in the future—are declared impervious to countervailing free-exercise rights. The bill denies individuals and organizations the opportunity to make their case as to why their right to free exercise, in a specific context, should be protected. It shuts the courthouse door in their faces, denying them entry into one of the few places in our country where any citizen can stand up for what they believe in no matter how marginalized or politically unpopular their beliefs may be.

Simply put, the "Do No Harm Act" demonstrates outright hostility and intolerance for certain people of faith. It hand-picks certain religious beliefs and practices—specifically those related to abortion, sterilization, marriage, and human sexuality—and deprives certain disfavored religious minorities of federal law's protection. But these believers are Americans too. Many of them can trace their heritage to religious minorities who fled Europe to America to escape the same type of religious intolerance the "Do No Harm Act" exhibits today. The American success story is a direct result of religious toleration and the revelation that government has no business enforcing orthodoxy and picking and choosing what religious beliefs and practices are worthy and which are not. Because the "Do No Harm Act" threatens to undo that progress and enshrine religious intolerance into law, Congress should reject it and reaffirm that religious minorities still have a place in American life.

Chairman SCOTT. Thank you. Reverend Hawkins.

STATEMENT OF REVEREND JIMMIE R. HAWKINS, DIRECTOR, PRESBYTERIAN OFFICE OF PUBLIC WITNESS, PRESBYTERIAN MISSION USA

Mr. HAWKINS. Good morning, Chairman Scott, Ranking Member Foxx, and committee members. Thank you for this opportunity to be with you here today. I am an ordained minister with the Presbyterian Church (U.S.A.) and serve as the director of the church's Office of Public Witness.

Religious freedom is sacred to me and to my denomination. For more than 200 years our historic principles have recognized the importance of religious freedom. And, of course, it is a fundamental American value.

In 1993, consistent with our teachings, the Presbyterian Church supported the pass of RFRA as a way to allow persons and religious groups to practice their faith without constraint of the government. Unfortunately, over the years RFRA has become a weapon aimed at excluding, marginalizing, and discriminating against vulnerable populations. This misinterpretation of RFRA runs counter to religious freedom and the teachings of my faith.

In our commitment to be disciples of Jesus Christ, my church is called to stand against oppression and in support of human dignity for all people because religious freedom must be equal and common to all. It cannot be maintained as a matter of privileged exemption for powerful individuals or groups. Religious freedom gives each of us the right to believe in accord with our own conscience, and practice our faith, as long as we don't hurt others.

We believe it weakens religious freedom when it is invoked in ways that deprive people of their civil and human rights to equal protection under the law or seek to justify exclusion and discrimination.

Presbyterians have historically valued religious liberty and continue to support the freedom to act according to one's religious beliefs.

However, in cases involving the refusal of goods and services, false claims of religious freedom cause direct harm to those who are denied access. Legislating such claims as cases of protected religious freedom would undermine years of progress in State and Federal civil rights and anti-discrimination law.

As Chairman Scott gave comment to the battles over slavery and racial segregation, religion and scripture are often cited as justification for maintaining inequality. People even heard it preached from pulpits on Sunday morning. Until the Civil Rights Era, refusals to serve African Americans were often cloaked under the guise of religious freedom. As well as support for slavery, which was given a theological and biblical undergirding.

In the end we are called here today to stand for the religious freedom and the rights of the individual. United States civil courts have rightly rejected the claims of those who have said that racial integration would violate their religion.

Invoking religious freedom to deprive people of their rights is still occurring today. As we see, RFRA is being misused to cause some harm.

Over the years, individuals and businesses have found ways to circumvent the original purpose of RFRA to discriminate against persons and to impose their religious beliefs on those who believe otherwise or who don't even believe at all. Personal prejudices have been enforced under the guise of religious sentiment. In this way some dominant religious groups have not been able to persuade us to stop the march of greater equality are now claiming discrimination, trying to use religious freedom as their last refuge.

In 2018, motivated by this misuse of RFRA and other religious freedom laws and policies, the Presbyterian Church passed a resolution to stand against any invocation of religious freedom in the public sphere that deprives people of their civil and human rights to equal protection under the law or that uses religious freedom to justify exclusion and discrimination.

That is why today the church supports the Do No Harm Act which will return RFRA to its original intent. It will protect religious freedom, but not be used to harm others. There can be no religious freedom without equal respect for the dignity of all persons. A dignity that is denied when services are refused. When claims of religious freedom become public efforts to exclude and discriminate, we are called to speak up for justice and to stand with the oppressed.

Thank you.

[The statement of Mr. Hawkins follows:]

Testimony of the Rev. Jimmie Hawkins,
Director, Office of Public Witness,
Presbyterian Church (U.S.A.)

Before the
U.S. House Committee on Education and Labor

Hearing on
Do No Harm: Examining the Misapplication of the Religious Freedom Restoration Act

June 25, 2019

Good morning Chairman Scott, Ranking Member Foxx, and Committee members. Thank you for the opportunity to testify today.

I am an ordained minister with the Presbyterian Church (U.S.A.) and am the Director of the church's Office of Public Witness. Religious freedom is sacred to me and my church. For more than 200 years, our Historic Principles have recognized the importance of religious freedom. And of course, it is a fundamental—patriotic—American value.

The Presbyterian Historic Principles of Church Order calling for religious freedom and the separation of church and state actually pre-date the adoption of the Bill of Rights. In 1788 our principles declared: "We do not . . . wish to see any religious constitution aided by the civil power . . . ." (F-3.0101b). Over the years, the church has adopted various policies and resolutions that demonstrate our commitment to religious freedom in our country and abroad.

The Presbyterian Church (U.S.A.) supported the Religious Freedom Restoration Act (RFRA) when it was adopted in 1993 because we supported its original intent: to allow persons and religious groups to practice their faith without constraint of the government, particularly Native American and other minority faiths. Unfortunately, since then, RFRA has become a weapon aimed at excluding, marginalizing, and discriminating against vulnerable populations. This misinterpretation of RFRA runs counter to religious freedom and the teachings of my faith.

Religious freedom gives each of us the right to believe in accord with our own conscience and practice our faith—so long as we don't hurt others. We believe it

weakens religious freedom when it is invoked in ways that deprive people of their civil and human rights to equal protection under the law or seek to justify exclusion and discrimination.

In our commitment to be disciples of Jesus Christ, my church is called to stand against oppression and in support of human dignity for all people. The fundamental principle of universal human dignity rests on the Biblical foundation that humankind is created in the image of God (Genesis 1:27). From this *imago Dei*, we conclude that no form of discrimination is defensible on religious grounds. When Presbyterians confess our faith in A Brief Statement of Faith (Book of Confessions), we affirm our calling to "hear the voices of people long silenced and to work with others for justice, freedom, and peace."

Presbyterians have historically valued religious liberty and continue to support the freedom to act according to one's religious beliefs. There can be no religious freedom without equal respect for the dignity of all persons, a dignity that is denied when services are denied. When claims of "religious freedom" become public efforts to exclude and discriminate, we are called to speak up for justice and stand with the oppressed.

Indeed, religious freedom must be "equal and common to all," as our Historic Principles from 1788 state—it cannot be maintained as a matter of privileged exemption for powerful individuals or groups.

That's why it was wrong when in battles over slavery and racial segregation, religion and scripture were often cited as justification for maintaining inequality. People heard it from the pulpits on Sunday mornings. Until the civil rights era, refusals to serve African Americans were often cloaked under the guise of religious freedom—the owner of the Piggie Park Barbecue Restaurants in South Carolina claimed he could refuse to serve African Americans in violation of the Civil Rights Act because his "religious beliefs compel him to oppose any integration of the races whatever." And when Meredith and Richard Loving appealed their conviction for violating Virginia's anti-miscegenation laws, the trial court ruled against the couple, asserting that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."

In the end, the Lovings' conviction was overturned and Piggie Park could no longer refuse service to African Americans. The United States civil courts rightly rejected the claims of those who said racial integration would violate their religion.

But that's not the end of the story. Invoking religious freedom to deprive people of their rights is still going on. Today we see RFRA being misused to cause harm.

Individuals and businesses have found ways to circumvent the original purpose of RFRA to discriminate against persons and to impose their religious beliefs on those who believe otherwise or who don't believe at all. Personal prejudices have been enforced under the guise of religious sentiment. In this way, some dominant religious groups that have not been able to persuade us to stop the march to greater equality are now claiming discrimination, trying to use religious freedom as their last refuge.

We do not view LGBTQ rights to be at odds with our church's teachings. The Presbyterian Church has as its theme, "Church Reformed, Always Reforming," for we believe that while God does not change, God's revelation is revealed in contemporary society in new and revelatory ways. Therefore, as the decades have progressed, the church has followed the Spirit of God as it has shed light upon past mistakes. In 1978, Presbyterians concluded that the denial of human rights to gay, lesbian, bisexual and transgender persons on the basis of religious belief was inconsistent with our Christian faith, as well as with our commitment to the principles of equality under the law as Americans. In 1987, the 199th General Assembly called for "the elimination . . . of laws governing the private sexual behavior between consenting adults [and the passage] of laws forbidding discrimination based on sexual orientation in employment, housing, and public accommodations."

In 2018, to effectuate our church principles, based upon legal and theological understandings of the First Amendment and free exercise of religion, and motivated by this misuse of RFRA and other "religious freedom" laws and policies, the Presbyterian Church (U.S.A.) passed an important resolution. The church decided "to stand against any invocation of 'religious freedom' that deprives people of their civil and human rights to equal protection under the law, or that uses 'religious freedom' to justify exclusion and discrimination." (Religious Freedom Without Discrimination (2018)).

Legitimizing these kinds of claims as cases of protected religious freedom would undermine years of progress in state and federal civil rights and anti-discrimination law. The key distinction lies in whose choice is being limited or protected. Personally choosing not to have an abortion or use birth control, for example, is religious freedom. Making that choice for someone else, on the basis of one's own religious principles, is religious oppression—as is done when an insurance company denies health care coverage for birth control or a doctor refuses to prescribe contraceptives. Using one's own idea of "religious freedom" to limit the lawful choices of others through your own economic leverage creates a dense pattern of religiously sanctioned discrimination.

In fact, the misuse of "religious liberty" is costing lives and depriving individuals of basic human rights. Policies adopted under the guise of religious freedom are in reality nothing more (or less) than a targeted attempt to promote a singular religious viewpoint that does not believe LGBTQ individuals are entitled to the full scope of human rights to employment, healthcare, and parenting rights. These policies give businesses, service and healthcare providers, government workers, and private citizens engaged in commercial activities the unfettered right to discriminate against others, deny them needed services, and impose their own religious beliefs on others, so long as they cite their religious or moral belief as the reason for doing so. Similarly, individuals found to have violated laws guaranteeing against discrimination in public accommodations and the delivery of commercial services are claiming a right to assert religious freedom as a shield against liability for such discrimination.

And we see examples in government contractors who are supposed to ensure everyone who wants and needs to participate in the taxpayer-funded program impose religious litmus tests to determine eligibility.

From the Supreme Court's decision in *Hobby Lobby* to the Franciscan Alliance case in Texas to the Harris Funeral Home case in Michigan and the Aimee Maddonna case in South Carolina, we see RFRA being misused.

The initial intent of "religious freedom" was to be like a defensive shield protecting the diverse practices of religious faith. It was not intended to be used as a hostile sword to discriminate against people seeking legal services and equitable resources. Historically, religious freedom has meant protection from oppression, rather than economically imposing one's religious convictions on others. Such practices of inequality perpetuate second-class citizenship in the name of religion, a violation of the First Amendment's prohibition of government establishment of religion.

For these same reasons, the Presbyterian Church (U.S.A.) supports the Do No Harm Act, which will return RFRA to its original intent: It will protect religious freedom, but not be used to harm others.

The Do No Harm Act provides protections for vulnerable populations and ensures RFRA cannot be used to get out from the protections in our law for equal employment and non-discrimination, health care, access to government services, and against child labor The Do No Harm Act therefore safeguards that religious freedom is used as a shield to protect the Constitutional right to free exercise of religion and not a sword to discriminate.

"Religious freedom" can never be a pretext for denying all of God's children basic human rights and freedom from discrimination in secular employment or benefits, healthcare, public or commercial services or goods, or parental rights.

We are committed to defend real religious freedom and fight against efforts to misuse it. Passing the Do No Harm Act would be an important step.

Chairman SCOTT. Thank you. Under Committee Rule 8a we will now question the witnesses under the 5-minute rule. And we will first recognize the gentleman from Connecticut, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Scott, for holding this hearing today. And thank you to all the witnesses for your testimony this morning.

You know, listening to, again, what we have heard here today, it does seem we have to go back a little bit to 1994 when the RFRA law was passed. And again, Ms. Laser, you again sort of alluded to the fact that again, this was an attempt to rebalance the law after the Smith decision. Can you talk about what the law looked like prior to that Smith decision in terms of the balancing test between compelling State interest, as well as restrictions being, you know, protected?

Chairman SCOTT. Your microphone, please.

Ms. LASER. Prior to the Smith decision the law was much like the RFRA balancing test intends to be. So if you had a sincerely held religious belief that was substantially burdened, the only way that could be overcome is if the government had a compelling interest and it was narrowly tailored.

And, you know, that law was sort of working until Employment Division v. Smith when Scalia wrote his opinion. RFRA was in response to that previous balancing being out of whack from Employment Division v. Smith, and that's why so many groups across political divides came together.

Everyone agreed that these Native Americans engaging in this healing peyote smoking ceremony deserved protection from these prohibitions on receiving unemployment if you failed a drug test. So that's why it came into being.

Unfortunately, soon after RFRA passed in 1993 there started being indications that it was going to be misused in the ways that we are seeing so much of today. For example, commercial landlords right away argued that RFRA gave them the right to impose their religious beliefs that people shouldn't be cohabitating before marriage, and to ignore housing discrimination laws and refuse housing to unmarried couples. So we did start to see that pretty soon after RFRA passed.

But what's really important is RFRA would have never passed as a consensus bipartisan bill had it been assumed that it was going to cover cases like that.

Mr. COURTNEY. So basically what has happened is the compelling State interest has sort of then continued to be degraded to the point where it really, again, as has been testified, became more of a sword rather than a shield in terms of protected groups.

Ms. LASER. Yes. And in the Hobby Lobby case in particular, the court actually changed the meaning of substantial burden and sort of made it much easier to meet, much more like just meeting the sincerely held religious belief test. And they also made it harder for the government to prove that they had a narrowly tailored solution to their compelling interest. And so the court actually changed the balancing test for the worse from pre-Smith law in the Hobby Lobby decision.

Mr. COURTNEY. So you have described one example in your testimony of the homeless shelter refusing access to a transgender

person. Again, the compelling State interest in that case is where Federal funds are paying to support the emergency housing. Emergency housing is the compelling State interest, which should be upheld despite whatever a person's view is of a transgender or other minority individual.

Ms. LASER. Exactly. Government services are provided for people in need. We feed people, we give people shelter, we take care of people when they are in dire conditions.

Like Samantha Coyle in Alaska, who is a transgender woman who showed up at a government-funded homeless shelter and was turned away and had to sleep in the woods. And that's not how we want our government acting, denying much needed services to people in the name of religion.

Mr. COURTNEY. And other examples of compelling State interest would be, again, the access to healthcare, coverage for medically prescribed services. Which again, if you degrade the compelling State interest it effectively becomes a barrier from people getting what their doctors tell them they need; is that correct?

Ms. LASER. Absolutely. We need to put patients first and, you know, that's not happening with a lot of the regulations that we are seeing today come out of the Trump Administration in the name of RFRA and religious freedom.

Mr. COURTNEY. So the Do No Harm Act, I mean is that sort of the purpose is for Congress, again, to revisit this issue and to restore what was the original intent of RFRA and, again, what was traditionally the way the Supreme Court interpreted the Free Exercise Clause; is that correct?

Ms. LASER. That's right. And also to make sure that we are holding to the Constitution and the Establishment Clause. The Do No Harm Act doesn't change the balancing test that we are talking about. It just makes sure that the Establishment Clause law is in effect. And the Establishment Clause says that you can't use your religion to cause harm to third parties.

There's a line of Supreme Court cases that say that Calder and Cutter, and it was clear from our founding framers as well. And that is what the Do No Harm Act does.

Mr. COURTNEY. Great. Thank you.

Ms. LASER. Thank you.

Chairman SCOTT. Thank you. The gentleman from Tennessee, Dr. Roe.

Dr. ROE. Thank you, Mr. Chairman. We have a First Amendment right to practice our religion in America, and the government forcing someone to act in a way that violates those beliefs is in direct opposition to the very foundation of our Constitution.

The Religious Freedom Restoration Act protects our First Amendment right. The RFRA does not pre-determine winners and losers, and in fact is noted in testimony over 80 percent of the time the court rules in favor of the government, not under RFRA.

My colleagues on the other side of the aisle will tell you that RFRA is being used as a license to discriminate. That is not true. The RFRA protects people of faith from discrimination by allowing them to challenge government actions that would burden their freedom to practice their religion. This is not about forcing religious

beliefs on anyone. This is about not forcing people of faith to abandon their beliefs.

Now I want a question for either Mr. Sharp or Reverend Hawkins. In 2016 the Obama Administration HHS published final rules under Section 1557 of the Affordable Care Act that expanded the definition of sex to include gender identity and termination of pregnancy.

Under these rules, would religious hospitals or doctors be forced to offer or perform procedures that violated their beliefs or values? And what are the consequences for providers that choose not to violate those beliefs?

I am one of those providers. As a matter of fact, look at the dais, I am the only one up here. I am an OBGYN doctor. So what is the answer to that question?

Mr. SHARP. Thank you for the question. And when you look at what was originally enacted with 1557, it was protecting against sex discrimination. And then that was ultimately through an HHS regulation expanded to include gender identity.

But you bring up the importance of the purpose of RFRA and that balance it provides. Because for a medical provider they may have deeply held religious beliefs regarding a variety of medical services. And what we want to make sure is that provider has a process by which they can go to court and explain their religious convictions and at the same time the other side, the government can go to court and explain their interest involved as well.

What we want to secure is that process for physicians like yourself, for medical providers across the country, just to have that access to the doors of justice to plead their case in court.

Mr. HAWKINS. I think it is indeed a delicate balance, and it is difficult to have the identity of a doctor and of a Christian. But I do like the name of the act, Do No Harm. And I have said in the past that doctors have stolen their Christian theme because we are called to do no harm in our faith.

I think there are always limitations on either side and I think that as a minister there are limitations that have to be imposed upon me and my servant on—

Dr. ROE. The question I have is not that. The question I have is will I be forced to perform something that I believe is wrong, which is an abortion.

Mr. HAWKINS. The question is will you be forced? You mean by government regulations?

Dr. ROE. That is correct. Just what I am asking. If this happens would providers like myself be forced to do the procedure they believe is morally wrong?

Mr. HAWKINS. I think there will be times when you have to struggle with that question.

Dr. ROE. I don't have any struggle with it at all. I have none.

Mr. HAWKINS. I think that in our Christian walk there are times when we are, if you want to use the word forced, we are compelled to do things that might personally bother us. For example, as I was about to say, as a minister I counsel others. And yet if I learn—

Dr. ROE. I am not talking about counseling somebody, I am talking about actually doing a medical procedure, that is what I am asking.

In the testimony, Mr. Sharp, you then mentioned without RFRA protections many religious organizations would be forced to stop providing services such as homeless shelters, community gardens, nursing home services, and more to the general public. When it comes to preventing services mandates, do you believe that the impact would include providing health coverage for employees? Do you believe that organizations will be forced to drop coverage all together rather than violate their beliefs?

Mr. SHARP. Thank you. And I think that is among the concerns that RFRA is designed to help prevent. When you look at the claims brought by a variety of groups, whether it was Little Sisters of the Poor, Geneva College, the Mennonite Conestoga Wood Specialties and others, they were facing this very difficult choice of we want to take real good care of our employees but we also have that duty to God that we are trying to honor. And we want to balance that, and the best way we do it is let's provide great healthcare but at the same time don't force us to pay for things and to support things that we believe violate that sanctity—

Dr. ROE. I want to say one other thing, my time is about expired. But in the Hyde Amendment it states that we don't intend to use Federal dollars to fund abortion. I think in the private business asking for the same protections with private dollars as with public dollars when they have to provide a service they don't think they should.

Mr. Chairman, I yield back.

Chairman SCOTT. Thank you. Gentleman from Northern Mariana Islands, Mr. Sablan.

Mr. SABLAN. Yes. Thank you very much, Mr. Chairman, for holding today's hearing. I find quiet time every day of my life to just contemplate on if there is something that I have done or something I had failed to do to harm someone or make someone even uncomfortable, and that how I could fix that. I try to live my life that way. I don't always succeed but I know I am not condemned to hell because I do that.

But let us talk about recent law. When Congress passed the Affordable Care Act our country took an historic step forward on the path toward healthcare justice by protecting millions more from discrimination in healthcare settings. Specifically Section 1557 of the ACA prohibits Federal health programs and entities that receive Federal financial assistance from discriminating based on the race, color, national origin, sex, age, and disability status.

I was hoping that the panel might be able to briefly discuss the importance of these protections for the American people. So, Ms. Laser, may I ask, prior to the ACA, what protections existed to prevent discrimination in healthcare, and how did they compare to the protections in Section 1557?

Ms. LASER. Thank you. The Healthcare Rights Law 1557 is a landmark piece of legislation in large part because, remarkably to me actually as a woman, it is the very first law to prohibit discrimination on the basis of sex by healthcare providers that receive Federal financial assistance. First time ever in healthcare law that

applies to healthcare programs that receive financial assistance from the government.

And what that means, according to settled case law, is that it prohibits not just discrimination against women but discrimination based on gender identity and also sex stereotyping. Because that's what the courts have found sex discrimination includes.

It also includes discrimination on the basis of pregnancy and pregnancy-related conditions, including termination of pregnancy.

And the other aspect of this bill that is wonderful is that it recognizes that there is discrimination in access to healthcare if you are not acknowledging the difficulties to access for people who are limited in their English proficiency. And therefore it brings along provisions that takes care to give translation notices, tag lines and such for people who are not native English speakers.

Mr. SABLAN. Yes, like for myself, I have a limited number of English words every day so once I use it up I get confused. You know, there really is a reason why there is a saying that, you know, we don't discuss politics and religion at the kitchen table when we sit down for a meal, otherwise it could blow up.

But, Ms. Laser, what impact would ending these protections that we just talk about have on communities historically subject to discrimination in healthcare as well as the remote island communities like the colonies, like my district, with access to challenges and ongoing provider shortages.

Ms. LASER. Yes. You know, sometimes when you belong to a majority group it is hard to even understand or know the difficulties and challenges that people face who are part of minority groups. But there are extensive difficulties that folks who are part of minority groups face in the healthcare system, and barriers to access.

People who are transgender reportedly one in four don't even go and seek care because they are so concerned about being harassed or turned away by the healthcare system. Women have confronted many problems. Many studies don't even reflect how drugs effect women's health. Women haven't been taken into account, and women would suffer. And so would gays and lesbians who, you know, lesbians are turned away from physicians, etcetera.

Mr. SABLAN. Ms. Laser, with my time I have one question. Reverend, you said this in your statement, "Today we see RFRA being misused to cause harm." Can you in a very short time express that?

Mr. HAWKINS. Yes. Many of the cases that we have examined wherein a transgender woman was fired because she was transgender. Wherein individuals find themselves such as seeking to be foster parents, and because of their religious beliefs, do not align with the agency that is in charge they are denied the opportunity to be foster parents.

Mr. SABLAN. Yes. But my time is up, but I think God spoke to someone and said remove that person from this service because his different religion. There is only one God.

Mr. HAWKINS. Yes. And God loves us all.

Mr. SABLAN. I love you too, Reverend. Thank you.

Chairman SCOTT. Thank you. The gentleman's time has expired. Mr. Thompson.

Mr. THOMPSON. Thank you, Chairman. Thanks all the members of the panel for being here.

Mr. Sharp, I appreciate your being here today. A normal feature of RFRA is that it requires the government to explain and justify a restriction on religious liberty. I mean our country was formed by those who were seeking religious liberty.

The government must show that there's a compelling interest and the restriction is the least restrictive means of achieving interest. Now does RFRA give individuals some much needed leverage when dealing with the Federal Government, and does it increase government transparency and accountability?

Mr. SHARP. Yes. RFRA's a check on oppressive government regulation. It gives that religious minority whose practices are burdened by a government rule or regulation a check that they can go to court and they can let their voice be heard and have an opportunity to seek relief from what the regulation imposes on them.

So absolutely it creates government accountability. And it requires the government not only to respond when it infringes, but even when they are looking to pass laws, looking to enact regulations, to take a step back and say is this going to impact the religious exercise of an individual, and make sure that they are showing that proper protection and that proper respect for our First Amendment rights.

Mr. THOMPSON. I would like to follow up about RFRA as it relates to the Affordable Care Act. As you know, the Trump Administration released two interim final rules in October 2017 dealing with moral exceptions or religious exemptions for coverage of certain preventative services under the ACA.

With that being said, can any employer decide that they no longer wish to pay for preventative services and claim a religious or moral exception under these recently finalized rules, and are there guidelines in place for employers looking to use these exception processes?

Mr. SHARP. Thank you for that question. So after the Affordable Care Act and the contraceptive mandate we saw numerous organizations, non-profits, the Little Sisters of the Poor, Geneva College, and a few closely held businesses as well, find their beliefs in conflict in the law.

I thought it was interesting, I was reading something recently, I think it was former ACLU President Nadine Strossen, and even RFRA was being debated in 1993 and '94, specifically raised this concern that absent RFRA, and under the Smith ruling, religious organizations could be forced to provide abortions or contraceptives. And so what this ruling in Little Sisters of the Poor and others and this recent interim rules do is show that proper respect for people's faith. To give those that have a deeply held religious belief or moral conviction about the sanctity of life, the opportunity to get an exemption, not from providing health care but from providing a handful of contraceptives or other items that they believe terminate an innocent human life.

And so what these do is protect that freedom of conscience. Again, a very tailored, balanced approach that protects those while also furthering the other interests involved in healthcare.

Mr. THOMPSON. Thank you, Mr. Sharp. Chairman, I yield back the balance of my time. I yield to the Ranking Member.

Mrs. FOXX. Thank you, gentlemen, for yielding. Mr. Sharp, your testimony cites several studies on the Religious Freedom Restoration Act cases. One study said 70 percent of RFRA claims are made by individuals, 15 percent by houses of worship, and 15 percent by non-profit organizations, educational institutions and for-profit businesses.

There were only three reported cases brought by for-profit companies. What does this data say to you about who is being protected by RFRA?

Mr. SHARP. I think it demonstrates that RFRA is continuing to serve those who are most impacted by oppressive government regulations. It is often the individual, the place of worship, the non-profit, very powerless organizations that most feel the brunt of any government regulation. And so again, the study you are referencing was done in 2018, so this is post-Hobby Lobby, looked at it and said well, what we are continuing to see is a pattern that these individuals and houses of worship are making up the majority of cases, the majority of instances where a person of faith is seeking relief, going to court, and making their case.

And again, we do want RFRA to extend to everybody. We think everyone deserves that opportunity, but it is continuing to serve the groups it intended to.

Mrs. FOXX. Thank you, Mr. Chairman. I yield back to Mr. Thompson.

Mr. SCOTT. Thank you. The gentlelady from Oregon, Ms. Bonamici.

Ms. BONAMICI. Thank you, Mr. Chairman and Ranking Member. Thank you to all of our witnesses, Ms. Laser especially. I followed the work of the Americans United for Separation of Church and State for years, and I commend you for so capably filling the very big shoes of Barry Lynn.

So I am from Oregon, so just for the record the full title is Employment Division of Oregon v. Smith, the case that originated in my home State.

I also chair the Civil Rights and Human Services Subcommittee here on the full committee, and I am deeply concerned about the Trump Administration's efforts to roll back individual rights and liberties under the guise of protecting religious freedom.

And as we have heard from our witnesses this morning, the intent of the original Religious Freedom Restoration Act was to protect the rights of religious minorities, not to use religion to somehow justify discrimination against women, communities of color, LGBTQ individuals, and other minorities.

So, Reverend Hawkins, thank you for emphasizing the importance of protecting personal religious views. And just to follow up on Ranking Member Foxx' question about the number of cases brought by corporations. To me it is because corporations don't have religious beliefs, they are corporations. That was always baffling to me about the Hobby Lobby case to begin with.

But, Reverend Hawkins, in your written testimony you said legitimizing these kinds of claims as cases of protected religious freedom would undermine years of progress in State and Federal civil

rights and anti-discrimination law. The key distinction lies in the choice being limited or projected personally choosing not to have an abortion or use birth control, for example, is religious freedom. Making that choice for someone else on the basis of one's own religious principles is religious oppression.

I couldn't agree more, the way you phrased it. And how have the examples, Reverend, how have the examples we have discussed here today show that RFRA is being used not just to protect personal views but to infringe on the views and beliefs of others?

Mr. HAWKINS. If I am an employer and I have the power to determine who gets hired and who does not get hired, who gets fired. I have power over that individual. And therefore I can use my religious views, my beliefs to try to influence them in a way that goes beyond the quality of work that they are performing.

We all have religious freedom as individuals, and like you I kind of question about where the corporations have religious views. They really reflect the religious views of the individuals who are in charge.

So I cannot do anything in my personal faith walk to harm another person. I cannot allow my religious views to say that well, you are right and I am wrong. Because every religious view is limited, every person, no matter what denomination you belong to, there are strengths and weaknesses within that faith system.

So we have to be careful, especially when we try to determine who is righteous and who is Christian, who is non-Christian, and impose our beliefs upon them.

Ms. BONAMICI. Thank you. And, Ms. Laser, I am deeply concerned about this Administration's ongoing attacks on women's health and women's right to make their own reproductive healthcare decisions. And as we have heard today, without appropriate safeguards, religious liberty can begin to subvert the rights of other people. And I look at Title X for example, the Family Planning Program.

The Nation's dedicated source of Federal funding for family planning and annually Title X health centers provide high quality family planning and sexual healthcare for four million predominately low income people.

In 2017 in my own State, nearly 45,000 Oregonians got lifesaving preventive health services, breast and cervical cancer screening, testing and treatment for sexually transmitted diseases, HIV testing, contraceptive service supplies and information.

And yet now under this Administration this very successful program is in danger. I look at this domestic gag rule that basically eliminates comprehensive pregnancy options counseling. And the result is the government telling doctors and nurses how to do their job. And essentially the rule is bending over backward to appease anyone or entity whose opposed to women's access to comprehensive health services.

So, Ms. Laser, are we seeing a pattern by the Administration when it comes to attacks on women's health, and how is religious liberty being used to compromise the health and safety and decisions, personal health care decisions of women?

Ms. LASER. Yes. We definitely are seeing that sort of pattern that you are alluding to, in addition to the Title X issues and, you

know, I would like to remind people that Title X was signed into law by President Nixon actually originally.

We are also seeing the attacks on women's health in the form of the final regulations on birth control that we have been talking about that would allow all bosses to deny access to affordable birth control to their employees, universities to deny access to birth control to students.

We actually brought a lawsuit against the Trump Administration and Notre Dame on behalf of a group of students at Notre Dame who are seeking affordable birth control there but their options are being limited by the university.

There is also recently the Denial of Care Rule that the Administration issued that would allow everyone associated with the medical industry, from the scheduler to the doctor, to turn away patients, even in cases of sort of life endangerments, based on their moral and religious views. And that would also definitely impact women, over women showing up needing to terminate an ectopic pregnancy that is endangering her life, could be turned away based on the Denial of Care Rule.

Then we have got the proposed rule for 1557, the healthcare law that we were talking about, that the landmark legislation that put sex discrimination prohibition into Federal healthcare law that would undermine those protections, erase gender identity and sex stereotyping entirely from the regulations, and allow for another gaping hole like you are referencing, religiously affiliated hospitals and insurance companies to have a religious exemption when it comes to the sex discrimination provision.

Ms. BONAMICI. That's very concerning and I see my time has expired. Thank you, Mr. Chairman, I yield back. Thank you for your testimony.

Mr. SCOTT. Thank you. Gentlemen from Michigan, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman. And thank you to the panel for being here. Mr. Sharp, thank you for standing firmly for American values, Constitutional values, as a lone voice in many cases for what we just took for granted.

In a union that wasn't perfect, in fact this union, as our framers and founders said, we were to make a more perfect union. That's a continuing effort that we have to do.

For the other members of the panel, again, thank you for being here, but your testimony is troubling, troubling to me.

As I sense that I am to acquiesce in my faith. My faith is personal, I don't push it on anybody else. When my faith says to me that I should take God at his word and act accordingly. And my God says I am to love all. Those he loves, I must love. But what he condemns I cannot condone.

Again, that is acts, that is philosophies, that is values of others, I understand that. But I am a Christian first and a Congressman second. My faith is not divorced from my life. And I would expect everyone else who has a similar belief, whatever that might be, that they in this country should be free. So, Mr. Sharp, thank you for standing for that.

Regardless of whether we are Judea, Christian, or any other belief, or no belief at all, that is the beauty of our country.

And when we talk about diversity, if it is diversity without allowing those of us who have a strong value system based upon our faith and not express that freely, again, loving all those that God loves, but not condoning what he condemns.

We have a problem in this country. Northwest Ordinance, a key principle document for our country, says religion, morality, knowledge, being necessary to good government and happiness of mankind, schools and a means of education shall forever be encouraged. It starts with religion, morality, knowledge.

Jonathan Witherspoon, a minister who signed the Declaration of Independence, said a republic once equally poised must either preserve its virtue or lose its liberty.

As so, Mr. Sharp, thank you for being here today, and the work you do for religious freedom as a fundamental human right.

I would like to share a situation that is ongoing in my home State of Michigan. St. Vincent Catholic Charities has been serving at-risk children in Michigan for over 75 years by finding foster and adoptive parents for children in need of a loving home. Sadly, in 2017, the ACLU sued the State of Michigan to forbid the State from partnering with faith-based adoption agencies like St. Vincent solely because of their religious beliefs. That lawsuit led the State of Michigan in March to announce that contrary to State law, it would stop partnering with faith-based agencies like St. Vincents.

For Catholics, that we have already talked about, who couldn't be part of adoption or fostering and other situations. Over 12,000 children in the State of Michigan are waiting to be adopted and the State can't find enough families to care for them. The government is now compelling this agency either do what we say and violate your beliefs, we can't adopt children. 12,000 innocent children are being impacted.

And then we find one Bethany Christian Children's Services acquiesces and gives away their faith and says we will do whatever the State says. That's a violation of our Constitution.

Mr. Sharp, the government should not be in the business of forcing adoption. I describe this one case. How would narrowing RFRA threaten charities and non-profits across the country?

Mr. SHARP. To the exact point you raise, you know, we have got crises going on. I think the total is over 400,000 children across the country in need of a loving home. We want as many organizations as possible to help combat that crisis. But when you tell them that the cost of them serving those children is them checking their faith at the door, of abandoning those principles, it is going to dissuade them from doing so. And so at the very time we need more involved, we need laws to ensure that they are encouraged to get involved and if they do they don't have to worry about the government punishing them for their beliefs. That is the type of harm that RFRA helps to protect, by ensuring there is a process for people of faith to have their religion.

Mr. WALBERG. And there is no other entity out there, whatever it is, faith or lack of faith, that can be held back from having those services available to those that they would choose?

Mr. SHARP. That's right. There are numerous adoption providers throughout the State that serve same sex couples, other couples, we want a diversity, we want a variety of groups all working

together to solve this problem, and that includes ensuring people of faith are part of that.

Mr. WALBERG. And they should step up. I yield back.

Mr. SCOTT. Thank you. Gentleman from California, Mr. Takano.

Mr. TAKANO. Thank you, Mr. Chairman. Thank you, Chairman Scott, for holding this very important hearing on religious liberty.

Liberty is fundamental, it is pre-political, it is pre-modern, it is part of our human history and is, I agree, is an important foundation for public morality and personal morality.

But in a Constitutional democracy, one that values fundamentally not establishing one religious faith over another, religion should not be used as a shield for discrimination. When a Federal contractor or a grantee receives taxpayer dollars to provide a service, they receive taxpayer dollars to provide a service. And granted there are many, many different contractors out there. They are stepping into the shoes of the Federal Government.

If a religious social services organization were to receive Federal dollars and then also receive a religious exemption from serving LGBTQ individuals or individuals who may not be of a faith or any number of ways in which the people of service may not be in accord with the people who run that agency, that organization would be using Federal dollars to discriminate.

Now this is a huge problem as it is in direct conflict with the strong protections the Federal Government has in place not to discriminate against protected categories such as race, religion, national origin, sex, sexual orientation, or gender identity.

Federal services like emergency shelters, workplace training programs, and housing assistance programs, are designed by Federal agencies to respond to and identify need within American communities and should be free from discrimination.

Now, Mr. Sharp, I am sure you are aware of the specific example in South Carolina of foster care parents, of HHS specifically relying on RFRA as a justification to grant them a waiver to allow them to discriminate against LGBTQ parents who want to adopt or take in foster children. So they are relying on RFRA as part of their justification.

They are receiving Federal dollars. Do you think it is right for a religious organization that does not believe in serving LGBTQ individuals to be allowed to take Federal dollars and then also then discriminate against certain categories of people, including LGBTQ people?

Mr. SHARP. Thank you for that question. One of the beauties of RFRA is that it does not pick winners and losers. It is that process, that balancing process. And so when we talk about the specific context of adoption providers there are a lot of interests involved.

There is the interest of the birth moms. For many of these women this is the last decision they are going to get to make over their child. And they may have a conviction about having their child raised consistent with a particular religious faith or particular type of family.

There is the interest of the child involved. There is the interest of the provider as well in ensuring that they have an open door to allow them in. So what we are focused on is ensuring that there is that process, that all of these balancing can occur between these

interests, not guarantee any outcome, but just allowing them to have that opportunity.

Mr. TAKANO. I understand that. But should any organization that takes Federal dollars, in this case an organization that is, you know, adoption agency. Should they be allowed to discriminate against people who are maybe LGBTQ or people who are non-believers?

Mr. SHARP. And again, I would say two things. No. 1, part of RFRA is that it is a very fact-specific analysis. It is what Justice Chief Roberts—

Mr. TAKANO. I understand you are referring to RFRA, but I am asking a very specific question. In principle, as a policy, should they be able to, after receiving Federal dollars, Federal taxpayer dollars, dollars that are intended for a certain need, should they be able to discriminate against any number of categories of people?

Mr. SHARP. And again, I am going to go back, but RFRA is about balancing all those interests. And we have to ensure that the interest—

Mr. TAKANO. I am not asking about RFRA right now, I am asking you simply should that be allowed to occur? Should we as a matter of policy from the Federal Government, allow anyone to receive Federal dollars and then have that entity go ahead and discriminate against American citizens or Americans?

Mr. SHARP. I think we want to ensure that every religious organization—

Mr. TAKANO. Mr. Sharp, I think the answer is very simple and you're dancing around it.

Ms. Laser, can you answer that question?

Ms. LASER. Here's the thing. So you can't have it both ways. If faith-based groups want to be eligible to receive government funding to perform government services, then they have to play by the same rules as everyone else. We have anti-discrimination laws in place because those are shared secular American laws that we have passed. We have come together and democracy brings all of our different faith views together.

When I worked for the Religious Action Center of Reformed Judaism, I brought a Jewish perspective to you all to argue for laws to become a certain way based on Jewish values. But the democracy process translates those values into shared American values. Values that we can all live under, that we can peacefully co-exist in such a diverse religiously pluralistic society that we are. Religion should not be used to carve out exceptions from where the government has committed to providing services to people in need.

And the Establishment Clause makes clear that is not how religious freedom is intended, through a line of Supreme Court cases. So the answer is no.

Mr. TAKANO. Mr. Chairman, my time has run out. I thank you for this hearing.

Mr. SCOTT. Thank you. Gentleman from Kentucky, Mr. Guthrie.

Mr. GUTHRIE. Thank you. Thank you all for being here today, I appreciate it very much.

Mr. Sharp, constituents across my district come from various faith backgrounds. Can you expand on how the Religious Freedom Restoration Act does not favor a particular religion, and can you

elaborate on how detrimental the Do No Harm Act would be to all individuals willing to express their religion?

Mr. SHARP. Thank you for that question. The Religious Freedom Restoration Act was both enacted and has been used by a diverse array of religious groups. As I discussed earlier, from Muslims and Christians and Catholics to Rastafarians and Sikhs and Humanists, and so many others. It is continuing to be used by a very diverse group of individuals who all simply want to ensure that if a government regulation burdens their ability to live out their faith, and I do believe that every religious organization should be free to live consistent with their faith, that they have a process to go seek judicial relief.

What the Do No Harm Act takes away that opportunity for relief. Shutting the doors of the courthouse to a lot of individuals or organizations if their claims fall out of disfavor, if their claims are now exempt under the Do No Harm.

And I think it is very clear looking at the Do No Harm what it is meant to go after. It is meant to go after a lot of the unpopular outcomes recently, a lot of the unpopular things we see religious groups doing.

But I think in a time like that RFRA is more urgent than necessary to ensure that the political whims don't dictate whether an individual or organization's faith is respected.

Mr. GUTHRIE. Okay. Well a follow up on that. Without the Religious Freedom Restoration Act would faith-based groups need to ask for exemptions from every law or draft legislation that could unintentionally take away their freedom?

Mr. SHARP. Yes. I think that is exactly one of the issues is imagine where a government regulation comes along and you have got a small congregation, a small group of believers, they don't have the power to go and request that. They don't have the lobby, they don't have the support to do that. And so what is going to happen is they are going to be steamrolled by this government regulation.

What RFRA does is that if such a regulation passes and a powerless group finds themselves subject to it, they now have a safety valve, a way to go to court and say judge, this is violating our beliefs, these are our sincerely held religious beliefs. And the government can show up and explain why it has got a compelling interest. But it ensures that they have got a process for justice.

Mr. GUTHRIE. Thank you very much. And that concludes my questions. I will yield the remaining of my time to the Ranking Member, to the Republican leader.

Mrs. FOXX. I thank the gentleman from Kentucky for yielding.

I have a question, Mr. Sharp, and I would like to make a couple of statements and then see if you agree or disagree.

No. 1, I want to emphasize over and over again a very important statement you made. Disagreement is not discrimination. In our beliefs we disagree, but that does not mean we are discriminating. And in my opinion disagreeing doesn't mean I am imposing my beliefs on you.

So I totally disagree with the statement that by disagreeing I am imposing my beliefs on someone else.

Also it has been said we can't have it both ways. Well it seems to me the very act that created RFRA undermines that. Those people wanting to smoke peyote, the government said it is okay because it is part of their religious belief. So it seems to me the very thing that created RFRA has undone all these comments we have heard from others.

But let me go back to my question. And if I have said anything wrong, please correct me. I was struck by the statistic in your testimony, courts rule in favor of the government in over 85 percent of RFRA cases.

So the government wins 85 percent of the time. Does this suggest to you that RFRA is being used to make sweeping changes to society, or does it merely provide an opportunity to argue for a religious exemption in court in the most efficient way that we currently have?

Mr. SHARP. The latter. RFRA is providing that opportunity to seek relief from government regulation. And as Chief Justice Robert's words, and I was sure were very apt, he said I trust the judiciary to be able to weed out the cases, to see when there is sincerely held religious beliefs that are being burdened and when there is frivolous claims. And I think what we are seeing is the judiciary is capable of doing that and is doing a great job while also simultaneously ensuring that when we do have regulations that truly infringe upon religious liberty, relief is available.

Mrs. FOXX. Thank you. And I make one more comment. We have heard the word comprehensive health services used here. It is my understanding that Planned Parenthood is happy to encourage women to have abortions but never discuss with them that they can keep their child and put it up for adoption. That is not comprehensive.

I yield back to the gentleman from Kentucky.

Mr. SCOTT. The gentlelady from North Carolina, Dr. Adams.

Ms. ADAMS. Thank you, Mr. Chairman and to the Ranking Member as well for convening today's hearing, and to the witnesses, thank you very much for your testimony.

Many on this committee are too familiar with the alarming statistics on maternal mortality in this country. The problem is particularly alarming among black women who face maternal mortality rates that are three to four times higher than their white peers.

And that is why my colleague, Congresswoman Underwood, and I founded the Black Maternal Health Caucus just a month or so ago to focus on this issue and on the disparities that we are seeing.

Now given this focus, I am concerned that the Trump Administration's rulemaking which will allow health providers to deny care to pregnant women will only exacerbate the maternal mortality crisis that we are facing. Studies have shown that black women already receive lower quality obstetric care, and many experience maternity care deserts. Meaning they live in counties where access to maternity care services is limited or absent.

Ms. Wilcher, how do you believe the Trump Administration's final rule on refusal of care will impact the ability of Black women to obtain quality medical care?

Ms. WILCHER. Again, my focus is employment, but my view is that we are concerned about the implications of RFRA on a number of fronts, and concerned about the issues related to African American women and care. I mean just because we have been watching that.

Ms. ADAMS. So ultimately how do you think the rule will impact the rate of maternal mortality among Black women?

Ms. WILCHER. We are concerned about the rate of maternal mortality. And this Administration in many ways has done things that have had a deleterious impact on people of color, and particularly in the healthcare field. So I wouldn't be surprised.

Ms. ADAMS. Okay. To follow up, in your opinion, do you believe that the rulemaking would delay emergency care for pregnant women who desperately need certain services or procedures or face a lost pregnancy or even their own death?

Ms. WILCHER. Well rulemaking, it would have an impact in terms of delaying individuals receiving services, most definitely. And that has real human consequences.

Ms. ADAMS. Thank you. I think it is important, Mr. Chairman, to note that the Trump Administration's rules do not protect anyone's freedom, as far as I am concerned. If anything, it takes away from freedom from the millions of women who need lifesaving care.

The attacks on Title X and on the ACA's contraceptive mandate and on ACA's anti-discrimination protections are an attack on the civil rights of millions of Americans. That is just plain and simple. So if anything comes out of this hearing, let it be that message.

So before I yield back, Mr. Chairman, I would like to submit for the record an article from the American Civil Liberties Union that tells the story of Tamisha Mayes, a Michigan resident who almost died when her local hospital turned her away after they refused to provide abortion services.

And, Mr. Chairman, I will yield my time back to Ms. Hines. Ms. Hayes, I am sorry, I will yield my time to Ms. Hayes.

Thank you.

Mr. Chairman, can I submit for the record this article from the Deputy ACLU Reproductive Freedom Project.

Mr. SCOTT. Without objection. The gentlelady from Connecticut.

Ms. HAYES. Thank you, Mr. Chair. I just have a question really quickly for Mr. Sharp.

Very briefly, do you believe that ensuring all children are provided with a loving and safe home is, as you put it, a draconian rule?

Mr. SHARP. No, I believe providing every child with a secure and safe home is part of what motivates the importance of protections like RFRA to ensure that a diversity of providers feel free to go in without having to compromise their faith is the price of helping to serve these children.

Ms. HAYES. Okay. Do you think that single mothers are unfit to provide a home to foster children?

Mr. SHARP. I personally don't. But I also understand that there are many birth mothers who may wish for their child to be placed in the home of a mother and father, that is what they want best.

There may be other considerations involved and we want to take all of those into the balance when we are looking at how RFRA ap-

plies and how these faith-based providers, birth moms and children, all of their interests should be protected.

Ms. HAYES. Perfect. Thank you so much. I will come back during my line of questioning.

Mr. SCOTT. The gentleman from Alabama, Mr. Byrne.

Mr. BYRNE. Thank you, Mr. Chairman.

Mr. Sharp, I am going to read you a few quotes regarding the Religious Freedom Restoration Act. First quote "Without the Religious Freedom Restoration Act the fundamental religious rights of all Americans to worship as their consciences dictate will remain threatened." Any idea who said that?

Mr. SHARP. I don't.

Mr. BYRNE. That was Judiciary Chairman Jerry Nadler. Second quote "The founders of our Nation, the American people today know, that religious freedom is no luxury but is a basic right of a free people. RFRA restores the First Amendment to its proper place as one of the cornerstones of our democracy. It is simple. It states that the government can infringe on religious practice only if there is a compelling interest and if the restriction is narrowly tailored to further that interest." Any idea who said that?

Mr. SHARP. A person of great wisdom.

Mr. BYRNE. Senate Minority Leader Chuck Schumer.

Third quote "After Employment Division v. Smith, more than 50 cases were decided against religious claimants. Amish farmers were forced to affix garish warning signs to their buggies despite expert testimony that more modest silver reflector tape would be sufficient. Orthodox Jews were subjected to unnecessary autopsies in violation of their family's religious faith, and one Catholic teaching hospital lost its accreditation for refusing to provide abortion services. RFRA is an opportunity to correct these injustices." Any idea who said that?

Mr. SHARP. No, sir.

Mr. BYRNE. Majority Leader Steny Hoyer.

Mr. Chairman, I ask unanimous consent to insert into the record a copy of the House floor Proceedings from passage of the Religious Freedom Restoration Act in 1993.

You know, I wish my colleagues would actually go back and read the Congressional Record from—

Mr. SCOTT. Without objection.

Mr. BYRNE. Thank you, sir. Back then Republicans and Democrats alike were united in a belief that the fundamental right of the free exercise of religion was worthy of the highest level of judicial protection. Congress did not enact a guaranteed win for people of faith, but restored, as you said, a balancing test. The religious individuals or organizations exercise against the government's compelling interest in restricting that activity.

As we have already heard today, the government's winning over 80 percent of the time. Yet the few wins for people of faith that they have gotten in recent years have really upset the majority.

This hearing is entitled the Misapplication of the Religious Freedom Restoration Act, but it should be clear to all that RFRA is being applied exactly as it was intended. The difference is not the law, it is in my Democratic colleagues' point of view since 26 years ago.

Frankly, this committee should question why we are even considering taking away the rights of citizens to freely practice their faith. This legislation does not live up to the ideals of our great Nation's Constitution. And we need to stand up for people of faith who are under attack in America today.

There is a fundamental conflict in values in this country, and there is a determined minority, an intolerant minority, that would tell the majority in this country who are people of faith, you cannot exercise your faith because we find it repugnant in some way. Well that is not what the Constitution is about. That is not the reason this country was founded. This country was founded so we can all freely exercise our religion. It is not a secondary right.

This bill, and I have tremendous respect for the sponsor of this bill. This bill, in essence, would make everybody's right to freely exercise their religion a secondary thing. Well to millions, tens of millions of Americans it is the primary source of their meaning in life. And they would take that away from them. For what? For a handful of cases that have gone the other way when 80 plus percent have gone the government's way?

That is how fundamental the conflict and values in this country has become. And we in this Congress should stand up for the majority of Americans who have Judeo-Christian values and say you can continue to exercise your faith and we, the government, are not going to take that away from you.

With that, Mr. Chairman, I yield back.

Mr. SCOTT. Thank you. The gentlelady from Washington, Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chairman. I think we have to stand up for everyone's religious freedom, not just those with Judeo-Christian values.

The right to religious freedom is the foundational value of the United States of America and it is enshrined in our Constitution. To ensure those freedoms are protected, the Religious Freedom Restoration Act, also known as RFRA, was introduced 25 years ago. And we have heard today through many of you that have testified, the concerns about the Trump Administration's cooptation of RFRA and the idea of religious liberty as a tool to threaten basic human rights of LBGTQ Americans, women, religious minorities, and other vulnerable communities.

Religious exemptions should never be used to override those nondiscrimination provisions in any venue, and certainly not in the area I want to focus on in my questioning, in the area of healthcare.

And that's why the Affordable Care Act contained important provisions that protected people from discrimination on the basis of race and color and national origin, sex, age, or disability, as well as ensuring that employer-sponsored insurance plans would provide adequate contraceptive services with no cost sharing.

I have to tell you I have watched in horror as I have seen the Republicans and Trump Administration strip away those exact healthcare protections, leaving millions of Americans vulnerable to discrimination or denial of access to critical healthcare services.

And there has been an attack on American's healthcare by abusing RFRA as a basis to discriminate against women, for example, who are seeking access to reproductive health services.

Recently I shared a very personal story, the first time I had ever done so in my life, to highlight why women have to be able to access the reproductive healthcare services they need. For me, making a deeply personal choice about abortion was a difficult enough choice on its own. I cannot imagine how much more difficult that choice would have been had I been denied care due to discrimination.

So, Ms. Laser, I hope I said that right. Your testimony highlights how the recent rules in the Trump Administration are contributing to discrimination in healthcare, and particularly for access to reproductive health services.

Can you please describe why access to reproductive health services is critical not only for women's health, but also for furthering women's equality?

Ms. LASER. Thank you for that question. And thank you for your beautiful op ed on your own story about your own reproductive freedom needs. Really appreciate it.

Sure. Contraception, I mean it sort of boggles my mind that we are in 2019 and still needing to talk about why contraception is important to women. When the Affordable Care Act passed, they actually delegated to the Institute of Medicine the decision about what is preventive healthcare and what is not. What is that important that it needs to be covered? And the Institute of Medicine said all forms of contraception need to be covered because that is preventive healthcare.

Women use birth control for a variety of different reasons. One of them is medical. Lots of women, 30 percent, use contraception at least in part to manage a medical condition like endometriosis, ovarian cysts, chronic migraines, and menstrual disorders.

