



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

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 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 woman¹⁰ and a Catholic¹¹ 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 to 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}

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%20.15.19.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

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://doi.org/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,



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