COMMITTEE ON EDUCATION & THE WORKFORCE

RELIGIOUS LIBERTY?

THE HISTORY OF RELIGIOUS LIBERTY IN FEDERAL POLICY FROM 1993 TO 2022

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ED & WORKFORCE DEMOCRATS

RELIGIOUS LIBERTY?

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INTRODUCTION

Religious liberty is a fundamental American value. The Nation's Founding Fathers knew from European history the dangers of governmental entanglement with religion. Against this backdrop and amid a protracted struggle for religious freedom in Virginia, in 1779, Thomas Jefferson introduced the Virginia Statute for Religious Freedom in the Commonwealth of Virginia, which is widely understood to have served as the blueprint for the First Amendment of the U.S. Constitution.[1] The Virginia Statute states, "[o]ur civil rights have no dependence on our religious opinions, any more than our opinions on physics and geometry."[2] The First Amendment reflects our country's longstanding commitment to separating religion and government, until recent Supreme Court decisions.

While many of us recognize the positive role religion plays in our lives and our communities, the Founding Fathers were cognizant of the historical misdeeds and bloodshed that occurred under the banner of religion. Thus, they enshrined in the First Amendment of the Constitution the Free Exercise Clause and the Establishment Clause—twin principles that together ensure the separation between church and state by guaranteeing freedom of religious exercise while prohibiting the government's establishment thereof. For over two hundred years, this guaranty has ensured that individuals may live freely in their faith, including the freedom to abstain from religion, without coercion by the state. This guaranty has also protected our religious institutions from the undue influences of the government, fostering independent and diverse religious voices in the nation; and ensured that government focuses on serving its citizens without entanglement and interference from religion.

Almost one hundred and fifty years ago, the U.S. Supreme Court recognized that religious freedom must be weighed with other interests because permitting otherwise "would . . . make the professed doctrines of 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."[3]

However, over the last three decades, since the 1990s, there have been numerous attempts by conservatives—many of them successful—to use the banner of religious liberty in a manner that runs contrary to this history and precedent.

OVERVIEW OF REPORT

This report provides a broad overview of how the federal government in the last few decades has used executive, legislative, and administrative actions to advance the religious freedom interests of some Americans in a manner that sometimes infringes on the rights and interests of others, such as civil rights protections, access to social safety net programs and health care services.[4] In doing so, this report outlines the troubling trajectory from the 1990s to today that moved the country from protecting the victims of discrimination to protecting the perpetrators of discrimination. Finally, this report underscores why we must course correct and once again recognize that reasonable limiting principles are necessary for religious freedom rights to mitigate the evisceration of other rights.

1990-2001 AND THE CLINTON ADMINISTRATION

The 1990s were an active period for the federal government's consideration of religious freedom issues. The Clinton Administration attempted to clarify religious freedom rights within constitutional parameters and Congress enacted laws to challenge Supreme Court cases in which it disagreed with the Court's interpretation of religious freedom rights. Congress also changed the rules for how faith-based organizations participate in several federal social service programs. This period forecasted future battles between stakeholders seeking to advance religious freedom rights and stakeholders seeking to protect civil rights.

Executive Actions

During his Administration, President Clinton took steps to clarify religious freedom protections in certain areas such as public schools and the federal workplace. For example, in 1995, against the backdrop of forthcoming congressional action on a school prayer constitutional amendment,[5] Clinton's White House issued a Memorandum on Religious Expression in Public Schools, which recognized that First Amendment requirements are not always easily understood and that there was a need to clarify for students, parents, and schools what was allowed under current law.[6] This memorandum also outlined the constitutional framework for allowing voluntary religious expression in schools.[7] Subsequently, in 1997, the Clinton White House issued similar guidance to provide clarity about voluntary religious exercise in the federal workplace.[8]

Administrative Actions

The Clinton White House's 1995 memorandum outlining the constitutional framework for allowing voluntary religious expression in schools also directed the U.S. Secretary of Education and the U.S. Attorney General to take appropriate steps to inform public school districts of these principles.[9] As a result of this directive, the U.S. Department of Education (ED) issued guidance outlining the extent to which religious expression and activity are constitutionally permitted in public schools.[10]

Legislative Actions

Congress Enacts the Religious Freedom Restoration Act

In its 1990 decision, Employment Division v. Smith, the Supreme Court affirmed the denial of unemployment compensation benefits for two Native American state employees who were fired for participating in a sacrament of the Native American Church that involved ceremonial peyote-smoking.[11] The state denied the employees benefits because their actions were considered "misconduct"—it violated a state drug law at the time.[12] Rejecting arguments that the former employees' religious practices should have shielded them from the consequences of the law, the Supreme Court stated that it had "never held that an individual's religious beliefs excuse[d] him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[13] The Court asserted that allowing exceptions to every state law or regulation affecting religion "would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind."[14]

This ruling paved the way for a robust debate on religious liberty issues. A bipartisan group of Members of Congress and a broad coalition of both liberal and conservative stakeholders believed that the Smith decision failed to "strike [a] sensible balance[] between religious liberty and competing prior governmental interests."[15] As a result, the 103rd Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), which requires that government action that substantially infringes on a person's exercise of religion serve a compelling government interest and be the least restrictive means to achieve that interest.[16] Thus, "RFRA imposes a heightened standard of review for government actions—including rules of general applicability—that 'substantially burden' a person's religious exercise."[17] Although the statute does not define "substantial burden," according to experts, it is based on free exercise clause cases prior to the Smith decision and means "such burdens [that] exist when an individual is required to choose between following his or her religious beliefs and receiving a governmental benefit or when an individual must act contrary to his or her religious beliefs to avoid facing legal penalties."[18]

Congress enacted RFRA to restore the state of the law pre-Smith, which provided heightened, but not unlimited, protections for individuals' religious liberty rights when they were denied a public benefit because of their religious beliefs.[19] Congress did not intend for minimal burdens to trigger RFRA protections, and even substantial burdens were permitted under the law when they achieved a compelling government interest that "allows the government to regulate for sufficiently strong reasons, principally to prevent tangible harm to third parties who have not joined

the faith."[20] Moreover, RFRA claims were supposed to be evaluated by an individualized assessment, weighing governmental and third-party interests against requests for exemptions, not through blanket exemptions.[21]

Congress also did not intend that RFRA be used to erode the exercise and protection of other civil rights under the guise of religious freedom. Indeed, the House Report accompanying RFRA specifically stated that "[n]othing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964," the federal civil rights statute that prohibits employment discrimination on the basis of race, color, sex, religion, or national origin.[22] Notwithstanding this legislative history, since its passage, RFRA has been interpreted contrary to congressional intent, most recently by a conservative Supreme Court justice who raised the prospect of using RFRA to supersede Title VII's protections against employment discrimination by employers.[23] The potential misuse of RFRA to undermine civil rights protections is one of the reasons that some advocacy groups, such as the National Women's Law Center, did not join the broad coalition of organizations endorsing the legislation to enact RFRA into law.[24]

Congress Responds to the Supreme Court's Limitation of RFRA

Religious Liberty Protection Act of 1999

In its 1997 decision, City of Boerne v. Flores, the Supreme Court limited the scope of RFRA by striking down its application to state and local governments.[25] Specifically, the Court concluded that Congress' enactment of RFRA exceeded its remedial authority under Section 5 of the Fourteenth Amendment, which only allows Congress to act "in instances where there is evidence of a pattern of conduct that violates the Fourteenth Amendment."[26] In particular, the Court determined that Congress had not established a pattern of widespread religious discrimination; thus RFRA could not be justified as "a remedial measure to prevent unconstitutional conduct."[27]

In response to the City of Boerne decision, the House of Representatives during the 106th Congress considered and adopted the Religious Liberty Protection Act of 1999 (RLPA), which would have applied a RFRA-like standard to state and local government actions.[28] During the deliberations on RLPA, civil rights organizations raised concerns that the bill would be used as a sword to undermine civil rights protections because some state courts were allowing private actors to engage in discrimination by evaluating their religious liberty claims based on the same strict scrutiny standard as RFRA, and proposed by RLPA. For example, several courts ruled in favor of commercial landlords to deny rental opportunities to unmarried couples due to the landlords' religious beliefs notwithstanding state and local laws protecting individuals against marital status discrimination.[29] Against this backdrop, groups such as the NAACP Legal Defense Fund formally opposed RLPA as it posed a threat to state and local antidiscrimination laws.[30]

During House Floor consideration of RLPA, an amendment that would have protected antidiscrimination laws was defeated by a vote of 190 Yeas and 234 Nays.[31] President Clinton, who strongly supported RFRA at the time of its passage, issued a statement of support for RLPA but noted the need to address the bill's possible preemption of civil rights protections.[32] RLPA ultimately passed the House by a final bipartisan vote of 306 Yeas and 118 Nays.[33] As it became clear that RLPA's passage could mean a further erosion of civil rights protections, the broad coalition of stakeholders supporting RLPA fractured, with several organizations withdrawing their support.[34] The growing concerns over the legislation's potential harmful impact on civil rights stalled action on RLPA in the Senate.[35]

Religious Land Use and Institutionalized Persons Act of 2000

When it became clear that RLPA could not pass the Senate due to civil rights concerns with the legislation, the 106th Congress pivoted and successfully enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which applied a RFRA-like standard to religious claims related to a limited number of state actions involving land use and incarcerated individuals.[36] During the introduction of RLUIPA in the Senate , Senator Edward J. Kennedy acknowledged, "It would be counterproductive if this effort to protect religious liberties led to confrontation and conflict between the civil rights community and religious community...[w]e believe our bill succeeds in avoiding these difficulties."[37] This targeted legislation enjoyed support from both the civil rights and religious communities.[38]

Congress Acts: The Rise of "Charitable Choice" Provisions

Religiously affiliated organizations have a long tradition of partnering with the government to provide a wide range of social services. These organizations, while religiously affiliated, were separately incorporated entities from sponsoring denominations or houses of worship. They followed the same contracting rules with the federal government as other (non-religiously affiliated) organizations offering a variety of services and did not engage in discrimination against program employees or beneficiaries.[39] In the 1990s, despite these longstanding partnerships during which religiously affiliated organizations received substantial amounts of federal funding, proponents of expanding the role of faith-based organizations without reasonable limits on their religious activities sought to advance bill language known as "Charitable Choice."[40] Charitable Choice was a legislative scheme that significantly altered how the federal government partners with faith-based organizations to deliver social services by allowing—for the first time in the nation's history—these organizations to use taxpayer funds to discriminate on the basis of religion in hiring,[41] to undermine state and local antidiscrimination protections, and to infringe on the rights of beneficiaries in federal social service programs.[42]

Beginning in 1996, during the 104th Congress, Senator John Ashcroft authored and successfully added Charitable Choice language to welfare reform legislation.[43] Thereafter, Congress added the Charitable Choice provision to several pieces of major social service legislation with little notice or scrutiny.[44] During his Administration, President Clinton signed bills containing Charitable Choice language into law four times: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[45] the Community Opportunities, Accountability, and Training and Educational Services Act of 1998,[46] the Children's Health Act of 2000,[47] and the Consolidated Appropriations Act, 2001.[48]

These laws, respectively, applied Charitable Choice to federal funding authorized under the Temporary Assistance for Needy Families (TANF), the Community Services Block Grant, and the substance abuse prevention and treatment services under Titles V and XIX of the Public Health Service Act. When President Clinton signed three of the four bills into law, he noted in accompanying signing statements that the Charitable Choice provisions would be unconstitutional if they permitted government funding of organizations that could not separate their religious activities from the federal programs; his explanations reflected the constitutional standard at that time.[49] For the fourth bill, PRWORA, President Clinton did not mention the Charitable Choice provision in his signing statement, but the Administration later submitted a technical corrections package to Congress to clarify that the provision "does not compel or allow States to provide TANF benefits through pervasively sectarian organizations" and that "State funds received by an organization for the purposes of providing TANF services and benefits may not be used for sectarian purposes."[50] However, Congress did not adopt this fix as part of other corrections and amendments to the 1997 welfare reform law.[51]

2001-2009 AND THE BUSH ADMINISTRATION

While Charitable Choice existed largely under the radar in the late 1990s, it would become the centerpiece of President George W. Bush's Faith-Based Initiative, a top domestic priority for his Administration. Enacting policies that were deferential to faith-based organizations was a continuation of his faith-based efforts in the state of Texas as Governor.[52] Taking a cue from President Bush, Congress focused its efforts to expand Charitable Choice to other federal programs and to promote policies advancing faith-based providers' right to discriminate based on religion with taxpayer funds.