Some women also have medical needs to use different forms of contraception. For example breast cancer runs in my family so contraception that is hormonal based isn't advised.

There are very important social and economic status needs for women to be able to use birth control. And I am a huge fan of children, in fact, two of my children are sitting behind me today, right over here. They left. My husband is still here, but they left. That is terrible.

But in any case, I have three children of my own. But it is very important to be able to plan when you have them so that you can stay in school, for example. There are studies that show that women are much more likely to find themselves in poverty if they have to drop out of school when they weren't planning to have a child.

It enables women to be equal participants in society. They say that most women not using birth control would have 12 to 15 children in the course of their lifetime.

Ms. JAYAPAL. Let me ask you specifically about unintended consequences, or perhaps intended consequences of allowing employers not to provide contraception. You have spoken to the broad range of issues very well, and your children should be proud of you.

But let us talk about employer plans for a second, and those unintended consequences.

Ms. LASER. Sure. Unintended consequences?

Ms. JAYAPAL. Or intended, however you want to take it.

Ms. LASER. Well, lots of women, or transgender men who work for employers who are imposing their own religious views on women, despite what our shared American laws say, which is that all contraception has to be covered with no cost sharing, are suffering because they can't afford contraception.

And that is what we have heard from the students at Notre Dame, at Irish for Reproductive Health. Some birth control can be very expensive. Like an IUD can cost $1,000 or $1,200 and can be really cost prohibitive. Women have to decide between child care and birth control, between putting food on the table and birth control. These are very dangerous decisions that women make because it can affect women's health, as we have discussed.

When an employer just decides to impose his or her religion on the women in need who are working for them, despite what is promised by our shared American law and our best medical judgments from the Institute of Medicine, that is putting women's lives and health at risk. But also women's economic and social status.

Ms. JAYAPAL. Thank you so much, I appreciate that. I see my time has expired. I yield back.

Mr. SCOTT. Thank you. The gentleman from Indiana, Mr. Banks.

Mr. BANKS. Thank you, Mr. Chairman.

Today's legislation hearing show so many of us just how much times have changed. In 1993 RFRA passed both the House and the Senate with near unanimous bipartisan support. Then Representative Chuck Schumer was the lead sponsor in the House of Representatives while Senator Edward Kennedy carried the bill in the Senate where it received 97 votes.

When President Clinton enthusiastically signed the bill into law he noted how a "Broad coalition of Americans came together to make this bill a reality."

Mr. Chairman, the 1990's weren't exactly a time of bipartisan unity, yet despite the intense political debates that took place, Republicans and Democrats came together to protect the religious freedom of all Americans.

Religious liberty remains the bedrock of the American experiment, and Republicans remain firmly in favor of RFRA protections. Unfortunately, my friends on the other side of the aisle are fighting tooth and nail to eliminate religious liberty and advance the radical pro-abortion agenda by rolling back common sense conscience protections.

My first question is a simple yes or no question. And, Ms. Laser, I will start with you. Do you think doctors or nurses should be forced to participate in abortions, yes or no?

Ms. LASER. That is a more complicated one.

Mr. BANKS. That is what I thought you would say. Ms. Wilcher, do you think that doctors or nurses should be forced to participate in abortions?

Ms. WILCHER. As my colleague said, it is complicated.

Mr. BANKS. Reverend Hawkins. Do you think doctors or nurses should be forced to participate in abortions?

Mr. HAWKINS. To be forced, again?

Mr. BANKS. Should be forced to participate in abortions?

Mr. HAWKINS. I don't think they should be forced.

Mr. BANKS. Okay. Mr. Sharp, do you think doctors or nurses should be forced to participate in abortions?

Mr. SHARP. No.

Mr. BANKS. Thank you. Mr. Sharp, as you testified, Congress intended RFRA to serve as a balancing test, not picking winners or losers, but respecting the faith practices of all Americans. RFRA does not allow the Federal Government to burden religious practice unless it can prove that it has a really good reason or a compelling interest and that the government's purpose is accomplished with as little a burden as possible on the individual.

This balancing test has been instrumental in numerous U.S. Supreme Court decisions. Take for example the Zubik v. Burwell decision where a unanimous court ordered that the government stop penalizing the Little Sisters of the Poor, an order of Catholic nuns, for choosing healthcare that meets their needs.

Or the 9 to 0 U.S. Supreme Court decision Holt v. Hobbs case which permitted a Muslim inmate to have a half-inch beard.

Mr. Sharp, do you think the Supreme Court was wrong in those decisions to uphold a religious liberty?

Mr. SHARP. No, I think they did exactly what RFRA was designed to do, protect religious liberty, provide people of faith an opportunity to get relief.

Mr. BANKS. Okay. And as a follow up to that, Mr. Sharp, who is best to define what the tenants of the Catholic faith are, the government or the Little Sisters of the Poor?

Mr. SHARP. The Little Sisters of the Poor.

Mr. BANKS. Go ahead and expand on that.

Mr. SHARP. We should all be worried when the government has the authority to determine what a particular faith believes or whether certain beliefs are consistent with a faith.

There has been numerous Supreme Court decisions on that exact issue. We want religious individuals who have a duty to the omnipotent being that they serve, to alone be responsible for determining what they are compelled to do, what they feel that their faith defines them. And what the government's role is to provide broad protections for that belief so that those individuals are not forced to do something that they believe violates those deeply held beliefs.

Mr. BANKS. Okay. Thank you. With the time I have remaining I will yield it to Dr. Foxx.

Mrs. FOXX. Thank you, Mr. Banks. Mr. Sharp, in August, 2018, the Department of Labor's Office of Federal Contract Compliance Programs issued a directive to provide guidance to its staff and Federal contractors on enforcement and compliance.

The directive summarized Supreme Court rulings that the government must permit individuals and organizations, with rare exceptions, to participate in government programs without having to disavow their religious character. Are you familiar with this directive, and did it accurately characterize the law?

Mr. SHARP. Yes, I am. In fact it was motivated in part by one of ADS cases, Trinity Lutheran. It involved a pre-school program that wanted access to shredded tires, playground mulch so their little kids at the program don't skin their knee when they go down the slide. And despite checking all the boxes and satisfying all the requirements, they were denied from participating in that government program because they were religious.

No religious contractor should be subject to the same thing. They should all have equal access.

Mrs. FOXX. Thank you very much. I yield to the gentleman from Indiana.

Mr. SCOTT. The gentleman from New York, Mr. Morelle.

Mr. MORELLE. Thank you, Chairman Scott, for holding this important hearing today, and to all our witnesses for being here this morning.

I want to pick up a little bit on what Ms. Jayapal's questions were about. I have had the privilege of serving on this committee since January of this year, and in those 6 months my colleagues and I have sat in this room and heard from multiple witnesses who are expert on a number of issues related to healthcare. And they have allowed us to respond to the parade of ways that the Administration has attempted to undermine the Affordable Care Act and roll back protections for millions of Americans.

In February we talked about the 102 million people who, prior to the ACA, had lifetime limits on their health plans. People, to pay for high cost medical conditions like cancers, out of pocket, should the Administration be successful in its attempts to repeal the Affordable Care Act.

In April we held a hearing on short-term limited duration health insurance plans, a form of health coverage that is a poor substitute for comprehensive insurance.

And today this discussion, the use of the Religious Freedom Restoration Act, which other people have opined on and described, to hack away at the stability of the ACA.

I find this horrifying, but hardly surprising. Since 2017 we have seen countless attempts and efforts to roll back our healthcare system on LGBTQ and patients in other marginalized communities. And I wanted to get some thoughts about this.

In 2016 the Obama Administration finalized regulations to ensure that civil rights protections under Section 1557, the Affordable Care Act, applied to a wide range of entities that received Federal funding, including hospitals, insurance companies, government entities, and other organizations.

Last month the Trump Administration proposed a rule which would entirely remove a definition for covered entity.

Ms. Laser, can you share your assessment of the Trump Administration's decision to seemingly scale back the number of entities to which Section 1557 applies?

Ms. LASER. Sure. So it is my understanding that the proposed rule would change who has to comply with 1557, and limits the number of insurance plans and the number of Federal health programs that have to comply.

Which would drastically change the scope of existing non-discrimination protections, further limiting access to healthcare. That

would be the effect. Furthermore, under the proposed rule, religiously affiliated hospitals and insurance companies can exempt themselves from the sex discrimination requirements in this provision.

So it is another regulation in the name of religion that is turning back rights and protections that the American people have decided to give to vulnerable communities.

Mr. MORELLE. And while it is true that most of the conversation today, as I followed it, is really centered around reproductive rights. The truth is that you can use a religious exemption to anything that you ultimatly decide, even though it discriminates against someone, might apply to your religious freedoms. I mean, you know, new religions can pop up and you could have all kinds of things relative to healthcare that a religious group would find objectionable too. And there are some religions that object to medical care entirely.

So certainly while we have talked about reproductive rights, understandably and necessarily, it is certainly not limited to that.

I wanted to just get, again, Ms. Laser, from you, your thoughts on this. In January of last year the Trump Administration created a new Conscience and Religious Freedom Division within the Office of Civil Rights at HHS. I am just wondering, are you aware of any initiatives the Division has undertaken over the past year that have improved access to healthcare for marginalized communities?

Ms. LASER. I am aware of none. In fact quite the contrary. It is my understanding that this is the Division behind the Denial of Care Rule that I spoke about earlier which would decrease instead of increase access to healthcare for marginalized communities.

Mr. MORELLE. And in your opinion was the Division necessary to protect the so-called rights of healthcare workers?

Ms. LASER. No, because those rights were already being protected by the Office of Civil Rights at HHS even before that. HHS has successfully protected those interests, as defined by Congress, and, nope, that was being taken care of.

Mr. MORELLE. Very good. Thank you. Mr. Chair, I yield back my time.

Mr. SCOTT. The gentleman from Texas, Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman. I appreciate this hearing, appreciate the witnesses.

Just a quick question. Should a parent, does the parent have the right to raise their child in their faith? Does a parent have that right? I mean does a Muslim parent have a right to raise their child as a Muslim, a Christian parent as a Christian, a Jewish parent as a Jew. I mean does that seem reasonable to you? Yes or no question, does that seem reasonable to you?

Ms. LASER. Absolutely.

Mr. TAYLOR. Does that seem reasonable to you? Just going down the line here.

Ms. WILCHER. Yes.

Mr. SHARP. Yes.

Mr. TAYLOR. Does that seem reasonable to you?

Mr. HAWKINS. Yes, as long as that faith does not impact others negatively.

Mr. TAYLOR. All right. Okay. So in that vein I think we begin that fundamental parental right for faith, you know, it seems reasonable that, you know, a Catholic parent who is giving their child up for adoption could say I want my child to be raised as a Catholic once they are adopted.

I think if we are going to begin with that fundamental right of a parent's decision about faith, that faith should extend even if they give the child up for adoption.

And I think that applies for, and I happen to represent a very diverse community. I live right next to the largest Synagogue in Collen County. We actually have the largest Mosque in North Texas in my district. I have a very large Hindu community in Frisco, Texas. And, you know, I want to defend all their faiths. I want to defend those parents' ability if they decide that they don't think that they can raise a child and they want that child to be adopted, that they should be able to choose a faith-based organization to raise their child in the faith of their choice.

And I think that RFRA is something that defends that, defends the very basic premise that we all agree with here, right? We all agree that a parent should choose the faith of their child.

And so when we think about in Texas, you know, I have a 100 percent meeting policy, I meet with all my constituents, I have had 250 meetings so far in the last 6 months, been pretty busy. But, you know, in those meetings I have actually had the opportunity to meet with community leaders who are working on foster care. And they tell me that while we have lots of beds in Collin County, other communities are using those beds, you know, for foster care. And so it is so important to have as many possible foster care opportunities as possible. So having religious based foster care organizations increases the opportunities. More beds, it is better for the children.

And so, Mr. Sharp, can you just speak to that? I mean like the need for having foster care and for people to be able to make religious choices about their children, even if they are not raising their children?

Mr. SHARP. Absolutely. And I think that highlights the importance of RFRA and the harm of Do No Harm.

When you have a birth mom that reaches out and says I would like my child to be raised consistent with this faith, an adoption provider that tries to honor that quest, under Do No Harm, could now find themselves facing government restriction and punishment for trying to honor the interest and request of that birth mom.

But under RFRA that faith-based provider has the opportunity to go into court and say we are representing the interest of the birth mom, wanting to protect that parental right interest and ensure that her wishes are respected.

And so they get that opportunity to go into court and make that case. And that's so important.

Mr. TAYLOR. I appreciate that. I think RFRA really does protect all faith communities. And again, I have the privilege of representing a very diverse community with many faith communities. And as I talk to the people that care about children, that this is an extremely important fundamental piece of statute. Certainly in Texas we have worked to preserve the abilities so that we have as

many choices as possible for parents, whatever their faith may be, to protect a right that I am glad to see we all agree that parents should be able to choose the faith of their child.

I yield the balance of my time to the Ranking Member.

Mrs. FOXX. I thank the gentleman from Texas.

Mr. Sharp, when he signed RFRA into law, President Clinton said the government "Should be held to a very high level of proof before it interferes with someone's exercise of religion."

Do you think President Clinton described the appropriate legal standard in free exercise cases?

Mr. SHARP. Thank you. And I do. We look at freedom of speech, free exercise of a religion, freedom of the press, many of these others that are these bedrock Constitutional principles that our courts have long said when the government tries to restrict those it better have a really good reason to do so. Employment Division v. Smith undercut that specifically for religion, and RFRA restores it.

And so I agree with President Clinton. This is respecting the proper place that religion holds in our Constitutional system.

Mrs. FOXX. And just for the sake of it, we are midway into this hearing, I am going to quote again the first part of the First Amendment to the Constitution. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

That last part is often left out when people talk about our rights, and I think it is important to emphasize it.

I yield back to the gentleman from Texas, Mr. Chairman.

Mr. TAYLOR. Yield back.

Mr. SCOTT. Thank you. Gentlelady from Pennsylvania, Ms. Wild.

Ms. WILD. Thank you, Mr. Chairman. Ms. Laser, I feel your pain. My two young adult children were so scarce on the campaign trail that some people didn't believe I had kids.

Moving on, I am dismayed that the questions and the answers on this very important subject seem to be falling along party lines. This is an issue that I don't believe should be partisan.

A separation of church and State is enshrined in our Constitution. Sadly, I often feel that my colleagues on the other side of the aisle only have respect for one of the Amendments in the Bill of Rights, and perhaps only part of that Amendment.

In any event, RFRA's restored the use of strict scrutiny as the standard to be employed by the courts in reviewing actions that may infringe on the free exercise of religion. And for the non-lawyers in the room, strict scrutiny means that the government must have a compelling government interest before imposing a substantial burden on religious exercise or in allowing the intrusion of religion in government matters.

So moving on to the Affordable Care Act, which is lawfully the law of this land, and was lawfully passed. Section 2713 of the ACA requires individual and employer-provided health plans to cover certain key preventive services, including all forms of FDA approved contraceptive methods, along with prenatal care, counseling for sexually transmitted infections, and screening for domestic violence.

In implementing this requirement the Obama Administration provided a very narrow exemption to accommodate certain religious non-profit employers, such as churches, that objected to contraception coverage.

But in October of 2017 the current Administration promulgated two interim final rules that allow virtually any employer or institution of higher education to circumvent the contraceptive coverage requirement entirely.

And then we have Hobby Lobby v. Burwell in which the plaintiffs, Hobby Lobby, a closely held for-profit corporation, whose owners opposed contraception based on their religious beliefs, successfully argued that they should be exempted from the ACA and its regulations requiring coverage of contraceptive care. I stress to you, it is a corporation, not a 501C3 religious institution.

So my first question, and just a show of the hands here, is there any one of you who disagrees that a corporation is separate and distinct from its individual owners, officers, and board of directors? Is there anyone that disagrees with that concept?

Okay, seeing none, is there anyone that disagrees that a business like Hobby Lobby aims to make a profit? You disagree with that, Mr. Sharp. So noted for the record.

Do any of you, and specifically you, Mr. Sharp, do you know what is on Hobby Lobby's website?

Mr. SHARP. I believe when you look at Hobby Lobby—

Ms. WILD. No, my question is do you know what is on their website?

Mr. SHARP. I don't know everything on their website, but I know their devout belief in God is.

Ms. WILD. Well let me tell you what is on their website because I looked at it. It includes a link to shop departments for crafts and hobbies. It has coupons for tabletop decor, summer toys, yarn, furniture, and wearable art. There is nothing on Hobby Lobby's website that promotes the owner's preferred religion.

Despite the fact that you all agree that a corporation should be treated separately from the individual owners, and despite the fact that Hobby Lobby is in business to make money, and its own website makes no reference to its owner's religious beliefs, we allow that company's owners to dictate their religious beliefs upon their employees by denying contraceptive coverage to those employees. So what does that mean for its employees who are of child-bearing age?

Any one of you care to answer that one?

It means they can't get contraceptive coverage, right? Other than seeking alternative employment.

It wasn't the Federal Government that was restricting Hobby Lobby's religious freedom. Hobby Lobby isn't even a 501C3 place of worship. It was really the owners of Hobby Lobby that were trying to avoid compliance with the ACA.

So let me ask you this, Mr. Sharp. Would you allow a restaurant owner to forbid African Americans from sitting at the lunch counter to avoid desegregation laws?

Mr. SHARP. No. RFRA has never been used that way, and if anyone attempted to, they would lose because the government has a compelling interest in eradicating discrimination based on race.

Ms. WILD. That is your opinion. Thank you.

I yield back.

Mr. SCOTT. Thank you. Gentlelady's time has expired. The gentleman from Pennsylvania, Mr. Smucker.

Mr. SMUCKER. Thank you, Mr. Chairman. Like the previous questioner, I come from Pennsylvania, which really was seen as an example of religious liberty of all the colonies originally. In fact the founders who came to Philadelphia for the Constitutional Convention marveled at the diversity of religion across the city, and in what was unusual at that time, you had strong Catholic congregations, Jewish and Protestant, all operating freely and as they chose.

It is still true today in the community that I represent, Lancaster and York County, Pennsylvania where we have people of all faiths practicing their religion in the way that they choose, and doing good for the community. And so we have strong Catholic presence with Catholic charities doing a lot of good, every denomination doing good. We have a strong Muslim community who have specific an organization that is dedicated to building bridges between various religions and dispelling some of the fallacies that folks hold about various religions.

I am very, very proud of that. And when my colleague mentioned separation of church and State, it was never intended that we would not be a religious society. It was intended to ensure that government did not impede, did not restrict an individual's ability to practice their faith in a way that they chose.

Lancaster County, Pennsylvania is home to one of the largest Amish populations in the United States. In fact my own roots are Amish as well. And that particular community came there because they were looking to escape persecution. Protecting faith, protecting their faith as a fundamental right, protecting the faith of other groups as a fundamental right, is a value that our Nation has preserved for more than 400 years. And it is one that has allowed the Amish to live independently and maintain their strong core values.

The Religious Freedom Restoration Act has provided more protections for the Amish by ensuring that they don't have to lobby for statutory exemptions to protect their religious freedom with each new law that is passed. And of course, as I mentioned, they are not the only religious community that have woven threads in the district that I serve, there are many, many diverse religions.

Despite the bipartisan historical support for RFRA, the legislation we are speaking about today will continue down a path that my colleagues on the other side of the aisle have chartered to erode the rights that are protected by RFRA.

We have seen this in the form of Federal mandates that would force individuals with strong religious convictions to violate their moral beliefs, such as these coverage mandates for abortion. Or restrictions on parochial schools, and we have a strong community of parochial schools, where parents are choosing to send their child to a school specifically because they want to see them raised up in their particular religious belief.

The Amish, for instance, has a lot of one-room schools. And potentially under this proposed law, they would need to hire a teacher who is not Amish, who may be of an entirely different faith.

Time and time again, the Supreme Court has ruled that attempts to limit religious expression are unconstitutional. In fact I believe it was just 5 days ago the Supreme Court ruled that the 100 year old Bladensburg's Memorial Cross is Constitutionally protected.

So I do have a question, Mr. Sharp. I mentioned the Amish community I represent and explained how important RFRA has been for them. If the Do No Harm Act were to be passed into law, would the Amish community and other faith-based groups that I represent need to ask for more exemptions in every proposed piece of legislation that would potentially limit their religious rights?

Mr. SHARP. Very likely so. And being small groups like that they may not have political power, they may not get them. And that is why we need RFRA, to ensure those religious minorities have the opportunity to get relief.

Mr. SMUCKER. Thank you.

Mr. SCOTT. The gentleman's time has expired. The gentlelady from Washington, Dr. Schrier.

Dr. SCHRIER. Thank you, Mr. Chair. It has been really interesting to listen to this conversation. Thank you, witnesses, for your testimonies.

I thought I would speak up as the only woman doctor in Congress, because a lot of this really is revolving around women's health, and I would like to make a couple of points.

And I thought I would start, my colleague from Indiana asked a question of all of you about whether a doctor or a nurse should be forced to perform an abortion. And a few of you said it depends and it is a complicated question. One of you said absolutely not, should not be forced to.

And so I wanted to just delve into this a little bit because it is complicated, and I think that my colleagues don't really understand that. That in, let's see here, in 45 communities in our country, the only hospital available is a Catholic hospital. The treatment for an ectopic pregnancy, which is a pregnancy where the embryo implants in the fallopian tubes, totally non-viable, threatens the life of the mother. The standard treatment is a chemical abortion followed by removal of the embryo or fetus, depending on what state it is at, typically embryo.

And so when you ask that question about whether somebody should be forced to, what you are really talking about is a woman, maybe Catholic, maybe not, who goes to a Catholic hospital where the policy of those who run the hospital is that no abortions happen for any reason until the mother's life is threatened. And despite all standard medical care, accepted and taught in all medical schools throughout this country, and residency programs, that women could get transported to a hospital where they would not perform that, where instead they would wait for her to bleed out, to risk her life, before they would do what is a medically acceptable procedure, which is an abortion.

So I want to be really clear that is not a chuckle worthy question or answer. This is a very real question that threatens women's lives. And I also just wanted to be really clear on this, that there is a difference between a woman of any faith who goes to a Catholic hospital seeking care, and that might be the only hospital in her

area, versus a Catholic woman who goes to the hospital and chooses for her own care because of her own religious preferences, to take that risk and to wait until she might be at death's door.

So here are a couple questions. First, Ms. Laser, would you like to comment about any of this, and your take about how this relates to women's healthcare, and that this is not about a 20-year-old seeking an elective abortion and having a doctor forced to perform that. This is about a real medical procedure that could be life-saving. So I did not want to blur any lines there.

Ms. LASER. I actually appreciate the opportunity to say more than one word, even though I said a couple.

You know, I said it is complicated, and I don't think it is complicated where a woman's life is in danger. You know, then I think a doctor has a duty to do what needs to be done for the sake of the woman's life. Period.

And I think that what we are witnessing today is an attack on women's reproductive freedom really, in pursuit of what feels like it is a political agenda. And there are gaping new religious exemptions that are being created not just with regard to abortion, but with regard even to contraception. Like we talked about, with the final rules that would allow individual employers and universities to deny huge numbers of women access. So I think we are sort of living in an unbelievable moment for 2019 when it comes to women's health, regrettably.

Dr. SCHRIER. Thank you. And then, Mr. Sharp, are you in a position where you might reconsider your answer about absolutes in this case?

Mr. SHARP. Well thank you. And on one hand I think we can all agree that the government has a very compelling interest in protecting life. But I also, like my colleague, recognize that these are complicated cases sometimes. And what RFRA does is not pick the winners and losers. That is not what we are trying to advocate for. But rather to provide a process so that important interest in life can also be weighed against the doctor's concerns about doing something that violates their faith. Not picking winners or losers, but just the process for that to be discussed and considered in these complicated issues.

Dr. SCHRIER. I believe Ms. Laser has a comment.

Ms. LASER. I think what is really being left out though is that the way the Trump Administration is issuing regulations, they are putting their finger on the scale on one side. So RFRA does have a balancing test, and frankly, I just want to emphasize that the Do No Harm Act doesn't change that. RFRA isn't going away. I just think it is very important that we understand that, if you pass the Do No Harm Act. So I think when the government issues regulations that says any healthcare provider, anyone associated with the health system can refuse care, and any boss can refuse birth control, that is deciding, that is not balancing. Thank you.

Dr. SCHRIER. I would agree that is going back to the handmaid's tale. I have run out of time. And I wanted to thank you all for your help.

Mr. SCOTT. Thank you. Gentleman from Wisconsin, Mr. Grothman.

Mr. GROTHMAN. Sure. I guess I will start with Mr. Sharp. We are going to get a little bit beyond the statute we are discussing today.

I think America was founded, or at least John Adams said it was for moral and religious people. And I think the question is whether the government in any cases is hostile to a moral and religious people. Do you think America should always abide by those standards?

Mr. SHARP. I agree that the government should not be demonstrating hostility toward any person of faith, whatever their beliefs may be. And that is why we have RFRA, First Amendment, and so many other protections.

Mr. GROTHMAN. A wide variety of things. And I realize many wonderful people have many different ideas on, you know, how to handle things.

Right now in our country there are a variety of programs, Medicaid, food stamps, low income housing, TANIF, Bell grants, a variety of other things, in which you are eligible for these programs if you do not get married, but you lose benefit of these programs if you do get married. Is that accurate?

Mr. SHARP. I am not familiar on all the details, but I do know there are conditions on a lot of Federal programs.

Mr. GROTHMAN. Quite right, given the definition of poverty. Does that bother you, or does it bother anybody else up here that in making a decision whether to get married or not, the government weighs in substantially in favor of the decision not to get married if you have children. Does that bother anyone of the four of you? Doesn't bother you?

Ms. LASER. I don't agree with that characterization about the government favoring single people. But I have absolutely no problem with the government deciding to treat unmarried people equally.

Mr. GROTHMAN. I mean the point is it is not equal. Does that bother any of you? No? Okay. Doesn't bother you, Mr. Sharp?

Mr. SHARP. No. I mean I apologize, I mean I may not have fully understood this question, but I do think we can all agree that the government ought to be treating people equally. And that is why when a lot of these programs, especially when it involves questions of religious faith, that religious are not discriminated against.

Mr. GROTHMAN. I think probably the most important thing most people do in their life is raise children. Right now the Federal Government has a program providing free contraceptives to people, I can't remember if it is 15 or 14 years old. I think it is 14, might be 15. As I understand it, the way the program works, the parents do not know if the government is weighing in and providing contraception to people, I guess usually girls, that young.

Does that bother you? Do you feel that is stepping on the way maybe some parents, their values? Does that bother you?

Mr. SHARP. I am a strong advocate for parental rights and for making sure that parents are part of that process of making decisions for their child, with their child, discussing these issues and coming to resolutions. So we want to ensure that parents are always part of that process.

Mr. GROTHMAN. Okay. Others bothered by that? Not bothered, don't care?

Ms. LASER. I am not bothered because most young people go to their parents when they have contraceptive needs, and when they don't it is sometimes because they are in cases of incest or other dire situations where it is better that they be using birth control than not.

Mr. GROTHMAN. A lot of times when a 15-year-old is engaged in that behavior it is incest? I don't know, maybe it is true.

One other comment here. Before it was talked about, I guess they are talking about Hobby Lobby as a for-profit corporation. And the implication is that for-profit was kind of ugly or bad. And I just will point out, in my personal experience us Congressmen making $175,00 a year, I think we make more profit than most people working in for-profit institutions. Just point that out, it is not the end of the world, you know. A lot of people found for-profit businesses and they don't make as much money as we do, and it is not something to denigrate if people decide to start their own business.

And I yield the remainder of my time back to the Ranking Member.

Mrs. FOXX. Thank you, Mr. Grothman. I would like to point out that on the Hobby Lobby website, on the page About Us, it says "We are committed to honoring the Lord in all we do by operating the company in a manner consistent with biblical principles." So my colleague must not have gone very far in looking at the Hobby Lobby website.

And, Mr. Chairman, I would like to put the About Us page in the record.

Mr. SCOTT. Without objection.

Mrs. FOXX. Thank you. I yield back to the gentleman from Wisconsin.

Mr. GROTHMAN. Mr. Chairman, I think my time is up.

Mr. SCOTT. Thank you. The gentlelady from Connecticut, Ms. Hayes.

Ms. HAYES. Thank you, Mr. Chair. I guess I will just start with the Hobby Lobby question that we were just talking about and correct the record for Mr. Sharp, that RFRA has been used.

In Bob Jones University v. United States, the University sought to use religion to justify its racially discriminatory admission policies. So it has been used before.

Thank you to all the witnesses for being here. The subject of this hearing is extremely personal for me. I wear a cross around my neck every day because my faith is what grounds me. I am first a Christian and second a Congresswoman.

There have been times when advisors or consultants have suggested that I remove my cross for fear that it would communicate intolerance or bigotry as inherent to my Christian values. I have refused. I continue to refuse. Because I know the good that religion brings to me, to my community, through spirit and service. I refuse because I know that my duties as a Christian are not only to preserve and spread the gospel, but to feed the hungry, clothe the naked, and be of a good steward of my community.

Wearing this cross does not ever give me the right to impose my beliefs upon others or to discriminate upon immutable characteristics. While I want others to respect my right to religious freedom, I hope that my cross shows them my willingness, not my intoler-

ance, to protect the right of everyone to practice their religion or no religion at all. That is what our Founding Fathers said, that is what this country was founded upon. Let us not conflate the two.

We heard a lot about quotes from previous legislators, but as we all know, democracy is meant to evolve. And many of the things that those people voted for years ago never even made it to the floor, which is why we have new members, new Congresses, and we continue to evaluate our role in our communities. We have passed legislation in this Congress that would have never even been considered 20 years ago.

Today, so again, let us not conflate the two. Today we have heard what happens when RFRA is abused. We see blatant transphobia, discriminatory thinking, and polarizing intolerance. This does not reflect the God I serve.

I am struck by Mr. Sharp's previous answers to my question and his comments in support of Miracle Hill or New Hope Family Services, facilities that maintain that children thrive best in homes with married couples, with mothers and fathers. This is an incredibly regressive and insulting comment. Especially after having raised my own daughter as a single mom. She thrived. And this was after I received counsel from Planned Parenthood on my options and decided to keep her. She thrived, she is a married professional educator with a graduate degree, a homeowner, a conscientious and productive member of society. She, too, has values, and I am so incredibly proud of her.

Miracle Hill openly discriminates against foster parents based on their religion. In fact, they only place children in born-again Christian homes, which agree with their statement in support of their doctrine. I remind you this does not reflect the God I serve.

Reverend Hawkins, as a faith leader, is it not a moral issue to keep children that are eligible for adoption in the system rather than in permanent loving homes? Should faith ever come before a child's welfare?

Mr. HAWKINS. No, faith should never come before a child's welfare. And I have really got to add that I think there is some misunderstanding about what faith is all about.

Faith is not something you arrive and you have all of the answers. Faith evolves, the word that you used. Faith continues to allow itself to be challenged. Faith, and especially following the teachings of Jesus Christ as found in the gospels. We are called to love the Lord our God, to love our neighbor as we love ourselves.

So, no, faith should never prevent a child from being adopted in a loving home.

Ms. HAYES. Thank you. In Connecticut, 5 percent of children in the child welfare system aged out without ever finding a forever home. We know that same-sex couples are significantly more likely than different sex couples to be raising adopted or foster children. One in five same-sex couples are raising adopted children, compared to just 3 percent of different sex couples. And 2.9 percent of same-sex couples have foster children, compared to .4 percent of different sex couples.

Additionally, we know that LGBTQ plus youth are over represented in the foster care system. Many enter into child welfare system after experiencing familial rejection of their gender identity.

So this is not a question, but I will just leave it to you for consideration, Mr. Sharp. What would you tell a child who could be heading into a loving home, but is being denied that chance because the home has two moms, a single dad, or that they practice Judaism or Christianity? I just want you to think about that.

And one other thing to think about when we talk about people being forced to do something. If a group of firefighters show up at the Stonewall Inn and it is burning down, they can't choose not to put that fire out.

Thank you, Mr. Chair, I yield back.

Mr. SCOTT. Thank you. The gentleman from Idaho, Mr. Fulcher.

Mr. FULCHER. Thank you, Mr. Chairman. At least a couple of my colleagues from Tennessee and Indiana brought up the difficult question about whether or not it could be possible that a physician would be mandated to perform an abortion if that was against their belief system.

And most of the panel struggled with that. And it appears clear to me that indeed would be a possibility if the Do No Harm Act were passed.

Mr. Sharp, are you aware of any case or cases where the application or enforcement of the law under the Religious Freedom Act, where there's been the result of the taking of a human life?

Mr. SHARP. Not that I am aware of.

Mr. FULCHER. So it has also been said that the application of the Religious Freedom Act is just simply not tolerant enough. As I consider the cases that have been rendered under the Religious Freedom Act, the situation with the baker out of Colorado, didn't provide a cake under circumstances that violated his beliefs. The other one that has been talked about a lot here today, Hobby Lobby being able to decide what employee healthcare they are to pay for and what those services might look like.

It strikes me that in those cases the relationships involved were voluntary, the baker and those who approached that individual had options. The employees that work with Hobby Lobby have options. There's more than one employer out there.

And I will go back to you, Mr. Sharp. Doesn't that at least provide an example that the law and the application of that law under the current Religious Freedom Act is indeed tolerant, and that the law under RFRA is respectful of the First Amendment and of people of all or no beliefs.

Mr. SHARP. That's exactly right. I go back to a point I said earlier. Disagreement is not discrimination. And a pluralistic society means that a Colorado baker has the freedom to do, along with the countless other bakers that were more than happy to design a cake for a same-sex wedding. We can protect both, and that is part of what RFRA does, is regardless of a person's beliefs, they have that process where they can go and have their beliefs protected against government intrusion.

Mr. FULCHER. Thank you, Mr. Sharp. And certainly in my opinion the existing law under the Religious Freedom Act needs to stand just as it is.

I yield my remaining time to the Republican leader.

Mrs. FOXX. I thank the gentleman from Idaho for yielding, and I want to agree with him very, very strongly that RFRA protects peoples' religious freedom.

But it is really clear to me today in this hearing, and I think it is the very reason why we must make sure that this bill never passes, is that many of our colleagues would impose their beliefs on others if RFRA were changed. And that is really troubling to me. Again I want to say what Mr. Sharp has said, disagreement is not discrimination.

Mr. Sharp, the absence of RFRA, the Free Exercise Clause of the First Amendment would remain in effect, thankfully. Why is it important nonetheless to keep RFRA on the books in its current form?

Mr. SHARP. Thank you. And I think we need to remember what RFRA does specifically relates to that Free Exercise Clause. It is the court's decision in Employment Division v. Smith rolled back that strong protection for religious liberty and it left this gap of protection. And so Congress unanimously, bipartisanly came together and said we want to restore that proper understanding and respect for religion, insert that balancing test and that compelling interest test once again.

Mrs. FOXX. Thank you, Mr. Chairman. I say again also, RFRA is not about denying healthcare to women. RFRA is about protecting the First Amendment and our right to the free exercise of religion.

I yield back.

Mr. SCOTT. Thank you.

Mr. FULCHER. I yield back.

Mr. SCOTT. Thank you. The gentleman from Michigan, Mr. Levin.

Mr. LEVIN. Thank you so much, Mr. Chairman. And thank you for holding a hearing on such a critical issue that impacts so many Americans' work lives and home lives.

Mr. Sharp, in your written testimony you claim that RFRA is hardly ever asserted by a for-profit business, only three Federal cases were brought by for-profit businesses. If I have that right.

This seems like an effort to downplay the impact of discrimination by for-profit corporations. And I would like to take a minute to set the record straight about this issue.

Is one of those three cases you are referring to in your testimony the Hobby Lobby case?

Mr. SHARP. Thank you for that question.

Mr. LEVIN. Is it, yes or no, I don't have a lot of time.

Mr. SHARP. Yes, based on what I already discussed.

Mr. LEVIN. Right. So in that case the Supreme Court held that closely held for-profit employers could use religion as a justification for excluding certain forms of birth control from their employees' health insurance.

Now it may be true that this was just one case, but it is the Supreme Court after all. And I think it is important to dig a little deeper to fully understand its impact.

Mr. Sharp, are you aware of how many corporations are closely held in this country?

Mr. SHARP. I don't know the exact number but I know there is quite a few of them.

Mr. LEVIN. Yes. So according to the IRS, as many as 90 percent of businesses in this country are closely held. And these are not just small businesses. They include organizations like Hobby Lobby itself, which has 32,000 employees, Coke Industries, which has 120,000 employees.

Mr. Sharp, are you aware of what percentage of Americans work for closely held corporations?

Mr. SHARP. Again, I don't know the exact number, but I imagine it is a high number.

Mr. LEVIN. Yes. According to the U.S. Chamber of Commerce, more than half of private sector workers are employed by a closely held corporation. So I think it is deeply misleading to downplay the impact of these cases because, as we saw with Hobby Lobby, one case can impact the lives of tens of millions of people.

I want to turn to you, Ms. Wilcher, and ask you a different kind of a question. Directive 2018–03 supersedes current guidance and protocols of OFCCP, particularly regarding sexual orientation and gender identity. Based on your nearly 7 years at OFCCP, can you comment on the impact of Directive 2018–03, in particular what impact it will have on civil rights enforcement in general?

Ms. WILCHER. Well first of all, thank you for the question. It will have substantial impact depending on how, again, it is interpreted and enforced by the solicitor of labor, as well as the director. It has potential for having a lot of impact.

Particularly with the amendment that added gender identity and sexual orientation, which was to protect that LGBT community. This sort of sets back the clock, or it sets it back. And so it undermines the attempt to change 11246 to protect that community.

Mr. LEVIN. And are these recent actions of this Administration regarding enforcement of religious freedom and other civil rights in line with previous administrations? You have a lot of experience on this.

Ms. WILCHER. Not to my recollection, no. I mean I think I would have to do more study, but frankly, in my experience the answer is no.

Mr. LEVIN. And are we going in the direction of expanding the civil rights of LGBTQ Americans and others with the Trump Administration's directives at work and, you know, in all these different areas of life, adoption, and so on and so forth?

Ms. WILCHER. I try not to answer a question with no because it is complicated. The answer is without a doubt, no. I mean we are not going in the right direction, and we should.

Mr. LEVIN. Mr. Chairman, you know I am both a union organizer and a faith leader. Until my sister from Connecticut talked about her personal experience I didn't at all think of talking about mine. But I was the president of my Synagogue until I ran for Congress, and I have been deeply engaged in my own faith community and in interfaith work for years.

And it is just so deeply, deeply troubling when for-profit corporations and others try to use the guise of religion to violate the basic human rights of women over their own bodies, of people to employ-

ment. It is a shame, and I am very appreciative of your leadership so we can pass this bill and correct the situation.

Thank you so much, and I yield back.

Mr. SCOTT. Thank you. The gentleman from Texas, Mr. Wright.

Mr. WRIGHT. Thank you, Mr. Chairman. Thank all of you for being here on the panel today.

We have already discussed to some extent the First Amendment. There is a reason that the very first part of the First Amendment and the Bill of Rights dealt with religious liberty. And as the Republican leader on the committee mentioned earlier, it starts with Congress shall make no law establishing religion or prohibiting free exercise thereof.

Reverend Hawkins, would you agree that free exercise of religion means more than the act of worship, it means that we life the faith, or try to, that we carry the faith into the public square, we don't hide it under a basket, and that we use our religious faith as a foundation for decisionmaking for the choices we make in life. Would you agree with that?

Mr. HAWKINS. Are you Presbyterian?

Mr. WRIGHT. No, sir.

Mr. HAWKINS. You sound very Presbyterian. Yes, exactly, it is faith in action that makes a difference. Again, for the betterment of others.

Mr. WRIGHT. Okay. Thank you. And, Mr. Sharp, the Constitution guarantees, again, free exercise of religion. If the Federal Government is restricting it, how can it be the free exercise? Can it be?

Mr. SHARP. Not at all. And that is why we have the First Amendment and RFRA to provide that check against government authority.

Mr. WRIGHT. Exactly. You mentioned earlier about disagreement is not discrimination. When you have a number of organizations, and particularly charities, that offer services, or businesses that offer services, based on their religious faith, and realizing that there are so many different religions in the United States that exercise freely, they are going to do things differently from one another.

It doesn't bother me that evangelicals would so something different than I would like because I don't want evangelicals telling Catholic charities what to do, just as an example.

When there are options available, let's say someone, a bakery refuses to do what a customer might want, that is not the only bakery. There are other options, so how can they claim discrimination when there are other options available?

Mr. SHARP. I think that is part of the beauty of what laws like RFRA did, is they promote diversity so that you are going to have a variety of organizations and charities all coming together for the same goal but doing so consistent with their religious convictions.

Mr. WRIGHT. Thank you. I would agree with that, and I would say that the title Do No Harm is a misnomer in this case because to gut RFRA does great harm to this country.

And I am going to yield back to the Ranking Member.

Mrs. FOXX. Thank the gentleman from Texas.

Mr. Sharp, RFRA is a rather simple statute that merely codifies a compelling interest test for the government to burden a person's

religious beliefs substantially. It is very conformative with the First Amendment. What would happen to the effectiveness of the statute if Congress begins specifying areas of the law that will be exempt from RFRA, as Congressman Kennedy's bill, the Do No Harm Act, does?

Mr. SHARP. Thank you for that question. It would have a very detrimental impact on religious liberty. Because a lot of the individuals and organizations that right now are facing a lot of attack over their beliefs would find themselves deprived of the opportunity not to win, not to lose, but just to go to court and make their case, to have that fair process to explain why a law burdens their religion. And on the other side, let the government make its case as well.

We want every single American of every belief, every religion, every faith, every background, to have that access to that process afforded by RFRA.

Mrs. FOXX. And again, in order to violate the First Amendment, because of RFRA the government has to prove its case. And that I think is something that perhaps has not been accentuated enough in today's hearing as we have gone off on tangents, in my belief, and made this as though we are denying healthcare to women.

That is not what RFRA is about. RFRA is not about denying anything to anybody except the freedom of religion. The Do No Harm bill will deny that.

Thank you, Mr. Sharp, I yield back.

Mr. SCOTT. Thank you. The gentleman from Maryland, Mr. Trone.

Mr. TRONE. Thank you, Mr. Chairman. Ms. Wilcher, OFCCP has a long history of enforcing civil rights provisions that protect the employees of Federal contractors, including Executive Order 11246 which prohibits discrimination based on race, color, religion, sex, or national origin.

President Bush's 2002 religious exemption currently allows religiously affiliated entities to discriminate on the basis of religion in hiring. But specifically provides those entities are required to abide by all other provisions. For example protections on the basis of race or sex.

The Trump Administration proposed expanding this exemption but fails to reference the current exemptions' limitations regarding enforcement of other protections.

So based upon the data, the evidence, is there any indication that religious organizations are actually seeking such exemptions?

Ms. WILCHER. We looked at the compliance activity and we haven't seen any indication of that. You will have to talk to Ms. Laster, but we haven't seen it.

Mr. TRONE. Exactly. During your time at OFCCP did you receive reports or complaints from religiously affiliated organizations regarding their ability to comply with the specific provisions because of their faith? In other words, is this directive a solution or a problem, or a solution in search of a problem?

Ms. WILCHER. Well in my experience it is probably a solution in search of a problem. I didn't go through any of that. The executive order itself already has exemptions for religious organizations.

I mean and it has worked fine. So, no, to me this is a solution in search of a problem.

Mr. TRONE. Thank you. As someone deeply familiar with OFCCP's day to day operations, can you describe what impact this broad and vague proposal could have?

Ms. WILCHER. It could have quite a bit of an impact. First of all it is one thing to have a policy in writing, it is another to apply it and to interpret it. And unfortunately, what I saw in the South Carolina case is that this Administration looks to be really looking at it very liberally and broadly, which has the impact of limiting civil rights enforcement and anti-discrimination laws.

So us, the staff, as though I still work there. You know, the staff really gets conflicted. And if they feel as though there is pressure from justice or from any other entity to read very liberally in terms of RFRA and the issue of religious freedom, they are going to do it and they are going to look the other way. Knowing full well they were there to enforce the anti-discrimination laws.

And there is a difference between disagreement and discrimination. And that is what these laws are intended to protect.

Mr. TRONE. Absolutely. So even prior to RFRA, institutions whose purpose and character were primarily religious, they were able to hire based on religious beliefs, but does the Do No Harm Act do anything to change this ability to hire on religious beliefs?

Ms. WILCHER. No, not to my view.

Mr. TRONE. Has the Trump Administration gone too far and corrupted the intent of RFRA by allowing more and more exceptions and special rules leading this law to be used as a weapon of discrimination?

Ms. WILCHER. My view is, from what I have seen, the answer is yes, which is why I am here and this is why we are really concerned about what is happening. There is a First Amendment, there is also a Thirteenth, Fourteenth, and Fifteenth Amendment, and the civil rights laws that were there because of slavery and Jim Crow and segregation, because in the name of religion those acts were justified. So, yes, I suspect this Administration has gone a bit too far.

Mr. TRONE. And we have also heard some concerns today the Do No Harm Act would prevent religious organizations receiving Federal funding. Is that an accurate criticism?

Ms. WILCHER. Can you repeat that, I didn't hear?

Mr. TRONE. We heard today some concerns the Do No Harm Act would prevent some religious organizations from receiving Federal funding.

Ms. WILCHER. No. There is no indication of that at all.

Mr. TRONE. Exactly. Thank you. I yield back my time.

Mr. SCOTT. Thank you. The gentleman from Virginia, Mr. Cline.

Mr. CLINE. Thank you, Mr. Chairman. Thank our witnesses for being here.

As everyone has been discussing, the First Amendment guarantees Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. RFRA upholds this right on which our great country was founded. The Federal Government has a duty to ensure that this right is not violated and that

Federal overreach does not infringe on the State's ability to uphold this.

During my time in the Virginia General Assembly we worked to bolster these protections for all Virginians and I look forward to continuing that effort here in Congress.

And I think one of the things that was being discussed, an important point was made, and Mr. Sharp I will ask you. When these individuals are being required by the Federal bureaucracy to come to the Federal bureaucracy and ask for some type of exemption, there is an imbalance.

A notable feature of RFRA is that it requires the government to explain and justify a restriction on religious liberty. The government must show there is a compelling interest and the restriction is the least restrictive means of achieving the interest.

So is it your view that RFRA gives individuals some much needed leverage when dealing with the bureaucracy, and does it increase government transparency and accountability in the process?

Mr. SHARP. Thank you for that question. What it does is it is exactly you described. There are religious minorities, individuals, organizations, that find themselves having their religious freedom violated by the heavy hand of government. They may not have the political power to go and seek out an exemption.

So what RFRA does is provide them a process, a way to check that government authority, go to court and make their case. To explain why this burden on their religious exercise is unconstitutional and likewise allows the government to make its case as well. Not to pick winners and losers, but to provide that check, that accountability you referenced against government restrictions on the ability of people of faith to live and work consistent with those beliefs.

Mr. CLINE. Taking that one step further, how does it provide protections against rulemaking by these same bureaucracies that may intentionally or unintentionally damage the free exercise of religion?

Mr. SHARP. Thank you. And a lot of times we focus on RFRA and laws, but it also extends to agency actions and things like that. Indeed we talked about the contraceptive mandate, which as we discussed, was the process of one of those agency actions. So RFRA simply ensures that whether it is coming from a law passed by Congress, an action by the agency, whatever the source, if the Federal Government is taking an action that restricts an individual or organization's free exercise of their faith, RFRA provides a check, a process, for them to get relief.

Mr. TRONE. Thank you. With that, Mr. Chairman, I will yield my time to the Ranking Member.

Mrs. FOXX. I thank the gentleman from Virginia for yielding.

Mr. Sharp, in most RFRA cases involving preventive services are organizations seeking to exclude a wide range of women's health services, or are they targeting specific procedures or prescriptions that violate their beliefs?

Mr. SHARP. It is the latter. We have obviously talked about that issue a lot, and I think what gets lost in the Hobby Lobby and Conestoga Wood Specialty, who ADF had the pleasure to represent, was that they were not seeking an exemption from all services,

seeking to not cover healthcare, but specifically four items that they believed could result in the termination of a pregnancy, the loss of an innocent life, consistent with their beliefs. So what they sought was that very targeted, give us breathing room so that we do not have to pay for or provide those four items. Not a broad array of services, but four things.

That is what RFRA helps to do is to provide those narrow, targeted solutions.

Mrs. FOXX. Thank you. Mr. Sharp, RFRA sets up a balance between the free exercise of religion and potentially counter veiling governmental interests. Obviously we have heard a lot about what our colleagues think are counter veiling governmental interest. We might have a disagreement on that.

How would the bill introduced by Congressman Kennedy, the Do No Harm Act, affect this balance?

Mr. SHARP. The important aspect of RFRA, one of its many important aspects, is that it applies to any government action across the board. What the Do No Harm Act is going to narrow that, and we are going to say there is now going to be a lot of government actions that you don't have the opportunity to go to court and seek relief. Vast opportunities for people of faith are now going to be snuffed out because rather than being able to go to court and seek relief, those doors are going to be shut to them under the Do No Harm Act.

Mrs. FOXX. Thank you, Mr. Chairman, I yield back.

Mr. SCOTT. Thank you. Gentlelady from Minnesota, Ms. Omar.

Ms. OMAR. Thank you, Chairman. Ms. Laser, can you tell me the delicate balance between religious liberty and civil rights?

Ms. LASER. You know, religious liberty is about the freedom to believe what you want, or not believe, and to be able to practice those beliefs without causing harm. When someone violates someone else's civil rights, they are often putting their own religious beliefs above the religious beliefs of that other person.

What the First Amendment has when it comes to religion are two clauses, the Free Exercise Clause and the Establishment Clause. And it is important that both exist because there have to be limits on free exercise in order ultimately to protect religious freedom for everybody. And I don't feel like we have emphasized that plain enough.

So RFRA is about religious freedom, but the Do No Harm Act is what is ensuring that RFRA isn't being misused to take away the religious freedom of some, like Aimee Maddona, who is being refused government-funded services because she's Catholic.

Ms. OMAR. So let's see, religious liberty would be like, almost then a person like myself having the ability to wear my head scarf in order to serve my constituents in Congress?

Ms. LASER. Yes.

Ms. OMAR. Yes. Religious liberty would be almost then a person being allowed to grow their beard because that is consistent with their faith?

Ms. LASER. Yes.

Ms. OMAR. Would religious liberty be in allowing certain people to access service, like buying a cake from a cake shop?

Ms. LASER. Is that an example of religious freedom?

Ms. OMAR. Would that be an example of religious liberty?

Ms. LASER. Well, I mean if you are buying a cake for your religious wedding I suppose you could say it is connected to your exercise of your religion for some people, sure.

Ms. OMAR. The person denies you—

Ms. LASER. If the person is denying you that right, then what the government is doing, if the government is sanctioning that, right, because that is what is important when it comes to RFRA and the Do No Harm Act. We are talking about when the government is sanctioning one person being able to impose their religion on others.

In the case of Jack Phillips in Masterpiece Cake Shop, there was an anti-discrimination public accommodations law that the State had passed. All the people had come together, it was a secular shared law. And what Jack Phillips was saying is I want special treatment, I want a special exemption from this law.

If the government had given that to him, they are allowing him to impose his religious beliefs on others in a way that causes harm. And religious freedom is not about causing harm to other people.

Ms. OMAR. Because me exercising my religious freedom that is protected under religious liberty in our First Amendment, but imposing my faith on to you is not?

Ms. LASER. That is the point. The two clauses work together so the Establishment Clause puts a limit on your free exercise of religion because there are a lot of freedoms. You can swing your fists everywhere, but you can only swing your fist in our society up until the tip of my nose. And then that freedom is curtailed.

Ms. OMAR. So a police officer, a doctor, Members of Congress, we all take an oath to do no harm, yes? So if I am a police officer and there is a shooting at a gay bar and I say I am not entering this place because I have strong religious conviction that, you know, I don't believe in saving gay people. Like there was a police officer recently on a tape talking about how we should harm gay people. Would that be covered under his religious liberty, can he do that?

Ms. LASER. No, he cannot. Because it is very clear from not just the framers of the Constitution, but a line of Supreme Court cases that religious freedom is not the right to use your religion to hurt third parties or to cause harm. That is not what we mean by religious freedom.

Frankly, I had a group of Stanford students who visited me and I said what is the first thing that comes to mind when you think of religious freedom today? And they all agreed that what came to mind was anti-gay.

Ms. OMAR. And under our Constitution we are prohibited from establishing religion, yes?

Ms. LASER. Absolutely.

Ms. OMAR. So if you have Members of Congress that are legislating laws in accordance with their faith in regards to abortion or LGBTQ or women or any of those things, that should be prohibited within our Constitution?

Ms. LASER. You are not allowed to impose, through the government, your religious beliefs on others. That is not what religious freedom is about, that is not what our country rests on.

Ms. OMAR. For many of us religious freedom is extremely important. It is life and death in this country. Many of us fled our countries to come to the United States because that is the one thing that distinguishes us from many countries.

