



**Testimony of Rachel Laser,  
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**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*<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup> 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,<sup>3</sup> Congress attempted to pass a new bill<sup>4</sup> 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;<sup>5</sup> avoid ethics investigations;<sup>6</sup> obstruct criminal investigations;<sup>7</sup> shield religious organizations from bankruptcy and financial laws, which effectively denied compensation to victims of sexual abuse;<sup>8</sup> and thwart access to health

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<sup>2</sup> *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).

<sup>3</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

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

<sup>5</sup> *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).

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> *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.<sup>9</sup> In states with RFRA that mirror the federal RFRA, the statutes have been invoked to avoid licensing requirements<sup>10</sup> and resist lawsuits over sexual abuse by clergy members.<sup>11</sup>

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.<sup>12</sup> 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*,<sup>13</sup> 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,<sup>14</sup> 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.*,<sup>15</sup> a business owner refusing to serve African Americans argued his religious beliefs "compel[led] him to oppose any integration of the races"<sup>16</sup> and that the Free Exercise Clause gave him a right to violate Title II of the Civil Rights Act.<sup>17</sup> The Supreme Court

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

<sup>10</sup> *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).

<sup>11</sup> *E.g.*, *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHD07CV125036425S, 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).

<sup>12</sup> 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>).

<sup>13</sup> 573 U.S. 682 (2014).

<sup>14</sup> Hobby Lobby, Our Story, <https://bit.ly/2X4680M>.

<sup>15</sup> 390 U.S. 400 (1968) (per curiam).

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

<sup>17</sup> 42 U.S.C. § 2000a *et seq.* (the principal federal public accommodations law).

rejected his claim as “patently frivolous.”<sup>18</sup> And in *Bob Jones University v. United States*<sup>19</sup> 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.”<sup>20</sup>

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.<sup>21</sup> 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,<sup>22</sup> its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion.”<sup>23</sup>

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

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<sup>18</sup> *Piggie Park Enters.*, 309 U.S. at 402 n.5.

<sup>19</sup> 461 U.S. 574, 602 n.28 (1983).

<sup>20</sup> *Id.* at 604.

<sup>21</sup> *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).

<sup>22</sup> Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

<sup>23</sup> *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”).

<sup>24</sup> 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<sup>25</sup> and ensure it is “measured so that it does not override other significant interests.”<sup>26</sup> 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.”<sup>27</sup> 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.”<sup>28</sup> The law provided “no exception,” and no account of “the imposition of significant burdens.”<sup>29</sup> The “unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses,” and is unconstitutional.<sup>30</sup>

In *Cutter v. Wilkinson*,<sup>31</sup> the Court upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA),<sup>32</sup> RFRA’s sister statute. The Court explained that “[p]roperly applying RLUIPA” includes taking adequate account of other significant interests.<sup>33</sup> 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.”<sup>34</sup> This principle applies equally to RFRA, which contains the same legal test and congressional purpose as RLUIPA.<sup>35</sup>

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<sup>25</sup> *Cutter*, 544 U.S. at 720; see also *Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985).

<sup>26</sup> *Cutter*, 544 U.S. at 722.

<sup>27</sup> 472 U.S. 703, 710-11 (1985).

<sup>28</sup> *Id.* at 708-09.

<sup>29</sup> *Id.* at 710.

<sup>30</sup> *Id.*

<sup>31</sup> 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).

<sup>32</sup> 42 U.S.C. §§ 2000cc - cc-5.

<sup>33</sup> *Cutter*, 544 U.S. at 722.

<sup>34</sup> *Id.*

<sup>35</sup> 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.*<sup>36</sup> 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.”<sup>37</sup> In his concurrence, Justice Kennedy emphasized that an accommodation must not “unduly restrict other persons, such as employees, in protecting their own interests.”<sup>38</sup> Indeed, every member of the Court reaffirmed that the burdens on third parties must be considered.<sup>39</sup>

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.”<sup>40</sup> 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.”<sup>41</sup> It then highlights cases that imply the government lacks a compelling interest in prohibiting discrimination against women and on the basis of sexual orientation.<sup>42</sup> 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”).