Executive Actions

White House Creates the Faith-Based Initiative

The purpose of President Bush's Faith-Based Initiative was to restructure the relationship between the government and faith-based organizations to expand the latter's role in providing federally-funded social services while focusing on efforts to:

- identify and eliminate alleged barriers to their participation in taxpayer-funded programs;
- ensure state and local governments follow Charitable Choice rules for federal programs;
- encourage greater corporate and philanthropic support for faith-based and community organizations; and
- promote legislative proposals to expand Charitable Choice.[53]

White House Issues Executive Orders 13198 and 13199

On January 29, 2001, President Bush issued two executive orders that would set the framework for his Administration's Faith-Based Initiative. Executive Order (E.O.) 13198 established the Faith-Based and Community Initiative centers at five cabinet departments—Health and Human Services (HHS), Housing and Urban Development (HUD), ED, Labor (DOL), and Justice (DOJ)—and directed these centers to conduct department-wide audits to identify existing barriers to participation by faith-based and community organizations in federal programs.[54] E.O. 13199 established the White House Office of Faith-Based and Community Initiatives (WHOFBCI) to lead the Administration's policy efforts to expand the involvement of faith-based and community organizations in federal programs and to eliminate alleged barriers that impeded their involvement with such programs.[55] On January 30, 2001, the White House sent its blueprint, Rallying the Armies of Compassion, to Congress; the blueprint set forth the Administration's vision for increasing federal support for faith-based and community organizations including a proposal to expand Charitable Choice.[56]

White House Publishes a Report on the Implementation of Executive Order 13198

In August 2001, the White House published a report that reflected the results of the department-wide audits required by E.O. 13198.[57] This report identified fifteen obstacles to the participation of faith-based and community organizations in the delivery of social services in federally-funded programs; one of these obstacles was the "barrier" of denying faith-based organizations the right to discriminate on the basis of religion in employment.[58] Years later, in 2005, the WHOFBCI released a position paper, which also asserted that faith-based organizations receiving taxpayer funds should be able to engage in hiring discrimination based on religion, once again confirming that hiring discrimination was a central policy of the Administration's Faith-Based Initiative.[59]

White House Issues Executive Order 13279

President Bush's efforts in 2001 to legislatively expand Charitable Choice failed in Congress (discussed below). Therefore, on December 12, 2002, he issued E.O. 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, to direct federal agencies to implement Charitable Choice rules through regulations or other administrative actions to achieve his faith-based policies.[60] Ultimately, the Bush Administration finalized nine regulations that incorporated Charitable Choice rules into federal social service programs.[61] E.O. 13279 is still in effect today, but it has been at times strengthened and at times weakened depending upon successive administrations.[62]

Administrative Actions

Bush's DOL Implements a RFRA Exemption Process for Faith-Based Grantees and Adds a Religious Exemption to Antidiscrimination Requirements for Federal Contractors

The fears from the late 1990s that RFRA could be misused to undermine civil rights protections came to fruition. The Bush Administration set in motion, for the first time, broad use of RFRA to weaken statutory antidiscrimination requirements in federally-funded grant programs. What was once broadly supported as a tool to secure the rights of religious minorities became weaponized against the civil rights of workers. Once the precedent was set by the Bush Administration to use RFRA to undermine the civil rights of workers, future administrations used it to justify the denial or limitation of other services such as health care services to individuals.

Department-wide RFRA Exemption Process

As discussed below, while Congress battled over whether to add an exemption to the religious antidiscrimination requirements for workforce development programs in the Workforce Investment Act of 1998 (WIA), at the end of the Bush Administration, in late December 2008, DOL instituted a department-wide RFRA waiver process to permit faith-based grantees to bypass WIA's statutory antidiscrimination requirements and any regulatory requirements applicable to other DOL-enforced laws that prohibit religious discrimination in employment.[63] The only mitigation was that the DOL RFRA waiver process required agency review and approval of the application for the exemption.[64]

Office of Federal Contract Compliance Programs and Federal Contractors

DOL's Office of Federal Contract Compliance Programs (OFCCP) is "responsible for ensuring that employers conducting business with the federal government comply with [applicable] equal employment opportunity laws," which includes Executive Order 11246 (E.O. 11246).[65] E.O. 11246, as amended, requires affirmative action and prohibits federal contractors from engaging in employment discrimination based on race, color, religion, sex, sexual orientation, gender identity, or national origin; this Order reflects the historic struggle by workers and civil rights activists to obtain equal treatment and dignity in employment.[66] These efforts came to fruition beginning in the 1940s when President Franklin D. Roosevelt issued E.O. 8802 and E.O. 9346 prohibiting discrimination based on race, color, creed, and national origin in the federal government and defense industries.[67] Subsequent administrations expanded on President Roosevelt's executive orders, with the culmination of E.O. 11246.[68] In 1965, President Lyndon B. Johnson issued E.O. 11246 to prohibit federal contractors—receiving taxpayer-funded contracts—from discriminating in employment decisions based on race, color, religion, sex, or national origin, mirroring Title VII's antidiscrimination requirements enacted in 1964.[69] Thus, E.O. 11246 reflects a longstanding federal policy that entities receiving taxpayer financed government contracts should not be allowed to discriminate in employment.[70]

President Bush's E.O. 13279, issued in December 2002, added an exemption to E.O. 11246 for religious organizations acting as federal contractors that allows them to hire and fire individuals based solely on their faith (i.e., engage in religious discrimination).[71] President Bush's inclusion of this religious exemption was fundamentally at odds with the civil rights history and executive actions to promote equal opportunity within the federal government that gave rise to E.O. 11246.[72] Although E.O. 13279 set a precedent for future administrations to expand exemptions to E.O. 11246's antidiscrimination requirements, it did not exempt religious contractors from compliance with E.O. 11246's other antidiscrimination requirements. However, as discussed below, the Trump Administration later used the exemption in E.O. 13279 as a justification to allow religious contractors to engage in wide-ranging discrimination based on other protected categories, except race.[73]

Bush's HHS Implements a RFRA Waiver Process for Grantees and Finalizes a Rule that Broadens the Scope of Conscience and Refusal Protections

RFRA Waiver Process

As noted above, President Clinton signed two laws adding Charitable Choice language to substance abuse prevention and treatment services under the Public Health Service Act (PHSA)—the Children's Health Act of 2000 and the Consolidated Appropriations Act, 2001. [74] The PHSA also contains religious antidiscrimination requirements for program participants.[75] In 2002, Bush's HHS proposed a rule interpreting the PHSA's Charitable Choice provisions to apply to substance abuse treatment and prevention services under the Substance Abuse Prevention and Treatment Block Grant program while also proposing, for the first time, a waiver process to allow

faith-based grantees to preempt the PHSA's existing religious antidiscrimination provision.[76] In the proposed rule, HHS noted that Congress was selective in applying religious antidiscrimination requirements in the employment context across federal programs, which "belies the notion that there is a compelling government interest in applying such requirements to [religious] entities."[77] HHS also explained that some grantees may be able to demonstrate that the application of the religious antidiscrimination requirement is a burden to their religious exercise and proposed a waiver process using RFRA.[78] Ultimately, HHS finalized a rule instituting a RFRA self-certification waiver process for religious providers operating substance use disorder grant programs with HHS funding.[79]

Unlike the waiver process implemented by Bush's DOL in 2008, these RFRA waivers were not subject to agency review.[80] The practical effect of the 2003 HHS final rule gave religious providers a blank check to discriminate using taxpayer dollars; rather than be subject to RFRA's balanced, individualized analysis, the providers could wholly exempt themselves from certain religious hiring antidiscrimination requirements in a federally-funded program.[81] At the time, legal scholars noted that "[t]he [HHS] rule. . .takes a much more expansive view of the scope of RFRA than the lower courts have ever recognized, or the federal government has ever asserted."[82] This marked the beginning of the troubling use of RFRA to exempt grantees from statutory antidiscrimination requirements.

Conscience and Refusal Protections in Health Care

For decades, various federal laws have provided a path forward for individuals who seek religion-based exemptions from certain activities, including those who have religious objections to performing certain health-related procedures such as abortion and sterilization.[83] These narrow provisions, broadly referred to as "federal conscience" or "refusal" provisions, are applicable to health care and primarily address a refusal to perform and/or pay for specific reproductive procedures, but they generally do not authorize a broad refusal for individuals to claim a religious objection to any health care service.[84]

In 2008, Bush's HHS finalized a rule to ensure that HHS "funds do not support morally coercive or discriminatory practices or policies" in violation of federal conscience protections.[85] Although many of the federal conscience provisions had existed for decades, stakeholders were concerned about the negative ripple effects of this "midnight rule"[86]—issued during the last month of Bush's tenure.[87] Specifically, there were concerns that because the rule was overbroad in its application—allowing any health care entity worker to refuse to participate in a service the worker found morally objectionable—it would negatively impact patients' rights to access health care services.[88]

Though the Bush Administration's "midnight rule" would be eventually scaled back by the Obama Administration, it nonetheless opened the door for the Trump Administration's efforts to broaden the scope of federal conscience and refusal provisions. Under the Trump Administration, health care providers and workers were permitted to use religion to undermine patient access to a wide array of health care services under the guise of advancing religious freedom (discussed further below).

Bush's DOJ Issues a Legal Opinion Misinterpreting RFRA

DOJ's Office of Legal Counsel (OLC) provides legal advice to the President and executive branch agencies, including interpretations of complex and important areas of the law. On June 29, 2007, John P. Elwood, DOJ's Deputy Assistant Attorney General with OLC, issued a memorandum (OLC Memo) explaining that RFRA provides an exemption that overrides statutory religious hiring antidiscrimination provisions for a federal grantee.[89] The OLC Memo interpreted the application of RFRA to World Vision, a faith-based organization that sought to discriminate on the basis of religion in its employment positions on a grant funded by the Juvenile Justice and Delinquency Prevention Act (JJDPA).[90] Although Charitable Choice regulations already applied to DOJ-funded programs, JJDPA's statutory antidiscrimination provision prohibiting religious discrimination could not be preempted by a regulation.[91] As a result, Bush's DOJ used RFRA to bypass statutory civil rights protections in a federal program.[92] Soon thereafter, DOJ also created a RFRA waiver process allowing religious organizations to self-certify their entitlement to a religious exemption under RFRA.[93]

This OLC Memo laid the groundwork for future administrations, faith-based organizations, and religious employers to assert that RFRA created a categorical exemption from statutory religious hiring antidiscrimination requirements and potentially other federal program requirements, including those pertaining to how beneficiaries are served in federal programs. During the Obama Administration, faith-based organizations repeatedly cited the OLC Memo "adopting its legal analysis in calling for far reaching accommodations that would allow them to discriminate against third parties and deny material services to grant beneficiaries."[94]

Legislative Actions

Congress Attempts to Codify Bush's Faith-Based Initiative

On March 29, 2001, during the 107th Congress, Congressman J. C. Watts, Jr. introduced H.R. 7, the Community Solutions Act of 2001, to serve as the legislative vehicle for President Bush's Faith-Based Initiative.[95] H.R. 7 was an expansive assault on civil rights—authorizing taxpayer-funded employment discrimination based on religious beliefs in federal social service programs, preempting programmatic religious antidiscrimination requirements, weakening state and local antidiscrimination hiring protections, and authorizing conversion of federal grant programs into vouchers while leaving beneficiaries in voucher programs subject to discrimination and coercion.[96] While the bill made some improvements from past Charitable Choice proposals by requiring that religious activity be separated from federal social service grant programs, concerns remained that it did not go far enough to protect the rights of beneficiaries, given statements by supporters and administration officials who encouraged funding social service programs with heavily religious content.[97] Weeks prior to the House's consideration of H.R. 7, it became mired in additional controversy after a report detailed that the Bush Administration sought to insulate faith-based organizations from state and local laws protecting "gay"[98] individuals from employment discrimination in exchange for support for the initiative.[99] Ultimately, H.R. 7 passed the House with strong Republican support in a mostly party line vote with 233 Yeas and 198 Nays, with doomed prospects in the Senate due to its failure to address the bill's troubling civil rights implications and constitutional questions.[100]

Congress Attempts to Erode Statutory Antidiscrimination Provisions in Federal Programs

In subsequent years, Congress continued its efforts to advance religious social service providers' right to discriminate in hiring through various pieces of social service legislation. These efforts proposed rolling back longstanding religious antidiscrimination provisions in legislation to reauthorize the Head Start Act in 2003 (the 108th Congress) and 2005 (the 109th Congress) and legislation to reauthorize WIA in 2003 (the 108th Congress) and 2005 (the 109th Congress).[101] Republicans sought to add a religious exemption to each program's existing antidiscrimination provision.[102] The battles over including a religious exemption hindered the timely reauthorization of several important social service programs, including WIA, for many years.[103]

Congress Probes Bush Administration Officials About Religious Discrimination in Federally-Funded Programs

Although the Faith-Based Initiative was one of the Bush Administration's most high-profile domestic priorities, some Administration officials did not fully understand the impact of the Initiative's focus on allowing federally-funded faith-based organizations to discriminate based on religion in employment decisions. For example, during a 2002 hearing in which the Committee on Education and the Workforce questioned the HHS Secretary, Tommy G. Thompson, about the Bush Administration's welfare reform policies, one of the Committee Members, Representative Robert C. "Bobby" Scott, asked Secretary Thompson about federally-funded grantees being allowed to discriminate based on religion in hiring decisions.[104] In response, Secretary Thompson stated, "If you are using federal money to discriminate, that is wrong, period."[105]

2009-2017 AND THE OBAMA ADMINISTRATION

On the campaign trail in 2008, then-U.S. Senator and presidential candidate Barack Obama expressed support for the role that faith-based organizations and other grassroots organizations play in helping individuals and communities in need.[106] He also indicated his support for the separation of church and state: "If you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion."[107] As president, however, Obama expanded civil rights protections in key areas, but he also maintained Bush-era faith-based policies that have had a negative, long-term impact on the same civil rights protections.