But it is also important that we have a secular government and protect peoples' civil rights and access to those civil rights.

So I appreciate your testimony, and I yield back.

Mr. SCOTT. Thank you. The gentleman from Georgia, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman, and thank you for holding this hearing.

This is a debate that frankly has been going on for 4,000 years. It is all played out in God's word, and it continues here today. Religious freedom is the cornerstone of the great American experiment. Our Founding Fathers protected religious liberty as no government has in history. The Religious Freedom Restoration Act protects the unalienable rights of religious liberty for all Americans, is a God given right.

RFRA, not the First Amendment, is the primary Federal safeguard of Americans' religious liberty.

In 1990 the Supreme Court greatly weakened the First Amendment's protection of religious liberty. Congress worked together to enact RFRA. Again, and I must disclose that while everything in my life, and I have been by some standards, successful, was great 20 years ago, that I found that what was next was, you know, I am just another broken, flawed man who cannot live without the saving grace of Jesus Christ. And that has offended some people in this room.

Now I made that choice and I found out very quickly that when I make that statement it is offensive, and that I cannot impose that on anyone here or in listening to my voice today. In fact, you know, when I first made that decision, you know, some folks called me the most dangerous person in the world. Because I wanted to shout it to the world. Because I knew the truth.

So why is it that, you know, that we are talking today about this subject? Well, you know what I found out in my walk is that, you know, I couldn't change anybody else, much less myself. And meaning that, you know, again, I can't impose my values on anyone here or within who is listening today, and all I can tell you is what I believe in.

Now that is why I think our founders created the First Amendment, and I think that is why we are here debating today, and we will be debating this for, you know, until eternity. So I do know that Christ said there would be many false prophets. This battle has been laid out for us in the scriptures. There are over 55 versus in the scriptures that reference government. You can Google what the Bible says about government and it will give you those scriptures.

I learned that in my study of the scriptures, which has been intense in the last 20 years, that, you know, one of the reasons that I am so passionate about this is it hasn't worked out too well for those folks who haven't followed God's laws and have been disobedient to his word.

So where are we headed in all of this? You know, the question asked by Pilate, what is the truth? Pilate was in charge of Israel

at that time. What is the truth here? And we will be debating this from now on.

You know I have been heavily criticized in this body for telling people what I believe. Which I think is in direct conflict with the First Amendment. And I have been criticized in my district. So why do I do it? Because I do it because I believe the church has been silenced by this government and people overall in this country have been silenced by this government and those in this government because we are in a battle of good versus evil. And we have been for 4,000 years.

Mr. Sharp, can you give me any examples of where the government has run roughshod over the church in this country, which is now unable, in fact the church doesn't even know the truth and is afraid to tell the truth in the pulpits of America today. Can you give me some examples of that?

Mr. SHARP. There are numerous ones. In fact, one I would like to bring up what was discussed earlier, Jack Phillips, our Colorado baker.

The church goes far beyond the four walls, including into his business and how he operates it. What he sought was not a special exemption, what he sought was equal treatment, the same freedom that every other creative professional, every other baker in the State of Colorado had, to decline to create expression that violates his religious conviction.

And so there are many other examples that ADF has represented of individuals, organizations, and churches. And we fully support the freedom of all of them to live out their faith.

Mr. ALLEN. Mr. Chairman, I am out of time, and I yield back.

Mr. SCOTT. The gentlelady from Georgia, Mrs. McBath.

Mrs. MCBATH. Thank you, Mr. Chairman. And thank you for all of you that are here today. We really appreciate your testimony and your time.

I am a devoted Christian and I live very hard to walk out my faith every single day. Not that I do it perfectly, but I really try to abide by the precepts of my faith. My faith teaches me to love all people and to treat everyone equally.

Never have I interpreted my religion as something used to discriminate against those who differ from me or my opinions. As my colleagues before me have pointed out, the Religious Freedom Restoration Act was not intended to be used as a means for discrimination to keep people from living the lives that they want, that they choose, as we have been witnessing recently.

Whether that means having access to contraceptives, practicing their respective religion while at work, or taking in a child in need of a loving home. We should not be imparting our own life choices on everyone else.

Ms. Laser, my question is for you, I would like to review the history of RFRA. Can you please explain for the committee why RFRA was passed and signed into law in 1993?

Ms. LASER. Sure. So RFRA was passed and signed into law in large part in reaction to the Employment Division v. Smith case. And in that case the court changed the standard, the free exercise standard around whether a generally applicable and neutral law could have a religious exemption if it burdened someone's religious

practices. In that case it was Native Americans in a peyote smoking ceremony and being denied unemployment benefits because of that.

And a lot of folks were concerned on all sides of, you know, the aisle. And came together, legal experts, civil liberties groups, religious groups, all sat at one big table and decided that we better make sure that we have religious freedom protections, in particular for religious minorities.

So the kind of things that came up during the debate were what about a Jewish school boy who wants to wear his yarmulke to school. Or what about a Muslim firefighter who wants to grow a beard. And so those were the types of things that folks worried about.

What folks weren't talking about and weren't worrying about was people being able to use religion to cause harm to other people and to discriminate against other people. People being able to impose their religion on other people. You can see those examples are very different from the types of examples that they were talking about.

And that is why RFRA was able to pass with such a broad consensus. Unfortunately though, that is not how it has played out, and that is not what we are seeing coming in spades from this Administration. And so the Do No Harm Act would restore RFRA to that original intent, leave the balancing test in place, but make sure that it couldn't be misused for something that it wasn't originally intended to do and that doesn't violate the Establishment Clause of our First Amendment. So it lays out some specific areas of the law where religious freedom doesn't get to trump protections that the society has given to different groups of vulnerable people. And child labor laws, workplace protection laws, civil rights protections, healthcare, government services, and government employees like Kim Davis, you know, being able to discriminate in the doling out of government services.

That is why it is such an important and critical fix.

Mrs. MCBATH. Thank you. Sir, if I may, one more question. Was there any indication at the time of RFRA's passage that RFRA would allow religion to undermine the rights of others?

Ms. LASER. No. And in fact, the coalition would have disintegrated if that would have been the case. It wouldn't have passed.

Mrs. MCBATH. Thank you very much.

Ms. LASER. Thanks.

Mr. SCOTT. Thank you. The gentleman from South Carolina, Mr. Timmons.

Mr. TIMMONS. Thank you, Mr. Chairman. And I would like to thank all the witnesses for taking the time to come before the committee to testify.

We keep talking a lot about discrimination. But I want to switch gears to talk about children. Children that for whatever reason are in need of foster care. Over the past few decades Miracle Hill has provided foster care for thousands of children. And while there are hundreds of other similar organizations all over the country, Miracle Hill is particularly important to me because they serve people in my congressional district.

The legal issue being discussed here is that Miracle Hill requires couples seeking to foster children through Miracle Hill, they have to share the theological convictions of Miracle Hill. Miracle Hill's reasoning is that if a couple wants to be in a position of spiritual leadership to the children they care for, those positions are reserved for people that can affirm Miracle Hill's statement of Faith.

I want to be clear. Miracle Hill will serve any child, no matter the child's race, faith, sexual orientation, gender identity, nationality, or any other differentiating factor. And this is important. I also want to be clear, Miracle Hill has never prevented, I will say it again, has never prevented any individual from becoming a foster parent. That is because there are other private providers less than two miles away from their location that would happily process any foster care application.

Alternatively, someone seeking to foster children can go the Department of Social Services which is another mile or two down the road. So I say again, no one has ever been denied the right to be a foster parent by Miracle Hill.

As circumstances may have it, Ms. Laser referenced a close friend of mine, Beth Lesser, who happens to be Jewish. And while Miracle Hill would not facilitate her fostering a child, she was able to foster a child with another nearby provider. So again, as I say, no one is being denied the right to foster a child.

Furthermore, Miracle Hill has never denied any individual, no matter their faith, gender identity, or sexual orientation, the right to volunteer at Miracle Hill. Anyone is welcome to volunteer in the soup kitchen, they can hand out coats and blankets in one of the many homeless shelters they operate, they can teach adults how to read, they can help with any of another variety of the important ministries that they have.

But again, longstanding policy, the policy since they were founded decades ago, if a parent seeking to foster a child wants to be in a position of spiritual leadership and influence, those positions are reserved for people that can affirm Miracle Hill's Statement of Faith.

I am going to speak really quickly. So we have the Catholic Dioses of Charleston, I am going to paraphrase. They fully support Miracle Hill's ability to continue operating. The President of the Coalition of Jewish Values, Rabbi Lerner, also in South Carolina, went even a step further, and I am going to read his because it is important.

"Contrary to what has been said, no one is denied the ability to provide foster services because Miracle Hill Ministries is among the agencies licensed to operate." Again, this is the President of the Coalition of Jewish Values, Rabbi Lerner. He said any individual or family can turn to numerous other providers, including the State itself, so the loss of Miracle Hill's license would only result in fewer children served and a lack of religious support for families who share Miracle Hill's beliefs. No one would gain, and many would lose, most of all the hundreds of children currently served through Miracle Hill. That is Rabbi Lerner, the President of the Coalition of Jewish Values in South Carolina.

So the Jewish community and the Catholic community of South Carolina fully support Miracle Hill.

My question is for Ms. Laser. In your opinion is there any space for religious organizations that adhere to traditional religious beliefs, to play a role in providing foster care services to vulnerable children, or even in the public square at all, or should they just go to church, ignore the problems in their communities, and let the government handle it?

Ms. LASER. Thanks for that question. They can absolutely play a role and they shouldn't be excluded from being able to provide government services and act as the ward of the State as foster care homes do for children. But when they take that on they have to have the best interest of the child as first and foremost. That is a duty and an obligation. And that is not what is happening because with most foster care situations it is not a lack of foster care agencies that is the problem, it is a lack of foster parents. And there is stories from all over the country where foster kids are even sleeping on the floors of offices because they can't find foster homes, which is a very serious problem.

They can be eligible to receive government money, but when they receive that money they have to play by the same rules as everybody else, which means they can't discriminate, because there are provisions in place that prevent that.

Mr. TIMMONS. Those provisions were added by the previous Administration 9 days before he left office, so I think maybe that is where we should be looking as far as the legal justification of it.

I think it is safe to say that if Miracle Hill was no longer licensed there would be less children placed in foster homes. So with that I will yield back the remainder of my time. And Thank you.

Mr. SCOTT. Gentlelady from North Carolina.

Mrs. FOXX. Thank you, Mr. Chairman. Mr. Sharp, in the Hobby Lobby decision the Supreme Court found RFRA applied to closely held for-profit corporations. Finding that both non-profit and for-profit corporations can advance religious freedom. Which also furthers individual religious freedom.

Do you agree it is appropriate for RFRA to apply to non-profit and closely held for-profit corporations?

Mr. SHARP. Yes, I do. And thank you for that question and that reminder that as Justice Alito said in the Hobby Lobby decision, businesses are not run in a vacuum, they are run by people, people of faith, people with deep religious convictions. In the case of Hobby Lobby, as they put on their website, it is people that their business is not about profit, it is about honoring God, honoring that commitment to God through the work that they do.

And so when these closely held businesses and organizations are involved what RFRA does is ensures that the beliefs of those owners that are reflected in how they operate their business and how they live their lives and interact with their community, that the those beliefs are given a fair hearing in court and an opportunity to seek relief from things like the contraceptive mandate, and other restrictions on their religious practice.

Mrs. FOXX. Thank you. Mr. Chairman, in the interest of time I will yield back and save my final comments for that time. Thank you, Mr. Chairman.

Mr. SCOTT. Thank you. One of the problems we have now is that the definition of victim has been changed around. We are pri-

marily focused on generally applicable anti-discrimination laws and executive orders that directed there should be no discrimination with Federal money. Traditionally the victims have been defined as those who are trying to get services or trying to get a job without facing discrimination. And now we are apparently trying to protect those who may be prevented from discriminating or imposing their belief on others. We have even heard a suggestion that discrimination would be okay so long as the victim has some other alternative, they can do to another family placement. If you are denied in one restaurant, well you just go across the street and eat somewhere else. That is not the tradition of victim in these cases.

In healthcare we have talked about forcing a doctor against his will to provide certain services. What we didn't talk about is a child's right to a vaccination, that the doctor didn't believe in vaccinations or other medical decisions. Those really ought to be up to the medical board, not to a bunch of politicians.

But the case in South Carolina gives us an opportunity, first one we have had in a long time, to actually discuss the situation of discrimination, because most of them try to say well, we don't do that. Now they have said they are going to discriminate in the way they provide services and in hiring. And, Mr. Sharp, shouldn't all citizens, if it is a government funded contract, be eligible for jobs and services under the government contract without facing invidious discrimination?

Mr. SHARP. I think we can agree everyone should be treated with dignity and respect in those situations. And I think it includes not only the recipients, but also the providers to make sure that all of their interest and concerns are properly balanced.

Mr. SCOTT. Does that mean that you ought to be able to get a job at a government-funded agency without facing discrimination?

Mr. SHARP. And again, I go back to—

Mr. SCOTT. Wait, wait, wait. They said they are going to discriminate, so apparently, do you agree with that or not?

Mr. SHARP. And I apologize. Are we specifically referring to Miracle Hill?

Mr. SCOTT. Or any other agency that is taking a faith-based exemption and wanting to hire and discriminate, directly discriminate based on religion. You are the wrong religion, you don't get a job here. That is what Allen Yorker was told. I mean that is what is going on. And we have an example here. Live example that people are ducking and dodging. That is what is going on.

Mr. SHARP. And again, not to duck and dodge, but for Miracle Hill it is a religious organization, it is important that they be allowed to hire individuals that share that religious—

Mr. SCOTT. With Federal money? They can do that with their own money. How about Federal money?

Mr. SHARP. I don't think we ought to condition Federal dollars on the ability of a religious organization to hire people that share their faith to accomplish their religion—

Mr. SCOTT. This isn't limited, as you suggested, to just religious organizations. It is anybody with strongly held beliefs. But a bunch of white Nationalists got a Federal contract, could they be able to discriminate against African Americans?

Mr. SHARP. Again, I said this earlier, RFRA has never successfully been used to support racial discrimination. Because the government has a compelling interest, as the Supreme Court has recognized, to eradicate racism.

Mr. SCOTT. That is a strongly held belief. Ms. Wilcher, let me ask you a question on Do No Harm. How would that effect the administration of Executive Order 11246?

Ms. WILCHER. Well as I see it, it would hold harmless these anti-discrimination provisions that exist. It would not therefore allow them to be exempted or overturned, which is what is important.

Mr. SCOTT. And could you administer the anti-discrimination provisions of the Executive Order with the Do No Harm Act?

Ms. WILCHER. Yes.

Mr. SCOTT. And what are the problems if we don't have the Do No Harm Act, what are the problems in enforcing the anti-discrimination provisions of that law?

Ms. WILCHER. Again, depending on how RFRA is being interpreted and applied, it could provide so many more exemptions than currently exist. And particularly as it relates to the LGBTQ community. And we are very concerned about that.

Mr. SCOTT. Thank you. And I yield for closing to the Ranking Member.

Mrs. FOXX. Thank you, Mr. Chairman. I must be honest, today's proceedings have disheartened me. It is one thing as politicians for us to debate and disagree on issue areas and ideas for how best to move the country forward. In fact, that is the beauty of this Nation's political progress, thanks to our freedom of speech and expression.

But it is a whole different ballgame when the issue being debated is the First Amendment of the United States Constitution itself. One of our colleagues said today, we take an oath to do no harm. No, we don't take an oath to do no harm. We take an oath to uphold the Constitution. Maybe she took a different oath.

We are discussing a bill today with a title dripping with irony. Do No Harm is a preposterous name for a bill that not only directly violates the First Amendment and Americans' freedom of religion, but also blatantly picks winners and losers among Americans of faith.

The Do No Harm Act undermines a law that has served to protect Americans from religious discrimination for 25 years. RFRA is not about protecting certain religious groups over others. RFRA applies to all religious faiths, including minority religions. It is a balancing test to ensure a fair day in court.

We are entering treacherous waters by considering legislation that stifles proven bipartisan solutions, and more seriously, our Bill of Rights. It is outrageous that Democrats are advertising this legislation as guaranteeing fundamental civil and legal rights when it dramatically attacks those same rights for people with religious convictions.

We have a responsibility as lawmakers to defend and protect the United States Constitution and the American people above all else.

The bill discussed here today is not only outside the bounds of responsible legislating and mainstream views about religious free-

dom, it is also outside the jurisdiction of this committee. Our time today would have been better spent discussing legislation on which our committee could actually vote. If any good was accomplished here it is that citizens of faith have been alerted. Those who cherish religious freedom have noted that elections have consequences and those consequences are being manifested in today's hearing.

This hearing was intended to review the "Misapplication of the Religious Freedom Act." In reality, it misapplies our role as legislators tasked with protecting the Constitution by stripping citizens of their fundamental rights.

Nevertheless, Mr. Chairman, committee Republicans will continue to stand up for religious freedom and oppose policies that disrespect and diminish the faith of any American.

I yield back.

Mr. SCOTT. Thank you.

Mrs. FOXX. I am sorry, Mr. Chairman, I ask unanimous consent to place in the record a letter from the U.S. Conference of Catholic Bishops Committee for Religious Liberty in support of the Religious Freedom Restoration Act and in opposition to H.R. 1450.

Mr. SCOTT. Without objection. Before I conclude I would like to make a few clarifying remarks.

The Do No Harm Act does not create a new affirmative requirement to provide or cover abortion, birth control, or any other type of healthcare. And Congress does pass laws that protect reproductive healthcare access. Do No Harm would ensure that RFRA cannot be used against those patients.

Because of several laws limiting coverage and provision of abortion care, the 2016 Rule implementing Section 1557 of the Act does not include requirements regarding coverage or provision of abortion care itself, however the rule did make clear that a woman cannot be discriminated against because she had an abortion. And notably the Trump Administration just proposed carving out this protection, just as another attack on Constitutional rights.

I notice the time is just about out, but I would want to remind everyone that the victim in this case is the person trying to get a job or trying to get services without facing discrimination.

We are talking about federally funded contracts, not what churches can do on their own. They can discriminate in hiring with their own money, they can do things like that. But if it is a Federal contract they ought to play by the same rules that everybody else is. You take the Federal money, you can't discriminate in employment, you can't discriminate in who you serve based on protected classes like religion. The services provided on those agencies are under the jurisdiction of this committee, particularly family placement services and others.

And so I think the hearing does indicate how these services will be provided in agencies under our jurisdiction.

But it is a simple question. Under a government-funded contract can you tell somebody that you are not entitled to a job in this federally funded program because of your religion? Yes or no?

I don't think you ought to be able to discriminate like that, others think that there is some value in that. We have been fighting that battle for a long time. I thought we had won it in 1964, 1965, but apparently we have to re-fight that battle all over again.

With that, if there is no further business to come before the committee other than unanimous consent requests to introduce into the record a number of letters and documents and reports, I ask unanimous consent, without objection. So ordered.

And the committee is now adjourned.

[Additional submission by Ms. Adams follows:]

American Civil Liberties Union Published on *American Civil Liberties Union* (https://www.aclu.org)

Catholic Hospitals Denied These Women Critical Care. Now They're Speaking Out. [1]

Author(s):

Brigitte Amiri

I am in awe of their courage, and I am heartbroken by what they have gone through. Woman after woman has come forward to tell us her story of being denied critical reproductive health care at a Catholic hospital.

Tell Catholic hospitals to stop discriminating [2]

Take Tamesha Means [3]. She lives in Muskegon, Michigan, and when she was 18 weeks pregnant, she rushed to the only hospital in her community when she was having a miscarriage. She was bleeding and in excruciating pain. But because of hospital rules called the Ethical and Religious Directives for Catholic Health Care [4], the hospital turned her away three times over two days when the proper course would have been to end the doomed pregnancy.

Tamesha was developing a life-threatening infection, although the doctors never told her that. The hospital only provided care when she started to deliver while being discharged the third time. The baby died shortly after.

Tamesha was devastated about the loss of her pregnancy, and she could have died. That's no exaggeration. Women in Ireland [5] and Italy [6] died when their pregnancies went horribly awry and were refused a life-saving abortion because of the religious views of their providers.

Tamesha feels strongly that no one should have to go through what she went through, and we took legal action against the Catholic bishops who enforce those restrictive hospital rules. Unfortunately, we were not successful in her case, but her bravery has given other the women courage to tell their story.

For example, we recently filed a federal agency complaint on behalf of another woman in Michigan, Jessica Mann [7], who suffered from brain tumors and whose doctors strongly advised her to have a tubal ligation — commonly known as "getting your tubes tied" — when she delivered her baby. Despite the fact that her doctors told her that a subsequent pregnancy could kill her, the Catholic hospital at which she planned to deliver refused to allow her doctor to perform the procedure because of the directives.

Similarly, Rebecca Chamorro [8] was denied a tubal ligation at the time she delivered her baby in a Catholic hospital. Even for women that don't have an underlying health condition, a tubal ligation at the time of delivery is the safest for the woman and results in the most effective procedure. She agreed to bring a lawsuit, which is pending in California against one of the largest Catholic health systems in the country.

And Melanie Jones [9], a woman in Illinois, came forward after her health care provider refused to remove her intrauterine device after it had become dislodged after she fell in her home. Melanie was

bleeding and cramping, but her doctor said that she was prohibited from removing the IUD because of the directives. Melanie decided to bring state and federal agency complaints against the health care system for turning her away when she needed critical care.

All of these women — and the many others in our report [10] — are my heroes. They were just trying to make the best decision for themselves and their families when their lives were upended by the discriminatory treatment of Catholic hospitals. We all have the right to our religious beliefs, but that right cannot be used to discriminate against others or harm them.

Together we will make progress as more people come forward to tell their stories of discrimination. Only together will we be able to emerge from — as Samantha Bee [11] recently put it —the Middle Ages. No one should be turned away from a hospital in her time of need.

If you or someone you love has been turned away from a Catholic hospital, we'd like to hear from you [12].

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[10] https://www.aclu.org/feature/health-care-denied
[11] https://www.youtube.com/watch?v=YWuGgahmP7Y
[12] https://action.aclu.org/secure/do-you-believe-catholic-hospital-provided-you-or-loved-one-inadequate-reproductive-health-car

[Additional submission by Ms. Bonamici follows:]

National Center for TRANSGENDER EQUALITY

Testimony of the National Center for Transgender Equality
U.S. House of Representatives - Committee on the Education and Labor Subcommittee on the Misuses of RFRA by the Trump Administration

June 25, 2019

The National Center for Transgender Equality (NCTE) appreciates the opportunity to submit this testimony regarding the application, and misapplication, of the Religious Freedom Restoration Act of 1993 (RFRA). Founded in 2003, NCTE is one of the nation's leading social justice organizations working for life-saving change for the nearly two million transgender people in the United States and their families.

We deeply respect and value freedom of religion, which is already protected by our federal and state Constitutions, as well as numerous federal statutes and regulations. No one should be fired, denied housing, or excluded from public spaces or services simply because of who they are, or because of their religious beliefs. RFRA was passed on a broad bipartisan basis to protect religious minority groups and avoid such clear harms.

Unfortunately, in recent year the Trump Administration has abused RFRA and twisted our nation's hallowed commitment to freedom of religion, attempting to turn it from a shield against government discrimination into a sword that can be used to harm others. This administration's most recent proposals through the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Labor demonstrate the harms caused by this misuse of RFRA. Refusing or obstructing access to medical care or housing and claiming that refusal in the name of freedom of religion is a perversion of that cherished principle. In health care, patients must come first. In housing, the government should put first the goal that of "a decent home and a suitable living environment for every American family."[1] In federal contracting, the government should pursue the complementary and fundamental goals of ensuring that taxpayer dollars further the purposes for which they are allocated and ensuring equal opportunity. The Trump Administration has taken a value that is the bedrock of our Constitution and turned it into a weapon of discrimination against our most vulnerable populations.

Who Transgender People Are

Transgender people—people who know themselves to be a gender that is different from the one they were thought to be at birth—live in every state and every Congressional district. It is estimated that 1.4 million American adults and 150,000 youth between the ages of 13 and 18 identify as transgender.[2] In

[1] Section 2 of the Housing Act of 1949, codified at 42 U.S.C. § 1441.
[2] Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* (2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-

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all, nearly two million Americans are transgender. The geographic distribution of the transgender Americans is similar to that of the United States population overall.[3] Transgender people are of every age,[4] every faith, every race and ethnicity,[5] and come from every walk of life. As such, the freedom of religion is as central to the lives and dignity of transgender people in the United States as it is for any other resident in this country.

While being transgender need not and should not be an obstacle to success or opportunity in this country, an enormous body of research demonstrates that today transgender Americans face severe and widespread stigma and discrimination. For example, a landmark national survey of nearly 28,000 transgender adults in every state in the country found that respondents were much more likely to experience unemployment, poverty, and homelessness and to be victims of violent crimes than the general population, and many reported being fired, evicted, or denied shelter based on being transgender.[6]

Text and Original Intent of RFRA

Freedom of religion is important to all Americans and is one of our nation's fundamental values. That is why it is protected by the First Amendment to the U.S. Constitution, by state constitutions, and by numerous federal statutes and regulations. RFRA was signed into law twenty-five years ago to clarify and expand upon the freedom of religion. The statute was adopted in response to the 1990 U.S. Supreme Court decision in *Employment Division v. Smith*.[7] In this decision, the Court held that two Native American who worked as private drug rehab counselors were rightfully fired and denied unemployment benefits after ingesting peyote as part of religious ceremonies conducted by the Native American Church.[8] A near unanimous Congress passed RFRA in 1993 to protect individuals like the two employees fired for practicing their religion.

RFRA was created to protect freedom of religious practice where that practice would not harm others, including ensuring that Jewish children can wear yarmulkes in public schools, Muslim firefighters can wear beards, and Christians can observe religious holidays. RFRA outlines that the government "should not substantially burden religious exercise without compelling justification" and that it should only do so if it furthers a compelling government interest in the least restrictive way possible.[9] RFRA's scope and purpose arose from the need to protect religious practice where the practice wouldn't harm others. This means that RFRA is a relatively narrow law that requires government agencies to observe a balancing

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UnitedStates.pdf (estimating that 0.6% of adults in the United States identify as transgender); Jody L. Herman et al., *Age of Individuals who Identify as Transgender in the United States* (2017), https://williamsinstitute.law.ucla.edu/wpcontent/uploads/TransAgeReport.pdf (estimating that 0.7% of people in the United States between the ages of 13 and 17, or 150,000 adolescents, are transgender).

[3] Flores et al., *supra* note 2, at 3-4.

[4] Herman et al., *supra* note 2, at 3.

[5] Andrew R. Flores, Taylor N. T. Brown, & Jody L. Herman. *Race and Ethnicity of Adults Who Identify as Transgender in the United States* (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity- ofTransgender-Identified-Adults-in-the-US.pdf.

[6] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* (2016), www.ustranssurvey.org/reports.

[7] 494 U.S. 872 (1990).

[8] *Id.*

[9] Religious Freedom Restoration Act, Public Law 141, 103rd Cong., 1st sess. (November 16, 1993), https://www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg1488.pdf.

test when an individual or entity has an objection to a generally applicable requirement, weighing the harms on the objecting person and the potential harms on others.

RFRA's balancing test applies broadly to federal laws, anticipating that exemptions meeting this exacting test would be rare. The drafters expressly anticipated, however, that Congress might someday see the need to specifically exclude an important statute from this test.[10]

The Supreme Court Has Rejected a Broad License to Opt Out of Civil Rights Laws

None of the cases commonly cited to justify broad exceptions to civil rights laws under RFRA—including *Trinity Lutheran*, *Hobby Lobby*, and *Masterpiece Cakeshop*—support such a proposition.[11] *Trinity Lutheran* involved a categorical ban on eligibility for local grants for *any* religious entity—a far cry from a generally applicable civil rights law. *Hobby Lobby* required an accommodation to employer health insurance requirements, on the premise that that accommodation would "protect the asserted needs of [employees] as affectively as" the underlying mandate[12] and "need not result in any detrimental effect on any third party."[13] *Masterpiece Cakeshop*—the only one of these cases to involve a nondiscrimination law—did not reach the merits of the exemption claim, instead citing a biased adjudicatory process and remanding for further proceedings.

The Supreme Court, however, has opined on the merits of religious exemption claims from civil rights laws on two occasions. In *Newman v. Piggie Park Enterprises*, the Court considered a claim that the 1964 Civil Rights Act's race discrimination prohibition in restaurants violated the freedom of religious exercise. The district court held that:

> Undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.[14]

The Fourth Circuit Court of Appeals affirmed on the merits, and instructed the district to award attorneys' fees to plaintiffs.[15] The Supreme Court affirmed in a unanimous, per curiam opinion, holding that the religious-exemption defense in these circumstances was "patently frivolous."[16]

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[10] 42 U.S. Code § 2000bb–3(b).
[11] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (holding state civil rights commission decision showed a biased process and remanding for further proceedings); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (striking down categorical bar to eligibility for all religious entities for local grant program); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (requiring religious accommodation for certain employers for employee contraceptive coverage requirement).
[12] 573 U.S. 682, 732.
[13] *Id.* at 729 n. 37.
[14] 256 F.Supp. 941, 945 (1966).
[15] 377 F.2d 433 (4th Cir. 1967).
[16] 390 U.S. 400, 402 n. 5 (1968).

In light of this clear direction from the Supreme Court, religious exemption claims under civil rights statutes that seek to reach beyond the explicit exemptions in those statutes have been rare. The Supreme Court reiterated this guidance recently in *Hobby Lobby* in the context of RFRA, stating:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[17]

These two statements are the Supreme Court's only precedents directly on the issue of religious exemptions from civil rights laws, and they are clear. There is no persuasive reason why, with respect to discrimination on the basis of gender identity or sexual orientation, or any other form of sex-based discrimination, the government's interest should be considered less compelling, or the very same statutes less precisely tailored.

Efforts by the Trump Administration and Others to Misconstrue RFRA

The Congress and the U.S. Supreme Court have long recognized that religious freedom should not be interpreted to permit harm to others that would otherwise be prohibited by law. However, the Trump Administration has attempted to redefine RFRA, transforming its careful balancing test into a broad license to discriminate, whereby private individuals and businesses can opt out of compliance with historic civil rights laws. The Trump administration has frequently cited RFRA to argue for a broad, blanket religious exemption that can be granted even when it would result in serious harm to third parties. When former Attorney General Jeff Sessions' implemented the "Federal Law Protections for Religious Liberty" guidance, he established the groundwork for writing discriminatory actions into law. This guidance prioritized religious liberties over all else and defined those protections so broadly that they can be widely implemented.[18] This is a much different interpretation than the very narrow scope established by the RFRA statute itself.

Attorney General Sessions Guidance on Religious Liberty

In October 2017, then-Attorney General Jeff Sessions issued a guidance document on "religious liberty." In that guidance document, the Attorney General claimed private businesses may be able to opt out of any law prohibiting discrimination on a basis other than race. The memo states: "The government may be able to meet [the compelling interest standard] with respect to race discrimination but may not be able to with respect to other forms of discrimination."[19] It then cited two cases involving discrimination against women and against LGBTQ people. As noted above, these cases involved quintessential private associations—a mosque and the Boy Scouts—and neither held that there was no compelling interest.[20]

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[17] 573 U.S. 682, 733 (2014).

[18] Attorney General Jeff Sessions, *Federal Law Protection for Religious Liberty*, (Oct. 6 2017), https://www.justice.gov/opa/press-release/file/1001891/download.

[19] *Id.*, at 15a.

[20] *Id.*, citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649–55 (2000) (holding Boy Scouts could not be considered a public accommodation under New Jersey State law on First Amendment grounds); *Donaldson v. Farrakhan*, 762 N.E.2d 835, 840–

Nevertheless, the Sessions memo cites them for that proposition, and goes on to suggest that the same analysis could lead to broad exemptions from civil rights law under RFRA—a proposition without foundation in the statutory text or any relevant case law, and which would turn our historic civil rights laws on their head.

Planned Expansion of Religious Exemption to Federal Contract EEO Requirements

In August 2018, the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) issued a very broadly worded directive instructing its staff to interpret religious exemptions to Equal Employment Opportunity requirements very broadly, "in all but the most narrow circumstances."[21] The Directive purports to construe Executive Order 11246, section 204(c), which tracks the coreligionist exemption of Title VII of the 1964 Civil Rights Act, but fails to provide any analysis of its text or of relevant case law or any specific, actionable guidelines for assessing EEO complaints.[22] Instead, the Directive quoted broad language from three Supreme Court cases—*Trinity Lutheran*, *Hobby Lobby*, and *Masterpiece Cakeshop*—none of which concerned EEO protections.[23] The Directive did not cite, discuss, or even acknowledge the *Piggie Park* case, or the discussion of civil rights laws in *Hobby Lobby*. OFCCP has drafted a proposed rule based on this Directive that is currently under review at the Office of Management and Budget.

Planned Rollback of HUD Equal Access Rule

The HUD Equal Access Rule, first adopted in 2012, protects LGBT people from discrimination in housing, homeless shelters, and other HUD-funded programs. The Rule has been critical to ensure the safety of transgender people in need of shelter. The Equal Access Rule's protections have been in place since the rule was first enacted in 2012 (24 C.F.R. Part 5). In 2016, HUD amended this rule to clarify its application to emergency shelters. The rule was finalized after several years of consultation and multiple comment periods.

Since that time, HUD has consistently and publicly assured stakeholders that it had no plans to roll back the Equal Access Rule—including a statement by Secretary Ben Carson's to the House Financial Services Committee as late as May 21, 2019. However, on May 22, the agency's Spring 2019 Regulatory Agenda stated that HUD was planned to cut back the Equal Access Rule after all. According to the Regulatory Agenda, HUD will propose that instead of simply prohibiting discrimination against transgender people in emergency shelters and other critical safety-net programs, HUD will "permits Shelter Providers to

41 (Mass. 2002) (holding a mosque was not a place of public accommodation under Massachusetts state law principally on statutory grounds).

[21] OFCCP Directive 2018-03, Executive Order 11246 § 204(c), Religious Exemption (Aug. 10, 2018).

[22] *Compare* E.O. 11246 § 204(c) (exempting "a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities") *with* 42 U.S.C. § 2000e–1 (exempting "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities").

[23] *See supra* note 11.

consider a range of factors" in determining whether and how to serve transgender people in need, including the shelter provider's religious beliefs. [24]

In justifying this rule change, HUD has pointed to a pending lawsuit in which a faith-based shelter repeatedly turned away a homeless woman simply because she is transgender.[25] The shelter claims that Anchorage's local nondiscrimination ordinance violates the free exercise of religion.[26] According to press reports, this shelter sadly chose to turn away a woman named Samantha Coyle away solely because she is transgender.[27] She had been referred there by another shelter. Knowing she could not safely stay in a men's shelter as the only woman there, Ms. Coyle was forced to sleep outdoors. This is the type of discrimination that HUD would promote if the Equal Access Rule is revised.

There is nothing more sacred to most faith traditions than helping those in need. Faith-based programs can and do welcome transgender people every day without exclusion or discrimination, and in compliance with the Equal Access Rule. When a shelter uses federal funds to help some of our most vulnerable neighbors, HUD needs to ensure that there is no room for discrimination.

HHS Rollback of Patient Protections

Among the most harmful and potentially dangerous potential harms from the misapplication of RFRA come in the area of health care. Today, the vast majority of physicians are willing to treat transgender patients, just like anyone else. Nevertheless, the personal beliefs of health care administrators, providers, and support staff in the health care industry have too often been used to deny individuals access to health care and other critical services—a problem that can be significantly worsened by expanding existing exemptions. For example, religious or moral disapproval has been invoked to refuse to provide infertility and reproductive care,[28] treat patients with HIV,[29] treat a newborn because of her parents' same-sex relationship,[30] and provide emergency services and other care for people who are suffering

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[24] Dept. of Housing and Urban Dev., Spring 2019 Regulatory Agenda, "Revised Requirements Under Community Planning and Development Housing Programs (FR-6152); Proposed rule (RIN: 2506-AC53)."

[25] HUD Press Office, *WHAT YOU NEED TO KNOW: HUD to Help Local Homeless Shelters Serve Their Clients' Needs* (May 23, 2019).

[26] *Downtown Soup Kitchen v. Municipality of Anchorage et al.*, 3:18-cv-00190 (D. Alaska).

[27] KTUU, Transgender woman at center of Downtown Soup Kitchen lawsuit speaks out, January 17, 2019, https://www.ktuu.com/content/news/Transgender-woman-at-center-of-Downtown-Soup-Kitchen-lawsuitspeaks-out-504529741.html.

[28] Casey Ross, *Catholic Hospitals are Multiplying, Boosting Their Impact on Reproductive Health*, SCIENTIFIC AMERICAN (Sept. 14, 2017), https://www.scientificamerican.com/article/catholic-hospitals-are-multiplying-boosting-their-impact-on-reproductive-health-care; Nat'l Women's Law Ctr., *Health Care Refusals Harm Patients: The Threat to Reproductive Health Care* (2014), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/refusals_harm_patients_repro_factsheet_5-30-14.pdf; *see also North Coast Women's Care Medical Grp., Inc. v. San Diego County Superior Court*, 189 P.3d 959, 959 (Cal. 2008).

[29] *See, e.g.*, Complaint, *Simoes v. Trinitas Reg'l Med. Ctr.*, No. UNNL-1868-12 (N.J. Super. Ct. *filed* May 23, 2012); Nat'l Women's Law Ctr., supra note 28.

[30] Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, WASH. POST (Feb. 19, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it; *see also* Amicus Brief of Lambda Legal Defense and Education Fund et al., *Masterpiece Cakeshop et al. v. Colo. Civil Rights Comm'n et al.*, No. 16-111, 17–19 (Sup. Ct. *filed* Oct. 30, 2017).

miscarriages.[31] Religious objections have also been invoked to deny transgender people access to medical care—both care related and unrelated to gender transition—or subject transgender people to degrading or abusive treatment in medical settings. Consider the following examples:

> As my being transgender is a relevant piece of medical information…I revealed this information to [the doctor] when he entered the treatment room. His immediate response was, "I believe the transgender lifestyle is wrong and sinful." … The rest of the time between the examination and him writing the prescription, he asked questions about how transgender women find sexual intimacy. As he had yet to hand over the prescription, I felt compelled by the power dynamic to provide answers to questions I would normally tell an asker are none of his or her business…. [I]t was very creepy having this conversation with this person, and I felt I had the filthy end of the stick and was being subordinated by this doctor because he felt he could. – Karen S.[32]

> My Dignity Health insurance covered my hormones (because my doctor did not specifically note it as trans-related), and scheduled my top surgery before suddenly cancelling their coverage. Someone at their company had "connected the dots" and realized I was seeking transition-related services, which they denied due to their company's Catholic values. I was forced to pay for the surgery out of pocket, destroying my family's finance and putting me in considerable debt.[33]

> I was told by [mental health] professionals that I can only be "fixed" by "accepting Jesus" and denying who I really am when I sought assistance with beginning transition.[34]

In addition, the personal beliefs of hospital administrators and other health care workers have been used to interfere with doctors' exercise of their medical judgment. Some hospitals have invoked their religious affiliation to not only refuse to provide emergency care related to miscarriages, transition-related medical care, and other needs, but also to prevent doctors from providing those treatments at the hospital, in spite of those doctors' best medical judgment.[35] For example, in 2016 a New Jersey hospital approved and

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[31] Am. Civil Liberties Union, *Health Care Denied: Patients and Physicians Speak out About Catholic Hospitals and the Threat to Women's Health and Lives* (2016), https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied; Nat'l. Women's Law Ctr., *Denied Care When Losing a Pregnancy: Pharmacies Refuse to Fill Needed Prescriptions* (Apr. 16, 2015), http://www.nwlc.org/our-blog/denied-care-when-losing-pregnancy-pharmacies-refuse-fill-needed-prescriptions; Nat'l Women's Law Ctr., *Below the Radar: Health Care Providers' Religious Refusals Can Endanger Pregnant Women's Lives and Health* (2011), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/nwlcbelowtheradar2011.pdf; Samantha Lachman, *Lawsuits Target Catholic Hospitals for Refusing to Provide Emergency Miscarriage Management*, HUFFINGTON POST (June 10, 2016), https://www.huffingtonpost.com/entry/catholic-hospitals-miscarriage-management_us_5759bf67e4b0e39a28aceea6.

[32] Amicus Brief of Transgender Legal Defense and Education Fund et al., *Masterpiece Cakeshop et al. v. Colo. Civil Rights Comm'n et al.*, No. 16-111, 11 (Oct. 30, 2017).

[33] This quotation has been excerpted from a story shared by a 2015 U.S. Transgender Survey respondent after completing of the survey.

[34] This quotation has been excerpted from a story shared by a 2015 U.S. Transgender Survey respondent after their completion of the survey.

[35] For example, complaints have been filed against Catholic hospitals for refusing to allow doctors to provide care to transgender patients that the doctors are regularly allowed to provide for non-transgender people. *See, e.g.*, Complaint, *Hastings v. Seton Med. Ctr.*, No. CGC-07-470336 (Cal. Sf. Super. Ct. Dec. 19, 2007) (case settled). *See also Health Care Denied, supra* note 31.

scheduled Jionni Conforti's hysterectomy, then abruptly cancelled the procedure at the last minute and refused to allow his surgeon to perform it when an administrator discovered the patient was transgender despite his doctor's determination that the procedure was medically necessary.[36] These practices are especially concerning in light of the rapidly growing number of religiously affiliated hospitals. For example, the number of Catholic hospitals—which represent the largest denomination in the health care field—has increased by 22% since 2001, and Catholic hospitals now own one in six hospital beds across the country.[37] Catholic hospitals must follow religious directives that often restrict the provision of certain treatments, including for emergency contraception, sterilization, abortion, fertility services, and ectopic pregnancies.[38] Providers at such hospitals often find that they are unable to provide the standard of care for treatments such as miscarriage managements,[39] and one study of physicians working at religiously affiliated hospitals found that nearly one in five (19%) experienced a conflict between the religious directives of their hospital and their ability to practice in accordance with medical standards and their clinical judgment.[40]

Religious beliefs have also been invoked to justify refusals to provide critical human services for lesbian, gay, bisexual, and transgender (LGBT) individuals and families, as well as unmarried parents. The potential for harmful discrimination justified by religious beliefs is further illustrated by countless cases of religion being cited as a basis for denial of service or humiliating treatment toward LGBT people in restaurants, hotels, retail stores, and by individual government employees.[41]

For many patients, such refusals do not merely represent an inconvenience: in many cases, they can result in necessary or even emergent care being delayed or denied outright, putting their health and in some instances their lives at risk. These refusals are particularly dangerous in situations where individuals have

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[36] *Conforti v. St. Joseph's Healthcare System*, No. 2:17-cv-00050-JLL-JAD (D.N.J. filed Jan. 5, 2017).

[37] Lois Uttley & Christine Khaikin, *Growth of Catholic Hospitals: 2016 Update of the Miscarriage of Medicine Report* (2016), http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf?token=54%2Fj8Gp90FWPtm7ExSkDGRuC77o%3D.

[38] *See* U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (2009), http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf; Lois Uttley et al., *Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat to Reproductive Health Care* (2013), http://static1.1.sqspcdn.com/static/f/816571/24079922/1387381601667/Growth-of-Catholic-Hospitals-2013.pdf?token=O2KPmDeCHsArsY1wqp0wEBigKC4%3D.

[39] Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, AM. J. PUB. HEALTH (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636458.

[40] Debra B. Stulberg et al., *Religious Hospitals and Primary Care Physicians: Conflicts over Policies for Patient Care*, 25 J. GENERAL INTERNAL MED. 725–30 (2010), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2881970.

[41] *See, e.g.*, Amicus Brief of Lambda Legal Defense and Education Fund et al., *Masterpiece Cakeshop*, No. 16-111 (documenting instances of discrimination against LGBT people, including discrimination based on religious objections, in a variety of settings); Amicus Brief of National LGBTQ Task Force, et al., *Masterpiece Cakeshop*, No. 16-111; Amicus Brief of Transgender Legal Defense and Education Fund et al., *Masterpiece Cakeshop*, No. 16-111 (same); Amicus Brief of Transgender Law Center et al., *Masterpiece Cakeshop*, No. 16-111, 12–13 (Sup. Ct. filed Oct. 30, 2017) (same).

limited options, such as in emergencies, when needing specialized services, in many rural areas,[42] or in areas where religiously affiliated hospitals are the primary or sole hospital serving a community.[43]

Against this background, the Department of Health and Human Services (HHS) has adopted a rule that, purportedly based in part on RFRA, would substantially expand religious exemptions to existing federal, state, and local laws that protect patients, including civil rights laws.[44] The Department states that its new rule "does not go into detail as to how its provisions may or may not interact with other statutes or in all scenarios."[45] In fact, the rule gives no indication at all as to how it would interact with numerous federal and hundreds of state and local patient protection laws, beyond the vague statement that the rule does not conflict with the Emergency Medical Treatment and Active Labor Act (EMTALA), and the even vaguer statement that "The Department intends to give all laws their fullest possible effect."[46] This rule is currently subject to numerous legal challenges. Relying in part on RFRA challenges to the statute, HHS also recently proposed a rule that would create a new, essentially categorical exemption from the Affordable Care Act's nondiscrimination provisions for any religious entity that objects to the law's requirements.[47]

Expanding exemptions beyond established law as these HHS rules attempt to do—and encouraging service providers receiving federal funds to discriminate against intended program beneficiaries—would harm patients, jeopardizing the welfare of many intended HHS program recipients and compromising the Department's ability to meet its legal obligations and fulfil its mission. This represents a misapplication of RFRA and other applicable laws.

RFRA and Title VII: *R.G. & G.R. Harris Funeral Homes v. E.E.O.C. and Aimee Stephens*

In *R.G. & G.R. Harris Funeral Homes v. E.E.O.C. and Aimee Stephens*, a chain of Michigan funeral homes discharged a longtime employee solely because she discharged that she was transgender and planned to begin living as a woman in conformity with her gender identity. Counsel for the employer have stated that the decision to discharge Ms. Stephens, despite year of exemplary performance, was made "out of love," because the owner believed it was better for transgender people to "align their mind

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[42] People living in rural areas often struggle to access care due to a variety of factors, including physician shortages, financial and geographic barriers to transportation, and a lack of available specialists who can meet their needs. *See, e.g.*, Martin MacDowell et al., *A National View of Rural Health Workforce Issues in the USA*, 10 RURAL REMOTE HEALTH 1531 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3760483; Carol Adaire Jones et al., *Health Status and Health Care Access of Farm and Rural Populations*, U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV. (2009), https://www.ers.usda.gov/publications/pub-details/?pubid=44427; Thomas A. Arcury et al., *The Effects of Geography and Spatial Behavior on Health Care Utilization among the Residents of a Rural Region*, 40 HEALTH SERVS. RESEARCH 135 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361130; Corinne Peek-Asa et al., *Rural Disparity in Domestic Violence Prevalence and Access to Resources*, 20 J. OF WOMEN'S HEALTH 1743 (Nov. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3216064.

[43] *See e.g., Health Care Denied*, *supra* note 31; Uttley et al., *supra* note 38.

[44] Dept. of Health and Human Services, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority; Final Rule, 84 Fed. Reg. 23170 (May 21, 2019).

[45] *Id.* at 23183.

[46] *Id.*

[47] Dept. of Health and Human Services, Nondiscrimination in Health and Health Education Programs or Activities; Proposed Rule, 84 Fed. Reg. 27846 (June 14, 2019).

with their biological reality" rather than to "change their gender."[48] In court, the employer claimed that even if firing Ms. Stephens otherwise constituted unlawful discrimination under Title VII of the Civil Rights Act of 1964 (which the Sixth Circuit had already twice held it does), the employer was entitled to ignore that law under RFRA.

The Sixth Circuit court found there is "a compelling interest in ensuring that [an employer] does not discriminate against its employees on the basis of their sex," including against transgender employees.[49] Although this case was brought and litigated successfully by the federal government on behalf of Ms. Stephens, at the Supreme Court the government has elected to switch sides and ask for its own case to be dismissed on the basis that federal law offers no protection to transgender people at all.[50]

Although this argument is not before the Supreme Court in the currently pending appeal, it would remain alive in the case in the event of a remand and, if accepted, would create a broad new exception to cherished civil rights protections, with no apparent limiting principle. Ms. Stephen's case is a paradigmatic example of a harmful misapplication of RFRA, far afield from the law's intent or from any traditional application of its text.

Conclusion

RFRA is a landmark statute, intended to work alongside the U.S. and state constitutions and numerous other statutes and regulations to protect the freedom of religion. NCTE joins the entire civil and human rights community in supporting the freedom of religious belief and expression. Unfortunately, this administration's misuses of RFRA have opened the door for explicit discrimination and needless harm to vulnerable individuals and communities. Existing laws and regulations, including the traditional applications of RFRA, already provide more than adequate protections for people of faith and religious institutions. RFRA should not be twisted into a license to harm others and ignore our cherished civil rights statutes.

To clarify existing law and avoid harms to employees, patients, and those seeking critical safety-net services, while maintaining the broad protections of RFRA and its wide traditional range of applications, Congress should pass legislation such as H.R. 1450, the Do No Harm Act. This legislation is needed to codify the longstanding principle that RFRA does not create new exemptions to our historic civil rights laws.

Thank you for your consideration.

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[48] Josh Eidelson, *Meet Aimee. She's Trans and Got Fired Because of it*, BLOOMBERG BUSINESSWEEK (Mar. 24, 2019), https://www.bloomberg.com/news/articles/2019-03-20/meet-aimee-she-s-trans-and-got-fired-because-of-it.

[49] 884 F.3d 560, 594 (6th Cir. 2018).

[50] *Brief for Federal Respondent in Opposition* at 12, EEOC v. R.G. No. 18-107 (Sup. Ct. Oct. 2018).

[Additional submission by Mrs. Foxx follows:]

Committee for Religious Liberty

3211 FOURTH STREET NE • WASHINGTON, DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

Most Reverend Joseph E. Kurtz
Archbishop of Louisville
Chairman

June 24, 2019

The Honorable Bobby Scott
Chairman
Committee on Education and Labor
United States House of Representatives
Washington, D.C. 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Scott and Ranking Member Foxx:

I am writing as chairman of the U.S. Conference of Catholic Bishops' (USCCB) Committee for Religious Liberty to express our steadfast support for the Religious Freedom Restoration Act (RFRA), which passed with nearly unanimous bipartisan support in 1993, and to express our alarm at recent attempts to strip away the fundamental guarantees of this longstanding federal law, which protects conscience rights and religious liberty.

The misnamed "Do No Harm Act" (H.R. 1450), for example, would eviscerate RFRA when it comes to "access to, information about, referrals for, provision of, or coverage for, any health care item or service," which could include things like abortion, contraception, sterilization, or so-called "gender transition" procedures. Hence, the federal government could run roughshod over the religious freedom and conscience rights of Americans—including doctors, nurses, and other healthcare professionals—regarding the provision of health care or health coverage. The bill would also target faith-based nonprofits that partner with the federal government to provide critical social services to people in need, as the bill erases the application of RFRA from "a government contract, grant, cooperative agreement, or other award."

As a broad, interfaith coalition of religious leaders has explained, "Congress has *never* passed legislation with the specific purpose of *reducing* Americans' religious freedom. It should not consider doing so now."[1]

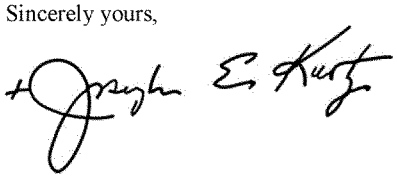
In short, we urge Congress to uphold our nation's commitment to religious liberty, as enshrined in the Constitution and in the federal Religious Freedom Restoration Act. The mere introduction of legislation like the "Do No Harm Act" calls into question

[1] *USCCB President, Diverse Religious Leaders Come Together to Urge Congress to Protect Religious Freedom Restoration Act*, July 1, 2014: http://www.usccb.org/news/2014/14-117.cfm

Congress's honoring its obligation to ensure the fundamental rights of religious freedom and conscience.

We oppose H.R. 1450 and any legislation that repeals or weakens the Religious Freedom Restoration Act. We urge you to reject these proposals.

Sincerely yours,



Most Reverend Joseph E. Kurtz, D.D.
Archbishop of Louisville
Chairman, USCCB Committee for Religious Liberty

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Our Story

In 1970, David and Barbara Green took out a $600 loan to begin making miniature picture frames out of their home. Two years later, the fledgling enterprise opened a 300-square-foot store in Oklahoma City, and Hobby Lobby was born. Today, with more than 900 stores, Hobby Lobby is the largest privately owned arts-and-crafts retailer in the world with over 43,000 employees and operating in forty-six states.

Hobby Lobby is primarily an arts-and-crafts store but also includes hobbies, picture framing, jewelry making, fabrics, floral and wedding supplies, cards and party ware, baskets, wearable art, home accents and holiday merchandise.

Corporate headquarters include over 10 million-square-feet of manufacturing, distribution, and an office complex in Oklahoma City.

Mardel Christian and Education Supply, an affiliate company, offers books, Bibles, gifts, church and education supplies as well as homeschooling curriculum. Hobby Lobby also maintains offices in Hong Kong, Shenzhen, and Yiwu, China.