<sup>36</sup> 573 U.S. 682 (2014).

<sup>37</sup> *Id.* at 727.

<sup>38</sup> *Id.* at 737-40 (Kennedy, J., concurring).

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

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

<sup>41</sup> *Id.* at 49,678.

<sup>42</sup> *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.<sup>43</sup>

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.”<sup>44</sup>

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”<sup>45</sup> and all Department of Justice (DOJ) attorneys must “adhere to the interpretative guidance” and implement it in litigation.<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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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<sup>43</sup> *Id.* (emphasis added).

<sup>44</sup> *Id.* at 49,670.

<sup>45</sup> *Id.* at 49,668.

<sup>46</sup> 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>.

<sup>47</sup> 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>.

<sup>48</sup> *Id.*

<sup>49</sup> 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.”<sup>50</sup> 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,”<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup>

On January 23, 2019, the Trump Administration granted that exemption.<sup>55</sup> 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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<sup>50</sup> 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>.

<sup>51</sup> Dep’t of Justice, Civil Rights Div., About the Division, <https://bit.ly/2fxQUac>.

<sup>52</sup> 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).

<sup>53</sup> S.C. Exec. Order No. 2018-12, 42-4 S.C. Reg. 11-12 (March 13, 2018).

<sup>54</sup> 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>.

<sup>55</sup> 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/2Ejghn7>.

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,<sup>56</sup> including one Americans United is litigating on behalf of Aimee Maddonna, HHS is expected to issue new regulations that will extend this policy nationwide.<sup>57</sup>

## **B. Discrimination in Healthcare**

Women clearly benefit from increased access to contraception.<sup>58</sup> 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.<sup>59</sup>

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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<sup>56</sup> 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).

<sup>57</sup> Sam Baker & Jonathan Swan, *Scoop: Trump’s Plan to Let Adoption Agencies Reject Same-Sex Parents*, Axios, May 24, 2019, <https://bit.ly/2HAgoO4>.

<sup>58</sup> 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.

<sup>59</sup> 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.<sup>60</sup> Trump Administration rules, however, put this access at risk for countless women.

Subject to lawsuits under RFRA<sup>61</sup> 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.<sup>62</sup> 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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<sup>60</sup> 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>.

<sup>61</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (per curiam).

<sup>62</sup> 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.<sup>63</sup> Two federal courts have put these rules on hold.<sup>64</sup>

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.<sup>65</sup> A clinic could turn someone away 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.<sup>66</sup> 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.<sup>67</sup> 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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<sup>63</sup> *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).

<sup>64</sup> 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).

<sup>65</sup> Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019).

<sup>66</sup> Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).

<sup>67</sup> 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.<sup>68</sup>

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<sup>69</sup> 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 against other 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.<sup>70</sup> RFRA, however, could not be used in ways that harm other people, including to:

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<sup>68</sup> 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").

<sup>69</sup> Dep't of Labor, Office of Fed. Contract Compliance Programs Directive 2018-03 (Aug. 10, 2018), <https://bit.ly/2ntYKYa>.

<sup>70</sup> 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;<sup>71</sup> by a for-profit business to get out of the prohibitions on employment discrimination under Title VII;<sup>72</sup> by a hospital to trump the protections against sex discrimination in the Health Care Rights Law;<sup>73</sup> or to avoid testifying in a federal child labor case.<sup>74</sup>

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.

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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.

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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/2N3MnI7>.

<sup>71</sup> See Revised Requirements Under Community Planning and Development Housing Programs, Regulation Identification No. 2506-AC53 (Spring 2019).

<sup>72</sup> 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).

<sup>73</sup> See Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019).

<sup>74</sup> 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).