Executive Actions

White House Maintains Aspects of the Bush Administration's Faith-Based Initiative

On February 5, 2009, President Obama issued E.O. 13498, which renamed the Bush Administration's faith-based office the White House Office of Faith-Based and Neighborhood Partnerships.[108] E.O. 13498 also created the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council) to guide the Administration's policymaking on faith-based issues.[109] Notably, the Obama Administration directed the Advisory Council to not address whether faith-based organizations should be able to discriminate in hiring in federally-funded programs.[110]

On February 4, 2010, a broad coalition of groups wrote to President Obama to express disappointment with the lack of progress in addressing the flawed faith-based policies from the Bush-era and urged the Administration to "take additional actions to prevent government-funded religious discrimination and protect social service beneficiaries from unwelcome proselytizing."[111]

White House Issues a Report from the Advisory Council with Recommendations to Protect Program Beneficiaries from Religious Discrimination and Coercion

In March 2010, the Advisory Council, comprised of diverse stakeholders, including proponents of Charitable Choice, issued a report that included twelve recommendations to the President to strengthen the effectiveness of partnerships with faith-based and community organizations, including strengthening the constitutional and legal footing of those partnerships.[112] The report also included recommendations to strengthen existing policies to protect the religious liberty rights of beneficiaries in both direct grant and voucher programs.[113] These recommendations included:

- reaffirming that organizations receiving federal funds to deliver social service programs are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion or religious belief;
- clarifying beneficiaries' right not to "actively participate" in religious practices including the right to refuse to attend such practices;
- affirming the beneficiaries' right to request an alternative provider where they have an objection to the religious character of the initial provider and the beneficiaries' right to have their objections redressed by a referral to an alternative provider who is either religiously acceptable or secular;
- requiring that providers give beneficiaries written notice of their rights at the time the beneficiaries enter the program; and
- distinguishing clearly between direct and indirect forms of government aid to religious institutions for federal employees, service providers, and the public since the difference has legal and practical implications that may, for example, affect whether religious elements are prohibited as part of federally-funded services which may limit some providers participation in certain programs.[114]

White House Implements the Advisory Council's Recommendations

In November 2010, President Obama issued E.O. 13559, which incorporated many of the Advisory Council's recommendations noted above such as protections for program beneficiaries against religious discrimination and coercion. In addition, E.O. 13559 created an Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies and develop a model set of regulations and guidance for agencies to adopt.[115] Consistent with E.O. 13559, the Working

Group developed a model set of regulations and guidance related to faith-based partnerships, which were criticized as being weaker than the recommendations proposed by the Advisory Council.[116]

In 2012, advocates once again expressed mounting frustration with the slow progress to address the flaws of the Bush Administration's Faith-Based Initiative, including the failure to protect beneficiaries and employees from religious discrimination.[117]

Administrative Actions

Nine Executive Agencies Issue Revised Charitable Choice Rules that Strengthen Protections for Program Beneficiaries

On April 4, 2016, nine executive agencies issued rules that amended the Bush-era Charitable Choice regulations to strengthen protections for beneficiaries in federal social service programs.[118] After eight years, the Obama Administration fulfilled its promise to revamp President Bush's Faith-Based Initiative with rules that safeguarded the civil rights of beneficiaries, but it nonetheless failed to address religious hiring discrimination.[119]

The rules made several key changes to ensure the rights of beneficiaries in federal social service programs, including:

- requiring that beneficiaries receive a notification of rights advising them that they may not be discriminated against on the basis of religion;
- informing beneficiaries that they have the right to refuse to participate in or attend offered religious activities that may occur outside of any federal program;
- providing beneficiaries with information on how to report violations of these requirements;[120]
- requiring that beneficiaries be offered the right to an alternative provider if they object to the religious character of the initial provider;
- applying religious antidiscrimination protections for beneficiaries equally to directly funded programs and voucher programs;[121] and
- requiring that there be at least one secular option in each voucher program.[122]

Despite the improvements to beneficiary protections, the rules maintained the overall Charitable Choice framework and the Bush-era policy that faith-based grantees could engage in employment discrimination based on religion, leaving the door open to the Trump Administration to expand the scope of religious employment discrimination even further.

Obama's DOL OFCCP Enforces Antidiscrimination Protections for Federal Contract Workers Based on Sexual Orientation and Gender Identity

On July 21, 2014, President Obama issued E.O. 13672, which expanded the antidiscrimination protections under E.O. 11246 to include a prohibition against employment discrimination based on sexual orientation and gender identity.[123] Notwithstanding this historic expansion of federal contract workers' civil rights, President Obama failed to rescind President Bush's religious exemption to E.O. 11246 pursuant to E.O. 13279, which had long-term consequences for workers' civil rights protections; the Trump Administration later used this exemption to expand the scope and degree of discrimination that is permissible by federal contractors.[124]

Obama's DOJ Fails to Rescind the Bush-Era OLC Memo

Despite consistent requests from advocates, civil rights groups, and Members of Congress, the Obama Administration's DOJ failed to rescind the Bush-era OLC Memo, which used RFRA to justify religious organizations' exemption from statutory religious antidiscrimination requirements in employment in federally-funded programs.[125] To the frustration of many, the Obama Administration also failed to acknowledge the harmful impact of continuing the Bush-era RFRA policy.[126] For example, during a July 2012 oversight hearing on the DOJ's Civil Rights Division held by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee, Representative Robert C. "Bobby" Scott asked Thomas Perez, the Assistant Attorney General for Civil Rights at DOJ, "Isn't it true that your policy is that a faith-based organization can in fact have an articulated policy—we don't hire Catholics and Jews—and still receive federal money?" Mr. Perez responded, "Well, again, sir, we look at particular situations, and we evaluate the specific facts of a particular situation and make the appropriate judgement as to the application of the facts to the law in that particular case."[127]

In 2016, prominent legal scholars called on the Obama Administration to rescind the flawed Bush-era OLC Memo outlining its incorrect legal foundation and highlighting the harm the OLC Memo caused.[128] In addition, the scholars expressed concerns that some organizations were using the OLC Memo's RFRA analysis to seek exemptions from providing certain services, such as emergency contraception, to beneficiaries in federal programs where these organizations had a religious objection to providing such services.[129] Noting this new use of the OLC Memo to justify withholding services from program beneficiaries, the scholars "identified a pressing need" for the Obama Administration to clarify that the OLC Memo does not authorize religious accommodations that would result in either discrimination or denial of services to beneficiaries in federal programs.[130] In the end, however, the Obama DOJ did not rescind or clarify the Bush-era OLC Memo, instead leaving its flawed analysis in place for continued use by the Trump Administration.

Obama's DOJ Issues Guidance on the Violence Against Women Act's Antidiscrimination Requirements

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013, which included antidiscrimination protections based on gender identity and sexual orientation for the first time.[131] First enacted in 1994, the Violence Against Women Act (VAWA) authorizes programs to address domestic violence, sexual assault, and dating violence.[132] On April 9, 2014, DOJ's Office of Justice Programs issued guidance on VAWA's statutory antidiscrimination requirements; this guidance, which relied on the RFRA analysis from the Bush-era OLC Memo, stated that federal grantees could seek a RFRA exemption from the religious antidiscrimination requirements.[133] As a result, faith-based grantees have been able to use VAWA funds while denying employment to otherwise qualified individuals solely due to their religion, religious beliefs, or acts or practices that the faith-based grantee feels is contrary to its own religious tenets. In practice, this means a grantee can, for example, refuse to hire or fire a person for being divorced, being a single parent, using contraception, engaging in premarital sex, or having a child out of wedlock.

Obama's HHS Narrows the Scope of Conscience and Refusal Protections and Takes Steps to Protect Health Care Access and Affirm Antidiscrimination Protections

Conscience and Refusal Protections

In 2011, the Obama Administration partially rescinded and revised the controversial 2008 Bush-era Conscience Rule out of concern that the previous rule was confusing and overbroad in its approach because it prioritized the religious and moral beliefs of health care workers over individuals' access to health care services.[134] The 2011 Conscience Rule removed definitions and terms that were overly broad in their application of existing federal conscience provisions.[135] However, in response to concerns that the rescission of the 2008 Conscience Rule would mean "there would be no regulatory enforcement scheme to protect the rights afforded to health care providers, ... under the Federal health care provider conscience protection statutes," the 2011 Conscience Rule maintained a provision from the 2008 Conscience Rule that designated the Office for Civil Rights (OCR) within HHS to process discrimination complaints related to existing federal conscience laws.[136]

Health Care Access

The landmark Patient Protection and Affordable Care Act (ACA) requires employment-based health plans and health insurance issuers to cover certain preventive health care services without cost sharing, such as deductibles or copays.[137] Before the 111th Congress enacted the ACA in 2010, there was no federal requirement for private health plans to cover preventive services. Further, there was no limit on how much Americans might be forced to pay out-of-pocket to get preventive care. The ACA's preventive service coverage requirement was a significant achievement in improving access to preventive care, but some stakeholders have objected to the fact that the requirement includes coverage for items and services such as contraception, screening for sexually transmitted diseases, and medication to reduce the risk of transmitting HIV.[138]

Regulations implementing the preventive service coverage requirements originally included an exemption for "religious employers," which was defined to exclude for-profit companies.[139] However, in 2014, the Supreme Court's decision in Burwell v. Hobby Lobby Stores Inc. changed that.[140] The Court used RFRA to conclude that a closely held for-profit company could use an exemption created for faith-based nonprofits under the ACA to opt out of providing their employees with a full range of contraception coverage as part of comprehensive preventive services required by the ACA, thus marking another troubling shift in the legal landscape for religious freedom issues.[141] Since then, RFRA has continued to provide a basis for other challenges to the ACA's preventive service coverage requirements. Most recently, a federal district court decision sided with an employer's RFRA-based

objection to providing coverage of an HIV medication; the employer claimed that the coverage is tantamount to subsidizing behavior that is inconsistent with the employer's religious beliefs.[142]

Antidiscrimination Protections

As enacted, Section 1557 of the ACA prohibits discrimination in health programs and activities receiving federal financial assistance; health programs and activities administered by the executive branch; and entities created under Title I of the ACA, including Marketplaces and health plans in those Marketplaces.[143] Section 1557's text incorporates by reference protections from discrimination on the grounds enumerated in four civil rights statutes as well as those statutes' enforcement mechanisms.[144] One of the four statutes is Title IX of the Education Amendments Act of 1972 (Title IX), which prohibits sex discrimination in educational programs or activities that receive federal financial assistance.[145] Title IX is the only one of the four statutes that has a religious exemption that permits religious institutions, such as religiously affiliated colleges, to claim an exemption from any Title IX requirement where such requirement conflicts with the institutions' religious tenets.[146] The HHS 2016 final rule to implement Section 1557 interpreted the statute as incorporating Title IX's prohibition against sex discrimination, but not its religious exemption because "Section 1557 itself contains no religious exemption. . . .[,] Title IX and its exemption are limited in scope to educational institutions, and there are significant differences between the educational and health care contexts that warrant different approaches" (e.g., availability of choice in the educational context but unavailability or limited choice in the health care context).[147]

Even though Section 1557 and the HHS 2016 final rule did not include a religious exemption to the antidiscrimination provisions, HHS acknowledged that the rule did not displace existing conscience and religious freedom protections, such as RFRA, which could potentially be used by providers to seek a religious exemption or accommodation.[148] In the final rule, HHS recognized that if "any requirement under the rule would violate applicable Federal statutory protections for religious freedom and conscience, such application would not be required."[149] Despite the 2016 final rule's provision for religious accommodations under existing federal laws, the rule was challenged in federal court for numerous reasons, including HHS' decision not to incorporate the Title IX religious exemption.[150] Ultimately, a federal district court—in a decision issued by an extremely conservative judge—enjoined the 2016 rule, in relevant part by finding that HHS' failure to incorporate the Title IX religious exemption violated the Administrative Procedure Act (APA).[151] This litigation has continued during both the Trump and Biden Administrations; depending on the outcome, it may potentially pave the way for future religious-based carveouts from Section 1557's antidiscrimination requirements.

Legislative Actions

Congress Reauthorizes the Workforce Innovation and Opportunity Act While Maintaining Antidiscrimination Requirements

As noted above, WIA's reauthorization expired in 2003; attempts to reauthorize the legislation stalled for several congresses due to Republican efforts to add a religious exemption to WIA's longstanding antidiscrimination requirements.[152] In 2014, the 113th Congress finally enacted the Workforce Innovation and Opportunity Act (WIOA) to reauthorize WIA.[153] Although the final bill maintained WIA's longstanding nondiscrimination provision without a religious exemption, during House Floor consideration of WIOA, Chairman John Kline, Jr. of the House Committee on Education and the Workforce indicated that RFRA could be used to override WIOA's religious antidiscrimination requirements using an agency process outlined in the Bush-era OLC Memo.[154] The legislative history for WIOA reflects that what could not be achieved through legislative action—adding a religious exemption to WIOA's antidiscrimination requirement—could be achieved by using RFRA to create such an exemption.