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- Offering our customers exceptional selection and value.
- Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.
- Providing a return on the family's investment, sharing the Lord's blessings with our employees, and investing in our community.

[Additional submission by Ms. Laser follows:]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

AIMEE MADDONNA,
Plaintiff,
v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

ALEX AZAR, in his official capacity as Secretary of the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND FAMILIES, DEPARTMENT OF HEALTH AND HUMAN SERVICES;

STEVEN WAGNER, in his official capacity as Principal Deputy Assistant Secretary of the ADMINISTRATION FOR CHILDREN AND FAMILIES;

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina; and

JOAN B. MEACHAM, in her official capacity as Acting State Director of the SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,
Defendants.

C.A. No. _____

COMPLAINT

INTRODUCTION

1. Children in foster care are vulnerable. The parents and families who choose to care for these children during often tumultuous periods of transition provide the children with an invaluable gift: a safe and loving home. In placing children in foster homes, therefore, what should matter is the needs of the foster children and the foster families who care for them. But not in South Carolina.

2. Here, what matters—to the U.S. Department of Health and Human Services and to the Governor of this State—is the religious preferences of faith-based foster-care child-placement agencies like Miracle Hill Ministries, which barred Aimee Maddonna and her family from opening their home and their hearts to children in foster care because the Maddonna family is Catholic, and Miracle Hill does not approve of Catholics.

3. Miracle Hill is the largest foster-care child-placement agency in South Carolina. It receives federal and state taxpayer funds to recruit, license, and train prospective foster parents and to place children in foster care with those families. Miracle Hill refuses, however, to recruit, license, train, allow to volunteer, or place foster children with any family that does not both adhere to evangelical Christian religious beliefs and belong to evangelical Christian churches of which Miracle Hill approves. With knowledge of Miracle Hill's discriminatory policy, the United States government and the government of South Carolina have enabled, sanctioned, and continued to fund the organization's preference for one religious group above all others in the provision of governmental services, to the detriment of the children that the State contracts with those agencies to serve.

4. Indeed, the U.S. government and the State of South Carolina have issued sweeping religious exemptions from federal and state religious-antidiscrimination requirements to allow any faith-based foster-care child-placement agency in the state to refuse to recruit, work with, train, or

place children with prospective foster parents who do not share the private child-placement agency's religious beliefs.

5. Defendants' actions are both irrational and illegitimate: The government ostensibly protects religious freedom by expressly authorizing and funding religious discrimination.

6. Moreover, by permitting foster-care child-placement agencies, such as Miracle Hill, to put their own religious preferences ahead of the best interests of the children when providing state and federally funded foster-care services, the U.S. government and the State of South Carolina harm vulnerable children by denying them access to loving families, while also harming those loving families, like the Maddonna family, by subjecting them to discrimination on the basis of their religious identities, in violation of the U.S. Constitution, federal law, and basic decency.

JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331 because the action arises under the Constitution and laws of the United States.

8. This Court has remedial authority to grant the requested declaratory relief under 28 U.S.C. §§ 2201 and 2202, and injunctive relief under, among other things, 28 U.S.C. §§ 1343(a)(3) and 2072, Federal Rules of Civil Procedure 57 and 65, and the Court's inherent equitable powers.

9. This Court has additional remedial authority with respect to the federal defendants under the Administrative Procedure Act, 5 U.S.C. §§ 551–706. Claims under the APA are ripe for judicial review because the grant by the federal defendants of an exception (i.e., exemption) under 45 C.F.R. § 75.102 from the essential religious antidiscrimination protections recognized by 45 C.F.R. § 75.300(c) constitutes "final agency action for which there is no other adequate remedy in court." *See* 5 U.S.C. § 704.

10. This Court has additional remedial authority with respect to the state defendants under 42 U.S.C. § 1983.

11. Venue is proper in the Greenville Division of the United States District Court for the District of South Carolina under 28 U.S.C. § 1391 and Local Rule 3:01(A)(1) because the federal defendants are subject to suit in any federal jurisdiction, a substantial part of the events giving rise to the claims occurred within this division, Plaintiff resides in this division, and no real property is involved in this action.

PARTIES

12. **Plaintiff Aimee Maddonna** and her husband and their three children are residents of Simpsonville, South Carolina, and observant Catholics. The Maddonnas are also federal and state taxpayers, whose tax dollars contribute to the administration of federal and South Carolina child-welfare programs, including the services offered at public expense and on a discriminatory basis through Miracle Hill.

13. The Maddonnas suffered harms as alleged in this Complaint because Miracle Hill Ministries, an organization that contracts with South Carolina to serve as the state's agent in licensing foster parents and making placements of foster children with families, denied the Maddonnas the opportunity to foster or volunteer with foster children in the organization's care because the family does not share the organization's preferred religious beliefs.

14. The Maddonnas also suffered harms as alleged in this Complaint because they object to paying through their federal and state tax dollars for publicly funded foster-care services that are provided not in the best interests of foster children and families but instead in a discriminatory manner that excludes Catholics, Jews, other religious minorities, and nonbelievers for not adhering to a preferred faith.

15. **Defendant United States Department of Health and Human Services** is the federal agency that is charged by Congress with the authority and duty to enhance and protect Americans' health and well-being via the provision of health programs and social services. HHS oversees the Administration for Children and Family's functions and responsibilities involving the funding and oversight of state foster-care systems.

16. **Defendant Alex M. Azar II** is sued in his official capacity as Secretary of the United States Department of Health and Human Services, where he oversees HHS and is responsible for all aspects of HHS's operations and management.

17. **Defendant Administration for Children and Families** is the sub-agency of HHS that is responsible for administering federally appropriated Title IV-E Foster Care program funding to states to provide safe foster-care placements for children who cannot remain in their homes as a result of maltreatment, lack of care, or lack of supervision. ACF is charged with ensuring that those funds are used for the care of children that comports with professional standards, including protecting the children's civil rights.

18. **Defendant Steven Wagner** is sued in his official capacity as Principal Deputy Assistant Secretary for the Administration for Children and Families. On behalf of ACF, Wagner issued a letter on January 23, 2019, granting South Carolina an exemption from the religious-antidiscrimination requirement of 45 C.F.R. § 75.300(c).

19. **Defendant Governor Henry McMaster** is sued in his official capacity as Governor of South Carolina. McMaster issued an Executive Order on March 13, 2018, permitting faith-based foster-care child-placement agencies to associate and work only with "foster parents and homes who share the same faith" as the exempted entities. S.C. Exec. Order No. 2018-12. At all times relevant to these allegations, McMaster was acting under color of state law for purposes

of 42 U.S.C. § 1983. Under Article IV, Section 15, of the South Carolina Constitution, the Governor is required to "take care that the laws be faithfully executed" and is thus responsible for ensuring that all South Carolina executive departments and agencies, including the Department of Social Services, comply with governing federal and state laws and regulations.

20. **Defendant Joan B. Meacham** is sued in her official capacity as Acting State Director of the South Carolina Department of Social Services. Meacham oversees the South Carolina Department of Social Services and its programs, reporting directly to Governor McMaster. The South Carolina Department of Social Services is the state agency responsible for overseeing the South Carolina Foster Care Program, licensing and supervising private foster-care child-placement agencies, and administering federal Title IV-E Foster Care and Adoption Assistance program funds to those private agencies. At all times relevant to these allegations, Meacham was acting under color of state law for purposes of 42 U.S.C. § 1983.

FACTUAL ALLEGATIONS

Plaintiff Aimee Maddonna's Interactions with Miracle Hill Ministries as a Prospective Mentor and Foster Parent

21. Aimee Maddonna's father was raised in foster care and orphanages, and he often told his children that he felt like the foster-care system had failed him. When he came of age, therefore, it became important to him to take in foster children, to provide them with the type of foster family that he wished he had.

22. Thus, Mrs. Maddonna grew up alongside biologically related and foster siblings. Some foster children stayed with her family for only a few days; others were with them for many years. In all, dozens of foster children became a part of Mrs. Maddonna's family.

23. Mrs. Maddonna's parents instilled in their children the importance of providing a safe, loving home to children in need of a foster family.

24. Mrs. Maddonna intends to pass these fundamental values of charity and service to her own three children, whom she homeschools in a loving home that she and her husband have made for them. In furtherance of that aim, Mrs. Maddonna has sought out volunteer activities that her family can perform together near their home.

25. Accordingly, building on her experience growing up with foster siblings, Mrs. Maddonna contacted Miracle Hill Ministries to see whether her family could volunteer to work with foster children. Mrs. Maddonna hoped that her family would bond with the children with whom they volunteered, and the family would be willing and prepared to provide a foster home to a needy child who was an appropriate fit with the family. Mrs. Maddonna's particular interest is and has been in helping older children, who are less likely than younger children to receive the attention of prospective foster and adoptive families.

26. Miracle Hill Ministries is a foster-care child-placement agency based in Greenville, South Carolina, that provides, among other services, assistance to those interested in being licensed by the South Carolina Department of Social Services as foster parents in the South Carolina Region 1 counties of Abbeville, Anderson, Cherokee, Greenville, Greenwood, Laurens, Newberry, Oconee, Pickens, and Spartanburg.

27. As a licensed child-placement agency, Miracle Hill assists prospective foster parents and families in obtaining state foster-care licenses, provides home studies and assessments that the South Carolina Department of Social Services relies on in making foster-care licensing decisions, and determines the foster families with whom the children in foster care should be placed.

28. Miracle Hill is one of only three nongovernmental foster-care child-placement agencies working with foster parents in Greenville County, where Mrs. Maddonna resides, and it is the largest nontherapeutic foster program in the State of South Carolina.

29. Additionally, unlike the Department of Social Services, Miracle Hill permits children as well as adults to volunteer with children and teenagers awaiting placement in a foster home, allowing for families like the Maddonnas to volunteer *as a family*.

30. Miracle Hill also helps prospective foster parents assess the fit of a child with a particular home and family when a potential placement arises.

31. For Mrs. Maddonna, having her whole family volunteer with the foster children was and is an important first step to developing relationships with and getting to know children who might be good matches for foster placement in her home.

32. Volunteering helps families establish the types of relationships with children in foster care that lead to long-term foster placements or even adoption.

33. Additionally, because the Maddonna children have special needs, it is important to Mrs. Maddonna to ensure that any foster child that the family would welcome into their home would be a good fit with this special family.

34. Mrs. Maddonna learned about Miracle Hill's volunteer opportunities when a representative of the organization advertised to a homeschooling parents' group with which Mrs. Maddonna participates.

35. Mrs. Maddonna contacted a Miracle Hill representative and corresponded with her over the course of a few weeks about the opportunity to volunteer with foster children.

36. During this period, Mrs. Maddonna told her children about the exciting opportunities that they could have to provide love and care to children in foster care. Her family

made plans to take the foster children out for ice cream, to teach them to play guitar, and to buy them new clothes for the first day of school.

37. After Mrs. Maddonna provided answers about her experience with the foster-care system and her family's ability to volunteer, the Miracle Hill representative said that there was just one final question before Mrs. Maddonna could start volunteering: Could she provide Miracle Hill with the name of her church as a reference? Mrs. Maddonna, a Catholic, responded that she would be happy to provide the name of her parish.

38. Mrs. Maddonna was shocked then to learn that this reference would not be accepted, and that her family's volunteering was no longer welcome.

39. The representative with whom she had corresponded for weeks expressed disappointment because, but for the Maddonnas' Catholic faith, they would be a great fit with the program.

40. Later, the Director of Development for Miracle Hill informed Mrs. Maddonna that only Christians who attended the right type of Protestant church were permitted to volunteer and work with the children that the South Carolina Department of Social Services had placed in the organization's care.

41. Mrs. Maddonna clearly understood that she and her family were ineligible to be trained by or receive placements from Miracle Hill because they are Catholic.

42. Because of the religious requirements that Miracle Hill inserts into its provision of foster-care services, the Maddonnas were prevented from becoming a foster family or even volunteering to work with foster children.

43. Mrs. Maddonna was forced to tell her young children that, because they are Catholic, they would not be permitted to take foster children out for ice cream, teach them to play guitar, or buy them new clothes for the first day of school.

44. The Maddonnas are not alone in this experience: Miracle Hill has turned away both Jews and Catholics seeking to volunteer with the foster children in the organization's care. *See* Lydia Currie, *I Was Barred from Becoming a Foster Parent Because I Am Jewish*, Jewish Telegraphic Agency (Feb. 5, 2019), https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish.

45. Defendants not only were aware of, but also affirmatively enabled, discrimination against the Maddonnas by licensing and funding Miracle Hill.

46. Since at least the spring of 2017, the South Carolina Department of Social Services has been aware that Miracle Hill discriminates against potential foster and adoptive parents and families on the basis of the religion of those parents and families.

47. In communications with the federal Administration for Children and Families in February 2018, Governor McMaster or his agents have explicitly informed the Administration that Miracle Hill and other South Carolina faith-based foster-care child-placement agencies have the desire to select among prospective foster parents on the basis of religion, contrary to federal and state requirements.

48. Because of the discrimination that she faced at Miracle Hill, Mrs. Maddonna has been afraid to reach out to the other nongovernmental foster-care child-placement agencies, all of which she believes are faith-based. She does not want to get her family's hopes up again, only to be told once more that their kind is not welcome to volunteer with or provide a loving home to children in South Carolina's foster-care system.

49. Mrs. Maddonna again reached out to Miracle Hill on February 9, 2019, asking that her family be accepted as volunteers.

South Carolina and Federal Foster-Care Program Requirements

50. Approximately 4,500 children are currently in South Carolina's foster-care system. *See* S.C. DEP'T OF SOC. SERVS., *Total Children in Foster Care on June 30, 2018–Office of Case Management*, https://dss.sc.gov/media/1828/total-children-in-foster-care-on-june-30-2018.pdf.

51. To provide care for these children, the South Carolina Department of Social Services contracts with private child-placement agencies—organizations that receive licenses from the state to facilitate the placement of foster children with foster parents and families by providing counseling, referrals, searches, and other services, and that receive reimbursements for those services from state and federal funds. *See* S.C. Code § 63-9-30(5); S.C. Code Regs. § 114-4910.

52. Typically, DSS issues a standard, one-year license to child-placement agencies that meet all regulations and qualify to participate in the program. *See* S.C. Code § 114-4930(E).

53. DSS then monitors all foster-care child-placement agencies in the state to ensure that they comply with federal and state laws and requirements. *See* S.C. Code § 114-4920(E).

54. If a child-placement agency is temporarily unable to comply with a state foster-care licensing regulation, the Department may grant the agency a temporary license if the agency provides a written plan to the Department to correct its areas of noncompliance within a probationary period. *See* S.C. Code § 114-4930(F).

55. DSS may deny or revoke a child-placement agency's license if DSS determines that the agency cannot comply with state regulations or if the agency provides false information during the application or relicensing process. *See* S.C. Code §§ 114-4930(G)(1)(d)–(e).

56. Licensed child-placement agencies conduct a variety of services on behalf of the state.

57. Licensed child-placement agencies conduct initial and relicensing foster-home investigations using the regulations established by DSS and make recommendations that DSS uses to determine whether a foster-family license should be issued, denied, reissued, or revoked. *See* S.C. Code §§ 114-550(C), (D), (K), 114-4980(A)(2)–(3).

58. Licensed child-placement agencies license foster homes on behalf of the state and then monitor those homes for compliance with the foster-home regulations established by DSS; investigate any complaints about possible violations of foster-home regulations; and provide DSS with written reports of their findings, conclusions, and any anticipated actions affecting the investigated homes' licenses. *See* S.C. Code §§ 114-4980(A)(4)–(5).

59. In addition to controlling foster parents' interactions with the South Carolina Foster Care System, child-placement agencies exercise substantial control over foster children's time in the system, developing written case plans for all children assigned to them and determining which foster home is appropriate for a child's placement based on the agency's assessments of foster families' and children's needs and strengths. *See* S.C. Code §§ 114-4980(B)–(C).

60. Under Title IV-E of the Social Security Act, South Carolina obtains reimbursement for a portion of the state's foster-care expenditures from the U.S. Department of Health and Human Services and uses those federal funds to reimburse licensed child-placement agencies for the services that they provide.

61. In order to receive these funds, South Carolina must ensure that its licensed child-placement agencies comply with federal law and requirements.

62. Since December 18, 2015, all HHS solicitations and contracts have been required to include the following clause:

> It is the policy of the Department of Health and Human Services that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as race, color, national origin, religion, sex, gender identity, sexual orientation, or disability (physical or mental). By acceptance of this contract, the contractor agrees to comply with this policy in supporting the program and in performing the services called for under this contract. The contractor shall include this clause in all sub-contracts awarded under this contract for supporting or performing the specified program and services. Accordingly, the contractor shall ensure that each of its employees, and any sub-contractor staff, is made aware of, understands, and complies with this policy.

48 C.F.R. § 352.237-74.

63. On July 13, 2016, HHS proposed changes to 45 C.F.R. § 75.300 to codify for all HHS grants what was already required for all HHS contracts: a prohibition against discrimination in the provision of federally funded services on the basis of a list of "non-merit factors," including religion. *See* 45 C.F.R. § 75.300(c); 81 Fed. Reg. 45,270-01.

64. HHS also proposed, through notice-and-comment rulemaking, to codify the Supreme Court's decisions in *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), by requiring that all same-sex spouses, marriages, and households are treated the same as different-sex spouses, marriages, and households in terms of determining beneficiary eligibility and participation in activities related to HHS grants. *See* 45 C.F.R. § 75.300(d); 81 Fed. Reg. at 45,271.

65. The proposal proved noncontroversial: HHS received only twelve comments on the codification, all of which were supportive of the proposed regulation. *See* 81 Fed. Reg. 89,393-01 (Dec. 12, 2016).

66. The proposed changes to 45 C.F.R. § 75.300 became effective January 11, 2017.

67. Under 45 C.F.R. § 75.101(b)(1), the antidiscrimination provisions of 45 C.F.R. § 75.300 follow federal grant dollars through grantees, such as South Carolina, to subgrantees, including Miracle Hill, thus barring discrimination in the provision of vital services in state foster-care programs.

68. Religiously affiliated organizations are permitted under federal and South Carolina law to become licensed child-placement agencies and to receive federal and state funds for providing foster-care services, as long as they comply with all applicable laws—just as nonreligious organizations must. *See* 45 C.F.R. § 87.3.

A South Carolina Faith-Based Foster-Care Child-Placement Agency's Noncompliance with Federal and State Antidiscrimination Laws

69. While reviewing Miracle Hill Ministries' application to renew its child-placement-agency license for 2018, the South Carolina Department of Social Services discovered references on the organization's website to its recruitment of Christian foster parents and families only.

70. Additionally, DSS discovered that Miracle Hill's foster-care application requests information regarding foster parents' and families' religious beliefs and practices, including requiring a reference from the parent or family's pastor.

71. Further, DSS discovered that Miracle Hill's Foster Care Manual directs its staff to inquire about families' particular religious beliefs and practices before accepting them to volunteer or to foster a child.

72. Accordingly, DSS followed up with Miracle Hill to determine whether the organization uses the religious information to assess homes for appropriateness of foster-care placements or to determine whether Miracle Hill would serve a prospective foster parent or family at all.

73. In subsequent telephone conversations, DSS confirmed that Miracle Hill uses the religious information that it gathers to refuse to provide services as a licensed child-placement agency to families who are not practicing evangelical Christians.

74. Specifically, Miracle Hill has required and continues to require every prospective foster parent to:

a. "be a born-again believer in the Lord Jesus Christ as expressed by a personal testimony and Christian conduct";

b. "be in agreement without reservation with the doctrinal statement of Miracle Hill Ministries";[1]

c. "be an active participant in, and in good standing with, a Protestant church";

d. "have a genuine concern for the spiritual welfare of children entrusted to their care"; and

[1] Miracle Hill Ministries' Doctrinal Statement reads:

> We believe the Bible to be the only inspired, infallible, inerrant and authoritative Word of God. We believe that there is one God, creator of heaven and earth, eternally existent in three distinct persons: Father, Son, and Holy Spirit. We believe in the deity and humanity of Jesus Christ, that He was born of a virgin, that we are redeemed by His atoning death through His shed blood, that He bodily resurrected and ascended into Heaven, and that He will come again in power and great glory to judge the living and the dead. We believe in the value and dignity of all people: created in God's image, but alienated from God and each other because of our sin and guilt, and justly subject to God's wrath. We believe that regeneration by the Holy Spirit by grace through faith is essential for the salvation of lost and sinful people. We believe in the forgiveness of sins, the resurrection of the body, and life everlasting solely through repentance and faith in Jesus Christ. We believe that the Holy Spirit unites all believers in the Lord Jesus Christ and that together they form one body, the church.

Miracle Hill Ministries, Doctrinal Statement, https://miraclehill.org/who-we-are/doctrinal-statements/.

e. "have a lifestyle that is free of sexual sin (to include pornographic materials, homosexuality, and extramarital relationships)."

75. DSS determined that Miracle Hill's policies and practices constitute discrimination on the basis of religion and contravene the following regulations and policies:

a. S.C. Code of Regulations § 114-4980(A)(2), which sets forth fully the requirements for foster-home investigations and does not permit child-placement agencies to create any additional requirements—such as religious requirements—for the families that they serve;

b. 45 C.F.R. § 87.3(d), which entitles and encourages religious organizations to participate in HHS programs, such as foster-care programs, but prohibits religious discrimination by participating organizations in the provision of services;

c. 45 C.F.R. § 75.300(c), which prohibits discrimination on the basis of religion; and

d. DSS Human Services Policy and Procedure Manual § 710, which commits DSS and its programs to providing "equal opportunities to all families and children, without regard to their . . . religion . . . ."

76. Additionally, DSS determined that Miracle Hill was violating its own policies submitted to DSS as part of the organization's license-renewal process.

77. Specifically, Miracle Hill's Foster Care Manual section MHM.CPA.900, labeled "Introduction," states: "In accordance with Federal and State laws and South Carolina Department of Social Services (SCDSS) policy, this agency and contracted providers for foster care and adoption services are prohibited from discriminating on the basis of race, color, national origin, sex, age, religion, political beliefs or disability."

78. Yet DSS's investigation revealed, as already noted, that Miracle Hill does in fact discriminate on the basis of religion.

79. For these reasons, on January 26, 2018, DSS determined that it was appropriate to issue Miracle Hill a temporary (rather than regular) child-placement-agency license under South Carolina Code of Regulations § 114-4930(F) while DSS worked with Miracle Hill to resolve the legal violations and to ensure that Miracle Hill complies with the policies submitted to DSS in the licensing process.

80. DSS requested that Miracle Hill address the concerns identified and issue a written plan of compliance within thirty days.

81. On knowledge and belief, Miracle Hill has never issued a written plan of compliance.

Efforts to Provide Religious Exemptions from Federal and State Religious-Antidiscrimination Laws for All South Carolina Faith-Based Foster-Care Child-Placement Agencies

82. Rather than require Miracle Hill to comply with federal and state law, South Carolina's Governor, Henry McMaster, ordered the creation of exemptions from state antidiscrimination requirements and sought the same with respect to federal antidiscrimination requirements for all South Carolina faith-based foster-care child-placement agencies.

83. *First*, on February 27, 2018, Defendant Governor McMaster wrote a letter to Defendant Steven Wagner, then-Acting Assistant Secretary for the Administration for Children and Families in the U.S. Department of Health and Human Services, requesting that HHS provide to the State of South Carolina a waiver for faith-based entities from the HHS requirement that federal-grant funds be withheld or returned in case of violations of federal law by state foster-care child-placement agencies.

84. McMaster's letter specifically identified two federal regulations, 45 C.F.R. §§ 75.300(c) and (d), that he believed "effectively requir[ed faith-based foster-care child-placement agencies] to abandon their religious beliefs or forgo the available public licensure and funding."

85. As discussed above, 45 C.F.R. §§ 75.300(c) and (d) merely codify long-standing antidiscrimination policy of HHS that had been included in all HHS contracts since 2015 and reflect Supreme Court precedent.

86. 45 C.F.R. § 75.300(c) provides that:

> no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

87. 45 C.F.R. § 75.300(d) provides: "In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples."

88. McMaster's letter requested that HHS permit South Carolina's faith-based child-placement agencies to discriminate, in violation of 45 C.F.R. §§ 75.300(c) and (d), while operating and conducting governmental services funded under Title IV-E of the Social Security Act.

89. *Second*, on March 13, 2018, McMaster issued South Carolina Executive Order No. 2018-12, directing DSS to permit faith-based foster-care child-placement subgrantees to associate only with "foster parents and homes who share the same faith" as the subgrantee "in recruiting, training, and retaining foster parents."

90. McMaster's Order also states that DSS "shall not deny licensure to faith-based [foster-care child-placement agencies]" and directs DSS to "review and revise its policies and

manuals in accordance with this Order and ensure that [DSS] does not directly or indirectly penalize religious identity or activity in applying" the state's requirements for licensure for foster care.

91. Further, on June 29, 2018, the South Carolina legislature ratified a budget proviso directing DSS to use funds appropriated by the legislature to make and promulgate rules and regulations to protect faith-based foster-care child-placement agencies from adverse actions if those agencies "decline to provide any service that conflicts with, or provide any service under circumstances that conflict with, a sincerely-held religious belief or moral conviction of the" agency. *See* 2018 S.C. Acts 361, § 38.30.

92. As a result of McMaster's February 2018 letter to Defendant Wagner and subsequent communications among Defendants or their agents, on January 23, 2019, HHS granted the South Carolina Foster Care Program an exemption from the religious-antidiscrimination requirement of 45 C.F.R. § 75.300(c).

93. In his letter granting the exemption, Wagner stated that South Carolina Foster Care Program subgrantees would be permitted to use "religious criteria in selecting among prospective foster care parents," including criteria based on the religious identity and practices of prospective foster-care parents.

The Effect of Sanctioning South Carolina Faith-Based Foster-Care Child-Placement Agencies' Discriminatory Policies

94. By permitting only those who attend preferred churches or practice a preferred faith to volunteer with and provide homes to South Carolina's children and teenagers in the foster-care system, faith-based foster-care child-placement agencies are, with express authorization, approval, and funding from the United States and South Carolina, denying these children access to safe and loving homes.

95. These organizations are authorized by both the federal and state Defendants to create religious requirements in addition—or directly contrary—to federal and state requirements concerning who may provide homes to children in foster care, thus excluding many otherwise eligible prospective foster parents who are willing to open their homes to children in need.

96. Miracle Hill's barring of non-evangelicals from volunteering with children in its foster-care program is detrimental to the children's finding homes, as are other, similar requirements by other faith-based agencies.

97. Volunteering and mentoring with foster children allow individuals to *see* these children, who would otherwise simply be faces on a billboard or in an infomercial.

98. Individuals and families who volunteer with and mentor foster children are more likely to open their homes to the children, providing them with the stable environments and individualized care that they, and all children, desperately need.

99. The religious exemptions from federal and state religious antidiscrimination requirements that Defendants have granted permit South Carolina's faith-based foster-care child-placement agencies effectively to bar those who do not share the agencies' religious beliefs from volunteering with and providing safe and loving homes to children in the South Carolina Foster Care Program.

100. It is never acceptable to use state or federal funds to discriminate based on religion.

101. What is more, the timing of the religious exemptions at issue here is particularly concerning given the spike in foster-care caseloads in South Carolina caused by the opioid epidemic.

102. From 2013 to 2018, the number of children in foster care in South Carolina steadily rose from 3,306 children to 4,518.

103. Over that same five-year period, the percentage of foster-care-home placements has remained relatively flat, with the total number of foster-care-home placements in 2018 being only 3,017—leaving a shortfall of some 1,500 homes.

104. The South Carolina region with the most children in foster care is Region 1, which has approximately one-third (1,555 of 4,518) of the children statewide.

105. Miracle Hills Ministries is a faith-based foster-care child-placement agency in Region 1 and is the largest placement agency in the region and the state.

106. Miracle Hill refuses to recruit or train prospective foster parents or families who do not share the organization's religious beliefs and will not place foster children with, or allow volunteers from, families who are not evangelical Christians.

107. In granting religious exemptions to South Carolina's faith-based foster-care child-placement agencies, Defendants did not consider the effects of those agencies' discriminatory policies on the number of foster homes available to the growing number of children in the South Carolina Foster Care System.

108. Although South Carolina Executive Order No. 2018-12 notes that all foster-care child-placement agencies "must assist *any children in foster care* without regard to their religious beliefs," the religious exemptions were granted without regard to the effects of faith-based foster-care child-placement agencies' discriminatory policies on children in foster care or on the children's biological parents, who may not share the religious beliefs of the faith-based foster-care child-placement agency to which the state assigns a particular child.

109. South Carolina law requires that religious education be provided to children in foster care "in accordance with the expressed wishes of the child's natural parents . . . ." *See* S.C. Code Regs. 114-550(H)(11).

110. Therefore, in spite of the exemptions, faith-based foster-care child-placement agencies still should assist Catholic children, for example, and must provide Catholic children with religious education in the Catholic faith if requested by a child's biological parents.

111. But under the exemptions provided, faith-based foster-care child-placement agencies can effectively terminate biological parents' rights to direct their children's religious upbringing while those children are in the care of the child-placement agency or a foster family, by preventing the child from being placed with a family that shares the child's biological family's religious beliefs.

112. And faith-based foster-care child-placement agencies' religious tests or requirements of the sort that Miracle Hill employs ensure that children's beliefs that differ from those of the agency to whom a child is assigned by the state will *not* be respected because the foster families are vetted to ensure a particular type of religious instruction to the foster children.

113. Nor have Defendants considered how faith-based foster-care child-placement agencies' discriminatory recruitment, training, and placement policies will affect lesbian, gay, bisexual, transgender, and questioning youth, who are over-represented in foster-care systems throughout the United States and whose very identities are at odds with the religious doctrinal statement to which Miracle Hill, for example, requires prospective foster families and volunteers to attest.

114. Indeed, the religious exemptions do not consider or serve the best interest of children in foster care at all.

115. Allowing faith-based foster-care child-placement agencies to close the door to willing and fully qualified foster parents like Aimee Maddonna because of their religious beliefs not only opens the door to, and expressly licenses, taxpayer-funded discrimination, but it also

deprives vulnerable children of safe, affirming, and loving homes, thus only worsening South Carolina's foster-care crisis.

CLAIMS FOR RELIEF

Count I—Federal Defendants
(Administrative Procedure Act—Arbitrary, Capricious, Abuse of Discretion, and Not in Accordance with Law)
5 U.S.C. § 706(2)(A)

116. Plaintiff Aimee Maddonna incorporates the foregoing allegations as if fully set forth here.

117. The exemption from 45 C.F.R. § 75.300(c) granted by the federal defendants to the South Carolina Foster Care Program under 45 C.F.R. § 75.102(b) constitutes final agency action under the Administrative Procedures Act.

118. The exemption is arbitrary, capricious, an abuse of discretion, and contrary to law under 5 U.S.C. § 706(2)(A) and must therefore be set aside because:

a. HHS failed to follow the procedure for granting exemptions under 45 C.F.R. § 75.102(b) by granting an unlawful class-wide exemption rather than deciding whether to grant exemptions for "individual non-Federal entities on a case-by-case basis";

b. HHS failed to consider relevant factors such as harm to prospective foster parents and families, the best interests of foster children, and possible alternatives to the exemption;

c. the exemption is not warranted by HHS's stated reasons in Defendant Wagner's January 2019 letter; and

d. the exemption purports to permit conduct that conflicts with other existing federal laws without providing clear guidance on whether those laws still apply or reasons for providing exemptions from those laws.

Count II—Federal Defendants
(Administrative Procedure Act—Contrary to Constitutional Rights)
5 U.S.C. § 706(2)(B)

119. Plaintiff Aimee Maddonna incorporates the foregoing allegations as if fully set forth here.

120. The exemption from 45 C.F.R. § 75.300(c) granted by the federal defendants to the South Carolina Foster Care Program under 45 C.F.R. § 75.102(b) is contrary to constitutional rights, powers, privileges, or immunities and therefore violates 5 U.S.C. § 706(2)(B) in the following regards and must therefore be set aside:

a. The exemption violates the Establishment Clause of the First Amendment to the U.S. Constitution.

b. The exemption violates the equal-protection guarantee of the Fifth Amendment to the U.S. Constitution because it has both the purpose and effect of discriminating impermissibly on the basis of religion.

c. The exemption discriminates against the Maddonnas based on their exercise of a fundamental right, in violation of the substantive-due-process protections of the Fifth Amendment.

Count III—All Defendants
(First Amendment—Establishment Clause)
U.S. Const. amend. I

121. Plaintiff Aimee Maddonna incorporates the foregoing allegations as if fully set forth here.

122. Defendants have provided and continue to provide federal and state taxpayer funds to faith-based foster-care child-placement agencies that discriminate based on religion in recruiting and training foster parents and volunteers and in determining foster-care placements for children who cannot remain in their homes.

123. Defendants were and are on notice that faith-based foster-care child-placement agencies that received federal and state taxpayer funds, including Miracle Hill, provide services in a discriminatory manner based on religion.

124. Defendants have enabled, sanctioned, and ratified, and have failed to implement adequate safeguards against, faith-based foster-care child-placement agencies' use of federal and state taxpayer funds for their own religious purposes, including the agencies' categorical exclusion based on religion of certain members of the public from publicly funded foster-care programs.

125. The federal defendants have also enabled, sanctioned, and ratified, and have failed to implement adequate safeguards against, faith-based foster-care child-placement agencies' use of federal taxpayer funds for their own religious purposes by granting a blanket religious exemption to all subgrantees in the South Carolina Foster Care Program to allow them to violate the religious-antidiscrimination requirement of 45 C.F.R. § 75.300(c).

126. Defendant McMaster has enabled, sanctioned, and ratified, and has failed to implement adequate safeguards against, faith-based foster-care child-placement agencies' use of taxpayer funds for their own religious purposes by issuing South Carolina Executive Order No. 2018-12, which directs the South Carolina Department of Social Services to permit faith-based foster-care child-placement subgrantees to associate "in recruiting, training, and retaining foster parents" with only those "foster parents and homes who share the same faith" as the subgrantees.

127. Defendant Meacham and the South Carolina Department of Social Services have enabled, sanctioned, and ratified, and have failed to implement adequate safeguards against, faith-based foster-care child-placement agencies' use of taxpayer funds for their own religious purposes by implementing South Carolina Executive Order No. 2018-12 and 2018 S.C. Acts 361, § 38.29,

and by permitting faith-based foster-care child-placement subgrantees to recruit, train, and place children with only foster parents and families who share the agencies' preferred faith.

128. By enabling, sanctioning, and ratifying, as well as failing to implement adequate safeguards against, faith-based foster-care child-placement agencies' use of taxpayer funds for their own religious purposes, Defendants have violated the Establishment Clause of the First Amendment because, among other reasons, Defendants' actions, policies, practices, and procedures:

a. have the primary purpose of favoring, preferring, and endorsing certain religious beliefs and certain religious denominations over others and over nonreligion;

b. have the primary effect of favoring, preferring, and endorsing certain religious beliefs and certain religious denominations over others and over nonreligion;

c. have the purpose and effect of preferring the religious beliefs of some people and institutions over the religious beliefs and fundamental rights of others;

d. endorse the religious beliefs of faith-based foster-care child-placement agencies;

e. delegate governmental authority to faith-based foster-care child-placement agencies, permitting these agencies to create religious requirements for gaining access to governmental programs, services, and resources;

f. entangle government with religion;

g. coerce individuals, including vulnerable and impressionable children who are wards of the state placed in the care of faith-based foster-care child-placement agencies, to believe and practice the agencies' preferred faiths without regard to the children's or their biological parents' own faiths; and

h. make the Maddonnas, other prospective foster families, children in foster care, those children's biological parents, and other third parties bear the costs and harms of faith-based foster-care child-placement agencies' religious beliefs or religious practices.

129. By granting to all subgrantees in the South Carolina Foster Care Program a blanket religious exemption from the religious-antidiscrimination requirement of 45 C.F.R. § 75.300(c) without showing that the requirement imposes substantial government-imposed burdens on religious exercise for the individual subgrantees receiving the exemption or providing adequate safeguards to ensure that only substantially burdened subgrantees may avail themselves of the religious exemption, the federal defendants have violated the Establishment Clause of the First Amendment.

130. By granting a religious exemption from the religious-antidiscrimination requirement of 45 C.F.R. § 75.300(c) for Miracle Hill and other subgrantees in the South Carolina Foster Care Program to use religious criteria in selecting among prospective foster-care parents, when compliance with the religious-antidiscrimination requirement of 45 C.F.R. § 75.300(c) would not cause a substantial government-imposed burden on these entities' religious exercise, the federal defendants have violated the Establishment Clause of the First Amendment.

131. Defendants have harmed and violated the Establishment Clause rights of the Maddonnas by using their federal and state tax dollars to underwrite, favor, and endorse religious beliefs to which the Maddonnas do not subscribe and religious denominations to which they do not belong.

132. Defendants' actions also harm other individuals and families who wish to become foster parents or otherwise to work with children in foster care but do not share the religious beliefs

of the faith-based foster-care child-placement agencies that participate in and administer portions of South Carolina's foster-care program.

133. Through the actions described above, Defendants have deprived and continue to deprive Mrs. Maddonna and her family of their rights protected by the Establishment Clause of the First Amendment to the United States Constitution.

Count IV—Federal Defendants
(Fifth Amendment—Equal Protection)
U.S. Const. amend. V

134. Plaintiff Aimee Maddonna incorporates the foregoing allegations as if fully set forth here.

135. The Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the federal government from denying equal protection of the laws.

136. The federal defendants have discriminated and continue to discriminate impermissibly against individuals and families, including the Maddonnas, based on religion by funding the administration of services that they are on notice are being administered in a manner that disfavors certain religious identities and their adherents.

137. By denying to individuals and families, including the Maddonnas, participation in taxpayer-funded federal programs based solely on their religion, the federal defendants have deprived and continue to deprive these individuals and families of the equal dignity, liberty, and autonomy guaranteed by the Fifth Amendment and brand them as inferior by discriminating against them based on their religious beliefs and identities.

138. The federal defendants' actions impermissibly subject non-evangelicals, including Catholics such as the Maddonnas, to different and unfavorable treatment based on religion.

139. Discrimination based on religion—a suspect classification—is presumptively unconstitutional and subject to strict scrutiny.

140. There is no constitutionally adequate justification for the federal defendants' actions.

141. The federal defendants' actions fail to advance any legitimate governmental interest, much less an important or compelling one. On the contrary, the government-supported religious test at issue is antithetical to the government's responsibility to ensure that the best interests of the children in foster-care programs determine the children's placement with foster parents.

142. Through the actions described above, the federal defendants have deprived and continue to deprive Mrs. Maddonna and her family of their rights protected by the equal-protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Count V—Federal Defendants
(Fifth Amendment—Substantive Due Process)
U.S. Const. amend. V

143. Plaintiff Aimee Maddonna incorporates the foregoing allegations as if fully set forth here.

144. The Fifth Amendment's Due Process Clause protects individuals' substantive rights to be free to exercise the religion of their choosing without unjustified governmental intrusion.

145. The federal defendants have enabled, sanctioned, and ratified the use of religious tests to deny the Maddonnas the ability to volunteer or foster in conjunction with South Carolina's federally funded foster-care program based solely on religious criteria. In doing so, the federal defendants have violated and continue to violate the substantive-due-process component of the Fifth Amendment because the federal defendants have burdened Mrs. Maddonna's and her family's liberty interests and penalized their exercise of their fundamental rights to exercise their religion.

146. There is no constitutionally adequate justification for the federal defendants' infringement of Mrs. Maddonna's and her family's fundamental rights. On the contrary, the federal defendants' actions harm not only the Maddonnas and other non-evangelical individuals and couples who wish to become foster or adoptive parents, but also the children in state care awaiting and hoping for placement in stable and loving homes.

147. Through the actions described above, the federal defendants have violated and continue to violate the substantive-due-process protections of the Fifth Amendment to the United States Constitution.

Count VI—South Carolina Defendants
(Fourteenth Amendment—Equal Protection)
U.S. Const. amend. XIV

148. Plaintiff Aimee Maddonna incorporates the foregoing allegations as if fully set forth here.

149. The Equal Protection Clause of the Fourteenth Amendment prohibits states and state officials from denying equal protection of the laws.

150. Violations of the equal-protection guarantee by persons acting under color of state law are subject to redress under 42 U.S.C. § 1983.

151. The South Carolina defendants have impermissibly discriminated and continue to discriminate based on religion against individuals and families, including the Maddonnas, by funding the administration of services that the state defendants are on notice are being administered in a manner that disfavors certain religious identities and adherents.

152. The state defendants have deprived and continue to deprive individuals and families, including the Maddonnas, of equal dignity, liberty, and autonomy, and have branded them as inferior, by discriminating against them based on their religious beliefs and identities.

153. The state defendants' actions impermissibly subject non-evangelicals, including Catholics such as the Maddonnas, to different and unfavorable treatment based on religion.

154. Discrimination based on religion—a suspect classification—is presumptively unconstitutional and subject to strict scrutiny.

155. There is no constitutionally adequate justification for the state defendants' actions.

156. The state defendants' actions fail to advance any legitimate governmental interest, much less an important or compelling one. On the contrary, the government-supported religious test at issue is antithetical to the state defendants' responsibility to ensure that the best interests of the children in the South Carolina Foster Care Program determine the children's placement with foster parents.

157. Through the actions described above, the state defendants have deprived and continue to deprive Mrs. Maddonna and her family of their rights protected by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Count VII—South Carolina Defendants
(Fourteenth Amendment—Substantive Due Process)
U.S. Const. amend. XIV

158. Plaintiff Aimee Maddonna incorporates the foregoing allegations as if fully set forth here.

159. The Fourteenth Amendment's Due Process Clause protects individuals' substantive rights to be free to exercise the religion of their choosing without unjustified governmental intrusion.

160. Violations of the substantive-due-process guarantee by persons acting under color of state law are subject to redress under 42 U.S.C. § 1983.

161. The state defendants have enabled, sanctioned, and ratified the use of religious tests to deny the Maddonnas the ability to apply to volunteer or foster in conjunction with South Carolina's federal- and state-funded foster-care program based solely on religious criteria.

162. In doing so, the state defendants have violated and continue to violate the substantive-due-process component of the Fourteenth Amendment because they have burdened Mrs. Maddonna's and her family's liberty interests and penalized their exercise of their fundamental rights to exercise their religion.

163. There is no constitutionally adequate justification for the state defendants' infringement of Mrs. Maddonna's and her family's fundamental rights.

164. The state defendants' actions harm religious individuals and couples, including the Maddonnas, who wish to become foster or adoptive parents.

165. Through the actions described above, the state defendants have violated and continue to violate the substantive-due-process protections of the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Aimee Maddonna respectfully requests that the Court:

a. declare that the exemption from the religious-antidiscrimination requirement of 45 C.F.R. § 75.300(c) granted by the federal defendants to the South Carolina Foster Care Program on January 23, 2019, was issued in violation of, and violates, the Administrative Procedure Act and the First and Fifth Amendments to the U.S. Constitution;

b. declare that South Carolina Executive Order No. 2018-12 was issued in violation of, and violates, the First and Fourteenth Amendments to the U.S. Constitution;

c. declare that the federal defendants have violated and continue to violate the First and Fifth Amendments to the U.S. Constitution by providing federal tax dollars to faith-

based foster-care child-placement agencies that use discriminatory religious criteria to perform contracted-for governmental services;

d. declare that the state defendants have violated and continue to violate the First and Fourteenth Amendments to the U.S. Constitution by providing taxpayer funds to faith-based foster-care child-placement agencies that use discriminatory religious criteria to perform contracted-for governmental services;

e. enter a permanent injunction prohibiting all Defendants from implementing, enforcing, or relying on the exemption from the religious-antidiscrimination requirement of 45 C.F.R. § 75.300(c) granted by the federal defendant to the South Carolina Foster Care Program on January 23, 2019, or any provision thereof;

f. enter a permanent injunction prohibiting the state defendants from implementing, enforcing, or relying on South Carolina Executive Order No. 2018-12;

g. enjoin all Defendants from expending or providing tax dollars to faith-based foster-care child-placement agencies that use discriminatory religious criteria to perform contracted-for governmental services; and

h. award such further and additional relief as the Court deems just and proper, including reasonable attorneys' fees, costs, and expenses under 42 U.S.C. § 1988, the Equal Access to Justice Act, any other applicable statutes, or the Court's inherent powers.

Respectfully submitted this 15th day of February, 2019.

s/ *Aaron J. Kozloski*

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[Additional submissions by Chairman Scott follow:]

FREEDOM FROM RELIGION *foundation*

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June 20, 2019

The Honorable Bobby Scott
Chair
House Committee on Education and Labor
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member

Dear Chairman Scott and Ranking Member Fox:

We are writing on behalf of the Freedom From Religion Foundation, a national nonprofit with 31,000 members across the country. FFRF protects the constitutional separation between state and church, and educates the public on nontheism.

Our colleagues are going to address some of the specific instances in which RFRA has been abused, so we opted to address that abuse from a wider perspective. We addressed some of the serious legal issues with RFRA in our *amicus* brief in the Hobby Lobby case, a copy of which is appended.[1] In particular, we want to ask a basic question about RFRA that has fallen by the wayside: Why?

The First Amendment and the U.S. Constitution already protect the free exercise of religion. They have for centuries. It's one of our nation's founding principles. So why do we need the Religious Freedom Restoration Act? Why do we need a law to protect that which is already so well protected under the Constitution? We don't.

Religious freedom guarantees the freedom to believe, but not necessarily the freedom to act on that belief. That is as it should be.
We recognize that drawing lines when it comes to government actions that regulate our behavior can be contentious, especially when that behavior is motivated by religion. But two things have long been understood in America.

First, the freedom to believe anything is absolute, but the freedom to act on those beliefs is not. In his letter to the Danbury Baptists, Thomas Jefferson put it like this: "the legitimate powers of government reach actions only, & not opinions."[2] To take the most obvious hypothetical: religion is not a license to murder, even if a person believes that their god is calling on them to kill others.[3] The law prohibiting murder applies to everyone, regardless of their personal religious beliefs. The same

[1] Amicus Brief for FFRF, et al., 2014 WL 333897, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[2] Jan. 1, 1802. *Available at* https://www.loc.gov/loc/lcib/9806/danpre.html.
[3] This is the example the Supreme Court used more than 150 years ago. Reynolds v. U.S., 98 U.S. 145, 166(1878) "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"

is and should be true of other laws, including civil rights laws. Civil rights cannot be violated because of how someone else interprets the will of their god.

Second, the best protection for freedom ***of*** religion is a government that is free ***from*** religion. A secular government, one that respects and fights for the separation between state and church, is the best guarantor of genuine religious liberty. Without this separation, religious liberty is subject to the whims of the ruling majority's preferred religion, which can change over time.

These are the principles the U.S. Constitution lays out. Not every real-world clash of religiously motivated action and the law will be as obviously wrong as murder. Some questions will be harder. But, as a rule, the old legal adage—"Your right to swing your fist ends where my nose begins"—works if slightly amended: your right to exercise your religion ends where my rights begin.

Our Constitution draws the line where the rights of others begin. This means that neutral, generally applicable laws that incidentally burden someone's ability to exercise their religion are entirely permissible. In fact, these laws are necessary for the normal functioning of society. Government's chief purpose is to make and enforce such laws. We want the government to prohibit murder and enforce that prohibition, regardless of what the murderer's religion or god might say.

These two reasonable principles led to RFRA, which disregards them.
These principles are embodied in the case the Supreme Court decided in 1990, the case that launched RFRA, a law which disregards those two sacred principles.

Two Oregon drug counselors, Alfred Smith and Galen Black, used peyote as part of a native American religious ritual. One was a member of that sect, the other just visiting the ceremony. Both were fired. They got fired because drug counselors aren't allowed to use drugs, which is perfectly reasonable for states to ask of their drug counselors. This should not be controversial in the slightest.

Then, the men were denied unemployment benefits because they were fired for cause. Smith and Black were not fighting a criminal conviction. They were not fighting to get their jobs back. They were challenging the denial of unemployment benefits. They were arguing that not receiving unemployment benefits after being fired from their jobs as drug counselors for using drugs violated their free exercise of religion.

To draw a more mainstream analogy, this would be like a Christian losing his driver's license for speeding on the way to church every Sunday morning and arguing that this deprivation burdened his religion. Going to church does not give one a right to speed with impunity.

The Supreme Court did not see a religious liberty issue with saying that drug counselors cannot use drugs and expect to keep their jobs or collect unemployment, no matter what their religion says about drug use. In *Employment Division v. Smith* (1990) it upheld the denial of benefits because the law was not "prohibiting the exercise of religion," and the religious burden was "merely the incidental effect of a generally applicable and otherwise valid provision." General laws—that is, laws that don't specifically target religion, like blanket laws against drug use—that are neutrally applicable *can* burden someone's exercise of religion. In other words, "an individual's religious beliefs" cannot "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[4]

To sum up, the Court quoted *Reynolds v. U.S.* (1878), the decision that overturned Mormons' claim that their religion exempted them from prohibitions on polygamy. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[5]

This constitutional principle has withstood countless attacks from religious groups seeking special exemptions from our laws. In the 1960s, Maurice Bessinger refused to let a minister's wife enter his South Carolina barbeque joint because she was black. He believed he had "a constitutional right to refuse to serve members of the Negro race in his business establishments [and] that to do so would violate his sacred religious beliefs." No court, including the Supreme Court, accepted his argument that the Civil Rights Act was invalid because it "contravenes the will of God."[6]

Likewise, collecting taxes and using them for any purpose, including war, is permissible even if Quakers are pacifists. Child labor laws apply to all businesses, including those run by Christians. Amish employers still have to pay social security taxes, even if their religion is opposed to government support.

Religious hysteria exploded after the *Smith* decision, so Congress passed RFRA: a superstatute that effectively amends every other federal law. RFRA acts as a constitutional amendment without the hassle of going through that process.[7]

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[4] *Smith*, 494 U.S. 872, 878–79.
[5] *Reynolds*, 98 U.S. 145, 166–67.
[6] *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968).
[7] *See* FFRF's *Burwell v. Hobby Lobby* amicus brief, *supra* n.1.

RFRA upended constitutional religious freedom. It goes too far and privileges religion.

RFRA did exactly what the Court feared in *Smith* and *Reynolds*, it elevated one individual's religious beliefs above the law. After the *Hobby Lobby* decision, individuals can even use their multi-billion dollar corporations to impose their religion on employees in spite of the law. This, incidentally, violates the first principle above: that religion can never excuse violating the rights of another citizen.

Some supporters of RFRA certainly had good intentions at its inception. But others saw a sinister potential in the law and have been working to use it in ways that may not have been intended, but which are required by the text of the law itself.

Their goal is to use RFRA to redefine religious freedom. To shifts the constitutional standard from one that protects belief to one that allows that belief to be imposed on others through actions. The result is that religiously motivated acts are exempted from our laws. RFRA supporters insist that it is not enough to be able to believe, they must be free to act on that belief no matter what the cost or impact on others.

The true impact of RFRA is simple: it privileges religion. It grants religion a special, favored status. It's the ultimate opt-out. But it also gives believers the ability to impose their religion on other citizens, as we saw with the *Hobby Lobby* case, and this includes the right to discriminate against other citizens. Those seeking to redefine religious freedom don't want protection, they want power.

RFRA does not protect religion. RFRA privileges religion.

Nearly 150 years ago, the Supreme Court asked if a citizen could avoid complying with laws "because of his religious belief." The resounding answer was "No." This would make "religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[8] In short, to allow religion to trump the civil law was to invite anarchy—or, if applied to favor only the majority's religion, theocracy.

But under RFRA, the law bows to sincerely held religious beliefs. It is time for that to change. RFRA should be repealed. Otherwise, it should be amended so to make it clear that RFRA cannot justify injuring another citizen or burdening the rights of that citizen.

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[8] *Reynolds*, 98 U.S. 145, 166–67.

No. 13-354

In The Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioner,
v.
HOBBY LOBBY STORES, INC., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, BISHOPACCOUNTABILITY.ORG, CHILDREN'S HEALTHCARE IS A LEGAL DUTY, THE CHILD PROTECTION PROJECT, THE FOUNDATION TO ABOLISH CHILD SEX ABUSE, SURVIVORS FOR JUSTICE, AND THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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a ruling in this case that RFRA is unconstitutional is needed to more securely protect our nation's children.

SUMMARY OF ARGUMENT

This case is testimony to the extreme religious liberty rights accorded to believers by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (2012), at the expense of others. The intense passions about religious freedom and women's reproductive health in this case have obscured the issue that should be decided before this Court reaches the merits: RFRA is unconstitutional.

RFRA is Congress's overt attempt to takeover this Court's role in interpreting the Constitution. "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)." *Boerne v. Flores*, 521 U.S. 507, 512 (1997). Accordingly, it "contradicts vital principles necessary to maintain separation of powers . . . ." *id.* at 536, and Article V. *Id.* at 529. RFRA also is beyond Congress's power, as an illegitimate exercise of power under the Commerce Clause.