House Democrats Introduce Legislation to Address the Misuse of RFRA

During the 114th Congress, due to the growing concerns about the misuse of RFRA, on May 18, 2016, Representative Joseph P. Kennedy and the Ranking Member of the House Committee on Education and the Workforce, Robert C. "Bobby" Scott, introduced H.R. 5272, the Do No Harm Act.[155] This bill would amend RFRA so that it cannot be used to preempt laws that prohibit discrimination, govern wages and collective bargaining, prohibit child labor and abuse, provide access to health care, govern public accommodations, or require that goods and services be provided in a contract or program.[156]

House Members Attempt to Expand the Scope of Permissible Religious Discrimination in Federal Defense Contracts

Attacks on civil rights in the name of religious liberty appeared during the 114th Congress in the House-passed version of the National Defense Authorization Act for Fiscal Year 2017 (NDAA), jeopardizing reauthorization of the yearly defense bill that traditionally enjoyed strong bipartisan support.[157] The House version of the bill included a controversial provision that allowed faith-based organizations to discriminate on the basis of religion in hiring in any taxpayer-funded defense contracts, purchase orders, and cooperative agreements.[158] In the face of serious opposition, this provision was removed in the final conference agreement adopted for NDAA that fiscal year.[159]

Congress Probes Administration Officials About Religious Discrimination in Federally-Funded Programs

Although the Obama Administration rolled back several Bush-era policies that advanced religious liberty interests at the expense of civil rights protections, Obama Administration officials were seemingly unaware that the Administration had retained some core policies from Bush's Faith Based Initiative—permitting federally-funded faith-based organizations to discriminate based on religion in employment. For example, during a 2011 hearing before the House Committee on Education and the Workforce to discuss HHS' FY 2012 budget request and departmental priorities, Representative Robert C. "Bobby" Scott asked HHS Secretary Kathleen Sebelius to explain the Administration's position on this issue.[160] Representative Scott asked Secretary Sebelius whether it is "possible for any sponsors of programs run in your Department of [sic] private organizations to get grants to run programs to discriminate based on religion? That is to say, you would have been a good applicant for this job, but we don't hire people of your religion. Is that possible?"[161] The Secretary responded: "To my knowledge, that would violate the civil rights umbrella that we operate under, Congressman."[162] Representative Scott further probed and asked the Secretary: "So . . . if a faith-based organization were running a [federally-funded] program and said we don't hire Catholics, Jews, or Muslims, you wouldn't think they could get funded under your administration, do you?" to which Secretary Sebelius responded, "To my knowledge, no."[163] Contrary to the Secretary's response, however, the Obama Administration had in fact retained policies that allowed this kind of religious discrimination by federal grantees.[164] In fact, HHS acknowledged in a post-hearing communication following-up on the Secretary's response to Representative Scott's question that Title VII's religious entity exemption does permit certain religious organizations, including federal grantees, to make employment decisions based on religion.[165]

2017-2021 AND THE TRUMP ADMINISTRATION

The Trump Administration capitalized on the landscape of religious liberty policies left in place by previous administrations and expanded them in sweeping and unprecedented ways to advance the right to discriminate under the guise of religious freedom. This report highlights a few, but not all, of the many harmful Trump Administration actions to license discrimination in the name of promoting religious liberty.

Executive Actions

President Trump issued two executive orders that set the framework for his Administration's efforts to advance religious liberty policies at the expense of civil rights protections. On May 4, 2017, President Trump issued E.O. 13798, Promoting Free Speech and Religious Liberty, which established the Administration's policy to protect and enforce religious exercise and political speech to the greatest extent practicable and would later serve as the justification for several of the Administration's harmful policies.[166] E.O. 13798 also directed several agencies to carry out activities, including rulemaking, to address conscience-based objections to the preventive services mandated under the ACA, and it directed the Attorney General to issue guidance to serve as the Administration's flawed legal blueprint for interpreting religious liberty protections in the law.[167] A year later, on May 3, 2018, President Trump issued E.O. 13831, Establishment of a White House Faith and Opportunity Initiative, which served as an impetus for nine federal agencies to issue rules that revised the Charitable Choice regulations for federal social service programs to roll back beneficiaries' protections and expand religious exemptions for providers.[168]

Administrative Actions

Nine Executive Agencies Issue Revised Charitable Choice Rules that Weaken Protections for Program Beneficiaries

On December 17, 2020, nine executive agencies issued revised Charitable Choice rules (Trump Faith-Based Rules) that rolled back the Obama Administration's protections for beneficiaries and further expanded the ability of providers to engage in religious discrimination in federal social service programs.[169] While there are some policy differences among the agency rules, they all:

- stripped the notice requirements for beneficiaries to inform them of their right to be free from religious coercion and discrimination;
- eliminated the alternative choice requirement for beneficiaries who object to a provider's religious character;
- permitted faith-based providers receiving vouchers, for the first time ever in our history, to require beneficiaries to attend any religious activity that is considered fundamental to a program;[170] and
- expanded the availability of religious exemptions and accommodations to providers, suggesting that faith-based providers could seek exemptions from program requirements including those provisions that might affect how beneficiaries are served and how they access services.[171]

The Trump Faith-Based Rules also expanded the policy allowing providers to discriminate against workers on the basis of religion in federally-funded social service programs. For instance, the ED and HHS final rules included language allowing providers to require workers in federally-funded programs to adhere to the religious tenets of the organization.[172] Moreover, the final rules for these two departments removed religious antidiscrimination protections for beneficiaries in voucher programs, allowing these beneficiaries to be subjected to religious discrimination and coercion, contradicting President Bush's E.O. 13279, which prohibited religious discrimination and coercion against beneficiaries.[173]

Trump's DOL Expands the Religious Exemption for Federal Contractors, Implements a Department-Wide RFRA Waiver Process for Grantees, and Undermines Workers' Pay Protections

The Office of Federal Contract Compliance Programs and Federal Contractors

On December 9, 2020, OFCCP issued a "midnight rule" during the waning days of the Trump Administration that dramatically expanded the scope of the religious exemption under E.O. 11246.[174] For example, despite the history preceding the issuance of E.O. 11246—during which time several presidential administrations affirmed the importance of prohibiting employment discrimination in government contracts—the 2020 rule made the shocking pronouncement that OFCCP "has less than a compelling government interest in enforcing [E.O. 11246's]

nondiscrimination requirements—except for protections on the basis of race—when enforcement would seriously infringe the religious mission or identity of a religious organization."[175] According to the Trump-era OFCCP, the agency's "general interest in enforcing E.O. 11246 is less than compelling in the religious context addressed here, given the numerous exceptions from its nondiscrimination requirements it has authority to grant, and has granted, in nonreligious contexts."[176]

Moreover, the 2020 rule created its own religious employer test, which was a departure from longstanding Title VII case law interpreting a religious employer as "a religious corporation, association, educational institution, or society."[177] This departure allowed for-profit contractors to qualify for the exemption when "no federal appellate court nor Supreme Court has ever held that a for-profit corporation" meets the definition of religious corporation under Title VII.[178] Additionally, the 2020 rule permitted contractors whose purpose and/or character is not primarily religious to qualify for E.O. 11246's religious exemption.[179] The most alarming feature of the rule was its misstatement of RFRA analysis to justify allowing contractors to engage in employment discrimination based on the other protected categories, such as sex (including sexual orientation and gender identity), when religion motivated that discrimination.[180]

Department-wide RFRA Waiver Process

In addition to the OFCCP rule, the Trump-era DOL took other actions that undermined workers' civil rights protections. For example, on January 15, 2021, consistent with the Bush-era OLC Memo and the Bush-era DOL RFRA waiver process, President Trump's DOL implemented a RFRA exemption process that allowed its grantees to seek an exemption from statutory religious antidiscrimination hiring requirements.[181] Under this process, grantees received automatic approval if their requests were not acted on by DOL within fourteen calendar days.[182] In contrast, the Bush-era DOL RFRA waiver process required agency review under a thirty-day time limit but did not provide an automatic approval if the agency did not meet its deadline.[183] Yet again, RFRA was used to create a categorical exemption from antidiscrimination requirements, potentially without agency review, without balancing the government's or the grantee's interests and without considering the impact of harm to affected individuals by granting the exemption.

Wage and Hour Division and Worker Pay Protections

The Trump-era DOL's promotion of so-called religious liberty interests undermined workers' pay protections under the Fair Labor Standards Act (FLSA), which provides workers with equal pay, minimum wage, and overtime pay protections and is enforced by DOL's Wage and Hour Division (WHD).[184] In certain circumstances, WHD will publish guidance documents, including opinion letters, to provide the public with a clearer understanding of FLSA requirements.[185] Opinion letters can be issued by the WHD Administrator or a lower-level official, but letters issued by the Administrator may be relied upon as a good faith defense to FLSA wage claims.[186]

On January 8, 2021, WHD's Administrator issued an opinion letter in response to a request for guidance from a private daycare and preschool on "whether, assuming that the teachers qualify as ministers, the teachers are exempt from the FLSA's wage-and-hour requirements under the ministerial exception and whether the school can pay them as salaried exempt employees or on any other basis it chooses."[187] The "ministerial exception" is rooted in the Religion Clauses of the First Amendment of the U.S. Constitution and "prevents courts from interfering with churches' decision to fire, demote, or otherwise discipline ministers—even if those actions would otherwise violate federal laws prohibiting employment discrimination."[188] In the opinion letter, WHD acknowledged that there is "no checklist" to determine whether an employee qualifies for the ministerial exception; instead, this is a fact-based, case-by-case determination.[189] Nonetheless, WHD adopted the requester's assumption that the teachers qualified as ministers without a thorough analysis.[190] WHD relied on the school's representation that it "is affiliated with and under the direct control of a church" to conclude that the school is a religious organization whose employees may qualify for the ministerial exception and therefore be exempt from FLSA wage-and-hour requirements.[191]

This short shrift analysis has had long term implications. It represents an expansion of who may qualify for the ministerial exception and, because the WHD Administrator issued the opinion letter, the analysis can be used as a defense in cases involving alleged violations of FLSA requirements in similar circumstances.[192]

Trump's ED Requires Colleges to Exempt Religious Student Clubs from Antidiscrimination Requirements and Undermines Transparency Regarding Title IX's Religious Exemption

Religious Student Clubs Rule

Even students were not spared from the Trump Administration's efforts to advance religious liberty interests at all costs. On September 23, 2020, ED issued a final rule that required public colleges and universities to exempt officially sanctioned religious student clubs from antidiscrimination requirements that apply to all school-funded student clubs.[193] As a result, all students' contributions to the college's activity fees to fund these clubs would, in effect, subsidize their own discrimination when seeking to join these student groups.

Title IX Transparency Rule

The Trump Administration also issued a rule clarifying that religious colleges and universities do not have to provide advance notice to receive a Title IX religious exemption from the statute's prohibition against sex discrimination, thereby decreasing transparency about how a school's policies could subject students to discriminatory decisions based on sex (e.g., a student could face expulsion for their sexual orientation, gender identity, or being pregnant and unmarried).[194] This rule codified an existing practice of ED's Office for Civil Rights.[195] As previously mentioned, certain religious educational institutions can claim an exemption from any Title IX requirement where such requirement conflicts with its religious tenets.[196] While Title IX applies to education programs and activities, several federal agencies, including the U.S. Department of Agriculture (USDA), enforce Title IX as it pertains to the education programs they administer.[197] In a world where an increasing number of institutions, providers, and individuals are claiming religious exemptions to civil rights requirements, students and other individuals who seek social services or employment from these groups could face discrimination without any notice or recourse.

Trump's HHS Undermines Civil Rights Protections and Access to Health Care Services

Conscience and Religious Freedom Division

The Trump Administration pursued some of its most aggressive religious liberty initiatives within HHS. In 2018, HHS created a Conscience and Religious Freedom Division (CRFD) within its Office for Civil Rights (OCR) to "more vigorously and effectively enforce existing laws protecting the rights of conscience and religious freedom."[198] HHS' budget diverted resources away from other critical areas of civil rights enforcement to elevate health care providers' religious claims even though the number of these claims—less than two percent of complaints for Fiscal Year 2018— did not justify such a diversion.[199]

Discrimination Against Foster Care Parents

During the Trump Administration, there were approximately 400,000 children in foster care each year.[200] Children in foster care are some of the most vulnerable individuals being served by federal programs. Yet, President Trump's HHS allowed child welfare entities in South Carolina, Texas, and Michigan to use RFRA to turn families away from participating in federally-funded foster care programs based on their religion or because of religious objections to the foster care parents' sexual orientation or gender identity.[201] The Trump Administration's policy not only denied foster children the opportunity to be fostered by these qualified families, but it also subjected these prospective foster parents to a religious test and denied them access to taxpayer-funded services. In addition to granting RFRA exemptions to allow providers to discriminate, HHS finalized another "midnight rule" in the waning days of the Trump Administration to roll-back the existing antidiscrimination requirements that applied to child welfare and other HHS funded programs.[202]

Discrimination in Health Care

On June 19, 2020, the Trump-era HHS issued a Section 1557 rule that eroded antidiscrimination protections for LGBTQ+ individuals and undermined sex antidiscrimination protections for individuals seeking health care services.[203] For example, the rule incorporated Title IX's religious exemption, contradicting Section 1557's purpose, which is to ensure that individuals are not subject to discriminatory treatment when accessing health care services.[204] The practical effect of the rule meant that health care providers could engage in sexual orientation- and gender identity-based discrimination while using their religious beliefs as a shield. In a 2020 lawsuit, stakeholders challenged several aspects of the Trump-era Section 1557 rule including the incorporation of Title IX's religious exemption.[205] Ultimately, the federal district court blocked HHS from implementing the rule's provision

that incorporated Title IX's religious exemption, concluding that HHS violated the APA by incorporating the exemption without considering the effect it would have on individuals' access to health care.[206]

In addition to the Title IX religious exemption, the Trump-era rule also exempted organizations from compliance with Section 1557's regulations if doing so would violate a conscience or religious exemption law such as RFRA.[207] Taken together, the Trump-era rule gave health care providers broad authority to avoid compliance with the rule's general prohibition against sex discrimination if the avoidance was related to religious-based objections.

Conscience and Refusal Protections

Prompted by President Trump's E.O. 13798, which encouraged vigorous enforcement of religious freedom protections under federal law, on May 2, 2019, the Trump-era HHS finalized a rule that allowed health care providers to deny care for patients on the basis of a religious or moral objection.[208] The rule broadened the scope of the existing conscience refusal law by redefining the type of care that may be refused and the individuals who are entitled to deny that care, including those who may only be tangentially involved in direct care like billing staff and receptionists.[209] Though the rule was set to take effect on November 22, 2019, multiple federal courts vacated the rule in its entirety by finding, among other things, that HHS exceeded its authority by issuing the rule.[210]

Weakened Access to Contraceptive Coverage under the Affordable Care Act

In 2018, the Trump-era HHS, in conjunction with DOL and the U.S. Department of the Treasury, further weakened the ACA's preventive care requirements by jointly issuing multiple rules that provided sweeping exemptions to employers and institutions of higher education with religious or moral objections to covering contraceptives.[211] The Trump Administration reasoned that RFRA gave the agencies the authority to create exemptions or accommodations when a statute imposes a substantial burden on the religious exercise of affected parties.[212] In the Supreme Court's 2020 decision, Little Sisters of the Poor Saints Paul & Peter v. Pennsylvania, the Court upheld the Trump Administration's authority under the ACA to promulgate the religious and moral exemptions.[213] The Court indicated that it was reasonable for the agencies to consider RFRA in its rulemaking on this issue.[214]

Trump's DOJ Implements Guidance, a Directive, and a RFRA Waiver Process to Reinforce Religious Liberty Rights

On October 6, 2017, DOJ issued guidance titled Federal Law Protections for Religious Liberty (Guidance) in response to the directive in E.O. 13798.[215] Though the Guidance purported to advise agencies on the execution of federal law with respect to religious liberty protections, "in practice, it expand[ed] [religious liberty] provisions to improperly elevate the right to religious exemptions above other legal and constitutional rights and . . . shield[ed] those who seek to use federal dollars while denying necessary services to and discriminating against LGBTQ people, women, and religious minorities."[216] Of particular concern, the Guidance suggested that almost any government action could be considered a burden on religious exercise while minimizing the government's compelling interest to act in some areas, such as civil rights, thereby inviting a never-ending parade of exemptions to avoid compliance with a wide host of civil rights laws.[217] Fundamentally, the analysis in the Guidance was unbalanced, failing to set out Establishment Clause protections preventing harm to other individuals when evaluating requests for religious accommodations or exemptions.[218]

Following the issuance of the Guidance, Attorney General Jeff Sessions issued a directive to U.S. Attorneys to adhere to the Guidance's instructions to give wide latitude and deference to discrimination in the name of religion.[219] Moreover, in 2018, DOJ updated its RFRA waiver process for faith-based grantees to request an exemption from the religious antidiscrimination requirements for DOJ-funded programs.[220] This process allowed the grantees to self-certify the necessity of the exemption through an application, but in practice, DOJ did not review these applications.[221] Thus, DOJ permitted federally-funded grantees to avoid compliance with antidiscrimination requirements with no oversight.[222]

Legislative Actions

On January 28, 2019, during the 116th Congress, Representatives Joseph P. Kennedy and Robert C. "Bobby" Scott reintroduced H.R. 1450, the Do No Harm Act, to respond to the continued misuse of RFRA by the Trump Administration.[223] On February 28, 2019, then-Senator Kamala Harris sponsored the Senate companion bill, S. 593, the Do No Harm Act.[224] On June 25, 2019, the House Committee on Education and Labor held a hearing titled, "Do No Harm: Examining the Misapplication of the Religious Freedom Restoration Act," which outlined the ways in which RFRA had been misapplied since its enactment in 1993 and the importance of passing the Do No Harm Act to ensure that the exercise of religious liberty does not further weaken fundamental civil and legal rights.[225]

2021-PRESENT AND THE BIDEN ADMINISTRATION

Amid an increasingly hostile environment in the federal court system and perpetual congressional inaction, there remain in place many harmful policies advanced in the name of religion that were implemented across previous Democratic and Republican administrations.

Executive Actions

On February 14, 2021, President Biden issued E.O. 14015, which established a White House Office of Faith-Based and Neighborhood Partnerships.[226] E.O. 14015 designated the Office with the responsibility of establishing policies for partnerships with community organizations, including faith-based organizations.[227] Importantly, E.O. 14015 rescinded President Trump's E.O. 13831, which had removed the beneficiary protections for participants in taxpayer-funded social service programs.[228] E.O. 14015 did not, however, address the religious exemption for federal contracts put in place by President Bush's E.O. 13279 as an amendment to President Johnson's E.O. 11246.

In addition to the issuance of E.O. 14015, the Biden Administration is poised to engage in rulemaking to revise the Charitable Choice rules governing federal social service programs across nine agencies yet again.[229]

Administrative Actions

Biden's HHS Takes Several Steps to Reverse Trump-era Policies that Undermined Civil Rights Protections and Access to Health Care Services

Revokes RFRA Waivers that Allowed Discrimination in Federally-Funded Foster Care Programs

In November 2021, HHS revoked the categorical RFRA waivers the Trump Administration gave to South Carolina, Texas, Michigan, and several child welfare entities within those states.[230] As discussed previously, these waivers allowed federally-funded foster care programs to reject prospective foster parents based on their religion or LGBTQ+ status due to the providers' religious objections.[231] President Biden's HHS announced that it will return to the agency's "longstanding practice of a case-by-case evaluation of requests for religious exemptions, waivers, and modifications to program requirements."[232] A few months after HHS revoked the RFRA waivers, HHS' Secretary, Xavier Becerra, appeared before the House Committee on Education and Labor for a hearing to examine the Department's FY 2023 budget request and departmental priorities during which the Committee's Chairman, Representative Robert C. "Bobby" Scott, asked the Secretary about the Trump Administration's use of the RFRA waivers.[233] Secretary Becerra responded, "We're going to do everything we can to prevent discrimination."[234] Chairman Scott then noted that, "you're not doing anything to prohibit faith-based organizations from participating [in federally-funded foster care programs], it's just that they have to follow the civil rights laws and treat everyone [equally] regardless of religion"; the Secretary agreed with this statement.[235] Notwithstanding the Secretary's position, the fact is, current law allows faith-based organizations to discriminate based on religion.[236]

Releases Proposed Rule Implementing Section 1557 of the Affordable Care Act

On August 4, 2022, HHS released a proposed rule to revise the harmful Trump-era Section 1557 rule.[237] The proposed rule includes several improvements to ensure the implementation of the broad antidiscrimination protections in covered health care services and programs under the ACA.[238] Importantly, the proposed rule does not incorporate Title IX's religious exemption, but it does propose creating a process for health care providers to notify HHS' OCR regarding conscience and religious freedom objections.[239] Significantly, the proposed rule states that any requested accommodations under RFRA must be considered on a case-by-case basis while also noting that HHS will evaluate potential harms that any requested accommodation has on affected individuals accessing care.[240] Unfortunately, the proposed rule fails to include any advance notice or transparency provisions that require providers to disclose their religious exemptions/objections to individuals seeking care.

Though the Biden Administration is poised to restore the robust antidiscrimination protections of Section 1557 through agency rulemaking, its actions may be curtailed by court rulings that limit the application of these protections. For example, in a 2021 federal district court case, the court prohibited HHS from interpreting or enforcing Section 1557 against certain religious providers based on their RFRA claims concerning gender-transition care or abortion services.[241]

Releases Proposed Rule to Partially Rescind the Trump-era Conscience and Refusal Rule in Health Care

As noted above, after the issuance of the 2019 Conscience Rule—which would have empowered more health care providers to deny health care services—multiple federal courts vacated the rule in its entirety before it took effect.[242] Since that time, however, there have been other developments that have limited access to health care services, such as several states enacting laws that limit access to abortion and gender-affirming care and more claims by employers and providers using religious-based objections to deny other health care services.[243] Therefore, President Biden's HHS issuance of a proposed rule on January 5, 2023, that partially rescinds the 2019 Conscience Rule is a welcome development.[244] This proposed rule would maintain the framework established by the 2011 Conscience Rule, which included, among other provisions, an enforcement provision designating HHS' OCR as the authority to receive and coordinate complaints alleging violations of the conscience statutes.[245] The proposed rule would also rescind the portions of the 2019 Conscience Rule that "are redundant, unlawful, confusing, or undermine the balance Congress struck between safeguarding conscience rights and protecting access to health care, or because significant questions have been raised as to their legal authorization."[246] The practical effect of the proposed rule would be to rollback those provisions from the 2019 Conscience Rule that limited access to health care services by redefining the type of care that may be refused and the individuals who are entitled to deny that care.

Biden's OFCCP Announces Plans to Rescind the Trump-era Expansion of the Religious Exemption for Federal Contractors

On November 9, 2021, the Biden Administration published in the Federal Register a notice of its intention to rescind the Trump-era religious exemption rule that undermines President Johnson's E.O. 11246.[247] In the notice, OFCCP explained that E.O. 11246 reflects the federal government's longstanding commitment to provide equal employment opportunity in federal contracts.[248] The notice also detailed how the Trump-era religious exemption rule departed from Title VII precedent, which the agency had consistently relied on for decades when interpreting the protections under E.O. 11246.[249] Further, the notice stated that the Trump-era rule's embrace of a categorical approach in its analysis of RFRA claims was inappropriate as it failed to account for competing governmental and third-party interests against requests for exemptions.[250] After rescinding the Trump-era rule, OFCCP intends to return to a case-by-case, fact-specific inquiry to determine RFRA's application.[251]

Biden's ED Announces Plans to Review the Trump-era Rule that Allowed Religious Clubs to Discriminate and Updates Title IX Regulations

Religious Student Groups Rule

The Trump Administration issued a final rule addressing several education issues that included a provision permitting university funded religious student clubs to circumvent the schools' antidiscrimination requirements.[252] This portion of the rule was the subject of a lawsuit arguing that ED exceeded its authority.[253] The Biden Administration's ED has announced that it has undertaken a review of those portions of the rule dealing with religious student clubs and free speech polices and indicated that it anticipates proposing to rescind those parts of the Trump-era final rule.[254]

Restoring and Expanding Protections Under Title IX Regulations

On July 12, 2022, ED proposed a new Title IX rule to address the shortcomings of the Trump-era Title IX rule that eroded some key protections for students' safety, weakened accountability for schools, and made it more difficult for sexual assault survivors to get justice.[255] The proposed rule would restore and expand critical protections under Title IX, such as expanding the definitions of "sex-based harassment" and "hostile environment," providing protections on the basis of sexual orientation and gender identity, and removing geographic limits to Title IX.[256] Although overall the Biden Administration's proposed rule is a vast improvement over the Trump-era rule, the proposed rule does not include certain protections for students such as increased transparency by religious institutions related to Title IX's religious exemption.[257] In comments to the proposed Title IX rule, several advocates, stakeholders, and Members of Congress urged ED to increase transparency to students regarding any claimed religious exemption or other exceptions under Title IX so that prospective students can fully understand how an institution's religious tenets may affect their participation in an education program (e.g., a school denying admittance or expelling an LGBTQ+ student or disciplining an unmarried pregnant student).[258]

Biden's USDA Issues Guidance Explaining Protections Based on Sexual Orientation and Gender Identity in Federally-Funded Child Nutrition Programs

Title IX's sex discrimination prohibition applies to child nutrition programs administered by USDA, including the school lunch program.[259] On May 5, 2022, USDA's Food and Nutrition Service (FNS) issued Guidance to state agencies and program operators to explain how they should process discrimination complaints based on gender identity and sexual orientation in taxpayer-funded programs or activities.[260] The Guidance advised that considering the Supreme Court's Bostock v. Clayton County decision, which concluded that Title VII's prohibition against sex discrimination includes discrimination based on sexual orientation and gender identity, USDA has determined that this kind of discrimination can constitute sex discrimination under Title IX as well.[261] FNS noted that this determination was based on its legal analysis of Title IX as well as ED's and DOJ's prior interpretations of Bostock's application to Title IX.[262]

Soon after USDA issued the Guidance, some Republicans seized the opportunity to argue that USDA is holding school lunch money "hostage" to the Biden Administration's "transgender policies."[263] In response to this fearmongering, on August 12, 2022, USDA released additional Guidance to explain and clarify Title IX's sex-based prohibition and religious exemption and advised that institutions that believe they are entitled to an exemption do not need to submit a request for the exemption; instead, they may, but are not required to, seek an assurance from USDA regarding the exemption.[264] Although this supplemental Guidance clarified and reaffirmed the right of certain institutions to be exempt from Title IX requirements, it did not provide similar clarity for the individuals who may be subject to the exemption, e.g., a beneficiary of a child nutrition program who may be denied services because of an institution's religious tenets. The lack of transparency about how an institution's religious exemption can affect services for beneficiaries in these programs may have a long-term negative effect on the beneficiaries.