RFRA also accords religious believers extreme religious liberty rights that yield a political and fiscal windfall in violation of the clearest commands of the Establishment Clause in a long line of cases. *Amici Curiae*, who are united in their concern that RFRA endangers the

vulnerable—who would otherwise be protected by the neutral, generally applicable laws of this country—respectfully ask this Court to hold that RFRA is unconstitutional once and for all, and to restore common sense to United States religious liberty guarantees.

ARGUMENT

This amicus brief makes an argument that has been lost in the intense public debate between claimed religious liberty for for-profit corporations and women's reproductive health: the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb , is unconstitutional.

The issue of RFRA's constitutionality has not been raised in this case, or the vast majority of other RFRA cases involving federal law, because the religious claimants do not challenge it, the federal government has chosen not to,[2] and courts

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[2] The Attorney General determines when to defend a federal statute and when not to. The default position is to defend acts of Congress, but this is not a hard and fast rule, and the Attorney General owes fealty to the Constitution, not Congress. Recently, Attorney General Eric Holder refused to defend the constitutionality of the Defense of Marriage Act, Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Rep. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html, in *United States v. Windsor*, 133 S.Ct. 2675, 2683 (2013). *Windsor*, 133 S.Ct at 2683. The issue was neither raised nor addressed in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005), which is

rarely take up the issue *sua sponte*. Thus, there have only been a few federal courts reaching the issue. *See, e.g., Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (holding RFRA as applied to Age Discrimination in Employment Act is constitutional as it did not violate the separation of powers principles nor the Establishment Clause, and was a proper exercise of Congressional power under the Commerce Clause, in response to Plaintiff minister invoking age discrimination claim and that RFRA was unconstitutional); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (holding RFRA constitutional as applied to federal law under Art. I powers, after the district court raised question of RFRA's constitutionality).

The decision in *Emp't Div. v. Smith*, 494 U.S. 872 (1990), is a landmark, summary, and straight explanation of this Court's entire free exercise jurisprudence, in which this Court carefully considered and weighed the various possibilities and the most appropriate balance between history, doctrine, and the Court's experience over 100 years with free exercise cases. With a simple majority vote for RFRA ,[3] Congress shoved the Court aside

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this Court's only other RFRA case other than *Boerne v. Flores*, 521 U.S. 507 (1997).

[3] RFRA was not passed unanimously in either the House or Senate, despite its proponents' claims. It was passed in the House by a procedure euphemistically called "unanimous consent." 139 CONG. REC. H8713 (daily ed. Nov. 3, 2003).

and handed believers the most extreme religious liberty regime ever in place in the United States.

This Court correctly held in *Smith* that under the Free Exercise Clause, "the approach in accord with the vast majority of our precedents, is to hold the [strict scrutiny] test inapplicable to [free exercise] cases" involving neutral, generally applicable laws. *Id.* at 885. For the Court, the case was essentially a case of first impression in that it involved a demand for accommodation where the underlying religious conduct was illegal, which distinguished it from the *Sherbert v. Verner*, 374 U.S. 398 (1963), line of cases. Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, The Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1673 (2011). The result was that two drug counselors who were fired after using the illegal drug peyote, during Native American Church religious services, could not obtain unemployment compensation, because they had violated state law. The Free Exercise Clause did not provide immunity from the state law governing peyote or unemployment compensation. *Emp't Div. v. Smith*, 494 U.S. at 890.

This Court explained:

> [G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's

> obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense.

494 U.S. at 885 (internal quotation marks and citations omitted). Accordingly, strict scrutiny in the *Smith* case "would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability." *Boerne v. Flores,* 521 U.S. 507, 513 (1997.

Lobbyists for religious organizations and some civil rights groups responded to *Smith* with hyperbole and exaggeration, claiming that the Supreme Court had "abandoned" religious liberty. They mischaracterized the Court's previous holdings. Their representations to Congress that the First Amendment mandates exemptions from neutral, generally applicable laws also incorrectly portray the Framers' intent and the history of free exercise in the states. *See Boerne,* 521 U.S. at 541 (Scalia, J., concurring); *see also* Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why it is Not Protected Under Religious Liberty Constitutional Provisions,* 18 WM. & MARY BILL RTS. J. 953 (2010) [hereinafter Hamilton, *Licentiousness*]; Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective,* 60 GEO. WASH. L. REV. 915 (1992); Ellis West, *The Case Against a Right to*

Religion-Based Exemptions, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

This Court predicted in *Smith* that legislatures would be amenable to requests for accommodation. 494 U.S. at 890. The decision proved to be prescient: while the rhetoric on Capitol Hill furiously attacked this Court's interpretation of the First Amendment as the end of religious liberty, the federal government and the states where Native American Church members practice their religion enacted exemptions for the sacramental use of peyote.[4] This underscores how misguided the attack on *Smith* was.

The hearings before Congress were almost exclusively a litany of criticism against this Court and the *Smith* decision, accompanied by demands that Congress reverse this Court's reading of the First Amendment. As this Court stated, "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990)." *Boerne*, 521 U.S. at 512.

RFRA was enacted three years after *Smith* was decided. It handed religious claimants the constitutional standard that drug counselor Smith had demanded but that the Court had thoughtfully

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[4] *See, e.g.*, David Perry Babner, *The Religious Use of Peyote After* Smith II, 28 IDAHO L. REV. 65 (1991); Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 474-77 (2012).

rejected. The result was that religious entities obtained extreme rights to trump constitutional, neutral, generally applicable laws, in defiance of the Court's opinion.

In 1997, this Court, in a majority decision authored by Justice Kennedy, held that RFRA was unconstitutional in *Boerne v. Flores,* 521 U.S. 507 (1997), invoking several constitutional bedrock principles. First, RFRA is a violation of the separation of powers as a takeover of the Court's primary role as interpreter of the Constitution, *Boerne*, 521 U.S. at 519, 523–24. Second, it is beyond Congress's power. *Id.* at 536. Third, RFRA's enactment by simple majority vote circumvented the rigorous requirements under Article V to amend the Constitution. *Id.* at 529. These defects remain, even when RFRA is solely applicable to federal law, and this Court should invalidate RFRA once and for all.

To quote Gertrude Stein, "[a] rose is a rose is a rose." Gertrude Stein, *Sacred Emily*, Geography and Plays (1922). The plain language of RFRA makes the case that it is a shameless takeover of the Free Exercise Clause, constitutional doctrine, and "all . . . free exercise cases." 42 U.S.C. § 2000bb(b)(1) (2012). The very title of the law indicates that it is a "restoration" of something that previously existed. It invokes the "framers" for a standard they would not have adopted. *See* 42 U.S.C. § 2000bb(a)(1) (2012); *see also Boerne*, 521 U.S. at 541 (Scalia, J., concurring); Hamilton, *Licentiousness*, *supra*; Hamburger, *supra*; West, *supra*. It unabashedly states that the statute's

purpose is to "restore the compelling interest test as set forth in [the Supreme Court's First Amendment free exercise cases] *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (2012).

In short, RFRA is "restoring" this Court's doctrine in cases where this Court had held it did not belong. *See also* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L. J. 65, 119–20 (1996) (arguing that based on its "proclaimed purpose, RFRA violates the separation of powers doctrine . . . .").

RFRA plagiarizes this Court's doctrinal terminology and approach by choosing the Court's trigger for free exercise cases and a level of scrutiny from prior cases. It even replicates the burdens on the parties in free exercise cases:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (2012). This plain language establishes that Congress was aggrandizing its power by taking over this Court's power to interpret the Constitution. On its face, therefore, RFRA is not an ordinary statute, and is in violation of the separation of powers and Art. V. Moreover, the only class of beneficiaries for these extreme rights against constitutional laws is religious, which violates the Establishment Clause. No matter how much one pretends that RFRA is "just a statute," it is in fact an unconstitutional enactment.

I. RFRA Violates the Separation of Powers

There is nothing subtle about RFRA's encroachment on this Court's power. With RFRA, Congress selected the constitutional standards it prefers and required them to be applied in every circumstance where the Court has ruled it should not be applied. *See* Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 6 (1995) (arguing that RFRA violates the separation of powers doctrine because "it undermines the most fundamental power held by any branch of government: the power to determine its own limitations.").

RFRA was and is a novel statute, which has not yet been replicated. For that reason alone, this Court should be wary. "Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2586 (2012) (Roberts, C.J.) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3159 (2010)) (internal quotation marks omitted).

RFRA is Congress's attempt to concoct its own free exercise clause out of the Court's constitutional doctrine. This Court's terminology is Congress's terminology. The title alone says Congress is restoring a doctrine, not introducing anything new. RFRA lifts this Court's doctrinal language including "substantial burden" and "compelling interest."[5] And Congress "restores" its two favorite free exercise decisions, *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). RFRA even replicates the burdens on the parties. 42 U.S.C. § 2000bb-1.

At the same time, Congress shopped among various other constitutional parameters. To these pre-existing free exercise doctrines, it added a new element for the benefit of religious believers. As

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[5] Congress borrowed free exercise doctrine up to the point it could hand religious lobbyists the maximum benefit, but was not even satisfied with that. It also added narrowly tailoring not yet seen in the Court's free exercise cases. .

this Court noted in *Boerne*, the "least restrictive means" test was not the test used in previous free exercise cases, *Boerne*, 521 U.S. at 535, even in *Sherbert* or *Yoder*, The concept of extremely narrow tailoring for strict scrutiny, however, is present in this Court's other constitutional cases invoking strict scrutiny, *e.g.*, under the Equal Protection Clause when a law includes a race-based distinction. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989).

Then Congress ordered the federal courts to apply this new package of free exercise rights to the very laws this Court had held should not receive the benefit of strict scrutiny: neutral, generally applicable laws. *Boerne*, 521 U.S. at 515; *Smith*, 494 U.S. at 879.

RFRA's legislative history supports reading it as a takeover of this Court's power to interpret the Constitution, as it focuses nearly exclusively on members of Congress and testimony castigating the Supreme Court for its First Amendment interpretation in *Smith*. To say that RFRA is not in fact an attempt to overrule this Court's constitutional interpretation is to engage in high-level intellectual gymnastics divorced from its text, history, and fundamental common sense.

If it were constitutional, RFRA is a formula that would make it possible for Congress to meddle with any constitutional doctrine and decision, and move the Court to the sidelines as political winds shift constitutional standards by simple majority votes. *See* Christopher L. Eisgruber & Lawrence G.

Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 469-70 (1994) (arguing that RFRA is unconstitutional because it violates principles of religious freedom, it exceeds Congress' authority, and it is an "assault upon the judiciary's interpretive autonomy."). It ignores this Court's long experience in crafting and considering the proper balance of rights. Before RFRA, this Court's role was to engage in ongoing oversight and consideration of how each constitutional rule operates through the decades and centuries most effectively to achieve the Constitution's multiple ends. If Congress can unilaterally insert its preferred standards whenever politically pressured to do so, this Court's role has been preempted. *See* Aurora R. Bearse, Note, *RFRA: Is it Necessary? Is it Proper?*, 50 RUTGERS L. REV. 1045, 1066 (1998); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 3 (1998).

As this Court stated in *Boerne*, "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536.

II. RFRA Violates Article V

Article V imposes extraordinary limits on amendments to the Constitution, resulting in only 27 amendments over the course of 225 years:

> The Congress, whenever two thirds of both Houses shall deem it necessary,

> shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. U.S. Const. art. V.

The Framers chose this complicated and difficult route to ensure stability and maintenance of the separation of powers. *See* Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410, 1447 (1998). *Cf.* William Van Alstyne, *The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292–303 (1996), cited in *Boerne*, 521 U.S. at 529.

This Court in *Boerne* explained the separation of powers defects under the umbrella of Congress's power under the Fourteenth Amendment, by reasoning first from this Court's role vis-à-vis the Bill of Rights regarding the "traditional separation of power between Congress and the Judiciary," stating that, "[t]he first eight Amendments to the Constitution set forth self-executing prohibitions on government action, and this Court has had primary authority to interpret those prohibitions." *Boerne*, 521 U.S. at 524. The Court considered the argument that Sec. 5 of the Fourteenth Amendment was intended to invest Congress with a new power to create constitutional rights against the states—with the understanding that they could *not* be created against the federal government. While the history of the Fourteenth Amendment supports that Congress may enforce constitutional rights against the states, even in a prophylactic manner, the Court concluded that under the Fourteenth Amendment, "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." *Boerne*, 521 U.S. at 524. This Court's cases further confirmed that even Sec. 5 of the Fourteenth Amendment had not "endowed Congress with the power to establish the meaning of constitutional provisions." *Id.* at 527. With RFRA , Congress unilaterally usurped that authority: RFRA "appears . . . to attempt a substantive change in constitutional protections." *Id.* at 532. *See also, id.* at 534.

Accordingly, when the courts apply RFRA, the primary doctrine comes from the Court's constitutional free exercise cases, as the parties in

this case have urged this Court to do. "Given this restorative purpose, Congress expected courts considering RFRA claims to 'look to free exercise cases decided prior to *Smith* for guidance.' S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); See H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same)." Br. of Petitioner Kathleen Sebelius, Secretary of Health and Human Services, et al., Jan. 10, 2014, at 16. Br. for Respondents at 23–28, *Sebelius v. Hobby Lobby Stores, Inc.*, 133 S.Ct. 641 (2012) (No. 13-354); Br. for Petitioners at 17–19, *Conestoga Wood Specialities Corp. v. Sebelius*, (No. 13-356), 2014 WL 173487. *See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1131–32 (10th Cir. 2013) (en banc); *Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health and Human Servs.*, No. 13-1144, 2013 WL 1277419, at *2–3 (3d Cir. Feb. 8, 2013).

RFRA 's defenders say that RFRA is "just a statute" that is different from a constitutional amendment. Yet, everything passed by Congress is "just a statute." It is a meaningless truism to say that just because a law passes through Congress and is signed by the President, it is a statute. Some statutes are aggrandizements of Congress's power, or fail to follow required procedures, and, therefore, are unconstitutional statutes. *E.g., Clinton v. City of New York,* 524 U.S. 417 (1998) (holding Line Item Veto Act unconstitutional); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 21, 211 (1995) (holding § 27A(b) of the 1934 Act unconstitutional because it would require federal courts to reopen final judgments entered before the provision was enacted); *Metro. Washington Airports Auth. v.*

Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 253 (1991) (holding that congressional delegation of veto power to review board composed of congressmen unconstitutional); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding unconstitutional a section of the Immigration and Nationality Act authorizing a one-house resolution to invalidate Executive Branch decision to allow deportable alien to remain in the country); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Comptroller General, as congressional agent, may not exercise executive functions). That describes RFRA.

III. RFRA Is Not a Valid Exercise of Congressional Power

Article I grants no federal enumerated power to Congress that justifies RFRA as applied to federal law. It is in fact, simply, an enactment by simple majority vote of constitutional doctrines that Congress prefers. There is no enumerated power over religious liberty. The only conceivable theory to support its application to federal law is the Commerce Clause, and it is an illegitimate law under this Court's Commerce Clause jurisprudence.

The Commerce Clause cannot be used to regulate that which is noneconomic. RFRA is nothing other than a constitutional standard of review, which means it is solely aimed at laws. That is what constitutional standards of review measure. Yet, the law is by its nature noneconomic.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that a legitimate exercise power under the Commerce Clause requires a direct and substantial effect on commerce, and that to uphold the Gun-Free School Zones Act in that case, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.[6] *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2646 (2012) (Scalia, J., dissenting) ("At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants."); *Sebelius*, 132 S.Ct. 2566, 2586-87 (2012). To conclude that RFRA is a direct regulation of commerce with a substantial effect on commerce, this Court would have to "pile inference upon inference."

RFRA does not directly regulate any activity in commerce itself, but rather the law, which is noneconomic in nature. To be sure, religious entities have tried to undergird Congress's power to enact RFRA by arguing that religious entities otherwise operate in commerce. "But if every person comes within the Commerce Clause power

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[6] In *Lopez*, the Court also held that the Gun-Free School Zones Act was unconstitutional in part because Congress did not consider its authority under the Commerce Clause. 514 U.S. at 562-63. The same is true of RFRA.

of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end." 132 S.Ct. at 2648.

Under similar reasoning, the private right of action in the Violence Against Women Act was held as beyond Congress's power under the Commerce Clause, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000). *See also Reno v. Condon*, 528 U.S. 141, 142 (2000); *cf. Gonzales v. Raich*, 545 U.S. 1, 25-26 (2005) (finding law valid under the Commerce Clause where it "directly regulates economic commercial activity"). *See also* Lara A. Berwanger, Note, *White Knight?: Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?*, 72 FORDHAM L. REV. 2355, 2382 (2004).

RFRA 's novel tack of usurping this Court's constitutional doctrine as the substance of an ordinary statute is unconstitutional as against the states because it is beyond Congress's power, see *Boerne*, and unconstitutional when applied to federal law, because the Commerce Clause does not

justify regulation of the law *per se*, which is noneconomic in nature.[7]

IV. RFRA Violates the Establishment Clause

Defenders of RFRA say it cannot be unconstitutional on the theory that Congress can carve up its laws however it sees fit. After all, Congress's own efforts are scaled back by this self-imposed law. This is, in fact, an incomplete description of the necessary issues to be considered under the Religion Clauses.

The Establishment Clause prevents Congress from favoring religious individuals or entities. It is after all, "[t]he clearest command of the Establishment Clause. . . that one religious

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[7] Nor could RFRA be constitutional under Congress's spending or taxing powers. Such a preference for religious believers to overcome neutral, generally applicable fiscal or tax laws would be an extraordinary financial benefit designed solely for religious actors, and a patent violation of the Establishment Clause, as discussed in the next section. RLUIPA's prison provisions have been upheld under the Spending Clause, but RLUIPA regulates states and local governments, not individuals, and the relevant funding flows to prisons, not religious persons. *See Sossamon v. Texas*, 560 F.3d 316, 328 (5th Cir. 2009), *aff'd*, 131 S.Ct. 1651 (2011); *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006); *Benning v. Georgia*, 391 F.3d 1299, 1306–07 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 606–09 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002).

denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). This command is particularly strong when financial benefit is at stake. *See also Mitchell v. Helms*, 530 U.S. 793, 809 (Thomas, J., plurality) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, the Court has consistently turned to the neutrality principle, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."); *Lee v. Weisman*, 505 U.S. 577 (1992); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). RFRA carves up every neutral, generally applicable federal law (i.e., those that are constitutional under the Free Exercise Clause) for the benefit solely of religious actors and it does so by granting extreme rights against otherwise constitutional statutes. This violates the Establishment Clause.[8]

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[8] Even if this Court did not invalidate RFRA under the Establishment Clause on its face, it is undoubtedly unconstitutional as a violation of the separation of church and state in many applications. *See, e.g.*, Br. for Church-State Scholars Frederick Mark Gedicks, et al. as Amicus Curiae Supporting Petitioner, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354. *See also* Sara Brucker, Navajo Nation v. United States Forest Service*: Defining the Scope of Native American Freedom*, 31 ENVIRONS ENVTL. L. & POL'Y J. 273, 292 (2008). The same can be said about RLUIPA. See, e.g., Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized*

This Court has explained how extreme RFRA 's "stringent test," *Boerne*, 521 U.S. at 533, is as applied to state law, and the principle is no different when applied to federal law:

> The stringent test RFRA demands of state law reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If compelling interest really means what it says, many laws will not meet the test. The test would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the

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Persons Act of 2000: Unconstitutional and Unnecessary, 10 WM. & MARY BILL RTS. J. 189, 189 (2001).

> position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.

Boerne, 521 U.S. at 533–34 (citations omitted) (internal quotation marks omitted).

Imposing this gauntlet on every federal law forces the needs of other believers and nonbelievers to be subservient to the believers invoking RFRA. For example, the women in Hobby Lobby's employ were hired under the protection of Title VII's prohibition against religious discrimination, 42 U.S.C. § 2000e-2(a)(1) (2012). Therefore, Hobby Lobby cannot mandate that its employees share its owners' religious beliefs, and, in this religiously diverse society, many female employees likely will have their own, different beliefs. These women cannot, under the Tenth Circuit's reasoning and Hobby Lobby's invocation of RFRA, get coverage of widely accepted medical care consistent with their own religious beliefs, because of their employer's beliefs. That is an undue preference for one religion over another, which this Court's cases have long forbidden. *See* Ruth Colker, *City of Boerne Revisited*, 70 U. CIN. L. REV. 455, 465, 473 (2002) (arguing that the Court could have decided *City of Boerne* by ruling that RFRA violated the Establishment Clause because the compelling interest standard "pose[d] the problem of possibly providing undue preferential treatment to religious entities without balancing other interests . . . .[,]" and thus, the RLUIPA is also "unconstitutional not because it violates City of Boerne's proportionality and congruence test, but because it violates the

Establishment Clause in its attempt to protect religious freedom."). *See generally* Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 230 (2006) (arguing that the RLUIPA, as applied to auxiliary use claims, may violate the Establishment Clause because it "favor[s] religion over irreligion.").

RFRA is being invoked in this case as a license for employers to influence their female employees' contraception choices, but, because of the way that RFRA operates, this case actually represents just the tip of the iceberg. As Justice Kennedy has noted, the test in RFRA creates the potential for required religious exemptions from civil obligations of almost every conceivable kind. *Boerne*, 521 U.S. at 533-34. For example, the contraception mandate at issue in this case is just one element of a list of preventive requirements for health plans, which also includes certain immunizations; "evidence-informed preventive care and screenings" for infants, children, and adolescents; and domestic violence screening and counseling, among others. 42 U.S.C. § 300gg-13 (2012). If Hobby Lobby can deploy RFRA to block coverage of women's reproductive health, the next believer will argue against vaccinations, and the next against screenings for children or domestic violence screening and counseling. There is no limit to the variety of religious believers in the United States, and good reason to know that the vulnerable will pay the price. It is no answer to say that protection of the vulnerable always serves a

"compelling interest," as the "least restrictive means" analysis tilts the balance away from all those protected by the law and toward the religious claimant determined to overcome the law.

The RFRA preference is not only a matter of believers obtaining a political advantage over public policy issues. RFRA also rewards believers with financial benefits. For example, it permits for-profit businesses like Hobby Lobby and Conestoga Wood to carve up neutral, generally applicable laws to their financial benefit, and to the financial detriment of other arts and crafts and cabinet stores of other faiths or no faith, favoring some believers in a way that this Court's precedents have never allowed. This Court has never allowed the government to pick and choose who receives financial benefits according to belief (or lack thereof). *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002) (upholding voucher system only because it covered all schools, religious and non-religious); *Texas Monthly, Inc.*, 489 U.S. at 2 (holding unconstitutional tax exemption only applicable to religious publications); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding statute authorizing one-minute period of silence in all public schools for "meditation or voluntary prayer" violates the First Amendment because it was entirely motivated by a purpose of advancing religion); *Estate of Thornton v. Caldor, Inv.*, 472 U.S. 703 (1985) (holding statute unconstitutional because it imposed an absolute duty on employers and employees to conform their business practices to the practices of one particular religion); *Larkin*, 459 U.S. at 116 (state statute granting churches

and schools the power to reject liquor license applications for locations within 500-foot radius of the church or school violates the Establishment Clause); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947) (upholding bus service to religious schools, in addition to public schools, because it was available to all students). *See also Mitchell,* 530 U.S. at 840 (2000) (O'Connor J., concurring), quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 847, (1995) (O'Connor, J. concurring) ("Although '[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'"); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 690 (1994) (holding that a statute creating separate school district for religious enclave violated the Establishment Clause).[9]

Moreover, federal law then rewards believers who prevail under RFRA with attorneys' fees, which means that taxpayers pay for believers to demand a personal accommodation that is not constitutionally required. 42 U.S.C. § 1988 (2012). Therefore, taxpayers are paying for believers' litigation in circumstances where the Constitution

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[9] RFRA also creates perverse profit incentives for for-profit businesses to claim religious rights. Were Hobby Lobby to prevail in this case, it would be able to drive its overhead costs down, which would permit it to push prices down, and therefore trump other arts and crafts stores in the marketplace.

does not require the accommodation. That is a novel, and truly stunning benefit to be accorded to believers alone. If taxpayer standing ever were justified, this is the law that would justify it. *Flast v. Cohen*, 392 U.S. 83 (1968). The Establishment Clause violation is straightforward: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

The financial imbalance between religious believers and other citizens is even more extreme than it might seem at first blush, because RFRA lets religious citizens rewrite any federal law they don't like, to their benefit. RFRA forces other citizens to enter a second round, this time in federal court, to pursue their policy convictions. Believers, like all citizens, can ask Congress for exemptions, *see Smith*, 494 U.S. at 879-80, but if an exemption is denied through duly enacted legislation, RFRA invites the believer into the judicial system to trump the duly enacted public policy. After having fought in the political process, the objecting taxpayers must then expend their own funds in federal litigation to protect the law that was passed, assuming they can intervene or obtain taxpayer standing, and they must do so under a standard that places a heavy thumb on the side of the balance of the religious believer. In short, religious believers are getting two bites at the public policy apple.

In sum, RFRA 's invalidation of constitutional laws to the benefit solely of religious

actors, is a patent preference for believers, which violates long-settled and critically important principles under the First Amendment's Establishment Clause.

CONCLUSION

The Religious Freedom Restoration Act was held unconstitutional in *Boerne v. Flores*, 507 U.S. 521 (1997), as a violation of separation of powers, federalism, and Art. V procedures. Under pressure from religious lobbyists and intent on trumping this Court's constitutional free exercise doctrine, Congress ignored much of the *Boerne* reasoning, and re-enacted RFRA following *Boerne* as a law that only applies to every federal law. Its constitutionality has not been widely considered, because the religious claimants do not raise it, the Attorney General has chosen not to, and courts have not raised it *sua sponte*. The result is that this novel federal statute, which is one of the most aggressive attacks on this Court's role in constitutional interpretation in history, has fomented culture wars in the courts like the one ignited by for-profit employers in this case.

RFRA violates the separation of powers and Article V, exceeds Congress's enumerated powers, and violates the Establishment Clause. Accordingly, *Amici Curiae* respectfully request this Court address its constitutionality and hold RFRA unconstitutional.

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FIGHTING HATE FOR GOOD

June 25, 2019

The Honorable Bobby Scott
Chairman
House Committee on Education and Labor
Washington. D.C. 20515

The Honorable Virginia Foxx
Ranking Member
House Committee on Education and Labor
Washington. D.C. 20515

Dear Chairman Scott and Ranking Member Foxx,

We write to provide the views of ADL (Anti-Defamation League) in advance of the House Education and Labor Committee hearing on "Do No Harm: The Misapplication of the Religious Freedom Restoration Act" and ask that this statement be included as part of the official hearings record.

ADL and Religious Freedom

For more than a century, ADL has been an ardent advocate for religious freedom for all Americans – whether in the majority or minority. We have been a leading national organization promoting interfaith cooperation and intergroup understanding. Among ADL's core beliefs is strict adherence to the separation of church and state effectuated through both the Establishment Clause and the Free Exercise Clause of the First Amendment. As an organization with deep roots in the Jewish community, we do not come to this position out of hostility towards religion. Rather, our position reflects a profound respect for religious freedom and a deep appreciation for America's extraordinary diversity of religious communities. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America, and to the protection of all religions and their adherents.

ADL believes that true religious freedom is best achieved when all individuals are able to practice their faith or choose not to observe any faith; when government neutrally accommodates religion but does not favor any particular religion; and when religious belief is not used to harm or infringe on the rights of others through government action or others in the public marketplace.

The United States government should not sanction discrimination in the name of religion – and it should not fund it. The right to individual religious belief and practice is fundamental. But there should be no license to discriminate with government authority or funds. Religion should not be used as a sword to restrict someone else's rights or to thwart federal or state civil rights or anti-discrimination laws.

Background on and Misinterpretation of the 1993 Religious Freedom Restoration Act

The U.S. Supreme Court's unexpected and troubling decision in *Employment Division v. Smith* minimized constitutional religious liberty protections in the context of general and neutral laws that apply

across the board without exception.[1] Prior to 1990, when a general and neutral law or government rule substantially burdened religious exercise, the Court applied the stringent strict scrutiny standard under which government rarely prevails. Post-*Smith*, however, the Court applied the minimal rational basis standard under which government most frequently prevails. Thus, the *Smith* decision left individuals and religious institutions with very limited legal recourse to challenge general and neutral laws burdening religious exercise.

In response to this decision, ADL and a broad coalition of religious freedom advocates from across the political spectrum actively supported the 1993 Religious Freedom Restoration Act ("RFRA") that was designed to reinstate the Pre-*Smith* legal standard by requiring the government to demonstrate the strict scrutiny standard when a general and neutral federal, state, or local law or rule "substantially burdened" the religious exercise of individuals or faith-based institutions.[2] However, RFRA was never intended as a vehicle to discriminate or infringe on the rights of others. Furthermore, it was not meant to apply to for-profit entities or be raised as a legal defense in private lawsuits or disputes to which the government is not a party.

In the decade after RFRA's enactment, ADL became concerned by misinterpretations of the law, which impose religious beliefs on others. In 2007, the Department of Justice, Office of Legal Counsel issued a deeply disturbing opinion authorizing use of RFRA to override anti-discrimination protections in government contracts.[3]

The U.S. Supreme Court further misinterpreted RFRA in its 2014 decision in *Burwell v. Hobby Lobby*.[4] That decision is highly problematic for two reasons. First, the Court ruled that for-profit, closely-held corporations could invoke RFRA's powerful protections. Second, the Court held that RFRA could be used to infringe on the rights of others – e.g. permitting businesses to refuse provision of comprehensive employee health insurance, inclusive of prescription contraception coverage, as required by the Affordable Care Act. Furthermore, the decision left the door open to RFRA being used by for-profit business to discriminate except on the basis of race.

Misinterpretation of RFRA culminated with then-Attorney General Jeff Sessions issuing an October 6, 2017 memorandum to all federal agencies on "Federal Law Protections for Religious Liberty."[5] It misconstrues RFRA as vehicle permitting discrimination based on sincerely-held religious beliefs. The memo carves out unprecedented legal exemptions that would allow for-profit businesses to turn away customers based on religion and discriminate against employees in hiring or provision of benefits, including by federal contractors.

As outlined below, this memo has been used as the basis for executive and agency action that sanctions discrimination and other forms of harm. Indeed, the Trump administration has established a track record of subordinating civil rights laws in the name of excessively broad and unsound notions of "religious liberty." Such discrimination is in direct conflict with longstanding U.S. Supreme Court precedent. Over

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[1] 494 U.S. 872 (1990).

[2] In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the U.S. Supreme Court invalidated RFRA with respect to its application to the states.

[3] "Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act," John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, June 29, 2007, https://www.justice.gov/file/451561/download (web-page last visited June 21, 2019).

[4] 134 S. Ct. 2751 (U.S. 2014).

[5] "Federal Law Protections for Religious Liberty," Office of the Attorney General, October 6, 2017, https://www.justice.gov/opa/press-release/file/1001891/download (web-page last visited June 19, 2019).

30 years ago the Court ruled that religious exemptions which detrimentally affect nonbeneficiaries would violate the First Amendment's Establishment Clause.[6] Even in *Burwell v. Hobby Lobby Stores*, every member of the Court authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered when evaluating requests for religious accommodations under RFRA.[7]

HHS Waiver to South Carolina Foster Care Agencies That Permits Discrimination against Jews, LGBTQ People and Others

Earlier this year, the U.S. Department of Health and Human Services (HHS) invoked RFRA to grant a waiver to South Carolina from federal regulations prohibiting religious discrimination by federally funded, faith-based foster care agencies.[8] The State filed the waiver application because Miracle Hill Ministries, a South Carolina, taxpayer-funded foster care agency, sought to to discriminate against prospective foster parents on the basis of its religious beliefs.

Miracle Hill has a record of discrimination. Indeed, last year it rejected a woman, who had been a foster parent in Florida, as a volunteer mentor for foster children under its care simply because she is Jewish.[9] More recently, another Jewish woman[10] and a Catholic[11] woman alleged that Miracle Hill rejected them as foster parents because of their faith.

The discrimination allowed by the waiver is not limited to Jews and Catholics. Indeed, according Miracle Hill's foster parent policy:

> *A foster parent for Miracle Hill must: 1) be a born-again believer in the Lord Jesus Christ as expressed by a personal testimony and Christian conduct; 2) be in agreement without reservation with the doctrinal statement of Miracle Hill Ministries; 3) be an active participant in, and in good standing with, a Protestant church; 4) have a genuine concern for the spiritual welfare of children entrusted to their care; 5) have a lifestyle that is free of sexual sin (to include pornographic materials, homosexuality, and extramarital relationships)* ... (emphasis added).[12] [13]

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[6] *See Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985); *see also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

[7] *See* 134 S. Ct. at 2760.

[8] "Re: Request for Deviation or Exception from HHS Regulations 45 CFR 75.300(c)," U.S. Department of Health and Human Services, Administration for Children & Families, Jan. 23, 2019, https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf (web-page last visited June 19, 2019).

[9] "Scrutiny of Miracle Hill's faith-based approach reaches new level," Angelia Davis, Greenvilleonline.com, March 1, 2018, https://www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/ (web-page last visited June 19, 2019).

[10] "I was barred from becoming a foster parent because I am Jewish," Lydia Currie, JTA, Feb. 5, 2019, https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish (web-page last visited June 19, 2019).

[11] "AP Exclusive: Lawsuit claims discrimination by foster agency," Meg Kinnard, AP, Feb. 15, 2019, https://apnews.com/ed3ae578ebdb4218a2ed042a90b091c1 (web-page last visited June 19, 2019).

[12] "Miracle Hill Foster Home," https://miraclehill.org/wp-content/uploads/2016/11/Foster-Care-MHM-req.pdf (web-page last visited Feb. Jan. 30, 2019).

[13] *See Maddonna v. U.S. Department of Health and Human Services, et al.*, Complaint, U.S. District Court, District of South Carolina, https://www.au.org/sites/default/files/2019-02/Maddonna%20v.%20HHS%20Complaint%202.15.19.pdf (web-page last visited June 19, 2019).

Thus, under the purview of RFRA, Miracle Hill is permitted to broadly discriminate against otherwise qualified, prospective foster parents because a person follows a non-Christian faith; is LGBTQ, is Mormon; is mainline Protestant, including Episcopalian, Lutheran or Presbyterian; in an interreligious marriage; or a Born-again Christian, but inactive in a Protestant church, not in good standing with such a church, not in full agreement with Miracle Hill's doctrinal statement, or in an extramarital relationship. Furthermore, under the waiver any South Carolina faith-based, foster care agency could similarly engage in such discrimination.

Ultimately, it is vulnerable children who are most harmed by this waiver. According to a May 2018 news report, "[i]n South Carolina, officials with DSS said there are over 4,600 kids in foster care, and the state needs an additional 1,500 foster homes for them.[14] No child should be denied a loving foster home simply because a prospective parent is Jewish, another faith, LGBTQ or otherwise deemed religiously unfit.

DOL Directive Sanctions Discrimination by Taxpayer-Funded Federal Contractors

Federal laws and regulations prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Yet, invoking RFRA, the U.S. Department of Labor, Office of Federal Contract Compliance Programs issued a directive, effective as of August 10, 2019, that at a minimum sanctions discrimination by federally-funded contractors or subcontractors that are for-profit, closely held corporations or separately incorporated, religiously affiliated organizations.[15]

Specifically, the directive allows such contractors and subcontractors to deny employment on the basis of their religious beliefs. As a result, a person could be denied a livelihood simply because they are LGBTQ, Jewish, or another religious minority, a single parent or divorced, or even infrequently attend religious services. Thus, federal contractors or subcontractors could literally post a help wanted sign for a taxpayer-funded job stating, for example, "Gays, Jews and Muslims Need Not Apply" for a taxpayer-funded job.

IRS, EBSA and HHS Harm Women's Health by Issuing Excessively Broad Religious and Moral Exemption Rules to the ACA Contraception Mandate

In November 2018, the Internal Revenue Service, Employee Benefits Security Administration and Health and Human Services Department ("Departments") invoked RFRA to issue expansive religious and moral exemptions to the Patient Protection and Affordable Care Act's contraception mandate ("ACA Mandate").[16] [17] The new rules effectively eviscerate the ACA's Mandate by grossly expanding the

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[14] *South Carolina in critical need of foster parents*, Kolbie Satterfield, WCSC, May 2, 2018, http://www.live5news.com/story/38089846/south-carolina-in-critical-need-of-foster-parents/ (web-page last visited June 19, 2019).

[15] Directive (DIR) 2018-03, U.S. Department of Labor, Office of Federal Contract Compliance Programs, https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html#ftn.id2 (web-page last visited June 19, 2019).

[16] *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department, November 15, 2018, https://www.federalregister.gov/documents/2018/11/15/2018-24512/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the (web-page last visited June 19, 2019).

[17] *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services

existing religious exemption – well beyond reason or need – and creating an exceedingly broad moral exemption. The rules are a paradigmatic example of an exception swallowing a rule. Under it, even a publicly-held Fortune 500 corporation could opt out of the mandate on religious grounds. Ultimately, these rules will harm women, particularly impoverished women and women of color.

The previous rules fully exempted houses of worship from the ACA Mandate and accommodated nonprofit, religiously-affiliated employers with a sensible opt-out provision that required their insurance carriers or third-party providers to cover all costs for contraception coverage and to administer the coverage. The U.S. Supreme Court's decision in *Hobby Lobby* made this accommodation available to closely held, for-profit corporations that have religious objections to the ACA Mandate.

The new rules expand eligibility for both the accommodation and the exemption to all nonprofit and closely held for-profit employers with religious or moral objections to coverage. Under the religious rule, all publicly traded for-profit companies with objections based on religious beliefs can also qualify for an exemption. It also provides limited religious exemptions for individuals and insurance companies. As a result, there is no guaranteed right of contraceptive coverage for the employees, dependents, and students of these organizations. By claiming to relieve the alleged burden on employers' religious or moral beliefs imposed by the original ACA Mandate, these rules completely defer to employers' religious or moral rights without any concern for the burden placed on innocent third parties and women's access to health care.

According to a study conducted before the ACA Mandate went into effect, African-American women were 60 percent less likely, and Latina women 40 percent less likely, to receive oral contraception as compared to white women.[18] African-American women were also 50 percent less likely to receive IUD contraception, and 30 percent less likely to receive the contraceptive ring, compared with white women of the same age.[19] The lack of insurance coverage for contraception significantly contributes to disparities among racial and ethnic groups regarding unintended pregnancies.[20]

Health care disparities decreased after the ACA Mandate became effective. Undoubtedly, the new rules harm women's health, particularly women of color, by limiting access to contraceptive care without cost sharing. Even the Departments estimated that 120,000 women will lose access to contraception through the combined rules. And they concede that they do not know and therefore did not include in their estimate, the number of women who will lose access to contraceptive coverage because: (1) an employer or insurer that did not cover contraceptive coverage on the basis of religious beliefs before the ACA Mandate now would be exempt from providing coverage under the new regulation; or (2) employers that qualify for an exemption under the religious exemptions will no longer make use of the accommodations provided under the previous rule.

Department, November 15, 2018, https://www.federalregister.gov/documents/2018/11/15/2018-24514/moral-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable (web-page last visited June 19, 2019).

[18] Race, Ethnicity and Differences in Contraception Among Low-Income Women: Methods Received by Family PACT Clients, California, 2001–2007.

[19] *Id.*

[20] CHRISTINE DEHLENDORF ET AL, *Disparities in Family Planning*, Am J Obstet Gynecol. 2010 Mar; 202(3): 214–220. doi: 10.1016/j.ajog.2009.08.022; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835625/ (web-pages last visited June 19, 2019).

By limiting women's access to contraceptive coverage, the Departments have hindered women's ability to plan their family, including making choices regarding what type of contraception, if any. These decisions are critical to gender equality in all aspects of society and reducing socio-economic disparities.[21]

Congressional Action is Imperative

ADL firmly believes that the "play in the joints" between the Establishment Clause and Free Exercise Clause allows and, in many instances, mandates government to accommodate the religious beliefs and observances of citizens. Religious accommodation, however, has its limitations. In a pluralistic society, religious accommodation cannot be used to trample the rights of others. Yet, that is exactly what the Administration has done and likely will try to continue to do in its misapplication of RFRA.

Congress must therefore act by moving forward H.R. 1450, the "Do No Harm Act." This legislation would make several critical amendments to RFRA that would invalidate and preempt the types of harm outlined above.

First, the Act bars RFRA from being used to evade any law or implementation of a law that:

- Prohibits discrimination, including the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family Medical Leave Act, Executive Order 11246, the Violence Against Women Act, and Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity (77 FR 5662);
- Provides "... wages, other compensation, or benefits including leave, or standards protecting collective activity in the workplace ...;"
- Protects against child labor, abuse, or exploitation; or
- Requires "... access to, information about, referrals for, provision of, or coverage for, any health care item or service ..."

Second, the legislation would prohibit RFRA from being used to avoid "... any term requiring goods, services, functions, or activities to be performed or provided to beneficiaries of a government contract, grant, cooperative agreement, or other award ..." or applied in a way that would deny "... a person the full and equal enjoyment of a good, service, benefit, facility, privilege, advantage, or accommodation, provided by the government."

Third, the Act would restrict RFRA from being raised as a defense or otherwise in any lawsuit or judicial proceeding except where the government is a party and the relief sought is against that government.

The Do No Harm Act would therefore ensure that application of RFRA reverts to that law's original intent, thereby making it a shield for faith and not a sword to thwart anti-discrimination laws, women's equality, or to discriminate against or harm others.

Conclusion

Safeguarding religious freedom requires constant vigilance, and it is especially important to guard against one group or sect seeking to impose its religious doctrine or views on others. As George Washington wrote in his famous letter to the Touro Synagogue in 1790, in this country "all possess alike liberty of conscience." He concluded: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. For happily the

[21] United Nations Population Fund, Family Planning Overview, http://www.unfpa.org/family-planning (web-page last visited June 19, 2019).

Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support."

We appreciate the opportunity to provide our views on this issue of high priority to our organization. Please do not hesitate to contact us if we can provide additional information or if we can be of assistance to you in any way.

Sincerely,

Eileen B. Hershenov
Senior Vice President, Policy

Erika L. Moritsugu
Vice President, Government Relations, Advocacy, and Community Engagement

Steven M. Freeman
Vice President, Civil Rights

David L. Barkey
Senior & Southeastern Area Counsel,
National Religious Freedom Counsel

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AMERICAN ATHEISTS

June 25, 2019

The Honorable Rep. Bobby Scott
Chair, House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

Re: SUPPORT for H.R. 1450, the "Do No Harm Act"

Dear Chairperson Scott and Members of the House Education and Labor Committee:

American Atheists, on behalf of its constituents nationwide, thanks you for holding a hearing on H.R. 1450, the Do No Harm Act. This important legislation clarifies that the Religious Freedom Restoration Act (RFRA) is meant to ensure that "religious freedom is only used as a shield to protect individuals from discrimination and not a sword to cut down the rights of others."[1] American Atheists stresses that the First Amendment offers appropriate protection for religious freedom, and we advocate for a full repeal of RFRA because it grants unconstitutional preference to religious beliefs. However, we support the Do No Harm Act because it is an important step toward religious equality. We urge the Committee to swiftly pass this legislation to limit the negative impact of religious exemptions in federal law in areas such as civil rights and health care coverage.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. American Atheists believes that religious affiliation or beliefs should never justify special exemptions from the law, particularly if those exemptions burden third parties.

RFRA gives special treatment to religion above and beyond what the First Amendment requires or allows. It prohibits the federal government from "substantially burden[ing]" a person's religious exercise without the most compelling justification.[2] While it was originally intended as

[1] Press Release, Education & Labor Committee, Scott, Kennedy, Harris Reintroduce Bill to Protect Individuals from Discrimination (Feb. 28, 2019), at: https://edlabor.house.gov/media/press-releases/scott-kennedy-harris-reintroduce-bill-to-protect-individuals-from-discrimination-.
[2] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

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a shield to protect religious minorities and to ensure that religious freedom is protected, this law is now being used as a weapon. Even insignificant burdens on religious expression can trigger RFRA protection, and this law has been misapplied by the courts to justify the denial of health care coverage for employees, to allow for discrimination, and to undermine child abuse and labor laws. RFRA has provided religious individuals and groups justification to discriminate against atheists, religious minorities, LGBTQ people, and women.

In 2014, the Supreme Court ruled that a closely-held for-profit corporation was exempt from complying with the Affordable Care Act's contraception mandate based on the company's religious belief under RFRA.[3] After the *Hobby Lobby* ruling, a Michigan federal court held that RFRA exempts employers from Title VII's non-discrimination requirements. In that case, the Judge sided with a Detroit-based funeral home that fired a transgender employee due to her gender identity.[4] While the Sixth Circuit overturned this decision, it has been appealed to the United States Supreme Court.[5]

It is not only the judicial branch that has misused RFRA. In October 2017, Attorney General Jeff Sessions released guidelines on protecting religious freedom under federal law which present an extreme interpretation of RFRA and which act as a framework for interpretations by government agencies that will undermine vital constitutional protections.[6] In fact, over the last year, numerous federal agency actions and regulations have made unconstitutional religious exemptions and pointed to RFRA as justification. For example:

1. The Department of Health and Human Services (HHS) permitted federally funded child welfare agencies in South Carolina to place their own religious beliefs over the best interests of the children in their care by discriminating against Jewish and same-sex couples who wish to adopt or foster a child.[7] This exemption lays the groundwork for

[3] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Ginsburg, J., dissenting) ("the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law. . . they judge incompatible with their sincerely held religious beliefs.").
[4] *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.Supp.3d 594 (E.D. Mich. 2015).
[5] *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (Mem.).
[6] Memorandum from the Attorney General Jeff Sessions on Federal Law Protections for Religious Liberty (Oct. 6, 2017) at: https://www.justice.gov/opa/press-release/file/1001891/download?utm_medium=email&utm_source=govdelivery.
[7] Letter from Steven Wagner, Principal Deputy Assistant Sec'y, Admin. for Children and Families, Dep't of Health and Human Serv.'s to Governor Henry McMaster, Governor of S.C. (Jan. 23 2019) (Re: Request for Deviation or Exception from HHS Regulation 45 CFR § 75.300(c)) at: https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf).

other states to request waivers for the same purpose: to allow institutions to discriminate based on their religious beliefs and still receive federal funding.

2. HHS issued regulations[8] pertaining to "Protecting Statutory Conscience Rights in Health Care" that go far beyond the limited statutory religious exemptions created by federal law. By providing protection for religious conduct based on a specific set of beliefs, these regulations undermine the religious liberty of others, and they will threaten the safety, health, and well-being of millions of Americans by increasing discrimination and denials of care for vulnerable people across our nation.
3. HHS also issued regulations[9] pertaining to Title X family planning programs[10] which undermine religious freedom by giving preference to religious organizations in the distribution of federal funds. Moreover, these regulations unconstitutionally infringe upon the First Amendment freedom of speech by preventing medical providers from discussing abortion as an option or medically necessary procedure.
4. The Department of Labor issued a directive[11] to expand religious exemptions to nondiscrimination protections pertaining to federal contractors by allowing religious contractors to not only discriminate to prefer co-religionists in employment, but to discriminate on other protected bases due to religious belief. The agency is planning to issue a proposed rule on this matter.

Although the Supreme Court has made clear that the Establishment Clause requires the consideration of any impact an accommodation or religious exemption would have on third parties, RFRA fails to meet this standard. Specifically, the Constitution bars the government from crafting "affirmative" accommodations within its programs if the accommodations would harm any program beneficiaries.[12] The Constitution commands that "an accommodation must be measured so that it does not override other significant interests;"[13] "impose unjustified burdens on other[s];"[14] or have a "detrimental effect on any third party."[15] The fact is that

[8] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170 (May 21, 2019) (*to be codified at* 45 C.F.R. pt. 88).
[9] Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59).
[10] Population Research and Voluntary Family Planning Programs, Public Law 91-572.
[11] U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, Directive (DIR) 2018-03 (10 Aug. 2018).
[12] U.S. Const. Amend. I; *Cutter v. Wilkinson*. 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).
[13] *Cutter v. Wilkinson*, 544 U.S. at 722.
[14] *Id.* at 726.
[15] *Id.* at 720, 722; *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 ("unyielding weighting" of religious exercise "over all other interests...contravenes a fundamental principle" by having "a primary effect that impermissibly advances a particular religious practice."); *Texas Monthly,*

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without the passage of the Do No Harm Act, RFRA is of dubious constitutionality because it mandates a sweeping religious exemption applicable to all federal law without any consideration of harm to third parties. Conversely, this legislation would help ensure that religious exemptions in federal laws do not harm the beneficiaries of federal programs, such as young people in foster care and women receiving family planning care.

American Atheists contends that religious equality cannot truly be achieved until RFRA is repealed. However, the Do No Harm Act has broad support from numerous LGBTQ, civil rights, health, and faith groups, and it is an important step in the direction of religious equality.[16] We support the Do No Harm Act, and we urge you to swiftly pass this important bill. If you should have any questions regarding American Atheists' support for H.R. 1450, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,

Alison Gill, Esq.
Vice President, Legal and Policy
American Atheists

cc: All Members of the House Education and Labor Committee

Inc. v. Bullock, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries"); *see also United States v. Lee*, 455 U.S. 252 (1982) ("the limits [followers of a particular sect] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

[16] Press Release, Education & Labor Committee, *supra* note 1.

INTERFAITH ALLIANCE
PROTECTING FAITH AND FREEDOM

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Foy Valentine
Dr. Herbert D. Valentine

June 25, 2019

Chairman Bobby Scott
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

RE: Full Committee Hearing, "Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"

Dear Chairman Scott, Ranking Member Foxx, and Members of the Committee:

Faith is the prism through which millions of Americans articulate our values and foster relationships with others. Our constitution grants each of us the right to do so, with the secure knowledge that the government will not play favorites or favor religion over non-religion. The lofty ideal of religious freedom is often cited as one of the defining features of our national identity, enabling hundreds of religious and moral traditions to thrive within our borders.

This foundational right – giving each of us the ability to follow our consciences and live out our beliefs – is limited in one small but necessary way: our freedom of religion ends when it would deny the rights of others to do the same. But it is exactly this limitation that has become eroded in much of the current discussion around the Religion Freedom Restoration Act (RFRA) and other laws originally intended to protect freedom, but increasingly used to cause harm.

After two and half decades of agitation, lobbying, and litigation, RFRA has been become unrecognizable to many of its original supporters in the civil rights community – Interfaith Alliance chief among them. I write today as the president of Interfaith Alliance which, since our founding, has been at the forefront of the movement to promote true religious freedom. With members from over 75 religious traditions as well those of no faith, we are the only national interfaith organization dedicated to protecting the integrity of both religion and democracy in America. Interfaith Alliance joins nearly 80 civil rights, faith-based, and religious freedom organizations in endorsing the Do No Harm Act (HR 1450).

I welcome this committee's willingness to turn a keen eye to the growing misuse of RFRA and urge you to act swiftly to remedy the harm currently underway in the name of religious freedom.

I. RFRA Has Been Distorted Well Beyond Its Original Purpose

Before the Supreme Court sided with the state in *Employment Division v. Smith*, the judicial system typically provided heightened but not unlimited protections for religious exercise. But in 1990, the court upheld the State of Oregon's dénial of unemployment benefits to two Native American men who used peyote in a religious

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ceremony on the grounds that, because the Oregon drug law was not directed at Native Americans' religious practice specifically, it was deemed constitutional when applied to all citizens. Many religious freedom advocates recognized this ruling as a significant departure from past protections for religious expression, placing religious minorities at particular risk.

Shortly thereafter, Congress overwhelming passed and President Clinton signed the Religious Freedom Restoration Act to ensure that religious practice was accommodated appropriately by the federal government, even under facially neutral laws. RFRA prohibits the federal government from substantially burdening a person's religious exercise unless doing so is the least restrictive means of furthering a compelling governmental interest. Thus, minimal burdens were not supposed to trigger RFRA protection and even substantial burdens on religious exercise were permitted where necessary to achieve a compelling government interest (like prohibiting discrimination).

RFRA was supported by a broad coalition of organizations, including faith-based and religious freedom groups, legal experts, and civil liberties advocates. Interfaith Alliance was, and continues to be, among them. But in the intervening years since its passage, the scope of RFRA protections have been distorted well beyond individuals experiencing a substantial burden on their religious freedom to include non-profit organizations, for-profit entities, and even taxpayer-funded service providers.

In 2014, the Supreme Court ruled in *Burwell v. Hobby Lobby Stores* that large, for-profit, closely held corporations can use RFRA to sidestep requirements that would otherwise require them to provide insurance coverage for contraception. The court held that the Affordable Care Act's birth control benefit substantially burdened businesses, a standard originally intended for individuals seeking a religious accommodation for themselves alone.

By expanding who can assert a RFRA claim and where the burden of that accommodation may fall, the decision recognized an entire closely-held corporation as extension of the owners' religious expression. Hobby Lobby's owners could therefore impose their beliefs about certain forms of contraception onto thousands of employees and their families who receive their insurance through the store. This action curtailed the religious freedom of those beneficiaries as they were prevented from following their own beliefs in meeting their healthcare needs.