The Guidance has already been challenged in federal courts by several groups including a Florida-based religious school asserting that the Guidance violates the school's rights under RFRA.[265] Although this litigation was ultimately dismissed after the USDA confirmed that the school qualifies for a Title IX religious exemption, a separate lawsuit filed by twenty-two Republican-led states is still pending.[266] The Republican-led lawsuit argues, among other issues, that the Guidance misinterprets and inappropriately expands the analysis in the Bostock decision.[267] In response, USDA filed a motion to dismiss the lawsuit asserting that the Plaintiffs have not been harmed by the May 5th Guidance and that the Guidance is an interpretive rule and not a final agency decision.[268] Thus, it is unclear what, if any, long-term impact the Guidance will have on processing sexual orientation and gender identity discrimination complaints in FNS programs and activities.[269]

Legislative Actions

Democrats Attempt to Rein in the Misuse of RFRA

On February 25, 2021, during the 117th Congress, Representative Robert C. "Bobby" Scott, along with Representatives Steve Cohen, Jamie Raskin, and Mary Gay Scanlon, reintroduced H.R. 1378, the Do No Harm Act.[270] On September 15, 2021, Senator Cory A. Booker introduced the Senate companion bill, S. 2752, the Do No Harm Act.[271]

Republicans Attempt to Expand and Codify the Charitable Choice Rules

On August 2, 2022, during the 117th Congress, Senator Marco Rubio introduced S. 4735, the Lifting Local Communities Act.[272] The legislation would codify Charitable Choice rules to, according to its sponsor, provide certainty for faith-based organizations applying for grants from federal programs and to enshrine these rules into law "rather than subject [the religious protections for providers] to the back and forth of rulemaking."[273] This bill would supersede all federal law enacted before the legislation and would, among other things:

- apply Charitable Choice rules across every federal social service program directed at reducing poverty and addressing the needs of low-income individuals;
- permit faith-based organizations to discriminate in hiring based on religion and the "acceptance of or adherence to the religious tenets of the organizations;"[274]
- authorize exemptions to religious antidiscrimination requirements for beneficiaries (this could include denial of certain contracted services), and specify that the provider is not required to modify any program component, even when it may constitute religious discrimination against beneficiaries;
- permit privately funded religious activities to be offered at the same time as federally-funded social services (e.g., by using volunteers); and
- preempt state and local laws.

CONCLUSION

Over the past three decades, there has been a sustained, and at times bipartisan, effort to advance the religious liberty interests of a vocal minority at the expense of the civil and legal rights of all. These efforts have resulted in the advancement of policies that allow faith-based grantees and federal contractors using taxpayer dollars to engage in employment discrimination based on religion and have weakened protections for individuals based on their religious beliefs, practices, or lack thereof; sexual orientation; or gender identity. These efforts have also resulted in policies that allow faith-based grantees to engage in religious coercion and potentially deny program beneficiaries federally-funded social services because of a provider's religious tenets. These efforts have also given rise to policies that may limit access to health care services based on an employer's or provider's religious beliefs. Taking all these actions together, there has been a redefining of who is a victim of discrimination, and thus deserving of protection, in our policies and laws. The victim of discrimination is no longer the individual denied an equal opportunity to participate in or be employed by a federally-funded social service program; instead, the victim now is a faith-based organization that wants the discretion to reject or exclude individuals based on their religious beliefs, practices, or lack thereof, as well as based on sexual orientation or gender identity. Under this framework, the right to discriminate because of religious liberty interests is paramount to long sought, and hard fought, rights to be free and protected from discrimination.

These kinds of discriminatory practices shift the weight of the federal government from supporting victims of discrimination to supporting the right to discriminate with federal funds. This is a profound change in the civil rights landscape of our nation where historically the power of the federal purse has been used to expand equal opportunity regardless of one's protected status. Continuing this trajectory has the potential to further unravel fundamental civil and legal protections across several areas such as health care, social service programs, worker protections, and child nutrition. To reverse this dangerous trend, federal policymakers must be aware of, and proactively respond to, executive, administrative, and legislative actions that advance religious liberty rights at the expense of undermining other fundamental rights.[275] Religious liberty is a fundamental American value that has made our nation a beacon and model for the world, but pursuit of religious freedom should, at a minimum, not come at the expense of civil rights protections and access to social safety net programs and health care services.

CITATIONS

[1] John A. Ragosta, Virginia Statute for Religious Freedom, Thomas Jefferson Monticello (Feb. 21, 2018), https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/virginia-statute-religious-freedom/.

[2] Id. In 1786, James Madison shepherded a version of this bill through the Virginia General Assembly.

[3] Reynolds v. U.S., 98 U.S. 145, 166-67 (1879).

[4] There have also been an increasing number of cases "brought by institutions claiming their right to religious freedom entitles them to refuse to comply with anti-discrimination laws," but these cases are beyond the scope of this report. Louise Melling, When did religious belief become an excuse to discriminate?, THE WASH. POST (Sept. 7, 2022), https://www.washingtonpost.com/opinions/2022/09/07/supreme-court-religious-right-antidiscrimination-laws/.

[5] Mark Walsh, School-Prayer Amendment Back in the Spotlight, EDUCATION WEEK (Jun. 21, 1995), https://www.edweek.org/education/school-prayer-amendment-back-in-the-spotlight/1995/06 (describing a "proposed amendment to the U.S. Constitution that would guarantee the right to have organized prayers in public schools").

[6] Gerhard Peters and John T. Woolley, William J. Clinton, Memorandum on Religious Expression in Public Schools, THE AMERICAN PRESIDENCY PROJECT (July 12, 1995), https://www.presidency.ucsb.edu/documents/memorandum-religious-expression-public-schools [hereinafter Memorandum on Religious Expression in Public Schools].

[7] Id.

[8] Press Release, The White House Office of the Press Secretary, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997), https://clintonwhitehouse4.archives.gov/WH/New/html/19970819-3275.html.

[9] Memorandum on Religious Expression in Public Schools, supra note 6.

[10] U.S. Dep't of Ed., Religious Expression in Public Schools: A Statement of Principles (Jun. 6, 1998), https://files.eric.ed.gov/fulltext/ED416591.pdf.

[11] 494 U.S. 872 (1990).

[12] Id. at 875-76.

[13] Id. at 878-79.

[14] Id. at 888.

[15] Whitney Novak, CONG. RSCH. SERV., IF11490, The Religious Freedom Restoration Act: A Primer, 1 (2020), https://crsreports.congress.gov/product/pdf/IF/IF11490. In 1990, during the 101st Congress, then-Senator Biden introduced S. 3254, the Religious Freedom Restoration Act of 1990, in response to the Smith decision; this bill had similar language and was the precursor to the Religious Freedom Restoration Act of 1993. S. 3254, 101st Cong. (1990), https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/14/bill-s3254-1990.pdf.

[16] 42 U.S.C. § 2000bb-1(a), (b)(1)-(2).

[17] Novak, supra note 15, at 1.

[18] Id.

[19] H.R. Rep. No. 103-88, at 7 (1993), https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/26/houserept103-88-1993.pdf ("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. Therefore, the compelling governmental interest test . . . generally should not be construed more stringently or more leniently than it was prior to Smith."); see id. at 16 (Committee Republicans acknowledged that "[t]he changes made to the bill as introduced in the 103rd Congress make it clear that [RFRA] is not seeking to impose a new, invigorated compelling state interest standard, but is seeking to replicate, by statute, the same free exercise test that was applied prior to Smith.").

[20] Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 Fordham L. Rev. 883, 886 (1994), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3071&context=flr.

[21] 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion. . . .") (emphasis added); see also Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430-31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened.") (quoting 42 U.S.C. § 2000bb-1(b)).

[22] H.R. Rep. No. 103-88, at 9 (1993).

[23] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2021) (Gorsuch, J., concurring) (stating that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases") (citing 42 U.S.C. § 2000bb-3).

[24] Press Release, Congressman Bobby Scott, Scott, Kennedy Introduce Amendments to Religious Freedom Restoration Act (May 18, 2016), https://bobbyscott.house.gov/media-center/press-releases/scott-kennedy-introduce-amendment-religious-freedom-restoration-act (quoting the Vice President of Reproductive Rights and Health at the National Women's Law Center who stated that the Center "did not support [RFRA] because of concerns about how it could be misused and result in harm to women").

[25] 521 U.S. 507 (1997).

[26] Novak, supra note 15, at 1.

[27] Id. at 1-2.

[28] H.R. 4019, 105th Cong. (1998); H.R. 1691, Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. On the Constitution, 106th Cong. (1999), https://www.congress.gov/bill/106th-congress/house-bill/1691/actions [hereinafter RLPA].

[29] American Civil Liberties Union, Statement on H.R. 1691, Religious Liberty Protection Act of 1999, Before the Subcommittee on the Constitution of the House Committee on the Judiciary, Presented by Christopher E. Anders, Legislative Counsel (May 12, 1999), https://www.aclu.org/other/testimony-legislative-counsel-christopher-anders-hr-169-religious-liberty-protection-act-1999.

[30] Letter from the NAACP Legal Defense and Educational Fund, Inc. to Congressman John Conyers, Jr. (July 14, 1999), https://www.aclu.org/other/letter-naacp-legal-defense-and-educational-fund-religious-liberties-protection-act-1999.

[31] Congressman Jerold Nadler offered the amendment and stated in his floor remarks: "Unfortunately, the bill needs to be amended to ensure that while it acts as a shield to protect fundamental religious rights of all Americans, as it is intended to do, it cannot also be used as a sword to do violence to the rights of others…." 145 Cong. Rec. H5588-89 (daily ed. July 15, 1999) (statement of Rep. Jerold Nadler), https://www.congress.gov/106/crec/1999/07/15/145/100/CREC-1999-07-15-pt1-PgH5580-2.pdf.

[32] Gerhard Peters and John T. Woolley, William J. Clinton, Statement of Administration Policy: H.R. 1691- Religious Liberty Protection Act of 1999, THE AMERICAN PRESIDENCY PROJECT (July 14, 1999), https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-1691-religious-liberty-protection-act-1999 ("The Administration looks forward to working with Congress to ensure that any remaining concerns about the bill, including clarification of civil rights protections, are addressed and that it can be enacted into law as quickly as possible.").

[33] RLPA, supra note 28.

[34] Tom Strode, Religious Liberty Coalition Leaders Withdraw Support of RLPA, BAPTIST PRESS (Sept. 4, 1999), https://www.baptistpress.com/resource-library/news/religious-liberty-coalition-leaders-withdraw-support-of-rlpa/.

[35] 146 Cong. Rec. S. 7778 (daily ed. July 27, 2000) (Statement of Sen. Harry Reid), https://www.congress.gov/106/crec/2000/07/27/CREC-2000-07-27-pt1-PgS7774.pdf ("While the companion measure in the House

passed the House of Representatives 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.")

[36] 42 U.S.C. §§ 2000cc et seq.

[37] 106 Cong. Rec. S. 6688 (July 13, 2000) (Statement of Sen. Edward Kennedy), https://www.congress.gov/106/crec/2000/07/13/CREC-2000-07-13-pt1-PgS6678-2.pdf.

[38] Id.

[39] Keeping the Faith - The Promise of Cooperation, The Perils of Government Funding: A guide for Houses of Worship, Baptist Joint Cmte. on Public Affairs and The Interfaith Alliance Foundation, https://bjconline.org/wp-content/uploads/2014/04/Keeping-the-Faith.pdf (last visited Jan. 5, 2023).

[40] CONG. RSCH. SERV., RL30388, Charitable Choice: Constitutional Issues and Developments Through the 106th Congress, 1 (2000), https://www.everycrsreport.com/files/20001227_RL30388_110d98a43a8e31515bd305e9ba0e481522bc3904.pdf [hereinafter Charitable Choice CRS Report] (describing Charitable Choice as "the name given [to] a burgeoning legislative effort to expand the universe of religious organizations that can participate in publicly funded social service programs").

[41] Charitable Choice wrongly extends the religious exemption under Title VII of the Civil Rights Act of 1964 to government funded jobs of faith-based grantees. Id. at 2. Under Title VII, "a religious corporation, association, educational institution, or society," that uses its own funds, may prefer co-religionists in employment. 42 U.S.C. § 2000e-1(a). Charitable Choice allows workers to be disqualified from a taxpayer-funded job because they do practice the same religion as the employer. It allows the denial of employment to otherwise qualified individuals solely due to their religion, religious beliefs, or acts or practices that the faith-based grantee feels is contrary to its own religious tenets. In practice, this mean a grantee can, for example, refuse to hire or fire a person for being divorced, using contraception, engaging in premarital sex, or having a child out of wedlock.

[42] Charitable Choice CRS Report, supra note 40, at 2-3.

[43] Id. at 4-5.

[44] Judith B. Goodman, Charitable Choice: The Ramifications of Government Funding for Faith-based Health Care Services, 26 Nova Law Review 563, 569 (2002), https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1337&context=nlr ("The Charitable Choice provision got little attention when it was first adopted as part of the welfare overhaul in 1996. Nor did it appear on many radar screens when it was expanded to cover drug treatment and community development grants in 1998.").

[45] Pub. L. 104-193, Title I, § 104 (Aug. 22, 1996); 110 Stat. 2161; 42 U.S.C. § 604a.

[46] Pub. L. 105-285, Title II, § 201 (Oct. 27, 1998); 112 Stat. 2749; 42 U.S.C. § 9920.