The Trump administration later upped the ante by issuing new regulations in 2017, allowing *any* employer – not just closely-held corporations – to use RFRA to deny contraception insurance coverage to their employees and/or students. Later that year, then-Attorney General Jeff Sessions released guidance titled "Federal Law Protections for Religious Liberty" that further distorted RFRA and applied to all federal agencies.

Since then, federal agencies – relying on this guidance – have cited RFRA to create sweeping religious exemptions. For instance, in January 2019, the U.S. Department of Health and Human Services (HHS) exempted government-funded foster care agencies in South Carolina from a federal regulation that bars discrimination. As a result providers continue to receive government funds while refusing to work with otherwise qualified adoptive parents and volunteers who are not evangelical Protestants. This policy punishes children in the foster care system and denies them the loving homes they deserve simply because prospective parents do not meet the agency's religious litmus test. HHS may soon issue regulations to extend this harmful policy nationwide.

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II. The Do No Harm Act is a Necessary Measure to Protect the Religious Freedom of All Americans

Examples like those cited above are a clear departure from the original intent of RFRA – a bill passed to protect the religious freedom of individuals, especially members of religious minority traditions who may experience unique humiliations under facially neutral government policies. As RFRA has become increasingly distorted, it is often those it was intended to protect who suffer most.

To address this problem, the Do No Harm Act would restore RFRA to its original purpose and, at the same time, clarify that it may not be used justify actions that harm others. Under the Do No Harm Act, individuals could still use RFRA to protect personal religious exercise, including the right to wear religious attire and observe religious holidays. RFRA, however, could not be used to bypass federal protections in ways that undermine non-discrimination laws, deny access to healthcare, evade child welfare laws, supersede laws protecting workers' rights, refuse to perform the duties of a government employee, or refuse government-funded services under a contract.

As is often the case, the need for this bill is felt most acutely by the most vulnerable among us: the child in foster care, the patient experiencing a healthcare crisis, the low wage worker facing harassment or exclusion on the job. The Do No Harm Act would ensure that Americans of all faiths and of none can experience full participation in public life, access government-funded services, and make decisions for their own wellbeing without the religious beliefs of another interfering in their freedom to do so.

I strongly urge you to restore RFRA to its original intent through careful consideration and swift adoption of the Do No Harm Act. In doing so, you will act decisively to protect one of our most fundamental freedoms: the ability to believe as we choose while respecting our neighbors' ability to do the same.

Sincerely,

Rabbi Jack Moline
President, Interfaith Alliance

Faith Groups Who Have Endorsed the Equality Act

1. African American Ministers in Action
2. American Conference of Cantors
3. Anti-Defamation League
4. Auburn Seminary
5. BALM Ministries
6. Bend the Arc Jewish Action
7. Brethren Mennonite Council for LGBTQ Interests
8. Cathedral of Hope United Church of Christ
9. Catholics for Choice
10. Central Conference of American Rabbis
11. Charlotte Clergy Coalition for Justice
12. Chicago Theological Seminary
13. Christ Church: Portland
14. Covenant Network of Presbyterians
15. DignityUSA
16. Disciples Justice Action Network
17. Disciples LGBTQ+ Alliance
18. Estuary Space
19. Faith in Public Life
20. Forefront Church NYC
21. Freedom Center for Social Justice
22. Global Justice Institute, Metropolitan Community Churches
23. Hadassah, The Women's Zionist Organization of America, Inc.
24. Hindu American Foundation
25. Integrity USA: Episcopal Rainbow
26. Interfaith Alliance
27. Jewish Alliance for Law and Social Action (JALSA)
28. Jewish Women International
29. Kentucky Religious Coalition for Reproductive Choice
30. Keshet
31. Lake Oconee Community Church
32. Many Voices: A Black Church Movement for Gay & Transgender Justice
33. MAZON: A Jewish Response to Hunger
34. Meadville Lombard Theological School
35. MECCA Institute
36. Missiongathering Christian Church
37. Men of Reform Judaism
38. Methodist Federation for Social Action
39. Metropolitan Community Churches
40. More Light Presbyterians
41. Muslim Advocates
42. Muslim Public Affairs Council
43. Muslims for Progressive Values
44. National Council of Jewish Women
45. NETWORK Lobby for Catholic Social Justice
46. New Ways Ministry
47. Ohio Religious Coalition for Reproductive Choice
48. Parity
49. Rabbinical Assembly
50. Reconciling Ministries Network
51. ReconcilingWorks: Lutherans for Full Participation
52. Reconstructing Judaism
53. Reconstructionist Rabbinical Association
54. Religious Coalition for Reproductive Choice
55. Religious Institute
56. Soulforce
57. T'ruah: The Rabbinic Call for Human Rights
58. The Episcopal Church
59. The Freedom Center for Social Justice
60. The United Methodist Church – General Board of Church and Society
61. UMForward
62. Union for Reform Judaism
63. Union of Affirming Christians
64. Union Theological Seminary in the City of New York
65. Unitarian Universalist Association
66. Unitarian Universalist Women's Federation
67. United Church of Christ, Justice and Local Church Ministries
68. United Church of Christ, Justice and Witness Ministries
69. United Synagogue of Conservative Judaism
70. Women's Alliance for Theology, Ethics, and Ritual (WATER)

As of May 13, 2019 v2

The Washington Post

The Plum Line Opinion

Why Republicans are growing more willing to embrace discrimination

By Paul Waldman

Though liberals often like to imagine our history as an unceasing if often slow forward march toward more understanding, more openness and more inclusion, the truth is somewhat more complicated. It's also possible to see a cycle of steps forward and back in which every advance is followed by an often furious reaction.

Which may be the best way to understand some fascinating and disturbing new findings from the Public Religion Research Institute on the question of whether businesses should be able to refuse service to certain kinds of people they don't like:

Three in ten (30%) Americans say they think it should be permissible for a small business owner in their state to refuse to provide services to gay or lesbian people if doing so violates their religious beliefs, while two-thirds (67%) say they should not be allowed to do so.

Support for religiously based service refusals have increased across virtually every demographic group since 2014, when only 16% of Americans said small businesses should be allowed to refuse service to gay or lesbian customers because of religious beliefs, and 80% said they should not.

What's important here is that support for discrimination against all the groups they tested has increased: discrimination against gay people, transgender people, Jews, Muslims and atheists. Here's a striking graph:

In many cases, support for discrimination has either stayed steady or increased slightly among Democrats and independents, but it has increased hugely among Republicans over just that five-year span. While there are certainly levels of support for discrimination among Democrats and independents that are disturbing enough, the real action is among Republicans:

Support for discrimination against gay customers among Republicans more than doubled from 21 percent to 47 percent. Support for discrimination against atheists went from 19 percent to 37 percent. Support for discrimination against Jews went from 16 percent to 24 percent.

What could have caused this change? I'm going to argue that it was the Supreme Court and the Republican Party.

In particular, in response to expanding protections for gay Americans, the GOP adopted a set of specific policy ideas and promoted them in a particular way. This sent a signal to its voters that they should adopt those positions too, even though the issue of whether businesses should be able to turn potential customers away if they don't like the kind of people they are is something many of us hadn't thought about since that whole thing was supposedly settled by the Civil Rights Act.

This is a process of elite signaling that political scientist John Zaller explained a quarter of a century ago: When a new issue or idea emerges, at first people aren't too sure what to think, but once the parties coalesce around positions, eventually the masses figure out where they're supposed to stand as people see their party's representatives tell them what to believe.

In this case, the key event was the Hobby Lobby case, which was decided in 2014. While it wasn't about turning away customers — it concerned whether Hobby Lobby and other privately held corporations could exempt themselves from the Affordable Care Act's requirement that health insurance cover contraceptives — it established an important principle, namely that businesses could decide which laws they want to obey if they can come up with a religious rationale for disobeying the ones they don't like.

In practice, as everyone knew, the businesses that were going to take advantage of that newfound right would almost all do so in the name of conservative Christianity. And the Republican Party vigorously embraced the cause of "religious freedom" in this form.

Then, in 2015, the Supreme Court declared same-sex marriage legal everywhere in the United States, making conservative Christians feel even more that their values were being left behind by the larger culture. That made it particularly urgent to carve out a sphere of "religious freedom" in which they'd be able to decide which laws they wanted to follow.

The critical follow-up to the Hobby Lobby case was the Masterpiece Cakeshop case about a baker who refused to bake a cake for a gay couple in violation of Colorado's civil rights laws. Without going into the somewhat complicated Supreme Court ruling, what matters for our purposes is

that, once again, pretty much every Republican politician loudly proclaimed that, in the name of "religious freedom," bakers should be able to refuse service to gay people.

This sent an obvious message to rank-and-file Republicans, one that may well have bled over into increasing support for the right to discriminate against not just gay people but Muslims, or Jews, or atheists as well. It essentially replaced the old story about businesses refusing to serve people with a new story. The old story, the one you learned in school, was about the civil rights era, about sit-ins at lunch counters and racist business owners. The new story is about god-fearing business owners besieged by angry liberals trying to destroy their way of life and banish Jesus from America.

And then, of course, we have Donald Trump, who rode to the White House on the politics of backlash, a message to white voters that their struggles and problems were the fault of people not like them: immigrants, racial minorities, outsiders of all kinds. Not only did Trump embrace the religious right agenda, including the right to discriminate, he also told Republicans that it is no longer necessary to be nice to people you don't like.

That doesn't mean that the arc of history doesn't still bend toward broader inclusion. But sometimes we move backward, too.

Read more:

Paul Waldman: Have we become numb to Trump's loathsomeness?

Jennifer Rubin: Americans in the age of Trump: Less tolerant

Kathleen Parker: Trump represents the nadir of identity politics

Nancy Gibbs: How do we balance our shameless age with the zero-tolerance absolutes?

Colbert I. King: I used to think America would age out of racism. What was I thinking?

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Paul Waldman is an opinion writer for the Plum Line blog. Follow

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Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191

In The

Supreme Court of the United States

DAVID A. ZUBIK, et al.,

Petitioners,

v.

SYLVIA BURWELL, Secretary of Health and Human Services, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third, Fifth, Tenth And D.C. Circuits

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BRIEF OF *AMICUS CURIAE* THE HONORABLE ROBERT C. "BOBBY" SCOTT IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Congressman Robert C. "Bobby" Scott was first elected to Congress in 1992 and served on the House Judiciary Committee from 1993 until 2014 during that committee's deliberation of a number of key religious liberty issues, including the Religious Freedom Restoration Acts of 1993 and 2000 ("RFRA"). As Ranking Member of the Subcommittee on the Constitution from 1997 to 1999, he also played a key role in highlighting civil rights concerns as Congress reexamined RFRA *after* the decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and during the consideration of the Religious Liberty Protection Act (H.R. 1691).

In 2015, Congressman Scott assumed the Ranking Member position of the House Education and the Workforce Committee. The Committee shares jurisdiction on matters related to the Affordable Care Act, as well as strengthening worker protections and defending the civil rights of workers. It is Congressman Scott's view that religious liberty and freedom should not abrogate the civil rights protections of workers.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amicus* or his counsel made a monetary contribution to this brief's preparation or submission. All parties have consented on the docket to the filing of *amicus curiae* briefs.

SUMMARY OF ARGUMENT

Religious freedom lies at the heart of United States history and tradition, and has nurtured not only extraordinary religious diversity but also a peaceful society in which everyone is protected from harm regardless of their beliefs. Religious liberty needs to be balanced with concerns for harm to others, and that was the assumption of the bipartisan support behind the Religious Freedom Restoration Act of 1993 ("RFRA"). After RFRA was found unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997), many members of Congress began to question whether RFRA was the balance between liberty and protection from harm they assumed in 1993. Their concerns were assuaged by RFRA's proponents' exegesis of the bill, which repeatedly assured them that RFRA would not trump civil rights laws and would not be a tool for employers to overcome employee anti-discrimination laws.

When RFRA is interpreted literally, without reference to this legislative history, it becomes a tool by which a court can insert its policy judgment for the legitimate policy decisions of the elected branches. *Amicus curiae* is concerned that this Court's interpretation in *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S. Ct. 2751 (2014), crosses this boundary line into a violation of the separation of powers. To rule in favor of Petitioners in this case would be a certain violation of the separation of powers, as the Court would be putting itself in the shoes of the elected branches in reaching permissive accommodation.

Petitioners are asking this Court to personalize a fair and generous religious accommodation, to consider only their beliefs, and not the beliefs or rights of their employees. That is not the RFRA interpretation that a bipartisan Congress supported in 1993 or permitted to pass in 2000. It is certainly not the history of religious tolerance and peaceful religious coexistence that is the hallmark of the United States.

ARGUMENT

Religious freedom is a cornerstone of American law and society, a right that was of great importance to the founding generation and protected by the First Amendment. The notion that religious liberty is important and valuable to the public good is an idea embedded in American society, but the framing generation also understood that there is such a thing as too much liberty. Religious liberty must have a limit, particularly when its effect is harm to others. This "no-harm principle" was a notion articulated by John Locke in the 17th century, widely shared by the framing generation in the 18th century, and entrenched in modern philosophy and law by John Stuart Mill. In essence, the principle is a firm rejection of individual (or institutional) autonomy from the laws that protect others from harm. While the government has no business interfering in our beliefs, it must legitimately protect us from others' potential harms. GOD VS. THE GAVEL: THE PERILS OF EXTREME

RELIGIOUS LIBERTY 278-313 (Cambridge Univ. Press 2014).

Indeed, the 1786 Virginia Statute for Establishing Religious Freedom, which served as a basis for the First Amendment, enshrined this very balance between the freedom of conscience and not diminishing the rights of others to the rights and protections of civil law:

> Be it enacted by the General Assembly, that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Thomas Jefferson, *Virginia Statute of Religious Freedom, in Thomas Jefferson: Word for Word* 55-57 (Maureen Harrison & Steve Gilbert eds., 1993). It is the question of this very balance that is before the Court in the case at hand.

Despite religion's societal value, it has contributed to significant social ills as well, such as slavery, sexism, anti-miscegenation, child abuse, and segregation, to name a few. At the beginning of our nation's history, some of the most fundamental inequalities were justified by citing to religious beliefs. The Civil

Rights Act of 1964 was met with significant objection based on religion, and although such criticisms were ultimately rejected, resistance to the Act persisted even after its adoption. *See* Brief of Julian Bond et al., as *Amici Curiae* Supporting the Government at 10-27, *Sebelius v. Hobby Lobby Stores, sub. nom Burwell v. Hobby Lobby Stores*, 573 U.S. ___, 134 S. Ct. 2751 (2014) (No. 13-354).

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993) ("RFRA"), was a direct congressional response to the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). *Smith* was met with extreme criticism by religious entities and legal scholars alike, who cast the decision as a dramatic, unjustified departure from previous free exercise cases. Working with the characterization of *Smith*'s supposed ill effects on religious liberty as advanced by these religious groups and academics, Congress passed RFRA three years after *Smith* was decided. It did so on the premise that RFRA would "restore" prior free exercise doctrine, that is, the ordinary strict scrutiny test articulated by the Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963). There was no discussion or expectation that the Court's free exercise outcomes other than *Smith* would be altered by RFRA.

The Supreme Court majority's interpretation of RFRA in *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S. Ct. 2751 (2014), came as a surprise to many, including members of Congress who had supported

RFRA in the past. The statutory test had developed beyond what they believed RFRA was intended to accomplish and reneged on the promises RFRA's supporters had given that federal civil rights would not be undermined by RFRA.

This Court and others have rejected the assertion of religious beliefs as a justification for denying Americans full civil rights protection. For example, courts have rejected the claim that women should receive less compensation than men on the belief that men are the head of the house, the wife, and the family. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990). Similar invocations of religious beliefs related to race and sex have been struck down by the Court. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the governmental interest in eliminating racial discrimination outweighed any burden on the religious beliefs of a university. Bob Jones University refused to admit African-American students engaged in interracial relationships on the premise that it believed the Bible forbade such relationships); *United States v. Virginia*, 518 U.S. 515 (1996) (finding no "exceedingly persuasive justification" for denying women admission to an all-male military school and holding that classifications on the basis of sex may never be used to perpetuate gender stereotypes and the legal, social, and economic inferiority of women).

Many members and advocacy groups, who actively worked for RFRA's passage, were surprised by the

court's decision in *Hobby Lobby*.[2] For others, *Hobby Lobby* affirmed the troubling implications of RFRA that began to emerge after its passage in 1993 and led to the unraveling of support for it in 1999 during consideration of H.R. 1691, 106th Cong. (1999), the "Religious Liberty Protection Act" or RLPA.[3] H.R. 1691 was intended to restore RFRA's applications to the states post-*Boerne* decision, which was subject to many objections and dissents in Congress. In *Boerne*, the Court held that Congress had exceeded its constitutional authority in part by applying RFRA to the

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[2] For example, Senator Charles Schumer, who introduced RFRA in 1993, responded to the *Hobby Lobby* decision that RFRA "was not intended to extend the same protection to for-profit corporations, whose very purpose is to profit from the open market." Kristina Peterson, *Supreme Court's* Hobby Lobby *Ruling Ignites Debate Over Religious-Freedom Law*, Wall St. J. (June 30, 2014) http://www.wsj.com/articles/supreme-courts-hobby-lobby-ruling-ignites-debate-over-religious-freedom-law-1404155510. Rep. Jerry Nadler stated: "When we passed RFRA in 1993, we sought to restore – not expand – protection for religion. We kept in place the core principle that religion does not excuse for-profit businesses from complying with our laws. Religious belief did not excuse restaurants or hotels from following our civil rights laws in the 1960s or an Amish employer from paying into the Social Security system in the 1980s." Press Release, Rep. Nadler, Supreme Court Ruling on *Hobby Lobby* Case is a Defeat for Women, Religious Liberty (June 30, 2014).

[3] It is worth noting that RLPA, H.R. 1691, was identical to RFRA in that they both advanced an extreme religious liberty test (imposing on the government the requirement of proving that all laws serve a "compelling interest" in the "least restrictive means"). The main difference is that H.R. 1691 relied on the Commerce Clause in the hopes of passing constitutional muster. As a result, the legislative history and the debate of its provisions are intertwined with the RFRA of 2000.

states absent a clear and persistent record of constitutional violations. In short, the "bipartisan" broad support for RFRA ended not long after this Court decided *Boerne* and members re-examined RFRA.

In the 105th Congress, Ranking Member Robert C. "Bobby" Scott of the Subcommittee on the Constitution of the House Judiciary Committee, noted, "Mr. Chairman, part of my concern about the constitutionality of this bill stems from some of the language in *Boerne*, where the Court expresses almost a hostility to this kind of legislation and gives me the idea that it won't take much for them to throw out the next one. And the language that I am referring to says . . . government's ability to enforce generally applicable prohibitions of socially harmful conduct cannot depend on measuring the effects of governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling, contradicts both constitutional tradition and common sense." *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution & H. Comm. on the Judiciary*, 105th Cong. at 65-66 (1998).

This *amicus* brief outlines some of the complicated legislative history of RFRA that is important to the Court's deliberation on the matter at hand. Further, the brief argues that the *Hobby Lobby* majority's interpretation of RFRA risks violating the separation

of powers, particularly if it is applied to the facts of this case.

I. RFRA's Legislative History Indicates Unraveling Support Amid Growing Concerns about the Breadth and Scope of Its Impact

When RFRA was first enacted in 1993, a bipartisan coalition supported the laudable concept of shoring up protections for "religious liberty." The statute's title claimed that it was simply "restoring" religious liberty cases to a familiar, prior era. *See Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the House Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 326 (1992) (statement of Professor Douglas Laycock) ("RFRA makes the exception explicit rather than implicit, but the standard for satisfying the exception should not change."). The argument was made that the only result of enacting RFRA would be to overturn one case, *Employment Div. v. Smith*, 494 U.S. 872 (1990). *See* 136 Cong. Rec. S17330-31 (1990) (statement of Sen. Joe Biden) (goal of RFRA was to "restore the previous rule of law, which required the Government to justify restrictions on religious freedom").

Five months before RFRA was enacted in 1993, when this Court decided *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the tension between RFRA and the Court's prior doctrine began to emerge. In that case, Professor

Douglas Laycock, representing the church, argued that the Court should apply an extreme version of strict scrutiny wherein the government must prove the law serves a compelling interest by the "least restrictive means." *See* Brief for Petitioner at 36, *Church of the Lukumi Babalu Aye v. City of Hileah*, 508 U.S. 520 (1993) (No. 91-948). The *Lukumi* decision did apply strict scrutiny, because the law at issue was not generally applicable. *Lukumi*, 508 U.S. at 545-46.

More importantly, the *Lukumi* opinion also affirmed the two-part holding in *Smith*: (1) laws that are neutral and generally applicable receive rationality review while, (2) laws that are not neutral or not generally applicable, are subject to ordinary strict scrutiny. *Lukumi*, 508 U.S. at 531 (stating that neutral, generally applicable laws are subject to low-level scrutiny but a law that is either not neutral or not generally applicable is subject to strict scrutiny, where the government must prove the law satisfies a compelling interest by narrowly tailored means).

While *Lukumi* was being litigated, RFRA was pending before its initial passage. RFRA purportedly "restored" prior case law in its very title, but in fact its language departs from both elements of the Court's free exercise doctrine summarized in *Smith* and *Lukumi*: RFRA (1) subjects neutral and generally applicable laws to extreme strict scrutiny (not rationality review) and (2) it subjects laws that are not neutral or not generally applicable to that same extreme standard (not ordinary strict scrutiny).

Lukumi involved a law that was not generally applicable, because it targeted a small religious group and therefore strict scrutiny was applied under the First Amendment. In addition, the Native American Church (the entity at issue in *Smith*) had obtained exemptions in many states and from the federal government, and, therefore, negated the very need for RFRA after *Smith*. Thus, the *Lukumi* case and the legislative response to *Smith* show that RFRA was an overreaction. *Lukumi*, 508 U.S. at 539.

The congressional record, unfortunately, is blank on this score between this Court's *Lukumi* decision and RFRA's passage a mere five months later. Departing from its plain intent, RFRA would become a revolution in free exercise, empowering some to overcome neutral, generally applicable laws across the federal spectrum, and would therefore lead to unpredictable results, like *Hobby Lobby*.

Although there appeared to be broad support for RFRA and the need to "return to past doctrine," there was a clear failure to fully imagine the path we are now on and the threat RFRA could pose to a sweeping, endless array of issues, *e.g.*, increasing the rights of some to discriminate in housing against the emerging fair housing laws. Thus, in the hearings leading up to its first enactment in 1993, examples of the need for hyper-strict scrutiny of generally applicable laws were scarce. This contributed to RFRA's invalidation. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("RFRA's legislative record lacks examples of

modern instances of generally applicable laws passed because of religious bigotry.").

At the time of RFRA's passage in 1993, there was no inkling that RFRA would be wielded as a weapon to restrict access to contraception or to harm LGBTQ, women, or children. *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S. Ct. 2751 (2014); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Miller v. Davis*, No. CV 15-44-DLB, 2015 WL 9461520 (E.D. Ky. Sept. 11, 2015); *Perez v. Paragon Contractors Corp.*, No. 2:13-CV-281 RJS, 2013 WL 4478070 (D. Utah Aug. 21, 2013).

Nor did anyone imagine it would be a pipeline for the legalization of drugs. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *First Church of Cannabis v. Indiana*, No. 49C01-1507-MI-022522 (Marion Co. Cir. Ct. filed Jul. 8, 2015).

In 1998 and 1999, after the Court's decision in *Boerne* striking down RFRA, Congress revisited RFRA-like legislation in an effort to find a constitutional basis to re-enact it. Tellingly, it is this history, and members' reconsideration of RFRA, during which many members' deep concerns about RFRA's broad scope and its impact on civil rights, along with other important government interests, began to emerge. In hearings in the 105th and 106th Congress on this legislation, it became clear that there was a question of the interplay between the tests of RFRA and a host

of governmental interests to prohibit discrimination, and protect child welfare and other interests. *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution & H. Comm. on the Judiciary*, 105th Cong. at 68-71 (1998).

As noted in Dissenting Views to the House Report filed on the never-enacted H.R. 1691 or RLPA:

> We believe that the Boerne decision also indicates that Congress may have violated separation of powers principles by enacting RFRA, an issue the Court will be forced to decide if RLPA is enacted . . . . We know from our brief experience with RFRA and with several state versions of that statute that some religious groups will use RLPA to attack state and local civil rights laws.

H.R. Rep. No. 106-219, at 36 (1999).

Yet, proponents of RFRA responded to such concerns about the impact on civil rights with assurances to counter those concerns:

> Very briefly about civil rights laws, I would emphasize again what is frequently lost sight of. RLPA is not a statute that by itself trumps any particular practice or statute. It simply says you have got to look at it again and see if the statute or practice meets these standards: Does it serve a very important government interest, and does it do so in a way least burdensome to religion? It invalidates no civil rights law or any other law. In

> that respect, it is much narrower than existing exemptions from civil rights laws that give carte blanche to religious institutions to engage in religious discrimination, which is a typical feature of civil rights laws. Many civil rights laws have broader provisions – apply that same standard to anything a religious institution does. RLPA is not that broad. It gives the government a chance to justify its regulation. As I say in detail in the testimony, there aren't any religious organizations of any significance, and I don't know of any altogether, that practice or encourage racial discrimination. There are very few, and here the picture is a little more cloudy with regard to sexual discrimination. Moreover, it is settled by case law, that outside the area of hiring ministers, the claims of sexual equality are going to prevail over religious exemptions. That is even for religious institutions, to say nothing of for-profit institutions. I don't know of a single for-profit institution that has ever raised a successful religious freedom claim as against a civil rights claim. We can go into later, if there are questions, about how it would apply to marital status discrimination and gay rights discrimination, but I would expect largely that same pattern would hold.

Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution & H. Comm. on the Judiciary, 105th Cong. 56 (1998) (statement of Marc Stern, Director, Legal Department, American Jewish Congress).

And yet another RLPA proponent and religious liberty expert assured members on questions involving employers:

> As the employer becomes larger, or the nature of the work becomes less integrated with religious mission, this balance of interests changes. Soon it becomes impossible for the employer to show a substantial burden on religious exercise, and the state's interest in regulation grows in direct proportion to the number of jobs at issue.

Religious Liberty: Hearing on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure Before the H. Comm. on the Judiciary, 106th Cong. 153 (2000) (responses of Douglas Laycock to Questions from Senator Kennedy). This certainly does not line up with the court's determination in *Hobby Lobby*, offering RFRA protections to an employer operating six hundred stores and employing thousands of employees.

Foretelling where RFRA would land, the Dissenting Views from the House Judiciary Committee Report on RLPA concluded:

> By imposing an across-the-board strict scrutiny standard, RLPA will be used to attack state and local civil rights laws, child welfare laws and a host of other laws that may not be compelling but nonetheless serve important governmental functions. In the end, we find ourselves faced with a bill that even the *Sherbert* Court may have recognized as

> dangerous. As that Court expressed it, "Even when [] action is in accord with one's religious convictions, it is not totally free from legislative restrictions."

H.R. Rep. No. 106-219, at 38 (1999).

In the end, RLPA passed the House after the defeat of an amendment offered by Rep. Nadler, a RFRA supporter, to prevent harm to civil rights. But the vote was far from unanimous, showing the fracturing of support for a clean RFRA bill: 306 in favor, 118 in opposition, and 10 not voting. H.R. 1691. Clearly, the broad-based coalition of interests and support for RFRA from members unraveled. As a result of the civil rights concerns, the Senate never voted on RLPA but rather considered a narrower version, which re-enacted RFRA, but only as applied to federal law, and the Religious Land Use and Institutionalized Persons Act, S. 2869 106th Cong. (2000) (enacted); 146 Cong. Rec. S7774-01 (2000), ("RLUIPA"), which only applies to state laws involving land use and prisons.

As Senator Reid noted in his remarks on the Senate floor in support of the more limited legislation:

> While the companion measure [H.R. 1691] passed the House of Representatives overwhelmingly in July 1999, the legislation stalled in the Senate when legitimate concerns were raised that RLPA, as drafted,

> would supersede certain civil rights, particularly in areas relating to employment and housing. These concerns were most troubling to the gay and lesbian community. Discrimination based upon race, national origin, and to lesser certainty, gender, would have been protected, regardless of RLPA, because the courts have recognized that preventing such discrimination is a sufficient enough compelling government interest to overcome the strict scrutiny standard that RLPA would apply to religious exercise. Sexual orientation and disability discrimination, however, have not been afforded this high level of protection. Mr. President, as I was considering the merits of the Religious Liberty Protection Act, these concerns weighed heavily upon my mind. . . . As I stated earlier, protecting hard fought civil rights, including those which prohibit discrimination based upon sexual orientation, played an important role in my desire to pursue a more narrowly-tailored religious freedom measure. I am proud to have had the opportunity to work with Senators HATCH and KENNEDY to accomplish the worthwhile endeavor of protecting legitimate civil rights while at the same time protecting the free exercise of religion.

Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7774-01 (2000) (statement of Sen. Harry Reid).

To summarize, it was widely agreed that RFRA as applied to the federal civil rights laws should not

trump those laws. It was only on the basis of these assurances and understanding that led the concerned members to clear the way for the new RFRA and RLUIPA.

In a letter to Senator Hatch to support the narrower legislation, the Clinton Administration's Department of Justice noted the civil rights implications of RLPA, stating:

> In addition, apparently there has been some question about the potential effect of S. 2869 on State and local civil rights laws, such as fair housing laws. Although prior legislative proposals implicated civil rights laws in a way that concerned the Department, we believe S. 2869 cannot and should not be construed to require exemptions from such laws.

Id. at S7776 (letter from Robert Rabin, Assistant Attorney General to Sen. Hatch).

Today, the fears and misgivings on the scope of RFRA continue to grow. One only needs to look at the recent threatened state boycotts that garnered national attention over state legislative RFRAs in Arizona, Indiana, and Arkansas as indication of the controversy that the once broadly supported legislation enjoyed as a measure of the complicated tempest that is RFRA. Campbell Robertson & Richard Pérez-Peña, *Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana*, N.Y. Times, March 31, 2015, http://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html?_r=0. Note that

state action on RFRAs intensified leading up to and in response to the *Obergefell v. Hodges*, 578 U.S. ___, 135 S. Ct. 2584 (2015), case as a preemptive strike against an anticipated expanse of gay rights. As Congress abandoned re-enacting a RFRA applicable to the states in H.R. 1691 almost sixteen years ago, it has set the stage for the battle in the states over RFRAs even now.

There are some who have made the argument that Congress has taken a hand's-off approach to RFRA with no attempt to amend or modify its scope, implying that there have been no concerns or objections to its application or interpretation. This is not only an inaccurate assertion, but it also fails to recognize the deep concern by members who feel that legislation must now be crafted to deal with the misapplication of RFRA. For instance, the Equality Act of 2015 was recently introduced to explicitly prohibit discrimination based on sexual orientation and gender identity in hiring, employment, education, housing, credit, and public accommodation.[4] This landmark bi-partisan civil rights legislation specifically carves out RFRA to ensure that it does not apply to the bill's provisions recognizing that RFRA is a growing threat to the expansion of civil rights on the basis of sexual orientation and gender identity. Equality Act, H.R. 3185, 114th Cong. (2015).

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[4] This legislation enjoys bipartisan support and has 172 co-sponsors.

While *Hobby Lobby*, and potentially this case if Petitioners prevail, threatens to undermine the rights of female employees not to be discriminated against based on religion or gender, these threats to civil rights are only the first to emerge from RFRA's Pandora's Box when interpreted broadly and aggressively. In 1999, some House Judiciary Committee members warned, "If the *Smith* decision stands for anything, it stands for the Court's determination that an across-the-board strict scrutiny standard would work a substantial injustice to other important but not compelling government interests." H.R. Rep. No. 106-219 (1999-2000). Yet, even then, members could not have foreseen *Hobby Lobby* or the challenge at issue in this case as to whether the simple act of filling out a form constitutes an undue burden.

Due to the *Hobby Lobby* reasoning and if this Court were to rule in favor of Petitioners in this case along the same lines, the rights of female employees not to be discriminated against based on religion or gender will be severely undermined. Additionally, a decision in the Petitioners' favor interferes with Congressional intent and affirmation of the policy to extend contraception coverage to women as a key component of good health care policy, which was only arrived at after months-long deliberations, numerous hearings, and consultations with a wide spectrum of experts, including many health experts.

II. The *Hobby Lobby* Interpretation of RFRA Threatens the Separation of Powers by Delegating Lawmaking Power to the Unelected Judiciary

When the Court engages in constitutional analysis, the structure of the Constitution and the requirement of mutual respect for the other branches play a significant role in the Court's reasoning, overtly or sub silentio. *Nixon v. United States*, 506 U.S. 224, 240-43 (1993). The constitutional free exercise cases were routinely decided by this Court's deference to the hard policy judgments that Congress or the military or prison authorities needed to make, or, in other words, with a healthy humility for its institutional limitations when it comes to policymaking. This was true across a wide landscape of legal arenas. *See, e.g., Bowen v. Roy*, 476 U.S. 693, 700-01 (1986) (social security system); *Goldman v. Weinberger*, 475 U.S. 503, 507-10 (1986) (military uniform); *United States v. Lee*, 455 U.S. 252, 261 (1982) (social security tax system); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (child labor law); *Jacobson v. Massachusetts*, 197 U.S. 11, 27-31 (1905) (mandatory smallpox vaccination).

When the Court's free exercise jurisprudence was redirected by Congress into a federal statute, the Court's role in these cases changed from one of healthy deference and respect for its sister branches to a statutory interpretation divorced from the

Court's known shortcomings. The most serious constitutional mischief has arisen in this Court's interpretation of the "least restrictive means" test.

In *Hobby Lobby*, the Court majority was comfortable not identifying the government's "compelling interest" in the Affordable Care Act's contraception mandate as it applies to for-profit employers, 134 S. Ct. at 2803, but then concluded that the "least restrictive means" test granted it carte blanche to second-guess how Congress and the Executive had crafted a religious exemption. 134 S. Ct. at 2802.

A majority of the Court confidently concluded that a "least restrictive means" would be for the government itself to pay for women's contraception in circumstances where the for-profit employer would not due to religious reasons. 134 S. Ct. at 2780. This conclusion was not economically or politically feasible. It was plainly not an option that Congress could have or would have chosen. But the Court majority took RFRA's language as an opening to set public policy, and not to defer to legislative or executive judgment, or political reality. The failure of deference to the legislative process threatens the separation of powers.

This extraordinary grab for power was repeated in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), when this Court interpreted the same standard and, in the course of doing so, abandoned its previous wholesome deference to the executive branches operating the prison systems. *See, e.g., O'Lone v. Estate of Shabazz*,

482 U.S. 342 (1987). Instead, the Court lectured prison authorities on how long a beard must be to form a security threat. *Hobbs*, 135 S. Ct. at 866. This new tone is quite distinct from the Court's interpretation of the same provisions in *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), where a unanimous Court warned lower courts to defer to prison officials on matters of safety and security.

Of the Court's prior cases, the *Hobby Lobby* reasoning regarding the "least restrictive means" hearkens back to the reasoning in *Lochner v. New York*, 198 U.S. 45 (1906), because in both cases the Court put itself in the position of invasively second-guessing public policy. As with *Lochner*, the RFRA interpretation starting in *Hobby Lobby* has the capacity to raise questions about the Court's legitimacy and authority.

The *Lochner* approach was deployed by the Court to block social reforms for the protection of rights for workers, and particularly women and children, *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding federal regulation of child labor unconstitutional), workers in hazardous working conditions, *Lochner*, 198 U.S. 45 (1905) (holding state regulation of work hours unconstitutional), and women's rights, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding minimum wage law for women unconstitutional); Glen E. Summers, Private Property Without *Lochner*: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process, 142 U. PA. L. REV. 837, 863-84 (1993) ("when the judiciary acts as a

'superlegislature' . . . it serves to destroy the deviate constitutional scheme of separation of powers, and, in so doing, to undermine the intrinsic value and integrity of the democratic process."); Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 94 (1985) (when choosing itself, "the court becomes vulnerable to a charge that it is acting as a legislature. The outcome, based on past experience, is to harm both the Court and the country.").

This Court eventually abandoned the *Lochner* approach as beyond its institutional competency. *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937); *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

That institutional capacity has not changed since then, but the RFRA test of "compelling interest" and "least restrictive means" for laws that are neutral and generally applicable puts the courts in this untenable position where it is least capable.

Thus, by imposing super strict scrutiny on the government in cases involving neutral, generally applicable statutes, RFRA, at least as interpreted by this Court in *Hobby Lobby*, delegates lawmaking power to the courts and, therefore, violates the separation of powers. *See Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) ("we have long insisted that 'the integrity and maintenance of the system of

government ordained by the Constituted' mandate that congress generally cannot delegate its legislative power to another branch.") (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)); *J.W. Hampton, Jr. v. United States*, 276 U.S. 394, 406 (1928) ("It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch.").

The same constitutional error arises when religious entities like the Petitioners ask the courts to recraft and micromanage religious exemptions under the *Hobby Lobby* reasoning. This Court in *Smith* made clear that in our democratic process, the legislature is in the better and the traditional position to shape religious exemptions and held that the Constitution does not give the courts that same power. Yet, the *Hobby Lobby* majority reversed the appropriate role of the courts and legislature in this arena.

Members of Congress predicted this potential constitutional pitfall – particularly when civil rights are at stake – while considering RLPA, which was touted as a "fix" for the *Boerne* invalidation of RFRA. This is the other side of the separation of powers coin that forbids Congress from enacting legislation that is a constitutional amendment, as RFRA is. *Boerne v. Flores*, 521 U.S. 507, 516, 529, 536 (1997) ("Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.").

III. The Petitioner's Theory Would Result in a RFRA Interpretation Unconstitutional as Applied

The Petitioner in this case is making such an extreme claim that it potentially violates more than one constitutional prohibition.

This is not a case where RFRA is being used to attack a law with no exemption, but rather it is being deployed for the purpose of re-crafting the existing accommodation to the benefit of Petitioner's religious worldview. Nor should it be ignored that the Petitioners' request would inflict harm on female employees. This Court has never found that notifying the government of a need for religious accommodation is a substantial burden on religion. This was certainly not an argument ever raised or considered when either RFRA were enacted in 1993 or 2000.

This argument against notifying the government of a need for accommodation is, on its face and at its base, specious, as the vast majority of federal appellate courts have held. *Grace Schools v. Burwell*, 801 F.3d 788, 791 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 216-26 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1173-74 (10th Cir. 2015); *Michigan Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014); *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015); *Geneva Coll. v. Sec'y United States Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015); *Priests for Life v. United*

States Dep't of Health & Human Servs., 772 F.3d 229, 256 (D.C. Cir. 2014). *But see Sharpe Holdings v. Burwell*, 801 F.3d 927 (8th Cir. 2015).

To hold to the contrary turns RFRA into a sword that believers can wield against the thousands of religious accommodations already in place in federal law – to make them more and more extreme by judicial fiat.

In *Smith*, this Court correctly recognized that practice-specific religious exemptions have a long history and that there is every reason to expect lawmakers to be willing to provide exemptions in the future. "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby punished from the political process . . . It is [] not surprising that a number of States have made an exception to their drug laws for sacramental peyote use." *Smith*, 49 U.S. at 890. The permissive legislative accommodation approved in *Smith* (unlike the blunderbuss approach of RFRA), turns on the assumption that only the lawmakers can adequately consider how a particular exemption harms public policy or others, or does not.[5]

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[5] This argument applies whether the law is a result of the legislative process or executive enforcement of a complex legislative scheme wherein Congress has delegated enforcement and application of the law to the executive. *See, e.g., Whitman v. American Trucking Association*, 531 U.S. 457, 472 (2001) (rejecting nondelegation doctrine as between the legislative and executive branches). It is common for the executive branch to

(Continued on following page)

Lawmakers are in the position to make that call in the best interest of the public. The courts simply are not. Therefore, if this Court were to interpret RFRA as Petitioners demand, it would violate the separation of powers.

CONCLUSION

At the time of RFRA's passage in 1993, the broad-based coalition of its supporters sought only to enact a statute that restored what was perceived as the pre-*Smith* standard for religious liberty claims. It was certainly never intended to allow one group to use its religious exercise as a sword to usurp the rights of others. It should be noted that Congress rejected the notion that RFRA should be used in such a way when it failed to re-enact it as applied to the states, or RLPA, in 1999.

RFRA, as presented by the Petitioners' claim, does not reflect what its supporters intended at the

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recognize religious exemptions that were not already built into the original law. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegtal*, 546 U.S. 418, 433 (2006) ("21 U.S.C. § 812(b)(1) applies equal measure to the mescaline in peyote, yet both the Executive and Congress itself decreed an exception from the Controlled Substances Act for Native American religious use of peyote."); Exemptions Based on Religious Dietary Laws, 9 C.F.R. § 381.111 (2016); Accommodations to Religious Observance and Practice, 41 C.F.R. § 381.11 (2016); 29 C.F.R. § 1605.2(c)(1) (2016).

time of enactment. Moreover, such an interpretation threatens to violate the separation of powers. Accordingly, *Amicus Curiae* respectfully requests this Court reject the extreme reading of RFRA proposed by Petitioners, which would have the immediate effect of curtailing the rights of female employees. Further, such a reading would open the door for RFRA, in the name of religious exercise, to inflict harm against third parties across a broad array of important issues. Therefore, I strongly urge the Court to instead interpret RFRA in light of its legislative history and the intent of its bipartisan supporters.

Respectfully submitted,

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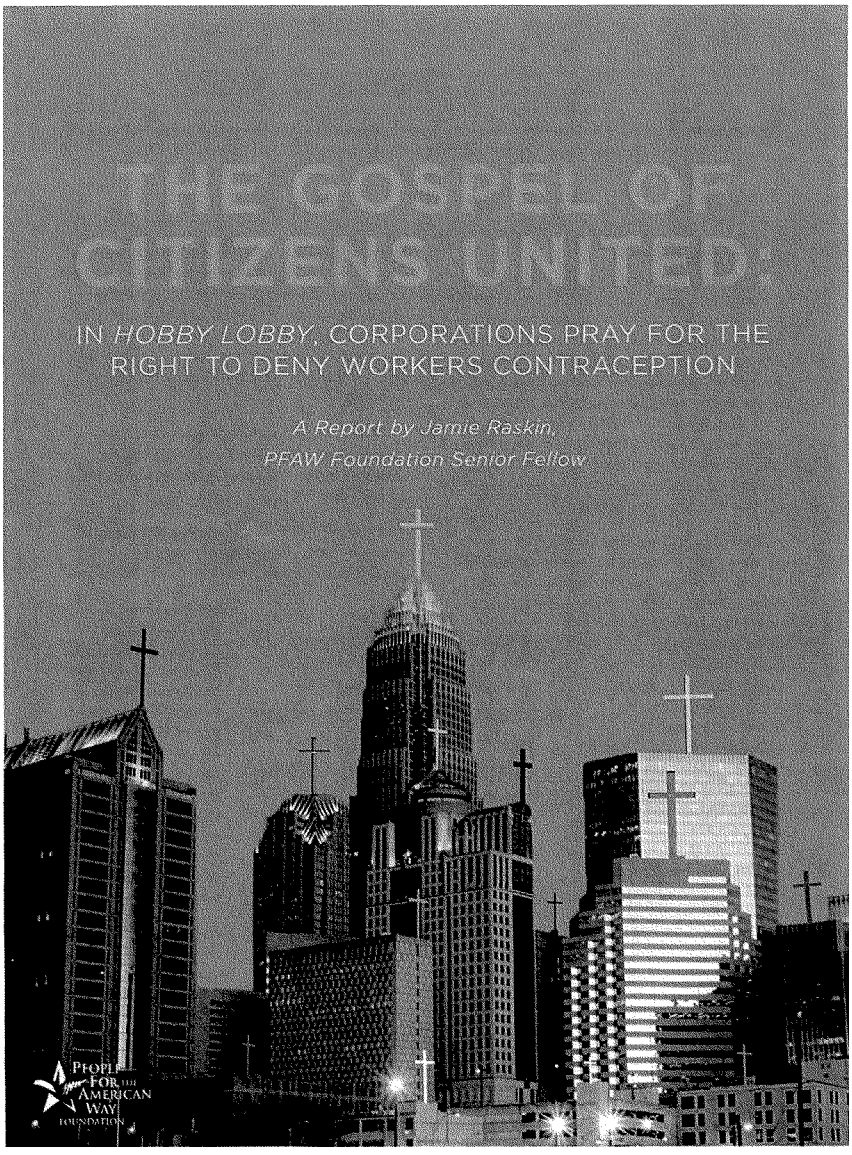
February 17, 2016


THE GOSPEL OF CITIZENS UNITED:
IN *HOBBY LOBBY*, CORPORATIONS PRAY FOR THE RIGHT TO DENY WORKERS CONTRACEPTION
A Report by Jamie Raskin,
PFAW Foundation Senior Fellow
People For the American Way Foundation

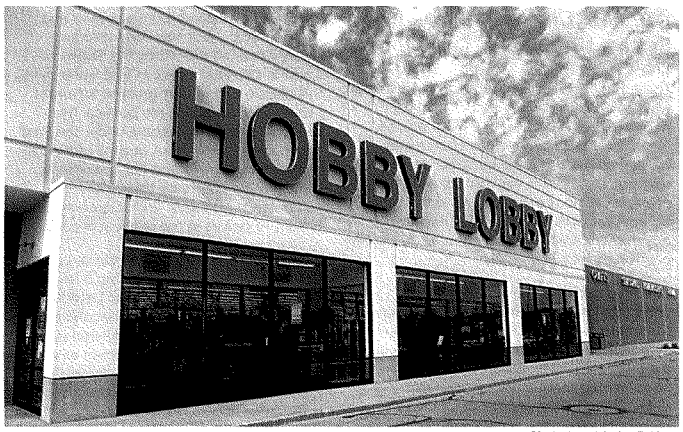


Photo by Nicholas Eckhart

Hobby Lobby has been consolidated with *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir., 2013), in which the United States Court of Appeals for the Third Circuit rejected the same package of arguments, advanced by a company owned by Mennonites, concluding simply that "for-profit, secular corporations cannot engage in religious exercise" and remarking that "we are not aware of any case ... in which a for-profit, secular corporation was itself found to have Free Exercise rights."

It is a sign of the times that the Tenth Circuit refused such an obvious conclusion, one arising out of centuries of American jurisprudence about the corporation, and instead voted to give Hobby Lobby the power under RFRA to deny its women employees coverage for certain contraceptives. It is a sign of the perilous corporatist path we are on that the Roberts Court now seems poised to take these claims seriously and to baptize for-profit business corporations as pious citizens, giving them the selective power to discriminate against employees who want nothing more than an equal right to comprehensive health care services.

As we shall see, not only is the Hobby Lobby corporation not being forced to violate its religious rights here (it doesn't have any), but it is not even being forced to pay for the offending contraceptive coverage at all because it is perfectly free under Obamacare simply to pay taxes into the general program rather than to purchase insurance plans for its employees. Payment of the tax would be both a less costly alternative and one that removes the corporation's alleged discomfort about paying for certain kinds of birth control. But the case is sufficiently complex, as a matter of fact and law, that there are many opportunities for conservatives to obscure the reality and promote the brazen claim that corporations are persons and Obamacare is trampling their religious freedoms.

494 U.S. 872 (1990). So the underlying question is necessarily whether corporations have Free Exercise rights.

Hobby Lobby comes from an *en banc* ruling of the United States Court of Appeals for the Tenth Circuit, which has advanced an extraordinary and dangerous conclusion: that a for-profit corporation operating more than 500 arts-and-crafts chain stores across the country and employing about 13,000 workers is actually a "person" engaged in the "exercise of religion" within the meaning of RFRA and, therefore, is immune from having to offer certain contraceptive coverage to its women employees under the Affordable Care Act. The basis for the ruling is that the five members of the Green family who own and operate Hobby Lobby have stated their commitment to "honoring the Lord in all we do by operating the company in a manner consistent with biblical principles." 723 F.3d at 1122. The Tenth Circuit found that, because Hobby Lobby has thus expressed itself "for religious purposes, the First Amendment logic of *Citizens United*, where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well. **We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."** (emphasis added)

But Hobby Lobby is neither a "religious employer" nor a non-profit institution. It is a standard for-profit business corporation.

The Tenth Circuit thus not only found that this giant corporation was a "person" practicing its (his? her?) religion but that Obamacare has forced it to violate its sincerely held religious belief that life begins at conception. Specifically, it ruled that the law *substantially* burdened the corporation's "religion" by arguably obligating it, under its employer-sponsored health plan, to cover several forms of contraception—including two types of IUDs and the emergency contraceptives Plan B and Ella—that the corporation considers religiously objectionable.

Furthermore, in performing the analysis required under RFRA, the *en banc* court found that the United States had no compelling interest in making Hobby Lobby, a religiously pious and devout corporation, offer such contraceptives to its female employees against its professed sectarian principles. The comic dimension of the case is that Hobby Lobby's employee insurance policy was already covering the contraceptives it allegedly deplores when Obamacare became the law. In other words, the corporation only became exorcised and religiously activated on the contraceptives when it decided to oppose the new federal policy.

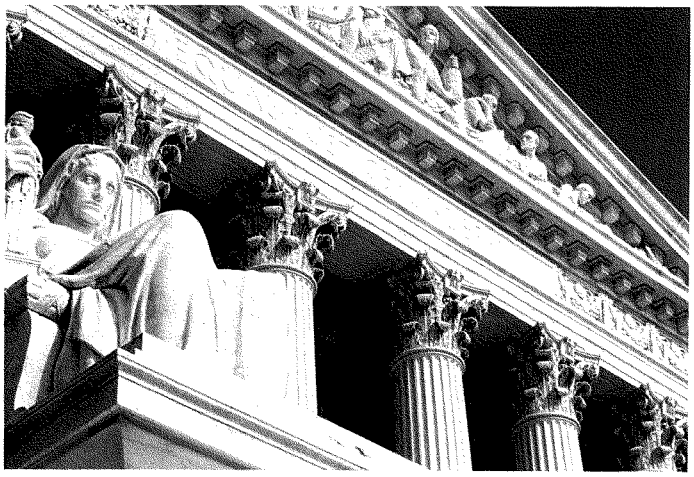
Business Corporations Have Never Had Religious Rights, and the Idea Is Absurd

The astounding nature of the decision becomes clear when we focus on the fact that Hobby Lobby is a regular business corporation, secular in its operations and devoted to profit-making purposes. It is neither a church nor a religious organization. It does not hire its workers based on religious preferences or practices. Under the Affordable Care Act, if Hobby Lobby *were* a church or a non-profit religious organization that had as its purpose the promotion of religious values, and if it primarily employed and served people along religious lines, it would be considered a "religious employer" and it would be *completely* exempted from the contraceptive-coverage requirement. Even if it did not meet those stringent

Corporations Can't Pray – Even If the Court Treats Them Like Gods

This is the crucial point. The author of the First Amendment, James Madison, argued that religious exercise was a freedom belonging to **individuals**, who have reason, conviction, and a relationship with God, and this freedom could not be tampered with by the state, the church, or any other institutional power. As he put it in his famous Memorial and Remonstrance Against Religious Taxation, quoting from the Virginia Declaration of Rights, "we hold it for a fundamental and undeniable truth 'that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction . . .' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."

The Court's campaign to treat corporations like "persons" for constitutional purposes actually gives corporations the power to **dominate** the political and private lives of citizens. *Citizens United* was decided in the name of free speech, but no person's right to spend his or her own money on political campaigns was enlarged by it in any way. The effect of the decision was to give CEOs the power to take unlimited amounts of money from corporate treasuries and spend it advancing or defeating political candidates and causes of their choosing. Its real-world consequence was thus not to expand the political **freedom** of citizens but to reduce the political **power** of citizens vis-à-vis huge corporations with vast fortunes. These corporations, endowed with limited shareholder liability and perpetual life, may now freely engage in motivated political spending to enrich themselves and their executives, leaving workers and other citizens behind. Adding insult to injury, most of the stock in large corporations is owned



Supreme Court

all American businesses, 60% of all U.S. employment, and one-third of all Fortune 500 companies. The religious rights that a small or family-owned corporation wins are the religious rights that a big or publicly held corporation will have. *See Citizens United.* There is definitely no constitutional difference between the status of a large corporation and a smaller one.

Saving Grace: The Whole Premise of the Case Is Flawed

It seems quite likely that the *Citizens United* five-Justice majority could vote for Hobby Lobby because the strongest pro-corporate Justices are also the weakest defenders of the separation of church and state. As usual, a high burden of hope rests with Justice Kennedy to pull the Court back from another jarring assault on constitutional democracy.

But even if the Court, disastrously, gets it wrong on the central question of whether for-profit business corporations can exercise religious freedoms, there is another chance for the Court to pull back from the brink at least on the Obamacare question. The whole premise of the litigation in *Hobby Lobby* is that federal law (specifically, the HHS "Preventive Services" Rule) compels the company to furnish employees with a health insurance package that covers the offending contraceptives, thus substantially burdening the company's alleged RFRA and Free Exercise rights. But this is a complete misunderstanding of how the law works because the company is not compelled to offer its employees any health insurance package, much less a package with specific contraceptives.

As Marty Lederman has pointed out in great detail in a trenchant blog post ("Hobby Lobby Part III—There Is No 'Employer Mandate'"), federal law and the HHS rule specifying covered contraceptives "do not impose any obligations at all on employers, such as Hobby Lobby and Conestoga Wood." Rather, federal law "requires virtually all **group health-insurance plans**, and **insurers of group or individual health insurance**, to include coverage for various preventive services, including 18 forms of FDA-approved birth control, without 'cost sharing' . ..." (emphasis added). However, it is true that if a plan or insurer fails to include the required items in a plan, the government can tax not only the plan and the insurer but the sponsoring employer as well.

A secular corporation owned by Christian Scientists could presumptively refuse to pay for any insurance plan involving doctors or hospital care; a secular corporation owned by Jehovah's Witnesses could presumptively refuse to pay for any insurance covering blood transfusions.

But here is the key point: as Lederman writes, **"federal law does not impose a legal duty on large employers to offer their employees access to a health insurance plan,** or to subsidize such a plan. There is no such 'employer mandate.'" (bold in the original). Rather, the Affordable Care Act imposes a tax on large employers in order to have them share in the cost of paying for the new national entitlement to health insurance. This is also how Social Security works: employers pay taxes to the government, which in turn pays Social Security benefits to individuals. However, unlike employers in the Social Security system, large employers in the ACA also *have an option to offer a health insurance*

Photo by Raychel Mendez via Flickr

to further its *interests without substantially burdening plaintiffs'* religious exercise would be for the government to use its own revenues to subsidize contraceptive use by Hobby Lobby and Conestoga Wood employees. Well, that is exactly what would occur if those employers were to choose to make a [tax] payment rather than offering their employees access to an employer plan." (emphasis in the original)

In short, even if corporations were persons with a religious conscience, and even if it authentically offended the religious sentiments of these corporate persons to have to pay a third-party health insurance provider for making certain contraceptives available to employees, there would still be no problem under RFRA or the Free Exercise Clause because the affected corporations can simply pay a tax instead.

The Religion of Business, the Business of Religion

Hobby Lobby is a case whose major claims would not have a prayer in any other Court at any other time. Yet, the *Citizens United* Court has made a religion out of business, so it is only natural that some people will now want to make a business out of religion.

But it is time for the Court to restore some reality to the conversation. Business corporations do not belong to religions and they do not worship God. We do not protect anyone's religious free exercise rights by denying millions of women workers access to contraception. And, as a matter of fact and law, employers are not being forced to purchase insurance plans at all for their workers because they can pay a simple and cheaper tax instead. The *Hobby Lobby* case is a tissue of misunderstandings, propaganda, and excruciating extrapolations from the *Citizens United* decision. It might be nice if the Court used the occasion of this train wreck of a case to rewind the tape on *Citizens United*. But some things may be too much even to pray for.

Citations are available in the online version of this report at www.pfaw.org

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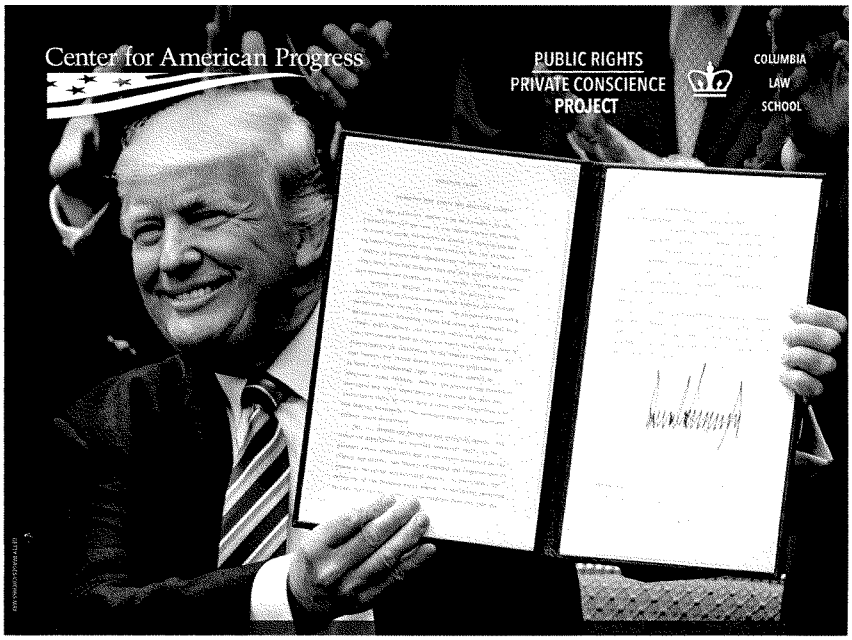

Religious Liberty for a Select Few

The Justice Department Is Promoting Discrimination Across the Federal Government

By Sharita Gruberg, Frank J. Bewkes, Elizabeth Platt, Katherine Franke, and Claire Markham April 2018

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Introduction and summary

In its first year, the Trump administration has systematically redefined and expanded the right to religious exemptions, creating broad carve-outs to a host of vital health, labor, and antidiscrimination protections. On May 4, 2017—the National Day of Prayer—during a ceremony outside the White House, President Donald Trump signed an executive order on "Promoting Free Speech and Religious Liberty." At the time, the executive order was reported to be a "major triumph" for Vice President Mike Pence, who, as governor of Indiana, famously signed a religious exemption law that would have opened the door to anti-LGBTQ discrimination.[1] Among its other directives, the order instructed Attorney General Jeff Sessions to "issue guidance interpreting religious liberty protections in Federal law."[2] The guidance on "Federal Law Protections for Religious Liberty," which Sessions subsequently issued in October 2017, purports to clarify existing religious liberty protections.[3] However, in practice, it expands those provisions to improperly elevate the right to religious exemptions above other legal and constitutional rights and to shield those who would seek to use federal dollars while denying necessary services to and discriminating against LGBTQ people, women, and religious minorities.

Federal agencies are already relying on Sessions' guidance to broaden exemptions related to essential health services, including sexual and reproductive health care. In January 2018, the Department of Health and Human Services (HHS) announced the creation of a Conscience and Religious Freedom Division in the Office for Civil Rights as well as the publication of a proposed rule that would radically redefine and expand existing religious exemptions under the law. Among its other provisions, the rule would expand the right of health care providers to deny patients necessary care related to abortion and sterilization.[4] In October 2017, HHS published a rule allowing virtually any employer that objects to contraception on moral or religious grounds to apply for an exemption to the Affordable Care Act's mandate that employers provide contraceptive coverage in their health insurance plans.[5] Both measures referenced Sessions' October 2017 guidance as part of the department's rationale for promulgating these rules.

Religious liberty is a foundational American value. Both the right to practice one's faith and the right to live free of a government-established religion are enshrined in the First Amendment to the Constitution. Both these rights are also very popular: Eighty-eight percent of Americans agree that religious liberty is a founding principle afforded to everyone in the United States, and almost two-thirds want to see that strong church-state separation is maintained.[6]

Throughout history, legislatures and the courts have worked to more clearly define and more robustly protect religious liberty for all Americans. While critical and widely embraced, the religious freedoms protected in the First Amendment are not unlimited. Much like all constitutionally protected rights, they must be balanced in an ongoing assessment of the needs and rights of a dynamic and pluralistic American landscape. For example, a common theme in First Amendment law has involved an understanding that religious liberty has a natural boundary where it causes harm to third parties.[7]

In 1993, communities of faith, civil rights advocates, and politicians along the ideological spectrum celebrated the passage of the bipartisan federal Religious Freedom Restoration Act (RFRA). RFRA prohibits the government from substantially burdening the exercise of religion unless doing so is the least restrictive means to further a compelling government interest. However, despite initial widespread support for RFRA, this strict test has since led to numerous attempts to go beyond RFRA's initial intent and use religious exemptions to override the rights of others.[8]

In the decades following RFRA's passage, conservatives have worked to use religious liberty claims to advance anti-equality political and legislative aims—particularly regarding issues of sex, marriage, and reproductive rights. This movement met with success in the 2014 Supreme Court decision in *Burwell v. Hobby Lobby*, which marked a dramatic change in the legal landscape of religious freedom.[9] In its opinion, the court granted Hobby Lobby—a closely held, for-profit company—the same religious exemption available to faith-based nonprofits under the Affordable Care Act (ACA): the ability to opt out of providing employees comprehensive insurance coverage, including no-cost contraception under the ACA's contraception mandate. The court's decision upset the previously shared understanding of who is eligible for RFRA protections, what constitutes a substantial burden on religious exercise, and what constitutes the least restrictive means of furthering a compelling government interest.[10]

Since inauguration, the Trump administration has tried to build on the *Hobby Lobby* decision in order to distort religious liberty protections so that they advance only the rights of a narrow segment of the faith community—namely, conservative Christians—and create a license to discriminate against LGBTQ people, women,

religious minorities, and nonreligious people.[11] The administration's policies have established a pattern of protecting the religious liberty of only this small segment of Americans. The Muslim ban; abandonment of employment protections for LGBTQ workers; commitments to further expand religious exemptions for employers who object to their employees accessing no-cost contraception; and other discriminatory acts have all prioritized the rights of the older minority of white evangelical Christians who share a conservative view of sex and sexuality and a narrow, exclusive definition of marriage and family. Yet the administration has failed to acknowledge that many people of faith hold a wide variety of views regarding these issues.[12]

This report discusses how the Department of Justice's guidance opens the door to an extreme rewriting of the concept of religious liberty. The guidance—and the numerous agency rules, enforcement actions, and policies that it is influencing—will shift the balance of individual religious protections across the federal government toward a new framing that allows religious beliefs to be used as a weapon against minority groups.

Jeff Sessions' religious liberty guidance is a solution in search of a problem

The executive order directing Attorney General Sessions to promulgate guidance on religious exemptions was a troubling development. Throughout his career, Sessions has espoused a flawed interpretation of religious liberty that flouts the separation of church and state and favors specific conservative, evangelical Christian beliefs. For example, while he supports enacting special free exercise protections for those with anti-LGBTQ and anti-choice religious beliefs, Sessions has championed Islamophobic government policies and rhetoric.[13] These concerns were borne out when Sessions issued religious liberty guidance that contained significant legal and constitutional problems.

While a few of these principles merely restate general and widely accepted principles of religious liberty law, others significantly expand upon or misinterpret Supreme Court precedent and statutory religious liberty protections. By elevating Sessions' beliefs on religious exemptions to the same level as established precedent, these provisions provide legal cover for individuals and government agencies to ignore a host of laws and policies; moreover, they are likely to create tangible harm in various marginalized communities.

Both the president's executive order and the attorney general's guidance are salient examples of a solution in search of a problem. Existing constitutional and statutory religious liberty protections for all are robust, comprehensive, and vigorously enforced—the fruits of which can be seen in the thriving, pluralistic religious communities in the United States. Attorney General Sessions has stated that religion in the United States is under attack; however, he offers no evidence for this proposition besides citing a law professor's blog post that encourages judges to "take aggressively liberal positions."[14] The First Amendment's guarantee of the free exercise of religion, the federal RFRA, and literally hundreds of federal regulatory measures provide more than adequate protection for the free exercise of religion in the United States.

Additionally, the Supreme Court maintains a docket that includes significant religious liberty cases each term and has not been hesitant to enforce constitutional and statutory free exercise rights when it finds that those rights have been abridged.[15] The administration has not made the case that existing protections for religious liberty have weaknesses that merit stronger federal measures. The extremism of the president and attorney general's embrace of religious exemptions—particularly given the strength of existing protections thereof—risk compromising establishment clause protections by directing agencies to pre-emptively provide exemptions to broadly applicable rules. As the Supreme Court noted in *Corporation of the Presiding Bishop v. Amos*, at some point, accommodation may devolve into "an unlawful fostering of religion."[16]

The guidance misinterprets constitutional and statutory religious liberty protections

The guidelines issued by Jeff Sessions' Department of Justice (DOJ) contain significant exaggerations and misinterpretations of religious liberty under the Constitution and federal law. The guidance overstates the right to religious exemptions under the First Amendment and RFRA, demanding that agencies provide exemptions that are not required under current law and that may be prohibited by the establishment clause of the First Amendment. Several of the memo's most significant overstatements are outlined below:

- **The establishment clause:** The guidance repeatedly understates the limits on religious exemptions imposed by the establishment clause. For example, the guidance's broad statement that "individuals and organizations do not give up their religious-liberty protections by ... receiving government grants or contracts" misleadingly ignores establishment clause restrictions that prohibit faith-based organizations from placing religious restrictions on the use of government funds and even limit some optional religious activities within grant programs.[17]

- **RFRA and corporations:** The guidance states that RFRA protects the exercise of religion by " 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies,' 1 U.S.C. § 1, including for-profit, closely-held corporations like those involved in *Hobby Lobby*, 134 S. Ct. at 2768."[18] The Supreme Court's holding in *Hobby Lobby*, however, was far narrower, finding only that the law applied to closely held corporations.

- **Religious employers:** The guidance overstates the existing religious exemption within Title VII of the Civil Rights Act of 1964, which permits religious employers to prefer coreligionists in hiring. The DOJ guidance states that such religious organizations are "entitled to employ only persons whose beliefs and conduct are consistent with the employers' religious precepts."[19] While Title VII permits religious organizations to hire employees that share their religion, neither the statute nor subsequent case law allows

religious employers to require the conduct of employees to be consistent with the employer's religion in a way that violates Title VII's sex discrimination prohibition.[20] For example, religious employers are not permitted to fire someone for conduct that is inconsistent with their faith if it is otherwise protected under Title VII—such as only firing female employees for getting pregnant outside of marriage.

- **RFRA compelling interests:** The guidance states, "An asserted compelling interest in denying an accommodation [under RFRA] to a particular claimant is undermined by evidence that exemptions or accommodations have been granted for other interests."[21] This is an exaggeration of nonbinding language, or dicta, from the justices in *Hobby Lobby,* as the majority opinion assumed that the government had a compelling interest in the contraceptive mandate, and five justices explicitly held that the government's interest was compelling.[22] In fact, the opinion stated that it was "unnecessary to adjudicate" the question of when and whether an existing exemption undermines an asserted compelling interest.[23]

- **Requirement to create a new government program:** The guidance claims that the RFRA analysis "requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances ... creation of a new program."[24] This, again, is taken from *Hobby Lobby* dicta that conflict with the opinion of not only the four dissenters in that case but with Supreme Court Justice Anthony Kennedy's concurrence, which stated:

  > *In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program ... The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government.*[25]

- **Eligibility for government funding:** The DOJ guidance broadly states that "Government may not exclude religious organizations as such from secular aid programs, at least when the aid is not being used for explicitly religious activities such as worship or proselytization."[26] The most recent case on this issue, however—*Trinity Lutheran Church v. Comer*—is ambiguous as to when the government can and cannot exclude religious organizations from funding. In a crucial but vague footnote, that opinion states, "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[27]

By expanding the types of companies that can bring RFRA claims, limiting what may be considered a "compelling interest," stating that narrow tailoring may require the creation of a new government program, broadening the religious exemption of Title VII, and understating the limits of the establishment clause, the DOJ guidance attempts to dramatically expand the right to religious exemptions under federal law. At the same time, it pays little consideration to the impact that such exemptions will have on the enforcement of health, safety, labor, and anti-discrimination laws, or on the communities who depend on these laws. While RFRA and other exemptions already robustly protect religious observers, the guidance seeks to further elevate the right to exemptions above a host of other liberty and equality rights. Even more troubling, the agencies that will be issuing exemptions under the DOJ guidance are largely led by officials who have openly favored conservative religious views about sex and marriage over a larger concern for religious diversity and plurality.

The guidance's impact will be far-reaching and expensive

An analysis by the Center for American Progress identified at least 87 regulations, 16 agency guidance documents, and 55 federal programs and services that Attorney General Sessions' guidance could undermine.[28] Most of these regulations and guidance documents were created by the Obama administration in order to advance LGBTQ equality and ensure that federally funded programs do not discriminate. This research shows that the guidance will likely have far-reaching negative effects on people across the country, particularly because the DOJ will review a wide variety of proposed regulations—including those that implement civil rights laws—for compliance, and it will alert other agencies when they might be in conflict with the guidance.[29] Given Sessions' and the administration's record on LGBTQ rights, reproductive health, and religious minorities, this guidance, at best, may produce a severe chilling effect on promoting or enforcing protections for LGBTQ people, women, and minority communities. At worst, it could bring about new, explicit exemptions that expressly undermine civil rights.

DOJ guidance establishes a broad license to discriminate

The U.S. Constitution as well as federal, state, and local law contains numerous provisions to ensure that religious freedom thrives, providing a shield for individual beliefs and practices. The DOJ guidance, however, seems to interpret almost any government action to be a substantial burden on religious exercise—while minimizing any compelling government interest to the contrary—and allows religious liberty to be used as a sword to infringe on the rights of others. Examples from the recent past, such as *Hobby Lobby*, show that there have been efforts to reinterpret "religious exercise" beyond an individual's own actions—for instance, wearing religious garb or abstaining from work on Sabbath—to include any connection, however tenuous, with activities that the individual opposes, such as paying for insurance that might be used to obtain contraception. In other words, under the guidance, individuals and corporations will be able to point to almost any law or regulation and claim that it has burdened their religious freedom. This broad interpretation opens the door to exempt individuals and

corporations from following any law they do not like. For example, employers may try—as Harris Funeral Homes has—to demand that their transgender employees dress according to their sex assigned at birth, claiming that following Title VII's protections against sex discrimination would be a substantial burden on their beliefs about gender;[30] that argument has already failed in the 6th U.S. Circuit Court of Appeals.[31]

The DOJ guidance unnecessarily emphasizes RFRA and asserts that many government interests, such as the prevention of discrimination, would not be found compelling enough to take precedence over religious beliefs "except in the narrowest circumstances."[32] This is a shocking statement by a government agency that is charged with the enforcement of federal civil rights laws. It creates a default in favor of religious exemptions, which will upset the careful balance that has been honed for centuries between religious freedom and other civil rights.

The guidance encourages federal agencies to give an unprecedented amount of deference to the religious beliefs of federal employees, contractors, and grantees. It also attempts to minimize third-party harm as a consideration when weighing religious objections against other protected rights, relying on a nonbinding footnote in *Hobby Lobby* while going beyond the Supreme Court's actual holding. The Supreme Court has repeatedly held that religious freedom should not be interpreted to allow for the infliction of harm on others.[33] It has invalidated religious exemptions that would have imposed "significant burdens" on third parties, noting that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[34] While the *Hobby Lobby* footnote argues that some religious exemptions that harm third parties may be permissible, the court was careful to note that it believed the impact of an accommodation on women employed by Hobby Lobby would be "precisely zero."[35] The guidance from the Department of Justice elevates a footnote in *Hobby Lobby* rather than the actual ruling, permitting harm to third parties in favor of individual religious practices.

The guidance puts vulnerable populations at risk

These expansive interpretations will likely lead to major regulatory changes, as agencies bring themselves into compliance and create broad exemptions that enable noncompliance with anti-discrimination and other laws. For example, by allowing individuals and companies to ignore nondiscrimination protections because of a religious objection to equal treatment for certain populations, the guidance would essentially gut these protections and render them largely ineffective, shifting the balance in favor of those who object to them on religious grounds.

Of particular concern is the impact that the guidance may have on contractors and grantees. The guidance document states that "government contracts, grants, and other programs" are entitled to religious "protections."[36] With hundreds of billions of dollars going to contractors and grantees every year, expanding religious exemptions for these organizations could have far-reaching effects on the employees who work for federal contractors, the communities served by federal grantees, and the taxpayers who fund these programs. More than half of the U.S. population still lives in a state with no employment nondiscrimination laws covering sexual orientation and gender identity.[37] Calculations using USASpending.gov's searchable database indicate that, in fiscal year 2016, approximately $615 billion in federal contracts, grants, loans, and other financial assistance was allocated to the 30 states without comprehensive LGBT nondiscrimination protections on the books—places where LGBTQ people are especially vulnerable to discrimination.[38] Despite existing protections, employees working for federal contractors in those states may now be even more vulnerable. Thanks to an executive order signed by former President Barack Obama, all federal contractors and subcontractors with contracts over $10,000 are barred from discriminating on the basis of sexual orientation and gender identity.[39] The contractor executive order, which was signed in 2014, was the single largest expansion of LGBTQ workplace protections in U.S. history.[40] Federal contractors employ nearly 30 million individuals—or about one-fifth of all U.S. civilian employees—who, with the implementation of the DOJ guidance, may be vulnerable to discrimination.[41]

In addition to potentially permitting employee discrimination by federal contractors, the DOJ guidance may allow providers to lock LGBTQ people out of many federally funded programs and services. Billions of taxpayer dollars fund organizations that provide critical services like health care, shelter, and assistance for victims of violence. Table 1 provides examples of programs that have sex-, sexual orientation- and gender identity-inclusive nondiscrimination rules in order to ensure grantees do not deny services to LGBTQ people. The DOJ guidance could permit a contractor or grantee to assert a religious belief in order to refuse services under these programs without risking the loss of federal funding. For example, LGBTQ survivors of interpersonal violence could be turned away from federally funded domestic violence shelters; health clinics around the world that are funded by the U.S. Agency for International Development could refuse to treat LGBTQ people; a landlord who receives federal funding could refuse to rent an apartment to a same-sex couple or a transgender person. And beyond service refusals, the guidance could be relied upon by federal agencies to sanction mistreatment of, for example, LGBTQ youth in residential programs; for instance, one residential placement facility in Michigan forced LGBTQ teens to wear orange jumpsuits in order to "warn" the other residents of their identity.[42]

In another example, under the guise of mental health care, faith-based organizations contracting with HHS could force any unaccompanied LGBTQ immigrant children in their care into conversion therapy.

The programs listed in Table 1 are just a few examples of the more than 50 taxpayer-funded programs and services CAP identified that could be permitted to refuse service to LGBTQ people and women under the DOJ guidance.

TABLE 1

Examples of programs with sex-, sexual orientation-, and gender identity-inclusive nondiscrimination rules

Attorney General Sessions' guidance jeopardizes access to these programs for women and LGBTQ people

Agency/Department	Program	Annual budget (FY 2017)
U.S. Agency for International Development and State	Global health programs	$8.8 B
U.S. Department of Housing and Urban Development	Homeless assistance grants	$2.4 B
	Community Development Block Grant	$3 B
	Section 8 contracts	$10.3 B
U.S. Department of Health and Human Services	Shelters for unaccompanied immigrant children	$1.4 B
	Community health centers	$5 B
	Ryan White HIV/AIDS Program	$2.3 B
	Runaway and homeless youth programs	$119 M
	Title X Family Planning program	$286 M
U.S. Department of Justice	Violence Against Women Act grant programs	$482 M
U.S. Department of Veterans Affairs	Homeless veterans' programs (including Supportive Services for Veterans Families)	$1.6 B

Sources: U.S. Agency for International Development and State, Congressional Budget Justification: Department of State, Foreign Operations, and Related Programs (U.S. Department of State, 2018), available at https://www.usaid.gov/sites/default/files/documents/1868/FY_2019_CBJ.pdf; U.S. Department of Housing and Urban Development, FY 2019 Congressional Justifications, available at https://www.hud.gov/sites/dfiles/CFO/documents/FY%202019%20Congressional%20Justifications%20-%20Combined%20PDF%20-%20Updated.pdf; U.S. Department of Health and Human Services, "HHS FY 2018 Budget in Brief - ACF - Discretionary," available at https://www.hhs.gov/about/budget/fy2018/budget-in-brief/acf/discretionary/index.html (last accessed March 2018); U.S. Department of Health and Human Services, "HHS FY 2018 Budget in Brief - HRSA," available at https://www.hhs.gov/about/budget/fy2018/budget-in-brief/hrsa/index.html (last accessed March 2018); U.S. Department of Health and Human Services, Putting America's Health First: FY 2019 President's Budget for HHS (2018), available at https://www.hhs.gov/sites/default/files/fy-2019-budget-in-brief.pdf; U.S. Department of Health and Human Services, "Title X Family Planning: Funding History," available at https://www.hhs.gov/opa/title-x-family-planning/about-title-x-grants/funding-history/index.html (last accessed March 2018); Office on Violence Against Women, FY 2019 Budget Request at a Glance (U.S. Department of Justice), available at https://www.justice.gov/jmd/page/file/1033176/download; U.S. Department of Veterans Affairs, Budget In Brief 2019, available at https://www.va.gov/budget/docs/summary/fy2019VABudgetInBrief.pdf.

The guidance has already been used by government grantees to expand religious exemptions around the provision of reproductive health services. Currently, government entities receiving federal funds are prohibited from requiring health care personnel to perform or assist in abortions or sterilizations or to provide referrals for abortions. HHS proposed a rule on January 26, 2018, which references the guidance in order to broaden these exemptions and significantly change the religious refusal landscape as it pertains to reproductive health services.[43] The proposed rule could allow hospital personnel to refuse to perform any reproductive health or other service by claiming that it conflicts with a religious belief. Back when emergency contraception was only available with a prescription, there were reports of emergency room doctors refusing to prescribe it to victims of rape if they believed that it was against their religion.[44] Even though a prescription is no longer necessary, there are reports of hospitals refusing to provide emergency contraception to rape survivors.[45] Hospitals and pharmacists nationwide could be allowed to refuse to provide emergency contraception or other forms of contraception on the basis of religious beliefs, expanding upon current state guidance that generally grounds such refusals in medical or professional opinion.[46] Furthermore, health care institutions would have to accommodate personnel who, due to religious beliefs, refused to perform key reproductive health services and functions, even if there was substantial evidence that doing so would result in harm to a third party, thereby opening up the possibility of significant litigation against these institutions. As the HHS's proposed rule demonstrates, the DOJ guidance opens the door to widespread denial of care on religious grounds, with the potential to severely impact the reproductive health care of women as well as that of LGBTQ individuals generally.

Thousands of DOJ attorneys may selectively enforce religious liberty

As noted in the introduction, in addition to Sessions' 20 "Principles of Religious Liberty," the attorney general also issued a memo declaring that the policy of the Justice Department is to further the "Principles of Religious Liberty" in all of its current and future cases—including its decisions of which cases to pursue.[47] This applies to all DOJ litigating divisions: for example, its civil rights office as well as all 93 U.S. attorney's offices, who enforce federal laws across the country. In January 2018, the DOJ amended its U.S. Attorneys' Manual to instruct U.S. attorney's offices on implementing the "Principles of Religious Liberty."[48] Each office was directed to assign an individual to coordinate religious liberty litigation and to implement the manual's religious liberty instructions. These new duties would include informing the office of the associate attorney general of any suits against the government that raise significant questions concerning religious liberty and that require the office's permission to uphold laws that may impinge on an individual's religious liberty.

Sessions' memo, coupled with the instructions to U.S. attorney's offices, reveals his intent to actively ensure that his overreaching interpretation of religious liberty becomes enshrined in law. In other words, the memo essentially requires all DOJ attorneys to further the legal goals of far-right litigation groups like Alliance Defending Freedom (ADF). The extent to which this could undermine LGBTQ rights, reproductive rights, and civil rights more broadly cannot be overstated. Nationwide, the Department of Justice has over 10,000 lawyers who now are all being drafted to advance an overly broad view of religious liberty whenever possible.[49] Rather than defending LGBTQ people and women who have been discriminated against, these attorneys have been directed to advance the ability of entities that, because of their religious views, are causing harm to third parties. President Trump's attempts to ban immigrants from Muslim-majority nations indicate that the administration is not interested in protecting religious freedom generally. Rather, it is apparent that the DOJ will privilege certain religious views—especially those in opposition to LGBTQ and reproductive rights—in the application of this guidance.

Political appointees will ensure that the guidance is widely implemented

The DOJ guidance instructs federal agencies to implement broad religious exemptions in all of their rulemaking and enforcement actions. Many of the agency staff tasked with providing these exemptions have long advocated for the use of exemptions as a tool to restrict access to reproductive health care and limit LGBTQ rights. At the same time, these advocates have denounced church-state separation and, in some cases, supported anti-Muslim discrimination. Thus, there is a serious danger that implementation of the DOJ guidance will result in lopsided protections that shelter conservative religious beliefs about sex, marriage, and reproduction while failing to similarly protect progressive faith communities or religious minorities.[50]

From drafting regulations and guidance with broad religious exemptions to reinterpreting existing rules to reallocating federal funds to faith-based service providers, President Trump's appointees will ensure that the guidance is implemented across the federal government. While there are political appointees at many federal agencies who will likely use this guidance to further anti-LGBTQ agendas, the Department of Health and Human Services currently hosts one of the largest concentrations of known anti-LGBTQ advocates. It is now home to many former employees of anti-LGBTQ and anti-reproductive rights organizations—individuals who have spent their careers undermining federal protections for LGBTQ rights and access to reproductive health services.

Many HHS appointees have a track record of anti-LGBTQ actions

The director of the Office of Refugee Resettlement, Scott Lloyd, was recently in the news for refusing to comply with a judicial order for a 17-year-old in federal custody to receive the abortion she requested, directing the shelter to take her to a crisis pregnancy center instead.[51] Prior to joining HHS, for years, he worked opposing access to contraception and abortion as the public policy attorney for the Knights of Columbus—a Catholic fraternal organization that has consistently opposed LGBTQ equality and reproductive rights.[52] Another Knights of Columbus alumna, Maggie Wynne, was a former director of the House of Representatives Pro-Life Caucus and now serves as a policy counselor at HHS.[53] HHS recently consolidated all decision-making authority over Title X family planning assistance grants from a group of policy makers to Valerie Huber, the former CEO of Ascend, an organization that promotes abstinence-only sex education and that supports crisis pregnancy centers. Women's health advocates caution that Huber will redirect funding away from providers like Planned Parenthood and toward largely faith-based crisis pregnancy centers.[54] Charmaine Yoest, former president of Americans United for Life and a senior fellow at American Values—a far-right organization that supports "traditional family values"—was, until recently, the assistant secretary of public affairs at HHS.[55] The head of HHS's Center for Faith-based and Neighborhood Partnerships, Shannon Royce, was previously chief of staff for Family Research Council, the political affiliate of James Dobson's Focus on the Family, an organization that shapes the religious right's policy agenda.[56] In her current role, Royce leads the department's efforts to partner with faith-based and community organizations.

Steven Wagner is the acting assistant secretary for the Administration for Children and Families, which oversees the Office on Trafficking in Persons; the Administration on Children, Youth and Families; and the Office of Refugee Resettlement.[57] In 2011, he wrote a column for *National Review* criticizing the Obama administration for not awarding the U.S. Conference of Catholic Bishops a grant in response to their refusal to provide family planning services to trafficking survivors. Wagner referred to the provision of contraception to victims of human trafficking as "tantamount to aiding and abetting the crime of exploitation."[58]

Alliance Defending Freedom frequently sues the federal government in order to undermine nondiscrimination laws and reproductive rights, working against what it refers to as the "myth of the so-called 'separation of church and state.'"[59] Due to the organization's focus on spreading defamatory information about LGBTQ people as a class and its support for the criminalization of LGBTQ people in other countries, it has been classified by the Southern Poverty Law Center as a hate group.[60] For years,

Matt Bowman litigated religious exemption cases for ADF and was also "a key member of the Life Litigation Project to protect the sanctity of human life."[61] He was one of the attorneys representing Conestoga Wood Specialties in its suit against HHS over the contraceptive mandate.[62] He is now a legal adviser at HHS, interpreting whether the department's policies are in line with the religious exemptions law.[63]

In his role as director of the HHS Office of Civil Rights, Roger Severino is also charged with interpreting whether or not the department and organizations receiving federal money are in compliance with the law.[64] Prior to joining HHS, Severino directed the DeVos Center for Religion and Civil Society at The Heritage Foundation. In that role, he referred to efforts to protect transgender people from discrimination as an "abuse of power" and claimed that the LGBT-inclusive nondiscrimination protections in Section 1557 of the Affordable Care Act were illegal.[65]

Appointees in other agencies are also likely to share the Trump administration's narrow views on religious liberty

While HHS houses some of the most troubling appointees, it is not the only agency where personnel can dictate policy. At the Justice Department, John Gore, the acting assistant attorney general for the Civil Rights Division, previously defended the University of North Carolina school system after the Obama administration sued it over HB2, the state's anti-trans bathroom bill, and defended voting restrictions that targeted minority voters.[66] Under the direction of Secretary of Education Betsy DeVos, the Department of Education has already rolled back protections for transgender students.[67] The DeVos family's foundation has given money to many anti-LGBTQ organizations, including Focus on the Family, Family Research Council, and the National Organization for Marriage.[68] Even the Department of State is putting in place personnel whose views of religious liberty prioritize conservative Christian adherents. Pam Pryor, the Trump campaign's leader of "faith and Christian outreach," currently holds one of the highest political appointments at the department.[69] Meanwhile, Gov. Sam Brownback (R-KS) has been tapped to serve as the State Department's ambassador at large for international religious freedom.[70] As governor, Brownback rescinded nondiscrimination protections for LGBTQ state employees; issued an executive order prohibiting the Kansas state government from taking action against religious organizations that refuse to provide social services or charitable services to same-sex couples; and signed legislation allowing university groups to exclude LGBTQ students while still receiving university funds.[71]

The Trump administration has built up its agency staff with appointees who have track records that—similar to Sessions'—are full of troubling attacks on LGBTQ equality, reproductive rights, and the rights of religious minorities. As a result, the implementation of selective religious liberty interpretations will find many champions and few critics in these key officials. Given their backgrounds, it is clear what values these officials are bringing to the administration. And with his guidance, Sessions has attempted to empower them and give those values legal cover, at the expense of others' rights to liberty and equality.

Conclusion

Not only has the guidance already resulted in regulations that vastly expand religious exemptions, but individuals are also using it to argue for exemptions from federal law. ADF submitted the guidance in support of its arguments in a Title VII anti-transgender discrimination case. The organization claimed that the guidance supported its position that the Religious Freedom Restoration Act provides an exemption from Title VII and therefore allowed employers to discriminate based on religious beliefs. Specifically, ADF claimed that forcing an employer to allow a transgender employee to dress according to her gender identity at work would burden the employer's religious liberty and that the government's interest in enforcing Title VII was insufficient to override this burden. The 6th U.S. Circuit Court of Appeals was unconvinced, stating that:

> *"As a matter of law, bare compliance with Title VII—without actually assisting or facilitating [the employee]'s transition efforts—does not amount to an endorsement of [the employee]'s views ... requiring the Funeral Home to refrain from firing an employee with different religious views from [the employer] does not, as a matter of law, mean that [the employer] is endorsing or supporting those views .... the fact that [the employer] sincerely believes that he is being compelled to make such an endorsement does not make it so."*[72]

Despite the 6th Circuit's strong rebuke of the overly broad construction of RFRA, the Trump administration continues to implement across the federal government its overreaching interpretation of religious exemption law. Under the Department of Justice's guidance, almost any government interference can be considered a substantial burden on the free exercise of religion. At the same time, the guidance makes it more difficult for the government to assert a compelling interest for why a religious exemption should be denied. Furthermore, regulations interpreting the guidance have failed to acknowledge the wide array of religious perspectives on issues of sex, sexuality, marriage, and family.

This guidance is a deliberate attempt to undermine the legal equality and dignity of LGBTQ people, which illustrates the urgent need for a comprehensive nondiscrimination law—at the federal level—that is inclusive of sexual orientation and gender identity. Implementation of the guidance by political appointees across the federal government could result in the violation of the rights of LGBTQ people, women, and religious minorities. Moreover, these individuals may receive unfair treatment as well as outright exclusion from a wide variety of critical federal programs.

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Acknowledgements

The authors wish to thank the following individuals who significantly contributed to research or provided feedback on this issue brief: Laura E. Durso, Shabab Ahmed Mirza, Sejal Singh, Jake Faleschini, Rebecca Buckwalter-Poza, Ashe McGovern, Caitlin Rooney, Rose Saxe, Sharon McGowen, Harper Jean Tobin, Nicholas Adjami, Billy Corriher, Nikita Mhatre, and Osub Ahmed.

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Introduction and summary

Twenty-five years ago, the federal Religious Freedom Restoration Act (RFRA) was signed into law to clarify and expand upon the right to religious liberty. RFRA outlines that the government "should not substantially burden religious exercise without compelling justification" and that it should only do so if it furthers a compelling governmental interest in the least restrictive way possible.[1] The purpose of this law is "to protect the free exercise of religion" while clearly defining and more robustly protecting the right of religious liberty for all Americans.[2] It passed with widespread, bipartisan support and was triumphed among faith communities, civil rights advocates, and politicians alike.[3] Since the passing of the federal RFRA, 21 states have mirrored the federal statute to adopt similar legislation.[4]

In 2014, however, the U.S. Supreme Court decision in *Burwell v. Hobby Lobby* marked a major shift in the interpretation of religious exemptions from religiously neutral laws. Rather than simply protecting the rights of religious people, RFRA was expanded and misused to discriminate. By treating two for-profit corporations—craft chain Hobby Lobby and furniture-maker Conestoga Wood Specialties—like individuals with the right to free exercise of religion, the ruling allowed the religious beliefs of the company owners to override those of their employees, rescinding employees' access to no-cost contraceptive health coverage to which they are entitled under federal law.[5] The ruling affected thousands of employees, and it expanded the use of religious exemptions by redefining the scope of federal RFRA protections to include for-profit corporations. The legacy of the *Hobby Lobby* decision has continued under the Trump administration as religious liberty is misused to discriminate against vulnerable communities, such as religious minorities, nonreligious people, people of color, women, and the LGBTQ community.[6]

The United States was founded on the principle of religious liberty—a principle that is now under threat. At the nation's outset, lawmakers established a unique society without a government-established religion, which is cemented in the First Amendment to the Constitution, and sanctioned rights for religious people.[7] They also protected the rights of religious institutions and ensured that all Americans could express a diverse range of beliefs without interference from the government.[8] In recent years, however,

the right to religious liberty has increasingly been exploited and misused in order to favor the interests of select, privileged conservative Protestant Christians over the basic rights of the most vulnerable Americans.[9]

The principle of religious liberty should extend to all people, not only ones who come from a specific set of religious beliefs. A 2014 study from the Pew Research Center reveals that the religious landscape in the United States is changing.[10] As the Christian population is declining—particularly among mainline Protestants and Catholics—the number of adults who do not identify with a specific religion is growing.[11] With the changing demographics of Americans and their religious connections, it is even more important that people of all faiths and people of no faith are granted the fundamental right to religious liberty.

Protecting religious liberty continues to be a priority for a majority of Americans: Almost two-thirds believe that there should be a "strict separation" between church and state, and nine out of 10 agree that the United States was founded with universal religious freedom that extends to people of all religions.[12] Policymakers have an opportunity and a responsibility to enact policies that will ensure the right of religious liberty for all Americans without infringing on the rights and religious freedoms of others. This report provides a menu of administrative and legislative options at the federal, state, and local levels to ensure that the right to religious liberty extends to all Americans—not solely those with the loudest voices, most power, or strongest political connections. In America—a country that has codified the necessity of freedom of religion for all—religious liberty policies should reflect the moral values of equality, inclusion, and freedom for all to live without fear of discrimination.

The Trump administration's widespread reinterpretation of the law

Though the U.S. Supreme Court has long recognized that religious freedom should not be interpreted to permit harm on others, the Trump administration has redefined the extent of religious liberty protections, establishing a broad license to discriminate.[13] Former Attorney General Jeff Sessions' guidance on "Federal Law Protections for Religious Liberty"—which he claimed would clarify the existing protections regarding religious liberty—serves as the groundwork for writing discriminatory actions into law. The guidance prioritizes religious exemptions over all other rights, and it defines the constitutional and statutory protections of religious liberty broadly so that they can be widely implemented. For example, previous analysis by the Center for American Progress found at least 87 regulations, 16 agency guidance documents, and 55 federal programs and services that the guidance could undermine—most of which the Obama administration created to advance LGBTQ equality and prohibit federally funded programs from discriminating, including on the basis of religion.[14] The guidance establishes an overarching license to discriminate for the federal government. Moreover, it puts vulnerable populations at risk of being denied equal treatment under the law.

Since the announcement of the guidance on May 4, 2017—the National Day of Prayer—the Trump administration has continued to use religious liberty to justify discrimination.[15] In July 2018, former Attorney General Sessions announced the creation of a Religious Liberty Task Force, which, according to Sessions, will ensure that "all Justice Department components are upholding that guidance in the cases they bring and defend, the arguments they make in court, the policies and regulations they adopt, and how we conduct our operations."[16] The purpose of the task force is to enforce the 2017 religious liberty guidance from the U.S. Department of Justice, yet such enforcement could promote a license to discriminate on the basis of religious liberty. These and similar initiatives erode the original intent of religious liberty—ironically, in the name of religious liberty—in order to validate discrimination against the most vulnerable communities.

The exploitation of religious liberty to deny access to health care

Trump administration officials such as Roger Severino, director of the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS), have tried to codify the favoring of religious liberty over other rights.[17] Much of the push behind these efforts has stemmed from Severino's Conscience and Religious Freedom Division, which was announced in January 2018.[18] His stated objective is to allow health care workers and institutions to deny patients access to health care if they claim that providing such care would be in conflict with their religious beliefs.[19] Conscience protections for health care workers—codified in the Weldon Amendment and others—date back to the 1970s, yet they have evolved over time to privilege religious beliefs over all other rights.[20] Health care institutions also have a responsibility to protect patients' well-being, which should not be neglected via policies that privilege religious beliefs over patient health and safety.

The role of religion in health care exemptions is no more striking than in Catholic hospitals. According to a 2016 count, Catholic hospitals hold 1 in 6 hospital beds in the United States.[21] This number has increased over time because of the high numbers of Catholic and secular hospital mergers that have taken place in recent years.[22] When hospitals merge, oftentimes some or all of their policies will also merge. Policies that govern Catholic hospitals, also known as "directives," are issued by the U.S. Conference of Catholic Bishops (USCCB) for the hundreds of Catholic hospitals in the United States.[23] The directives can be implemented differently at varying hospitals, as the local bishop is responsible for interpreting the guidelines.[24] Although federal law prohibits hospitals from denying emergency care to patients through the Emergency Medical Treatment and Active Labor Act (EMTALA), some Catholic hospitals will limit essential reproductive health services—including contraception, sterilization, abortion, and treatments for infertility—even in circumstances of miscarriage or other pregnancy complications, such as bleeding, infection, or excruciating pain.[25]

Of course, a health care institution's grounding in a certain faith is not inherently harmful. Rather, it becomes a concern if the institution lacks transparency on how its faith background may affect its policies in ways that could have repercussions on patients' ability to access necessary health-related services. A *New York Times* analysis of 652 websites of U.S. Catholic hospitals found that on nearly two-thirds of the websites, "it took more than three clicks from the home page to determine that the hospital was Catholic."[26] And in many cases, hospitals are portraying themselves more secularly by removing religious icons and imagery and by changing their names.[27] For example, San Francisco-based Catholic Healthcare West changed its name to Dignity Health in 2012,

and as a result, patients may not be aware that they are seeking services at a Catholic hospital.[28] Women may unknowingly plan to deliver their babies at hospitals that do not offer tubal ligation services due to policies based on religious objections.[29] Tubal ligations, which are safe and commonly performed contraceptive procedures,[30] are safest and most effective when they are performed directly after delivery.[31] Yet some women have learned that these services were not offered at the hospital while on the operating table after an emergency cesarean section.[32] Moreover, it is important that this information is transparent for the women who most often seek care at Catholic hospitals. In 19 states, women of color are more likely than their white counterparts to go to a Catholic hospital to give birth.[33] As a population that already faces health disparities—including high rates of infant and maternal mortality—women of color enter hospitals at a higher risk of having poor outcomes during their pregnancy and delivery than their white counterparts.[34] Hospitals should be transparent with current and potential patients regarding the extent to which the directives are followed. Access to such information could lead a patient to gather more details about the directives and how they may limit the care provided to them.

The Affordable Care Act (ACA) requires that hospitals provide their health care services to all people, regardless of their race, sexual orientation, gender identity, or sex. Yet the expansion of exemptions in health care disproportionately harms vulnerable communities, such as women—particularly women of color—and LGBTQ individuals. Previous CAP research analyzed closed complaints of discrimination based on sexual orientation, sex stereotyping related to sexual orientation, and gender identity.[35] The analysis revealed that the majority of patients who filed these complaints were denied care that was unrelated to transition-related treatments solely because of their gender identity.[36] For transgender patients, such exemptions could create challenges to accessing proper health care. In a recent example, a transgender patient was scheduled for a hysterectomy at Dignity Health, yet the procedure was considered to be sterilization and therefore was canceled.[37] According to the doctor in private practice who scheduled the procedure, the hospital routinely allows hysterectomies for cisgender patients.[38] The American Civil Liberties Union sued the hospital, arguing that withholding necessary medical services based on a patient's identity violates California's Unruh Civil Rights Act;[39] the case is still active.[40]

The gradual dismantling of the Affordable Care Act

Two final rules on religious and moral exemptions to the contraceptive coverage requirement set forth under the ACA carve out conscience protections for employers that allow them to withhold contraceptive coverage requirement services to their employees based

on "sincerely held religious beliefs" and "non-religious moral convictions."[41] The Trump administration moved forward with finalizing the rules, even though two federal district courts enjoined them.[42] In January 2019, two federal judges ruled against the birth control rule—one in California with a partial injunction, and another in Pennsylvania with a nationwide injunction.[43] Judge Wendy Beetlestone, the federal judge in the Pennsylvania case, cited that RFRA does not allow for this carve-out of contraceptive coverage. These types of exemptions could create a path for health care providers to pick and choose to whom services are provided and which types of services are offered. The exemptions from these rules would be applicable to many types of institutions, including higher education institutions.[44] For example, some institutions have conflated abortion and contraception in order to justify the reduction of available birth control services via religious exemptions. In early 2018, the University of Notre Dame—a private Catholic university—stated in a letter that it would only include "simple contraceptives (i.e., drugs designed to prevent conception)" in its contraception coverage under the school's health insurance plans and that it would not offer what it calls "abortion-inducing drugs," which include emergency contraceptives such as ella, Plan B, and some intrauterine devices (IUDs).[45] The letter notes that the decision was made based on the university's "fidelity to [its] Catholic mission."[46] This letter does not clarify what constitutes "simple" contraception and reinforces the misconception that certain contraceptives—such as Plan B and IUDs—induce abortion.[47] In addition, individuals cannot always seek health care services at the hospital of their choosing, and a patient's decision to seek care at a certain hospital is often done out of necessity due to a lack of other options.[48] Religious exemptions should not be used to override nondiscrimination protections in any venue, particularly in the case of health care.

The Trump administration will likely continue these efforts by rewriting religious liberty protections in new rules. The administration has recently lauded their efforts in a press release from HHS "to protect life and conscience" by curtailing abortion rights and promoting overly broad religious exemptions.[49] Moreover, a rule entitled "Ensuring Equal Treatment for Faith-Based Organizations" is on the regulatory agenda for HHS.[50] The rule is based on input from a request for information (RFI) in which some medical providers stated that their faith was in conflict with providing health services to everyone. For example, one commenter representing a faith-based medical school, Liberty University College of Osteopathic Medicine, said, "We cannot comply with the Obama-era transgender mandate that requires us to put aside conscience convictions and medical judgment."[51] Another commenter outlined concerns about "the transgender mandate" and the harms of "hormonal treatment and possibly surgical treatment for gender dysphoria," noting that due to her affiliation with a faith-based organization,

Catholic Health Initiatives, she would likely face little repercussion if she declined a patient's request to "provide gender-changing treatments."[52] The Christian Medical Association and Freedom2Care submitted a comment on behalf of almost 50,000 members and constituents, raising concerns that nondiscrimination measures in the ACA "opened the door to widespread discrimination against individuals and organizations of faith."[53] HHS plans to issue a new rule in line with the administration's official statements on protections for religious liberty, which includes Sessions' guidance.[54] The guidance has served as a blueprint for the Trump administration to chip away at nondiscrimination protections under the guise of protecting religious liberty.

The exploitation of religious liberty to discriminate against foster and adoptive parents

On the state level, religious liberty has been used to discriminate in taxpayer-funded child welfare programs such as adoption and foster care services. In response to marriage equality, states have begun to pass laws that allow these child welfare programs to deny services through religious exemptions.[55] As a result, LGBTQ parents have been refused the opportunity to adopt and foster children from faith-based child welfare providers. In the past three years alone, seven states have passed laws to allow taxpayer-funded child welfare programs to refuse to work with LGBTQ prospective parents if they assert a refusal based on religious reasons.[56]

Most recently, the Trump administration announced that South Carolina foster agencies are not required to comply with federal nondiscrimination rules barring discrimination on the basis of religion, even if they receive federal funding.[57] This is a clear violation of the separation of church and state. As a result, prospective foster parents from Jewish, Catholic, and other non-Protestant Christian backgrounds have been denied the opportunity to welcome foster children into their homes.[58] While the administration claims to be advancing religious liberty by supporting the Protestant foster care agency, it is in fact condoning the violation of the religious liberty of numerous prospective foster parents.

In addition, some state laws allow child welfare programs to refuse certain medical treatments to LGBTQ children.[59] This issue of religious liberty and child welfare was brought to the federal level in July 2018 with the introduction of the so-called Aderholt amendment, which sought to allow child welfare providers to discriminate on the basis of religion.[60] Ultimately, it was removed from the House appropriations bill in the final vote.[61]

It is against the best interests of children to deny them potential loving families and proper medical care.[62] In addition, taxpayers save nearly $29,000 per year for every child that is adopted from foster care and therefore does not age out of the child welfare system.[63] An organization's stated religious values should not take precedence over children having access to loving families and proper health care services.

Threats to the separation of church and state

By threatening to erode the separation of church and state at both the federal and state levels, the Trump administration has privileged a certain set of religious beliefs and political goals over the rights of many. This has not only laid the groundwork to redefine the extent of the law and the scope of religious exemptions, but also threatened the very definition of America's foundational principles of religious liberty and the separation of church and state.

Eroding religious liberty in order to form dark money channels

At the 2017 National Prayer Breakfast, President Donald Trump declared his intention to repeal the Johnson Amendment, a critical measure that ensures that houses of worship can maintain their sanctity by being free from political influence.[64] He said, "I will get rid of, and totally destroy, the Johnson Amendment and allow our representatives of faith to speak freely and without fear of retribution."[65] The amendment's repeal would allow houses of worship to accept tax-deductible monetary contributions for partisan purposes, including political endorsement or opposition of candidates.[66] Moreover, more than 100 religious groups, 4,000 faith leaders from all 50 states, and 5,000 nonprofits oppose the repeal of the Johnson Amendment.[67] It would distort the core mission of houses of worship from sacred spaces of prayer, healing, comfort, and community to partisan venues with a political agenda.

Republican members of Congress and conservative activists such as Liberty University President Jerry Falwell Jr. and Faith & Freedom Coalition Chairman Ralph Reed advocated for its repeal through a provision in the 2017 Tax Cuts and Jobs Act.[68] Ultimately, the bill did not include a repeal of the Johnson Amendment, but President Trump has continued to advocate for its repeal.[69] He proclaimed at a White House dinner for evangelical leaders that it is "interfering with your First Amendment rights."[70] Trump and his administration threaten to eliminate a protection that is crucial for all Americans, whether or not they are self-identifying people of faith.

Redefining religious liberty as a right provided to only a select few

While the Trump administration claims to be in pursuit of religious liberty, it has instead prioritized a specific set of conservative Protestant Christian beliefs over all others. Its efforts have extended far beyond the precedents set by both *Burwell v. Hobby Lobby*, which expanded who is eligible for RFRA protections and how they will be granted,[71] and *Trinity Lutheran Church v. Cromer*, which the Trump administration has attempted to expand in cases that pertain to when the government can or cannot exclude religious organizations from funding.[72] In the 2017 Supreme Court case *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Charlie Craig and David Mullins sought to purchase their wedding cake at Masterpiece Cakeshop in Colorado, yet the baker refused to sell the cake after realizing that they were a same-sex couple. The Trump administration did not play a neutral role in determining whether the right to free speech permits businesses to discriminate in this case.[73] Through an amicus brief, the Department of Justice urged the U.S. Supreme Court to side with the baker, despite standing civil rights laws.[74] This argument is not in line with the fact that a majority of American people of faith are opposed to all forms of discrimination, including, specifically, business owners refusing to serve consumers when they object to their sexual orientation or gender identity.[75] Moreover, polling has consistently shown that a strong majority of Americans believe that businesses should not be allowed to deny services to potential customers based on gender identity or sexual orientation.[76] This is consistent with precedential U.S. Supreme Court decisions, which clarify that the scope of religious liberty stops when it begins to harm another individual.[77] Although it is not out of the ordinary for the federal government to file a brief in a constitutional case, it is unusual for the Justice Department to argue for the constitutional right to discriminate.[78] Ultimately, the Supreme Court's narrow ruling did not set precedence to allow businesses to discriminate against LGBTQ people, but it did narrowly rule in favor of the baker.