[47] Pub. L. 106-310, Title XXXIII, § 3305 (Oct. 17, 2000); 42 U.S.C. § 300x-65.

[48] This Charitable Choice provision, enacted as part of the Community Renewal Tax Relief Act of 2000, amended Title V of the Public Health Service Act, and was included as part of the Consolidated Appropriations Act, 2001. Pub. L. 106-654 (Dec. 21, 2000); 42 U.S.C. § 290kk et seq.

[49] Gerhard Peters and John T. Woolley, William J. Clinton, Statement on Signing the Community Opportunities, Accountability, and Training and Educational Services Act of 1998, THE AMERICAN PRESIDENCY PROJECT (Oct. 27, 1998), https://www.presidency.ucsb.edu/documents/statement-signing-the-community-opportunities-accountability-and-training-and-educational; Gerhard Peters and John T. Woolley, William J. Clinton, Statement on Signing of Children's Health Act of 2000, THE AMERICAN PRESIDENCY PROJECT (Oct. 17, 2000), https://www.presidency.ucsb.edu/documents/statement-signing-the-childrens-health-act-2000-0; Gerhard Peters and John T. Woolley, William J. Clinton, Statement on Signing the Consolidated Appropriations Act, FY

2001, THE AMERICAN PRESIDENCY PROJECT (Dec. 21, 2000), https://www.presidency.ucsb.edu/documents/statement-signing-the-consolidated-appropriations-act-fy-2001.

[50] Summary of Technical and Conforming Amendments to Personal Responsibility and Work Opportunity Reconciliation Act of 1996, p. 25-26 (P.L. 104-193).

[51] Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 606, Title V, Subtitle F—Welfare Reform Technical Corrections, https://www.congress.gov/105/plaws/publ33/PLAW-105publ33.pdf#page=356 (last visited Jan. 5, 2023). The finalized technical amendments to PRWORA were enacted as part of the Balanced Budget Act of 1997.

[52] As Governor, President Bush established a Task Force on Faith-Based Programs that encouraged deregulating requirements for faith-based providers while simultaneously increasing state funding available to these entities. The Texas Freedom Network, The Texas Faith-Based Initiative at Five Years, Warning Signs as President Bush Expands Texas-style Program at National Level, 5-6, https://tfn.org/cms/assets/uploads/2016/01/TFN_CC_REPORT-FINAL.pdf (last visited Jan. 5, 2023). The Task Force's efforts facilitated legislation to exempt faith-based drug and alcohol treatment centers and childcare centers from state licensing and regulation. Id. at 10. The Texas legislature would later pull back the state alternative licensing program for faith-based childcare providers after concerns were raised about abuse and conflict of interest issues. Id. at 20.

[53] The White House, The White House Faith-Based & Community Initiative, https://georgewbush-whitehouse.archives.gov/government/fbci/president-initiative.html (last visited Jan. 5, 2023).

[54] Exec. Order No. 13198, §§ 1, 3, 66 Fed. Reg. 8497 (Jan. 29, 2001), https://www.govinfo.gov/content/pkg/FR-2001-01-31/pdf/01-2851.pdf.

[55] Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2001), https://www.govinfo.gov/content/pkg/FR-2001-01-31/pdf/01-2852.pdf.

[56] H.R. Rep. No. 107-36 (2001), https://www.govinfo.gov/content/pkg/CDOC-107hdoc36/pdf/CDOC-107hdoc36.pdf.

[57] The White House, Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs (Aug. 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/08/unlevelfield.html/.

[58] Id. at Barriers to Faith-Based Organizations Seeking Federal Support (describing barrier number 5 as the "denial of faith-based organizations' established right to take religion into account in employment decisions").

[59] White House Faith-Based and Community Initiatives, Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved, https://georgewbush-whitehouse.archives.gov/government/fbci/religious-hiring-booklet-2005.pdf (last visited Jan. 5, 2023).

[60] Exec. Order No. 13279, §§ 2,3, 67 Fed. Reg. 77,139, 77,142-43 (Dec. 12, 2002), https://www.govinfo.gov/content/pkg/FR-2002-12-16/pdf/02-31831.pdf.

[61] Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, 69 Fed. Reg. 42,586 (July 16, 2004) (to be codified at 45 C.F.R. pts. 74, 87, 92, 96).

[62] Years after leaving the Bush Administration, David Kuo, the former Deputy Director of the WHOFBCI, released a book criticizing the initiative as a political prop to help candidates that fell short of President Bush's promise that the initiative would increase resources to fight poverty. See David Kuo, Tempting Faith: An Inside Story of Political Seduction 206, 212 (2006). A poll taken nearly a decade after President Bush's Faith-Based Initiative went into effect showed that there continued to be popular support for religious groups as social service providers, but most Americans polled (60%) indicated concerns about religious coercion of beneficiaries in such programs

and the majority (74%) opposed allowing religious organizations that receive taxpayer funds to discriminate on the basis of religion. Pew Research Ctr. et al, Faith-Based Programs Still Popular, Less Visible (Nov. 16, 2009), https://www.pewresearch.org/religion/2009/11/16/faith-based-programs-still-popular-less-visible/.

[63] Workplace Prof, DOL Guidance on RFRA and Faith-Based Groups (Jan. 5, 2009), https://lawprofessors.typepad.com/laborprof_blog/2009/01/dol-guidance-on.html; US Dep't of Labor, Off. of the Assistant Sec'y for Admin. and Mgmt. Grants, The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance, http://www.dol.gov/oasam/grants/RFRA-Guidance.htm (last visited Jan. 5, 2023) (requiring an organization seeking a religious exemption to submit "a request for exemption to the Assistant Secretary charged with issuing or administering the grant") [hereinafter DOL RFRA Waiver Process].

[64] DOL RFRA Waiver Process, supra note 63.

[65] US Dep't of Labor, Off. Of Fed. Contract Compliance Programs, History of the Office of Federal Contract Compliance Programs, https://www.dol.gov/agencies/ofccp/about/history (last visited Jan. 5, 2023) [hereinafter OFCCP History].

[66] Id. See also U.S. Dep't of Labor, Off. Of Fed. Contract Compliance Programs, Executive Order 11246, https://www.dol.gov/agencies/ofccp/executive-order-11246 (last visited Jan. 5, 2023); Nat'l Archives, Executive Order 8802: Prohibition of Discrimination in the Defense Industry (1941), https://www.archives.gov/milestone-documents/executive-order-8802#:~:text=In%20June%20of%201941%2C%20President,to%20enforce%20the%20new%20policy (last visited Jan. 5, 2023) (describing how Black leaders such as A. Phillip Randolph and others met with White House officials and "demand[ed] that an executive order be issued to stop job discrimination in the defense industry" or they would bring thousands of "Negroes [to] the White House lawn" in protest).

[67] Id. See, e.g., Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941) ("reaffirm[ing] the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin"); Exec. Order No. 9346 (May 27, 1943) (expanding the coverage and scope of E.O. 8802).

[68] OFCCP History, supra note 65. See, e.g., President Truman's Administration, Exec. Order No. 10308 (Dec. 3, 1951) (creating the Committee on Government Contract Compliance, which was tasked with obtaining contractor compliance with the nondiscrimination provisions in President Roosevelt's Executive Orders 8802 and 9346). President Dwight Eisenhower's Administration, Exec. Order No. 10479, 18 Fed. Reg. 4899 (Aug. 18, 1953) (reiterating that "the policy of the United States Government [is] to promote equal employment opportunity for all qualified persons employed or seeking employment on government contracts because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds"); President John F. Kennedy's Administration, Exec. Order 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961) (stating that "the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts").

[69] See Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), https://www.archives.gov/federal-register/codification/executive-order/11246.html.

[70] Id.

[71] See Exec. Order No. 13279, §4, 67 Fed. Reg. 77,139, 77,143 (Dec. 12, 2002), https://www.govinfo.gov/content/pkg/FR-2002-12-16/pdf/02-31831.pdf.

[72] See OFCCP History, supra note 65.

[73] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79324 (Dec. 9, 2020), https://www.govinfo.gov/content/pkg/FR-2020-12-09/pdf/2020-26418.pdf. See also Press Release, House Committee on Educ. and Labor, Chairman Scott Statement on Trump Administration's Final Rule to Weaken Anti-Discrimination Protections in Federal Contracting (Dec. 7, 2020), https://democrats-edworkforce.house.gov/media/press-releases/chairman-scott-statement-on-trump-administrations-final-rule-to-weaken-anti-discrimination-protections-in-federal-contracting.

[74] The Children's Health Act of 2000 amended Part B of Title XIX of the PHSA, "which authorizes the Substance Abuse and Mental Health Services Administration (SAMHSA) in the Public Health Service to make block grants to the states for substance abuse prevention and treatment programs. But it stated that it is also applicable to the discretionary grant programs concerning substance abuse administered by SAMHSA under Title V." Charitable Choice CRS Report, supra note 40, at 10; Pub. L. 106-310, Title XXXIII, § 3305 (Oct. 17, 2000); 42 U.S.C. § 300x-65. The latter Charitable Choice provision was enacted as part of the omnibus, Consolidated Appropriations Act, 2001, as the Community Renewal Tax Relief Act of 2000 (CRTRA). Charitable Choice CRS Report, supra note 40, at 10, n. 43. CRTRA amended Title V of the PHSA, "which primarily authorizes discretionary grant programs for substance abuse and prevention treatment administered by SAMHSA. But this provision also stated that it is applicable to the block grants to the states authorized by Part B of Title XIX." Id. at 10. Pub. L. 106-654 (Dec. 21, 2000); 42 U.S.C. §§290kk et seq. The result of enacting these overlapping Charitable Choice provisions was that "both charitable choice statutes are fully applicable to the discretionary grant and block grant programs authorized by Titles V and Title XIX of the [PHSA] [] [b]ut they are not wholly congruent." Charitable Choice CRS Report, supra note 40, at 11. For an in-depth discussion of the legislative background on Charitable Choice applicable to substance abuse prevention and treatment services under the PHSA, see id. at 9-16.

[75] 42 U.S.C. § 300x-57(a)(2); 42 U.S.C. § 290cc-33(a)(2).

[76] Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants, Projects for Assistance in Transition from Homelessness Formula Grants, and to Public and Private Providers Receiving Discretionary Grant Funding from SAMHSA for the Provision of Substance Abuse Services Providing for Equal Treatment of SAMHSA Program Participants, 67 Fed. Reg. 77,350 (Dec. 17, 2002) (to be codified 42 C.F.R. Pts 54 and 54a and 45 C.F.R. Pt 96), https://www.govinfo.gov/content/pkg/FR-2002-12-17/pdf/02-31673.pdf.

[77] Id. at 77, 352.

[78] Id. at 77, 351-52.

[79] Charitable Choice Provisions and Regulations; Final Rules; 68 Fed. Reg. 56,430, 56,435 (Sept. 30, 2003), https://www.govinfo.gov/content/pkg/FR-2003-09-30/html/03-24289.htm (describing the RFRA exemption certification process for HHS grantees).

[80] Id. at 56, 436.

[81] Id. (stating that HHS "does not believe that it is necessary for the subgrantees to provide [certification] documentation to SAMHSA unless SAMHSA requests it").

[82] Ira C. Lupu and Robert W. Tuttle, Developments in the Faith-Based and Community Initiatives: Comments on Notices of Proposed Rulemaking and Guidance Document, The Roundtable on Religion and Social Welfare Policy, ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, 16 (Jan. 2003).

[83] Cynthia Brougher, CONG. RSCH. SERV., R40722, Health Care Providers' Religious Objections to Medical Treatment: Legal Issues Related to Religious Discrimination in Employment and Conscience Clause Provisions (2011), https://www.everycrsreport.com/files/20110718_R40722_f992e96aa57ad750346b255904002b482f462fe6.pdf.

[84] U.S. Dep't of Health and Human Servs., Conscience and Religious Nondiscrimination, https://www.hhs.gov/conscience/conscience-protections/index.html#:~:text=Your%20Conscience%20Rights,-Conscience%20protections%20apply&text=Federal%20statutes%20protect%20health%20care,moral%20objections%20or%20religious%20beliefs. (last visited Jan. 5, 2023); Jon O. Shimabukuro, CONG. RSCH. SERV., RL34703, The History and Effect of Abortion Conscience Clause Laws (2010), https://crsreports.congress.gov/product/pdf/RL/RL34703/5.

[85] Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 7802 (Dec. 19, 2008) (codified at 45 C.F.R. Part 88).

[86] Maeve P. Carey, CONG. RSCH. SERV., IN11539, Presidential Transitions: Midnight Rulemaking, 1 (2020), https://crsreports.congress.gov/product/pdf/IN/IN11539 ("During the final months of recent Administrations, federal agencies often have increased the pace of their regulatory activities. This phenomenon is often referred to as midnight rulemaking. Because it can be difficult to change or eliminate rules after they have been finalized, issuing midnight rules can help ensure the legacy for an outgoing President—especially when an incoming Administration is of a different party.").

[87] See, e.g., Julie Rovner, Bush's Last-Minute 'Conscience' Rules Cause Furor, NPR (Dec. 18, 2008), https://www.npr.org/templates/story/story.php?storyId=98467651 (quoting the president of the Planned Parenthood Federation of America, Cecile Richards, "This is a very wide, broadly written regulation that upsets what has been a carefully established balance between respecting the religious view of providers, while also making sure that we're guaranteeing patients access to health care.").