Soon after the *Masterpiece* decision, however, the U.S. Supreme Court chose to ignore President Trump's infringements upon religious liberty when it ruled that the United States can deny travel and entry from individuals from certain predominantly Muslim countries.[79] As one of the first defining acts of his then-new administration, Trump instituted a "total and complete shutdown of Muslims entering the United States."[80] While the religious liberty of the Christian baker in *Masterpiece* was prioritized over the rights of a same-sex couple, the freedom of Muslim individuals to travel and enter the United States was deemed a threat.

Data suggest a disconnect between which religious groups believe that their religious liberty is being threatened and those who are actually subject to the most harm due to religious discrimination. Most Americans do not believe that religious liberty is currently being threatened in America.[81] However, a majority of white evangelical Protestants—69 percent—disagree and believe that religious liberty is under threat.[82] In addition, 57 percent of white evangelical Protestants believe that Christians face discrimination in America, while only 44 percent of the same group believe that Muslims face discrimination.[83] Though white evangelical Protestants perceive victimization most strongly, other religious groups are being harmed by religious-based discrimination, and even hate crimes, more frequently. Analysis of FBI hate crime data from 2017 reveals that almost 80 percent of all incidents of religiously motivated hate crimes that year were motivated by anti-Jewish or anti-Muslim bias.[84] Yet both the executive and judicial branches of government have prioritized the alleged discrimination faced by some white evangelical Protestants over the outsized number of threats that other groups face.

Privileging conservative Christian views in state legislatures

Many of the same individuals who claim their religious liberty is under threat are actively working to enshrine their own religious beliefs into state law. Some conservative Christian organizations are working on an erosion of the separation of church and state through state legislatures. For example, Project Blitz, a campaign that showcases a playbook of 20 model bills created by a conglomerate of Christian-right groups—WallBuilders, the Congressional Prayer Caucus Foundation, and the National Legal Foundation—lays out a policy agenda to attack an inclusive vision of religious liberty.[85] The campaign's stated purpose and mission includes protecting "traditional Judeo-Christian religious values and beliefs in the public square."[86] Bills that require public spaces to privilege a specific set of religious beliefs do not respect the increasing diversity of religions and beliefs in America. Those who have vocalized their reasonable opposition to Project Blitz's bills have been cast as anti-religious or unpatriotic.[87]

Based on analysis from Americans United for Separation of Church and State, 74 bills were introduced in 2018 that followed Project Blitz's model legislation or covered similar goals.[88] Among other things, these bills promoted religion in public schools, threatened marriage equality, and denied adoptive and foster homes on the basis of religion. The entities behind Project Blitz organize prayer caucuses in statehouses to ensure that state legislators hear their ideas.[89] By introducing seemingly innocuous bills, such as those that require public schools to post the national motto, "In God We Trust," Project Blitz attempts to lay the groundwork for harmful legislation that privileges their conservative Christian views over all others.

The misuse of religious liberty has prioritized some political goals and religious beliefs over the importance of the separation of church and state. These efforts, spearheaded by the Trump administration, have affected houses of worship and religious institutions, the courts, and laws at both the federal and state level. Policies must be put in place to ensure that religious liberty is used to protect—not harm—communities across the country.

Policies and practices to reinstate a balanced and inclusive vision of religious liberty

Policymakers at all levels have the opportunity to create structures for a more balanced vision of religious liberty in America. Legislative options at the federal and state levels can explicitly codify nondiscrimination protections, while initiatives at the local level can pave the way for future policies and greater levels of public understanding. Most importantly, policies must respect religious beliefs without harming or infringing on the rights of others. Through options like the examples below, policymakers can create the framework for a balanced, inclusive vision of religious liberty throughout the United States.

Clarify that RFRA is not intended to be a tool to discriminate

The recently reintroduced Do No Harm Act would amend the federal RFRA to prohibit granting exemptions to civil rights laws that could cause third-party harm.[90] It would help to ensure that populations particularly vulnerable to the abuse of religious liberty are legally protected from such discrimination. Moreover, it would help to restore a balanced interpretation of religious liberty in which laws serve as a shield for religious freedom and religion cannot be used as a justification for discrimination.

State RFRAs should explicitly balance religious protections with nondiscrimination language.[91] For example, Texas' RFRA contains provisions to ensure that it is not used to avoid pre-existing civil rights protections, stating: "The protection of religious freedom afforded by this chapter is in addition to the protections provided under federal law and the constitutions of this state and the United States."[92] New state RFRAs should include specific language outlining the limits of the RFRA so that vulnerable communities are not put at risk. Meanwhile, existing state RFRAs should look to add similar language.

Ensure that religious exemptions do not undermine patient health

All hospitals should be required to clearly provide a list of services that they do not offer. For example, Washington state requires that hospitals make this information accessible on their websites—only posting it on the corporate parent site is not acceptable. As is the case in Washington, this information should be "readily accessible to the public, without requiring a login or other restriction."[93] In doing so, policymakers would ensure that health care providers are required to clarify the types of services they do and do not provide and would allow for patients to enter these hospitals better informed. In addition, local policymakers should clarify and explicitly state that it is against federal law to deny emergency reproductive health care.[94] States should also require that hospital mergers and acquisitions retain vital health services, including reproductive health care.[95]

Prohibit for-profit business corporations from claiming exemptions from anti-discrimination laws

The Massachusetts No Excuses for Corporate Discrimination Act—also known as H. 767—attempts to provide a solution to businesses claiming religious or secular moral exemptions from anti-discrimination laws.[96] The bill, which is currently under consideration in the Massachusetts Legislature, would close the loophole that allows for-profit business corporations to use claims of religious freedom to challenge anti-discrimination law, which have only recently started to be successful following the 2014 *Hobby Lobby* decision.[97] H. 767 specifically applies to business corporations and not to nonprofit organizations, which include religious organizations. State law grants business corporations their existence, powers, and conditions of operations.[98] As a result, states have an opportunity to implement legislation to ensure that for-profit corporations are not using claims of religious freedom to justify discrimination. H. 767 also would protect people from being discriminated against on the basis of religion since, under current law, for-profit business corporations can discriminate against an individual during the hiring process only to claim later that the laws against discrimination in hiring do not apply because of the owner or corporation's religious beliefs. Overall, this bill attempts to ensure that anti-discrimination laws are not subject to corporate claims for exemptions based on religious or moral beliefs.

Extend nondiscrimination laws at the federal level

The passing of the recently reintroduced Equality Act would extend nondiscrimination laws at the federal level to apply to everyone, including LGBTQ people.[99] Seventy percent of Americans already agree that a federal law is necessary to protect LGBTQ people from discrimination in areas such as public accommodations, employment, housing, and credit.[100] The LGBTQ population has long been subject to discrimination on the basis of certain religious-based claims, and as a result, they should be included in specific nondiscrimination protections.

Consult faith communities in local policymaking and foster interfaith dialogue

Local faith communities should be consulted in local policymaking in order to respond to their concerns and establish a formalized path of communication. For example, Maryland's Montgomery County Office of Community Partnerships houses the Faith Community Advisory Council (FCAC), which "ensures that the county executive is well informed of and able to act effectively in responding to the needs and concerns of faith communities, and to work collaboratively with government, nonprofits, and community organizations."[101] Through working groups like the Religious Land Use Working Group, the Faith Community Working Group, and the Neighbors in Need Working Group, the FCAC advises the county executive on the needs and concerns of members of the faith community in Montgomery County.[102] The council represents a diverse range of faith traditions in order to ensure that the many voices of the faith community are considered in policymaking. Other counties and local governments should adopt a similar working group model while also ensuring that less-often heard voices are included in policymaking decisions—such as those of atheists, women, LGBTQ people, and people of color.

As the Christian-identifying population in the United States declines and populations of those who identify as other faiths or are religiously unaffiliated grow, interfaith education and understanding become even more important.[103] Local governments have the opportunity to implement paths for interfaith involvement and consultation on local religious liberty-related issues.

Several state and local governments are also engaging faith leaders on local issues through the creation of interfaith task forces. For example, New York Governor Andrew Cuomo (D) created an interfaith advisory council to receive input on achieving greater interreligious understanding and promoting inclusivity and open-mindedness.[104]

Meanwhile, in Maryland, the Governor's Office of Community Initiatives builds interfaith partnerships with local faith leaders and organizations on issues such as homelessness, poverty, and domestic violence prevention.[105] Groups like these should be consulted on addressing local interfaith issues—similar to how Atlanta Mayor Maynard Jackson (D) implemented the groundwork for an interfaith chaplaincy with the support of local, diverse clergy.[106] A successful interfaith task force should promote opportunities for listening and gathering. For example, the Interfaith Council of Southern Nevada's Mayors Prayer Breakfast gathers more than 500 civic and religious leaders to celebrate the region's diversity and explore solutions to community problems.[107] Local interfaith task forces provide an opportunity for consultation and engagement from local faith leaders and organizations, thus promoting an inclusive vision of religious liberty.

Conclusion

Administrative and legislative options exist at the federal, state, and local levels to ensure that religious liberty is not used as a justification for discrimination. Policymakers should ensure that laws like the Religious Freedom Restoration Act uphold the right to religious liberty while also ensuring that populations particularly vulnerable to the abuse of religious liberty are legally protected from such discrimination. This menu of policy options serves as a model to create and maintain protections ensuring that the original intentions of religious liberty are upheld. These policy options would protect many people from the potential harm of a warped application of religious liberty—particularly populations that are most vulnerable, such as women, people of color, religious minorities, and LGBTQ individuals.

Religious liberty must extend to the growing and changing diversity of the American public. Its misuse, currently spearheaded by the Trump administration, has prioritized certain political goals and religious beliefs and will have lasting impacts on houses of worship, religious institutions, the courts, and laws at the federal, state, and local levels. If policymakers do not ensure that religious liberty protects the free exercise of religion for all Americans, it will continue to be weaponized as a tool for discrimination and political gain and weaken nondiscrimination protections. Religious liberty must include the everyone; it should not be a tool to ensure that only a specific set of religious beliefs and communities are prioritized above others.

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Acknowledgments

The authors would like to thank Osub Ahmed, Frank Bewkes, Maura Calsyn, Laura Durso, Sharita Gruberg, and Gabriel Lewis for their helpful guidance and contributions to this report.

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[Additional submission by Mr. Takano follows:]

Written Statement of
David Stacy
Government Affairs Director
Human Rights Campaign

To the
Committee on Education and Labor
United States House of Representatives
Hearing entitled "Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"
June 25, 2019

On behalf of the Human Rights Campaign's more than three million members and supporters, it is my honor to submit this testimony regarding the current status of the Religious Freedom Restoration Act (RFRA). As the nation's largest organization dedicated to promoting civil rights for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, HRC is particularly engaged on issues of religious liberty and mindful of the intersection between religious liberty and civil rights. We recognize and appreciate the fundamental right to free exercise and personal belief enshrined in our constitution. These core values have shaped our nation and have strengthened our union by safeguarding both the sacred and the secular. These issues are not novel. Policy makers and our judicial system have been navigating this intersection for decades. As the Supreme Court so eloquently concluded in the 1968 foundational civil rights case striking down segregation in public accommodation, in America individuals have "a constitutional right to espouse the religious beliefs of [their] own choosing, however, [they do] not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."[1]

Although we hold these core values as the cornerstone of our democracy, we find ourselves at a crossroads today. There are those who wish to distort our foundational freedoms into tools to limit the rights of some of our nation's most vulnerable individuals. These efforts not only reflect disrespect for the law and our shared legal history but also directly conflict with the enjoyment of Constitutionally protected rights of others.

When RFRA became law in 1993, it was designed to protect minority religious groups' constitutional right to freely exercise their religious beliefs. Since RFRA was seen as an important safeguard for our country's most vulnerable groups, it was supported by a richly diverse coalition of religious and civil rights groups. The passage of RFRA

[1] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

followed general outrage regarding the Supreme Court's opinion authored by the late Justice Antonin Scalia in *Employment Division, Department of Human Resources of Oregon v. Smith*.[2] In this case, practitioners of a Native American faith, were terminated from their employment as a result of their sacramental use of peyote.[3] Upon termination, they were denied unemployment benefits due to the State's categorization of peyote use as work "misconduct."[4] Respondents then brought suit alleging that the State's denial of unemployment benefits violated their First Amendment rights to freedom of expression and religion.[5] Finding for the State, the Court held that an individual's right to free exercise of religion does not supersede the individual's obligation to comply with "valid and neutral laws of general applicability."[6]

In response to this decision, there was a swift and decisive non-partisan effort to pass RFRA in order to restore the supremacy of individual religious rights that conflict with government laws and policies. Since its passage, RFRA has often been described as a shield from government intrusion – not a sword to be used against other vulnerable groups. However, despite the focused, straightforward intent to protect minority religious groups, individuals and businesses have sought to use RFRA as a license to discriminate and impose religious beliefs onto others. The Supreme Court's decision in *Burwell v. Hobby Lobby* has turned this original intent on its head by recognizing large corporations as "people" who are neither vulnerable nor minorities. This decision has encouraged politically and socially powerful groups to cite RFRA, as the legal mechanism to deny non-discrimination protections otherwise required by law. This interpretation is a significant departure from our longstanding frameworks. Unfortunately, over the past decade we have seen this important Constitutional shield transformed into a sword too many times.

The misuse of RFRA has become more prevalent during the Trump Administration. The original intent of RFRA was to allow those who felt their religious liberties were infringed upon to bring their concerns to court. RFRA allowed for a careful balancing test between the burdens imposed on an individual's religious freedom against the potential harm to others. However, this is no longer the case. What we see now is the Trump Administration abusing RFRA and relying on RFRA to implement broad religious exemptions without concern for the rule of law that results in the harm and discrimination of others. For example, in 2017 the Department of Justice published a memorandum and accompanying guidance and appendix implementing a Trump Executive Order regarding

2. *See generally* 494 U.S. 872 (1990).
3. *See id.* at 874.
4. *See id.*
5. *See id.*
6. *See id.* at 879.

the administration's implementation of RFRA.[7] This memorandum instructed all administrative branch agencies to evaluate existing and forthcoming rulemaking and utilize RFRA as a basis for altering these regulations. Over the past 21 months the impact of this executive order and memorandum have been clear. Agencies from the Department of Housing and Urban Development to the Department of Health and Human Services have published regulations incorporating religious exemptions or religious belief as a mechanism to avoid compliance with generally applicable laws.[8]

The Do No Harm Act would clarify RFRA in order to restore the original intent of the legislation and safeguard well-settled areas of law designed to protect our most vulnerable populations including child labor and abuse, equal employment and non-discrimination, health care, federal contracts and grants, and government services. The Do No Harm Act therefore ensures that religious freedom is used as a shield to protect the Constitutional right to free exercise of religion and not a sword to discriminate.

We recognize and celebrate that the right to believe is fundamental. However, religious beliefs can never be used as justification to discriminate and marginalize other people's basic civil rights. We appreciate the opportunity to provide this testimony.

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[Additional submission by Ms. Wild follows:]

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National Council of Jewish Women Testimony
Committee on Education and Labor, United States House of Representatives
Do No Harm: Examining the Misapplication of the Religious Freedom Restoration Act
June 25, 2019
Submitted electronically on June 21, 2019

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. We are driven by our Jewish values: *b'tzelem Elohim*, we are all created in G-d's image; *kavod ha bri'ot*, respect and dignity for all; and *tzedek tirdof*, the pursuit of justice. These values inform our work and inspire our efforts.

Under the guise of "religious liberty," the Trump administration has launched a sustained and coordinated attack on women, low-income people, people of color, young people, immigrants, and LGBTQ individuals. Specifically, the Religious Freedom Restoration Act (RFRA) has been manipulated to justify denial of prospective parents by government-funded foster care and adoption agencies, to decimate the Affordable Care Act's contraceptive coverage benefit, to authorize refusals of care based on the religious or moral beliefs of health care entities and providers, and to allow federal contractors to use their religious beliefs to discriminate against current and future employees.

One overarching theme behind so many of these harmful actions is a push from the administration to make policy and interpret the law based on a narrow understanding of evangelical Christianity. This view leaves no room for minority religions or atheists and flies in the face of the separation of religion and state, a founding principle enshrined in our Constitution's First Amendment.

The administration threatens the religious liberty of all people when it enacts policy to align with one interpretation of one religion and when it allows employers, health care providers, business owners, and government officials to use their individual beliefs to thwart our nation's civil rights laws. We depend on religious liberty to be a protective shield, not a weapon to harm and denigrate others.

NCJW endorses and resolves to work for the enactment, enforcement, and preservation of laws and regulations that protect civil rights and individual liberties for all. This is why we support the Do No Harm Act (HR 1450/S 593), legislation preserving RFRA's protection of religious freedom while clarifying that it cannot be used to harm others. Amending the law will safeguard personal beliefs and prevent entire institutions or individuals from unlawfully discriminating against or coercing the exercise of another's conscience. Lawmakers must act to end the Trump administration's abuse of religious liberty, to ensure fair treatment, and to secure equal rights and opportunities for all.

NCJW looks forward to working with the Committee to advance this critical legislation and to eliminate all forms of discrimination. Thank you.

[Questions submitted for the record and their responses follow:]

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July 22, 2019

Mr. Jimmie R. Hawkins
Director of the Office of Public Witness
Presbyterian Church (USA)
100 Maryland Avenue, NE, Suite 410
Washington, DC 20002

Dear Reverend Hawkins,

I would like to thank you for testifying at the June 25, 2019 hearing entitled *"Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Monday, July 29, 2019, for inclusion in the official hearing record. Your responses should be sent to Caroline Ronis of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

"Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"
Tuesday, June 25, 2019
10:15 a.m.

Representative Lucy McBath (D-GA)

- Reverend Hawkins, as a religious leader, what role should religion play in governance, particularly in a country as diverse as ours?

- Reverend Hawkins, faith-based organizations provide countless services to communities across the country – from helping to feed low-income families to providing housing opportunities to those in need. Can you share a little bit about the importance of this work and these missions? Is it true that this religious work can co-exist with robust civil rights?

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Ms. Rachel Laser, J.D.
President & CEO
Americans United for Separation of Church and State
1310 L Street, NW, Suite 200
Washington, DC 20005

Dear Ms. Laser,

I would like to thank you for testifying at the June 25, 2019 hearing entitled *"Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Monday, July 29, 2019, for inclusion in the official hearing record. Your responses should be sent to Caroline Ronis of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

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Enclosure

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Tuesday, June 25, 2019
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Chairman Bobby Scott (D-VA)

- What is the difference between private adoptions and foster care?
  - Can religion be considered when placing children through private adoptions? What about foster care placements?
  - Would implementing the "Do No Harm Act" change the answer to either of these questions?

- On pages 8-9 of his written statement, Mr. Sharp listed ten examples of exemptions provided under the "Religious Freedom Restoration Act's" "balancing test". Can you explain what effect the enactment of the "Do No Harm Act" would have on each of these examples?

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Mr. Matt Sharp
Senior Counsel
Alliance Defending Freedom
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, GA 30043

Dear Mr. Sharp,

I would like to thank you for testifying at the June 25, 2019 hearing entitled *"Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Monday, July 29, 2019, for inclusion in the official hearing record. Your responses should be sent to Caroline Ronis of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

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"Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"
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Chairman Bobby Scott (D-VA)

- On pages 8 and 9 of your testimony you appear to argue that very few RFRA claims involve nondiscrimination laws and assert that "practically no RFRA claims involved LGBT individuals." Please identify, by name and court, the lawsuits Alliance Defending Freedom is currently litigating that seek a religious exemption from a nondiscrimination law based on
  - The federal RFRA;
  - A state RFRA or RFRA equivalent;
  - A state constitutional provision; or
  - The Free Exercise Clause of the First Amendment.

- You have argued that Miracle Hill Ministries should be allowed to take federal and state dollars to place children who are in the care of the government and maintain a policy of only working with evangelical Protestant parents and mentors in its foster care program. Many children in the child welfare system and their birth parents are not evangelical Christian and I would like to understand what happens to these children in a system that limits the pool of parents to evangelical Protestants.
  - What is the legal basis for a taxpayer-funded entity to refuse placement of children with otherwise qualified individuals or families, based solely upon religion?
  - When Miracle Hill Ministries places non-evangelical children with evangelical families, is it the position of ADL that the foster families can force or pressure the children to engage in that family's religious practices? For example, Rep. Timmons explained that Miracle Hill's purpose for its policy is to choose foster families who share Miracle Hill's religious beliefs because those families are in a position of "spiritual leadership" for the children. Does this mean the foster families can require the children to follow the family's religious beliefs?
  - Can the entity or the families evangelize these children?

- Rep. Timmons also stated that Miracle Hill never prevented any individual from becoming a foster parent because there are other private providers "less than two miles away" from their location that would happily process any foster care application, and someone seeking to foster children could also go the Department of Social Services which is "another mile or two down the road." In other words, there is no real harm in discriminating against individuals or families based upon religion. Does this reasoning also apply to African Americans who are refused service at a restaurant when there is another restaurant across the street?

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Ms. Shirley J. Wilcher, M.A., J.D., CAAP
Executive Director
American Association for Access, Equity and Diversity (AAAED)
1701 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006

Dear Ms. Wilcher,

I would like to thank you for testifying at the June 25, 2019 hearing entitled *"Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Monday, July 29, 2019, for inclusion in the official hearing record. Your responses should be sent to Caroline Ronis of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

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Chairman

Enclosure

"Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act'"
Tuesday, June 25, 2019
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Chairman Bobby Scott (D-VA)

- Under the Department of Labor's Office of Federal Contract Compliance Programs Directive 2018-03, could a federal contractor cite religious beliefs for its employment policy and rely on this policy to:
  - Refuse to hire a qualified applicant who is married to his same-sex partner;
  - Fire a woman who is pregnant and unmarried; or
  - Refuse to hire a qualified applicant who is African American?

- The Department of Labor's Office of Federal Contract Compliance Programs Directive 2018-03 expands an already troubling exemption that allows religiously affiliated nonprofit federal contractors to prefer co-religionists in hiring. The directive cites three recent Supreme Court cases to justify the expansion. What is the relevance – if any – of those three cases and the OFCCP directive?

Representative Lucy McBath (D-GA)

- Reverend Hawkins, as a religious leader, what role should religion play in governance, particularly in a country as diverse as ours?

A person of faith has the right to become involved in politics as a candidate or volunteer. The values of faith should make our policies more humane, sensitive and provide resources to enhance the lives of citizens. But elected officials should never use religion as an instrument of governance. Public policy cannot be used to impose one set of religious beliefs on everyone else. For instance, policymakers should never use their political positions to implement policies based solely on their religious tenets that would result in denying services to any person or group. Religion and government must remain separate, as they have been since the founding of our nation.

- Reverend Hawkins, faith-based organizations provide countless services to communities across the country – from helping to feed low-income families to providing housing opportunities to those in need. Can you share a little bit about the importance of this work and these missions? Is it true that this religious work can co-exist with robust civil rights?

The services provided by faith-based organizations are invaluable in the lives of countless men and women around the world. In the Presbyterian Church (USA), we provide services generated by programs on both the national and congregational level. Nationally our hunger and disaster assistant programs provide support and relief to those enduring hardship. Congregations in communities throughout the country provide financial and other resources to families in the midst of struggle. Each week hungry people are fed, the homeless are sheltered and children are mentored, educated and provided daycare. This is a core part of the ministry of many faith-based communities and often, faith-based entities partner with the government to help deliver services.

At the same time, the separation of church and state is the linchpin of religious freedom. Effective government collaboration with faith-based groups does not require the sanctioning of federally funded religious discrimination.

Religious work can definitely co-exist with robust civil rights. My faith tradition teaches that we should protect the civil rights of all persons of children of God and our religious institutions would never violate the civil rights of any man, woman or child based on their Christian principles. Many Christian denominations and other faith traditions strongly affirm civil rights protections for all people, regardless of one's own personal feelings, religious sentiment or reservations. Within the Presbyterian Church (USA) our constitution states that members should respond "to God's activity in the world through service to others"... (and) work "in the world for peace, justice, freedom, and human fulfillment." (G-1.0304) Presbyterian believe that acting on one's freedom of conscience is not without limits and can only be done within the confines of overall denominational policy and procedures. In other words, one does not have unlimited freedom which contradicts the teachings or morality of the church. We support the freedom each individual has to act or

not to act in accordance with their religious beliefs, but freedom of conscience is not supreme and can be limited.

This principle is equally true in our nation's laws and values. The First Amendment ensures we are free to believe or not as we see fit, so long as we don't harm others. And when it comes to providing services to others in partnership with the government, we must abide by our nation's civil rights laws that ensure no one can be turned away. We cannot say you are the "wrong" religion or married to the "wrong" person and therefore refused to provide you with the services we provide.

Answers from Rachel Laser to additional questions from the June 25, 2019 hearing entitled "Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act.'"

(1) What is the difference between private adoptions and foster care?

In a private adoption, the birth parent or parents choose voluntarily to place their child for adoption. The birth parent(s) often select(s) the adoptive family with whom they will place their child. The state's role in the private adoption setting is generally limited to the state court's involvement in entering the decree of adoption after assuring that the placement is in the best interests of the child. The court's action then creates the new parent-child relationship and extinguishes the parental rights of the birth parent(s). Many states may also license agencies that assist in the placement for private adoptions to ensure that certain standards are maintained, but the state itself never has care or custody of the child being placed for adoption. The parental rights pass from the birth parent(s) to the adoptive parent(s) directly.

On the other hand, a child in foster care is in the care and custody of the state. If the child cannot safely remain in the care of their parent or parents because of abuse or neglect, the state child welfare agency may initiate a court proceeding to remove the child from their family and place them in the custody of the state. The state child welfare agency is then responsible for recruiting and identifying an appropriate family to foster the child until they can be reunited with their family. The state agency often contracts with foster care agencies to fulfill this obligation; these taxpayer-funded contractors perform a government function. If the child ultimately cannot be reunited with their parent(s), parental rights are terminated and the agency must timely seek a permanent family for the child, preferably through adoption. The foster parents' relationships with their children are by definition intended to be temporary, and the state exercises continuing authority over the children being fostered until they are either returned to the birth parent(s) or placed for adoption.

a. Can religion be considered when placing children through private adoptions? What about foster-care placements?

In private adoptions, the birth parent or parents often choose the adoptive family and therefore may consider religion. They may select an adoptive family based on the family's religion or decide to work with an agency to coordinate the adoption based on that agency's religious affiliation.

For children in foster care, the best interest of the child must guide all child welfare decisions. Because the state has an obligation to make reasonable efforts to reunify the family, the parent's and child's religion could be a relevant factor in order to ensure consistency for the child. South Carolina, for example, says that religious education provided to children in foster care must be "in accordance with the expressed wishes of the natural parents, if such wishes are expressed."[1] This underscores the need for a diverse pool of foster

[1] S.C. Code Regs. 114-550(H)(11).

parents to ensure that the needs of every child in foster care are met. The religion of the parent(s) of the child in foster care system or the religion of the prospective foster parents may be a consideration in the range of factors considered for healthy placement of the child. But for the reasons explained below, injecting the child welfare service provider's religious views into a placement decision can be detrimental to the foster care process and the goals that it seeks to further.

Children in the foster care system are in the state's custody and the state is responsible for providing child welfare services. States carry out this duty at least in part by contracting with foster care agencies or child-placing agencies. These contractors receive federal and state taxpayer funds to arrange for or place children with foster or adoptive families. The organizations are thus performing a government service on behalf of the government (and receiving a fee for doing it). Because the foster care agencies receive taxpayer funding and perform a government function, they are subject to constitutional and statutory requirements, just as the government would be if it were providing child welfare services directly. Thus, contractors cannot use a religious litmus test for their services by telling prospective parents and volunteers they aren't qualified solely because they don't share the agency's faith. This would elevate the religious beliefs of the contractor above the best interest of the children and would also be tantamount to the state's imposing its own religious preferences on the children (because the state cannot do through a private contractor what it cannot lawfully do directly). Moreover, a religious test reduces the number of qualified foster and adoptive parents who are able to open their homes to these children.

b. Would implementing the "Do No Harm Act" change the answer to either of these questions?

No. Birth parents could still choose the adoptive families with which to place their children. And when it comes to serving children in foster care, the Do No Harm Act would not change the requirement to abide by the best-interest standard in making child welfare decisions. Thus, the parent's or child's religion could be a relevant consideration when making a placement decision. The Do No Harm Act, however, would prevent a taxpayer-funded foster care agency from using the Religious Freedom Restoration Act (RFRA) to violate laws barring discrimination; thus, a contractor could not refuse to work with prospective parents and volunteers solely because of their religious beliefs or practices. This would help ensure a diverse pool of foster and adoptive parents and could increase the chances that each child's own religious needs are met.

(2) On pages 8-9 of his written statement, Mr. Sharp listed ten examples of exemptions provided under the "Religious Freedom Restoration Act's" "balancing test". Can you explain what effect the enactment of the "Do No Harm Act" would have on each of these examples?

On pages 8-9 of his written statement, in an effort to undermine the value of the Do No Harm Act, Mr. Sharp lists eleven of the ways "the RFRA balancing test" has been used. The Do No Harm Act would change the outcome in only one example—the Do No Harm Act is intended to

protect employees from being denied health care benefits like in *Hobby Lobby v. Burwell,* and thus the bill would prohibit RFRA from being used by employers to do so. RFRA wouldn't apply in any of the other cases, and therefore, the Do No Harm Act would not change their outcomes, and even if the federal RFRA did apply in some of the cases, the Do No Harm Act would not amend RFRA in a way that would change the hypothetical application of RFRA in those cases.

(a) **Example Provided by Sharp**: Native American kindergartener Adriel Arocha's right to wear his hair long, as his religion required, was vindicated. He had been told by school administrators to cut the long hair or tuck it into his shirt.

Answer: Passage of the Do No Harm would not change the outcome in this example.

The Do No Harm Act would amend the federal RFRA. The federal RFRA applies to federal laws and policies as well as laws and policies adopted by the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States.[2] The federal RFRA does not apply to state laws.[3] The ACLU, which supports passage of the Do No Harm Act, successfully litigated Adriel Arocha's case, *A.A. v. Needville Independent School District,*[4] under Texas' Religious Freedom Restoration Act—not the federal RFRA.

The Do No Harm Act would not amend the Texas RFRA and, therefore, would have no effect on this case. Even if the federal RFRA applied to this state issue, the Do No Harm Act would not change the way the federal RFRA applies in cases involving a school's policy about student's hair. To the contrary, the Do No Harm Act was drafted to ensure that RFRA would continue to apply to cases involving religious attire and grooming, like Adriel Arocha's.

Furthermore, this example highlights the Texas RFRA, which contains a provision that explicitly states that the law does not "establish or eliminate a defense" under "federal or state civil rights laws."[5] This demonstrates that the formula in the Do No Harm Act works.

Finally, it is noteworthy that Americans United supported the student and his family in this case by filing an *amicus* brief with the Fifth Circuit Court of Appeals.

Example Provided by Sharp: A Philadelphia outreach ministry was able to continue serving the homeless in a city park, as they had done for two decades, after the city attempted to ban this activity.

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[2] 42 U.S. Code § 2000bb–2 (2) and bb-3(1).
[3] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[4] 701 F. Supp. 2d 863 (S.D. Tex. 2009).
[5] Tex. Civ. Prac. & Remedies Code, §110.001, et seq.

Answer: Passage of the Do No Harm would not change the outcomes in this example.

Again, this case does not involve the federal RFRA. The ACLU successfully litigated *Chosen 300 Ministries v. City of Philadelphia*[6] under the Pennsylvania Religious Freedom Protection Act.[7] As already explained, the federal RFRA applies to federal laws, not city policies like the one in question in this case. Accordingly, the Do No Harm Act would have no effect on this case. Even if RFRA did apply to local matters like this, the Do No Harm Act would not prevent the use of RFRA in cases involving religious organizations voluntarily serving food to people experiencing homelessness in a park.

(b) **Example Provided by Sharp**: The U.S. Supreme Court held that the government could not force Mennonite owners of a Pennsylvania wood furnishings manufacturing company to purchase and provide what they saw as abortion-inducing drugs and devices in violation of their sincerely held beliefs that all human life is sacred and deserving of protection.

Answer: The Do No Harm Act was designed to change the outcome in cases like this where a for-profit business uses RFRA to deny employees access to healthcare. Mr. Sharp appears be describing *Conestoga Wood Specialties Corp. v. Burwell*,[8] however, his description of the facts is wholly inaccurate.

Under the contraception benefit of the Affordable Care Act, most employer-provided health insurance plans must cover FDA-approved methods of contraception, which includes IUDs and emergency contraception, without cost sharing. The ACA does not require *any* employer to purchase or provide *any* contraception of any kind. Contraception is not an abortifacient. At issue in the case was whether a for-profit corporation could use RFRA to deny its employees health care insurance benefits that are guaranteed by law.

In an unprecedented decision, the Supreme Court ruled that closely held corporations like Hobby Lobby and Conestoga Woods could use RFRA to deny this workplace healthcare benefit. The Do No Harm Act was designed to ensure that, in the future, RFRA could not be used to deny people access to healthcare like in *Hobby Lobby*.

(c) **Example Provided by Sharp**: The City of Fort Lauderdale was prevented from prohibiting a gentleman from operating a program to feed the homeless.

Answer: Passage of the Do No Harm would not change the outcome in this example.

Fort Lauderdale Food Not Bombs v. Fort Lauderdale,[9] did not involve a state or federal RFRA or even a state or federal constitutional provision related to religion. Instead, the plaintiffs argued that the city ordinance governing food sharing violated their "rights to

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[6] No. 67 C.D. 2015, 2016 WL 224036 at *4 (Pa. Commw. Ct. Jan. 19, 2016).
[7] 71 Pa. Stat. Ann. §§ 2401 et seq.
[8] *Conestoga Woods* was consolidated with *Burwell v. Hobby Lobby*.
[9] 901 F.3d 1235 (11th Cir. 2018).

free speech and free association guaranteed by the First Amendment."[10] The Eleventh Circuit Court of Appeals agreed that food sharing is "expressive conduct" and the Court remanded the case for further action under the Free Speech Clause. The Do No Harm Act could not—nor does it attempt to—amend the Free Speech Clause of the United States Constitution. Therefore, its passage would not change the outcome in this case.

(d) **Example Provided by Sharp**: Lipan Apache religious leader Robert Soto's right to possess eagle feathers, which are central to his religion, was vindicated. He faced criminal charges for possessing the feathers, which the federal government confiscated, but has since returned.

Answer: Passage of the Do No Harm would not change the outcome in this example.

The Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act prohibit people from possessing eagle feathers, but have an exception for Native Americans from federally recognized tribes to use eagle feathers in religious ceremonies. In *McAllen Grace Brethren Church v. Salazar,*[11] the Fifth Circuit, using RFRA, ruled that the government could not enforce the laws to prevent the plaintiffs, members of a non-federally recognized tribe, from possessing eagle feathers that are used in their religious ceremonies because it would make it "impossible" for the plaintiffs to practice their religion.[12]

The Do No Harm Act would not change the outcome in this case, as the bill does not prevent RFRA from being used to challenge environmental or animal laws.

(e) **Example Provided by Sharp:** Orthodox Jewish prisoner Bruce Rich was able to receive kosher meals, a diet mandated by his faith, which the prison had initially denied him.

Answer: Passage of the Do No Harm would not change the outcome in this example.

This case, *Rich v. Florida Department of Corrections*, was litigated under the Religious Land-Use and Institutionalized Persons Act (RLUIPA)[13]—not RFRA. RLUIPA governs land use cases and cases involving people in institutions, including "prisons, jails, pretrial detention facilities, juvenile facilities, and institutions housing persons with disabilities when these facilities controlled by or provide services on behalf of State or local governments."[14] The Do No Harm Act does not amend RLUIPA. Passage of the Do No Harm Act, therefore, would have no impact on the outcome of this case.

(f) **Example Provided by Sharp:** Muslim prisoner Abdul Muhammad won the right to grow the 1/2 inch beard his faith required. The prison had refused to allow his beard, even though beards were permitted for non-religious reasons.

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[10] *Id.* at 1239.
[11] 764 F.3d 465 (5th Cir. 2014).
[12] *Id.* at 479.
[13] 42 U.S.C. § 2000cc.
[14] *U.S. Dept. of Justice, Religious Land Use and Institutionalized Persons Act* (2017), *available at* https://bit.ly/2Ml76yO.

Answer: Passage of the Do No Harm would not change the outcome in this example.

Holt v. Hobbs,[15] in which Americans United filed an amicus brief in favor of Mr. Muhammad before the U.S. Supreme Court, is not a federal RFRA case. The Supreme Court applied RLUIPA to provide Mr. Muhammad a religious exemption. As explained above, the Do No Harm Act does not amend RLUIPA. Passage of the Do No Harm Act, therefore, would have no impact on the outcome of this case.

(g) **Example Provided by Sharp:** Two Christian evangelists, who were peacefully sharing their faith and handing out religious materials on a public sidewalk in San Antonio, were given a fair opportunity in court to build their case for the freedom to share their faith.

Answer: Passage of the Do No Harm would not change the outcome in this example.

It appears that this example is describing *Texas v. Warner*,[16] in which a street preacher was issued a citation for violating the city's noise ordinance because he was preaching on the street using a sound amplifier. The case was not litigated on religious freedom grounds. Mr. Warner's attorney did not even argue in his trial brief that the ordinance or citation violated the preacher's religious freedom rights, opting instead to rely on free speech protections. In the end, the Judge dismissed the case for "lack of sufficient evidence."

The Do No Harm Act would not amend the First Amendment, nor could it. Instead, it would amend the federal RFRA, which had no relevance in this case. Even if RFRA did apply and it was used to challenge the citation, the passage of the Do No Harm Act would have no effect on the outcome of the case as it does not restrict RFRA's application to noise ordinances.

(h) **Example Provided by Sharp:** Philemon Homes, a faith-based halfway house for prisoners, was allowed to continue offering its ministry after the local city council changed the city's zoning law to try to shut it down.

Answer: Passage of the Do No Harm would not change the outcome in this example.

Philemon Homes is a faith-based residential program to help low-level offenders make successful reentry after they have been released from state custody. The facility is operated by the pastor of Grace Christian Fellowship, which is located across the street from the church. After the Homes began operating, Sinton, Texas, enacted an ordinance directed at the Homes that prohibits "a correctional or rehabilitation facility" within 1000 feet of a church, as well as a residential area, public school, or public park.

In *Barr v. Sinton*,[17] Philemon Homes and the pastor challenged the law because it

[15] 135 S. Ct. 853 (2015).
[16] No. B1656170 01 (City of San Antonio Mun. Ct. 2019), *available at* https://bit.ly/2YehLmf.
[17] 295 S.W.3d 287, 292-3 (Tex. 2009).

prohibited the Home from being located across the street from its church. In fact, "because Sinton is small, it would be difficult for a halfway house to be located anywhere within the city limits." The court held that the ordinance, as applied to the pastor's ministry, Philemon Homes, violates the Texas' Religious Freedom Restoration Act.

As explained above, the Do No Harm Act does not amend state law. Passage of the Do No Harm Act, therefore, would not change the outcome of this case. Even if the ordinance in question were a federal law, passage of the Do No Harm Act would not change the outcome in the case because the Do No Harm Act does not change RFRA's applicability to zoning cases.

(i) **Example Provided by Sharp:** Courts have found that interests in public safety can still be honored, while not simultaneously offending the religious beliefs of many Amish communities, by allowing the Amish to hang lanterns and reflective duct tape on their horse-drawn buggies, instead of the typical orange reflective triangles.

Answer: Passage of the Do No Harm would not change the outcome in this example.

Buggy cases like *Wisconsin v. Miller,*[18] and *Minnesota v. Hershberger*,[19] involve state and local motor vehicle laws—not federal laws—and have been litigated under state RFRAs and state constitutional provisions—not the federal RFRA. The Do No Harm Act would not amend these state laws or constitutional provisions. Accordingly, the Do No Harm Act would not change the outcome of cases like this. Even if the ordinance in question were a federal law, passage of the Do No Harm Act would not change the outcome in the case because the Do No Harm Act does not change RFRA's applicability to motor vehicle laws.

[18] 549 N.W.2d 235 (Wis. 1996) (holding that the state law violated the Wisconsin Constitution).
[19] 462 N.W.2d 393 (Minn. 1990) (holding that the state law did not violate the Minnesota Constitution).

July 29, 2019

Chairman Robert C. "Bobby" Scott
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515-6100

Dear Chairman Scott:

I appreciate the opportunity to respond to additional questions regarding the June 25, 2019, hearing entitled "*Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act.'*"

You first asked about excerpts from my written testimony asserting that very few RFRA claims involve nondiscrimination laws or LGBT individuals. As explained in my written testimony, these assertions were made by Georgia Tech Professor Lucien J. Dhooge in his 2018 article entitled *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretative Case Law*, 27 WM. & MARY BILL RTS. J. 153 (2018), and by Wayne State University Law School Professor Christopher C. Lund in his 2016 article entitled *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 164 (2016). Questions regarding their research and any methodologies they employed in reaching the conclusions contained in their respective articles are best directed to Professors Dhooge and Lund.

You then requested a list of active lawsuits where ADF's clients seek a "religious exemption" from a nondiscrimination law based on a federal or state RFRA, a state constitutional provision, or the Free Exercise Clause of the First Amendment. To the best of my knowledge, ADF is not representing any clients who seek a "religious exemption" to a nondiscrimination law under a federal or state RFRA. Rather, in cases like that of Kentucky print-shop owner Blaine Adamson, our creative professional clients gladly serve <u>everyone</u> who enters into their shop. They do not discriminate based on a protected status. However, they are unable to create all expression or participate in all events when the requested expression or event conflicts with their religious beliefs—just as other creative professionals have the freedom to decline to create expression or participate in celebrations with which they disagree. Our clients are not seeking a "religious exemption"; rather, they seek for government officials to properly interpret and apply their laws and recognize that it is not status discrimination to refrain from creating custom-made messages or expressions that violate an individual's beliefs. As I expressed in my oral testimony, <u>disagreement is not discrimination</u>. Our clients' disagreement with certain messages they are asked to create is not status discrimination.

Additionally, if it is the Committee's intention to conduct a hearing on individuals or organizations who seek to enforce federal or state constitutional protections, or if the Committee is considering federal legislation that would undermine or erode constitutional rights, then ADF would

be happy to participate in that hearing and discuss cases in which our clients seek constitutional relief from government infringement of their religious freedom. But such discussions are outside the scope of a hearing about whether the federal Religious Freedom Restoration Act should be gutted by legislation such as the proposed "Do No Harm Act."

You next asked several questions about Miracle Hill Ministries, an organization that ADF does not represent. To the extent you seek answers regarding specific policies or practices of Miracle Hill Ministries, the organization and its legal counsel would be the best source of information.

Regarding your more general questions about foster-care organizations, you first inquire about the impact on "children in a system that limits the pool of parents to evangelical Protestants." I am not aware of any state that has such a limited "system." To the contrary, it is my understanding that states have a broad diversity of child welfare organizations—some faith-based, but most not—that all work towards the same goal of recruiting qualified families to provide loving homes for as many children as possible. Some of these organizations choose to specialize in recruiting foster-care families from certain communities and are thereby able to access a group of prospective parents that might otherwise remain untapped.[1] This diversity should be encouraged because its ultimate effect results in more families caring for more children in need.

It is the First Amendment that provides the legal protections for a faith-based child welfare organization to operate consistent with its faith, even when that organization receives federal funds. Specifically, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court reaffirmed that "[t]he Free Exercise Clause protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status." 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542, (1993)) (citations omitted). In that case, a religious preschool and daycare center applied for a Missouri state grant to purchase playground surface material made from recycled tires. Despite otherwise qualifying for the government funds, the religious organization was denied the funding because of its religious identity. The Court held that Missouri "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021.

Similarly, if the government denied federal funds to an otherwise qualified child welfare organization because of its religious character as expressed through its hiring policies and its decision to recruit families that share the organization's faith, the government would likely violate the Free Exercise Clause by expressly discriminating against a religious organization. Indeed, a government policy that expressly targets a faith-based child welfare organization for differential treatment is evidence of "clear and impermissible hostility toward … sincere religious beliefs," which the Supreme Court ruled against in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018).

Your questions about whether a foster-care family can share their faith with (or "evangelize," as described in your question) a child under their care likewise raises concerns about discrimination

[1] Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, The Heritage Foundation Backgrounder, No. 3320 (May 22, 2018), *available at* https://www.heritage.org/civil-society/report/the-role-faith-based-agencies-child-welfare.

against people of faith. Religious belief and exercise are not asbestos that must be purged from a house before a child may enter. Religion is integral to the lives of countless Americans—including many foster-care families and the children they serve. Our foster-care system should respect the religious freedom of all participants.

But if this Committee believes that merely exposing a foster-care child to any religious practice could be prohibited as "evangelizing" or "pressuring a child to engage in that family's religious practice," then what would stop the government from requiring foster-care families to completely abstain from any religious exercise as a condition of welcoming a child into their home? For example, would Muslim foster parents be permitted to fast during the month of Ramadan, even while not requiring the foster-care child to participate, or will fasting be viewed as "pressuring" the child to participate in the foster parents' religious observance? Must the parents abstain from salat, or ritual prayer, that they are commanded to do five times a day, if there is a possibility the child will overhear their prayers?

The U.S. Supreme Court explained in *Trinity Lutheran* that the government cannot require a religious family or organization "to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified." 137 S. Ct. at 2024. That includes participating in the foster-care system.

Allowing families who hold a variety of customs, practices, and beliefs to open their homes to children in need is not a flaw of our foster-care system that must be eradicated. It is a valuable feature that promotes diversity and ensures that all families feel welcome to join in the effort to provide every child with a home.

Finally, you ask about statements from Rep. William Timmons regarding the availability of nearby alternatives to Miracle Hill Ministries in South Carolina who are willing to process foster-care applications for families of any faith. Again, I am unable to opine about any of Miracle Hill's policies or those of other child-welfare providers in the state, and I would encourage you to direct your inquiries to those organizations.

However, regarding your question as to whether a similar reasoning would apply to a restaurant that refused to serve African-Americans, the answer is simple: No. There is no legal basis for a restaurant (or any other business or organization) to deny service to a person because of their race, nor do RFRA or similar state statutes protect that conduct. To my knowledge, no individual or organization has ever successfully used a federal or state RFRA to permit racial discrimination.[2] And if they attempted to do so, they should lose, because the U.S. Supreme Court has held that the government has a compelling interest in remedying the racial injustices of the past.

I sincerely appreciate the opportunity to engage in further dialogue on the importance of the procedural protections afforded to all Americans by the Religious Freedom Restoration Act, a law

[2] During the hearing, Rep. Jahana Hayes stated that "RFRA has been used in the *Bob Jones University v. United States*. The university sought to use religion to justify its racially discriminatory admission policies. So it has been used before." RFRA was not used in the *Bob Jones* case because the decision in the case was handed down in May of 1983—ten years before RFRA was enacted. Additionally, Bob Jones University lost because the U.S. Supreme Court found that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education." *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

that does not pick winners or losers. It simply ensures that everyone gets a fair hearing when government imposes a substantial burden on their religious exercise. ADF firmly believes that RFRA should not be gutted to deprive people of faith access to our justice system simply because their religious exercise is disapproved by some in power.

Cordially,

J. Matthew Sharp
Senior Counsel
Alliance Defending Freedom

AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY

Questions for the Record, Hearing on Religious Freedom Restoration Act
American Association for Access, Equity and Diversity

• Under the Department of Labor's Office of Federal Contract Compliance Programs Directive 2018-03, could a federal contractor cite religious beliefs for its employment policy and rely on this policy to:

o **Refuse to hire a qualified applicant who is married to his same-sex partner;**
- Yes. It is very possible, if not likely that the Department of Labor may use religious beliefs to permit a federal contractor to refuse to hire a qualified applicant married to his same-sex partner.
Not only does the directive indicate that the religious freedom language is to be interpreted very broadly, but the recently-announced Notice of Proposed Rulemaking attempts to codify the guidance in this directive. https://www.federalregister.gov/documents/2019/08/15/2019-17472/implementing-legal-requirements-regarding-the-equal-opportunity-clauses-religious-exemption. Note that the public was given only thirty days to comment and the comment period ends on September 16, 2019.

In its press release announcing the proposed regulations, the Department stated: "Consistent with the President's policy to enforce the robust protections for religious freedom found in federal law, the proposed rule states that it should be construed to provide the broadest protection of religious exercise recognized by the Constitution and other laws, such as the Religious Freedom Restoration Act." https://www.dol.gov/newsroom/releases/ofccp/ofccp20190814

The Department's interpretation of the case law may be more consistent with that of the Department of Justice on whether sexual orientation is covered under Title VII of the Civil Rights Act, instead of the interpretation currently held by the Equal Employment Opportunity Commission that sexual orientation is covered. Note that the executive order enforced by OFCCP, Order 11246, as amended in 2014, expressly adds sexual orientation and gender identity among its bases for protection against discrimination. So, to allow a contractor to cite religious beliefs in order to exclude an applicant based on his or her marriage to a same-sex partner squarely contradicts the order itself. Its justification for ignoring 11246 as amended will be presumably the Supreme Court cases cited: *Masterpiece Cakeshop v. Colorado Civil Rights Commission, Trinity Lutheran Church v. Comer, and Burwell v. Hobby Lobby Stores.*

o **Fire a woman who is pregnant and unmarried;**
While Title VII as amended prohibits discrimination on the basis of pregnancy, being an *unmarried* pregnant woman may be excludable given the breadth of the Department's interpretation of the government's deference to religious exercise.

o **or Refuse to hire a qualified applicant who is African American?**
Discrimination on the basis of race, notwithstanding the deference to religious freedom, may be the most difficult to justify given the fundamental purpose of Executive Order 11246 and related civil rights laws. That said, it is possible that if the Department chooses to give total deference to religious freedom, the First Amendment may be viewed by DOL as trumping the Thirteenth, Fourteenth and Fifteenth Amendments and related civil rights statutes. The NAACP Legal Defense Fund reminds us in its brief in the *Masterpiece Cake Shop* case that the landmark decision in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) established the fact that nondiscrimination on the basis of race in public accommodations was prohibited under Title II of the Civil Rights Act of 1964. See the LDF brief at https://www.naacpldf.org/files/about-us/16-111%20bsac%20NAACP%20Legal%20Defense%20%26%20Educational%20Fund%2C%20Inc..pdf.
In that case, Maurice Bessinger, the owner of the restaurant "Piggie Park," held the belief that serving Black customers or contributing to racial mixing in any way "contravene[d] the will of God." This brief recites the long history of the use of religion as a basis for race discrimination in the United States.

While unlikely that DOL will permit a contractor to discriminate on the basis of race in direct contravention of the purposes of Executive Order 11246, it is possible that such an occurrence may happen. One would think that race discrimination in public accommodations was a distant practice but a recent news report shows how there are some who continue to share Mr. Bessinger's beliefs about "race mixing." A mixed-race couple was recently denied the use of a hall for a wedding due to the owner's "Christian belief." http://www.deepsouthvoice.com/index.php/2019/09/01/no-mixed-or-gay-couples-mississippi-wedding-venue-manager-says-on-video/ After the story went viral, the owner reportedly recanted her belief that the Bible supported her views.

• **The Department of Labor's Office of Federal Contract Compliance Programs Directive 2018-03 expands an already troubling exemption that allows religiously affiliated nonprofit federal contractors to prefer co-religionists in hiring. The directive cites three recent Supreme Court cases to justify the expansion. What is the relevance – if any – of those three cases and the OFCCP directive?**

The cases cited in the directive and the Notice of Proposed Rulemaking are: *Masterpiece Cakeshop v. Colorado Civil Rights Commission, Trinity Lutheran Church v. Comer, and Burwell v. Hobby Lobby Stores*. We would argue that the most relevant of the three cases is the *Hobby Lobby* case that makes clear the religious exemption to the nondiscrimination protections under Title VII and presumably Executive Order 11246 can apply to for-profit corporations under the right circumstances and that for-profit status is not an absolute bar to granting an exemption citing religious freedom. The decision in the *Masterpiece Bakeshop* case was arguably very narrow and did not expressly grant the right of the bakeshop owner to discriminate on the basis of sexual orientation under the civil rights laws. In that case the Court upbraided the Colorado Civil Rights Commission for its hostility to the sincerely held religious beliefs of the baker and emphasized the importance of neutrality by the Commission. In *Trinity Lutheran Church*, the Supreme Court held that a church may not be denied an otherwise generally available public benefit like a government grant because of its religious status under the First Amendment. One could interpret this holding as allowing religious affiliated institutions to compete for and receive federal contracts. It would not be reasonable however, to conclude that these institutions could ignore the antidiscrimination laws altogether.

Two cases before the Supreme Court in the next term - *Bostock v. Clayton County, Ga.*, and *Altitude Express Inc. v. Zarda* are more relevant to the question of whether sexual orientation is covered under

Title VII and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* will address the question of the coverage of gender identity. EEOC has reportedly chosen to take the position of inclusion, while the Department of Justice takes the opposing view. Reportedly, EEOC has not signed on to the Department of Justice brief before the Supreme Court. https://www.law.com/nationallawjournal/2019/08/16/eeoc-doesnt-sign-trump-dojs-supreme-court-brief-against-transgender-employees/?slreturn=20190806134537

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[Whereupon, at 1:51 p.m., the committee was adjourned.]