[88] David G. Savage, 'Conscience' medical rule to take effect, L. A. TIMES (Dec. 19, 2008), https://www.latimes.com/archives/la-xpm-2008-dec-19-na-conscience19-story.html.

[89] John P. Elwood, U.S. Dep't of Justice, Off. 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), https://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision_0.pdf.

[90] Id. The grant that World Vision received, "like all grants under the JJDPA, is subject to 42 U.S.C. § 3789d(c), the antidiscrimination provision of the Omnibus Crime Control and Safe Streets Act of 1968," which includes a prohibition against religious discrimination in employment in connection with any programs or activity funded in whole or in part by the statute. Id. at 3 (citing 42 U.S.C. § 3789d(c)(1)); 34 U.S.C. § 11182(b) (incorporating the Omnibus Crime Control and Safe Streets Act into the JJDPA).

[91] 28 C.F.R. §31.502(3) (stating that that "[t]he funds under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.").

[92] Id. at 25. Though the OLC Memo only addressed the use of RFRA to override statutory religious antidiscrimination requirements, a former Bush DOJ official opined that it was a victory of religious rights over the "gay-equality" movement. Carl H. Esbeck, Religious Liberty and the Gay-Equality Movement, THE HILL (Oct. 30, 2007), https://thehill.com/opinion/op-ed/5922-religious-liberty-and-the-gay-equality-movement/.

[93] U.S. Dep't of Justice, Off. of Justice Programs, Certification Regarding Hiring Practices on the Basis of Religion, https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/certificationregardinghiring.pdf.

[94] Memo by Public Rights/Private Conscience Project, Law Professors' Analysis of a Need for Legal Guidance and Policy-Making on Religious Exemptions Raised by Federal Contractors, Columbia Univ. in the City of New York, School of Law, 9 (May 10, 2016) [hereinafter Memo by Public Rights/Private Conscience Project].

[95] Community Solutions Act of 2001, H.R. 7, 107th Cong. (2001), https://www.congress.gov/bill/107th-congress/house-bill/7/text/.

[96] Letter from Coalition of Religious, Civil Rights, Labor, Education, Health, and Advocacy Organizations, The Coalition Against Religious Discrimination: Charitable Choice Should be Severed from the Tax Provisions of H.R. 7 (Jun. 25, 2001), https://www.aclu.org/letter/coalition-letter-urging-movement-hr-7-without-charitable-choice-provisions.

[97] CONG. RSCH. SERV., RS20948, Charitable Choice Provisions of H.R. 7, 5 (2004), https://www.everycrsreport.com/files/20040614_RS20948_f2ee71970c6a3bb4df7a876eb8a5c10a8be6d1a0.pdf (describing the bill's limitation on the use of funds for sectarian activities); Laura Meckler, Programs Should have Grants, ASSOCIATED PRESS (Apr. 26, 2001). While H.R. 7's language required separation of religious activity in time and location from provision of the federally-funded social services, the language was sufficiently vague such that, for example, asking individuals to move into the next room at the end of the program to conduct the religious activity would be sufficient to meet its requirements. See Community Solutions Act of 2001, H.R. 7, Title II, § 1991, 107th Cong. (July 19, 2001), https://www.congress.gov/bill/107th-congress/house-bill/7/text/. Additionally, even after the passage of H.R. 7, there continued to be discussion about how to bring religious content into direct grant programs notwithstanding the requirement that the content be separate from the programs. Marvin Olasky, Rolling the Dice: How a bill becomes a law, part-one WORLD's exclusive look at the House debate over President Bush's faith-based initiative, WORLD (Aug. 4, 2001), https://wng.org/articles/rolling-the-dice-1617632521.

[98] Dana Milbank, Charity Cites Bush Help in Fight Against Hiring Gays, THE WASH. POST (July 10, 2001), https://www.washingtonpost.com/archive/politics/2001/07/10/charity-cites-bush-help-in-fight-against-hiring-gays/30e536a6-9535-4e1d-812f-180139055546/ (note that this article was written in 2001 and uses the term "gay" throughout, which is why the term is used above in the text of this report).

[99] Id.

[100] Dana Milbank, Bush Legislative Approach Failed in Faith Bill Battle, THE WASH. POST (Apr. 23, 2003), https://www.washingtonpost.com/archive/politics/2003/04/23/bush-legislative-approach-failed-in-faith-bill-battle/bccb0efd-cf97-4191-a3e5-322327482aa7/.

[101] Head Start reauthorizations—School Readiness Act of 2003, H.R. 2210, 108th Cong. (2003); School Readiness Act of 2005, H.R. 2123, 109th Cong. (2005). In 2007, there was an effort to include an exemption from Head Start's antidiscrimination requirements for religious providers in a reauthorization bill, but the final bill preserved Head Start's longstanding civil rights protections. Pub. L. 110-134. For the WIA reauthorization, see the Workforce Reinvestment and Adult Education Act of 2003, H.R. 1261, 108th Cong. (2003) and the Workforce Investment Act Amendments of 2005, H.R. 27,109th Cong. (2005).

[102] See CONG. RSCH. SERV., RL32736, Charitable Choice Rules and Faith-Based Organizations, 16 (2006), https://www.everycrsreport.com/files/20060712_RL32736_174d4404241a8d95052d0d5e76eac7a9a550a02d.pdf (describing how an amendment would have given religious grantees an exemption from WIA's "general rule barring providers from discriminating in their employee hiring practices on religious grounds"; this amendment was ultimately defeated); Id. at 17 (noting that the 2005 reauthorization for Head Start, H.R. 2123, included a provision "changing Head Start law to allow faith-based providers to discriminate in hiring based on religion"). See also People for the American Way, Government-Funded Religious Discrimination in Head Start Programs (Sept. 19, 2005), https://www.pfaw.org/press-releases/government-funded-religious-discrimination-in-head-start-programs/; H.R. Rep. No. 109-9, at 354-55 (2005), https://www.congress.gov/109/crpt/hrpt9/CRPT-109hrpt9.pdf.

[103] See e.g., Ben Penn, Weekly Notes: WIA reauthorization prognosis; Community colleges report, YOUTH TODAY (Nov. 16, 2010), https://youthtoday.org/2010/11/weekly-notes-wia-reauthorization-prognosis-community-colleges-report/ ("To Seth Turner, director of government affairs and public policy at Goodwill, the prospect of the re-introduction of an old Republican House bill gives him

flashbacks to the mid-2000s, when a single politically divisive provision held the bill back. Turner was referring to charitable choice, the issue of whether church recipients of WIA funds could discriminate in hiring practices based on religious affiliation, as an issue he thinks Republicans and Democrats will continue to butt heads over in 2011."); Rich Daly, Delay in Funding Federal Agency Puts Ambitious Agenda on Hold, PSYCHIATRY ONLINE (Oct 16, 2009), https://psychnews.psychiatryonline.org/doi/10.1176/pn.44.20.0004a (reporting "A major hurdle that [the Substance Abuse and Mental Health Services Administration's (SAMHSA)] reauthorization will face is a struggle over federal funding for faith-based treatment programs.").

[104] Working Toward Independence: The Administration's Plan to Build Upon the Success of Welfare Reform Hearing Before the H. Comm. On Education and the Workforce, 107th Cong., 33-34 (2002), https://www.govinfo.gov/content/pkg/CHRG-107hhrg82130/pdf/CHRG-107hhrg82130.pdf.

[105] Id. at 34.

[106] Pew Rsch. Ctr., John DiIulio Previews How Faith-Based Initiatives Would Change if Barack Obama is Elected (Sept. 23, 2008), https://www.pewresearch.org/religion/2008/09/23/john-diiulio-previews-how-faith-based-initiatives-would-change-if-barack-obama-is-elected-president/ (discussing candidate Obama's plan to "establish a new, 'reinvigorated' President's Council for Faith-Based and Neighborhood Partnerships").

[107] Barack H. Obama, Obama Delivers Speech on Faith in America, N.Y. TIMES (July 1, 2008), https://www.nytimes.com/2008/07/01/us/politics/01obama-text.html?pagewanted=all.

[108] Exec. Order No. 13498, § 1(b), 74 Fed. Reg. 6533 (Feb. 5, 2009), https://www.govinfo.gov/content/pkg/FR-2009-02-09/pdf/E9-2893.pdf.

[109] Id. § 2; 74 Fed. Reg. at 6534.

[110] President's Advisory Council on Faith-Based and Neighborhood Partnerships, A New Era of Partnerships: Report of Recommendations to the President, p. 119 (Mar. 2010), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf [hereinafter President's Advisory Council Report].

[111] Letter from Coalition Against Religious Discrimination (Feb. 4, 2010), https://www.aclu.org/letter/coalition-letter-president-obama-reform-faith-based-office.

[112] President's Advisory Council Report, supra note 110.

[113] Id. at 140–41. "[D]irect social service funding 'means that the government or an intermediate organization. . . selects the provider and purchases the needed services straight from the provider (e.g., via a contract or cooperative agreement.'" Id. at 133 (quoting 45 C.F.R. Part 260.34(1) (2010)). This "[d]irect aid includes federally-funded grants and contracts as well as the federally-funded subgrants and subcontracts that an intermediary awards to nongovernmental organizations." Id. "[I]ndirect social service funding is funding 'an organization receives as the result of the genuine and independent choice of a beneficiary' through a voucher, certificate, or similar mechanism." Id. (quoting 45 C.F.R. Part 96 n. 1 (2010)).

[114] Id. at 134 ("For example, if service providers are told clearly which existing programs involve direct and which involve indirect aid, providers that are unwilling to separate religious and secular components of their programming are likelier to self-select out of direct aid programs. This, in turn, would reduce the filing of grant applications that would either fail or, if granted, result in needless legal risk for both the provider and its government partner.").

[115] Interagency Working Group on Faith-Based and Other Neighborhood Partnerships, Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Apr. 2012), https://obamawhitehouse.archives.gov/sites/default/files/uploads/finalfaithbasedworkinggroupreport.pdf.

[116] Sarah Posner, Obama's faith-based failure, SALON (May 4, 2012), https://www.salon.com/2012/05/04/obamas_faith_based_failure/.

[117] Id.

[118] Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Partnerships with Faith-Based and other Neighborhood Organizations, 81 Fed. Reg. 19,355 (Apr. 4, 2016) (to be codified at 2 C.F.R. Part 3474, 3 C.F.R. Parts 75 and 76, 6 C.F.R. Part 19, 7 C.F.R., https://www.govinfo.gov/content/pkg/FR-2016-04-04/pdf/2016-07339.pdf [hereinafter Obama Final Rules].

[119] Id.

[120] See, e.g., 45 C.F.R. § 87.3(i) (2016).

[121] Some previous iterations of Charitable Choice, including as proposed in H.R. 7 in the 107th Congress, provided lesser religious anti-discrimination protections for beneficiaries in voucher programs than in directly funded programs. For voucher programs, H.R. 7 prohibited religious discrimination only in admissions and did not prohibit discrimination against beneficiaries "on the basis of religion, a religious belief, or a refusal to hold a religious belief" as it did in directly funded programs. See Community Solutions Act of 2001, H.R. 7, Title II, § 1991 (h)(1), (2), 107th Cong. (2001), https://www.congress.gov/bill/107th-congress/house-bill/7/text/ (compare the antidiscrimination provision for beneficiaries in grants and cooperative agreement programs to the provision for the beneficiaries in indirect aid and voucher programs) See also Obama Final Rules, supra note 118, at 19, 360, 19, 361 (noting that there was both "value in achieving uniformity" on the issue of beneficiary nondiscrimination provisions and "[t]he Agencies [] focused on the fact that the text of section 2(d) of the Executive order [13279] does not limit these nondiscrimination obligations to direct aid programs. It states that all organizations that receive Federal financial assistance under social service programs should be prohibited from discriminating against beneficiaries or prospective beneficiaries of the social service programs on the basis of religion or religious belief").

[122] To ensure that there is true beneficiary choice, a voucher program must be neutral towards religion. Thus, offering a secular option is needed to comply with Supreme Court precedent such as, Zelman v. Simmons-Harris, where the Court concluded that the voucher program could fund religious education because the program afforded "true private choice" which must permit "individuals to exercise genuine choice among options public and private, secular and religious." 536 U.S. 639, 662 (2002).

[123] Exec. Order No. 13672, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 Fed. Reg. 42971 (July 23, 2014).

[124] The White House, Off. Of the Press Sec'y, FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good For Business (July 21, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0; but see generally Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79324 (Dec. 9, 2020), https://www.govinfo.gov/content/pkg/FR-2020-12-09/pdf/2020-26418.pdf; see also Press Release, House Committee on Educ. and Labor, Chairman Scott Statement on Trump Administration's Final Rule to Weaken Anti-Discrimination Protections in Federal Contracting (Dec. 7, 2020), https://democrats-edworkforce.house.gov/media/press-releases/chairman-scott-statement-on-trump-administrations-final-rule-to-weaken-anti-discrimination-protections-in-federal-contracting.

[125] Editorial, Faith-Based Discrimination, N.Y. TIMES (Oct. 13, 2009), https://www.nytimes.com/2009/10/14/opinion/14wed4.html. See also Press Release, Office of Congressman Bobby Scott, Conyers, Scott, Nadler, and Cohen Ask DOJ to Have 2007 OLC RFRA Opinion Reconsidered (Feb. 23, 2016), https://bobbyscott.house.gov/media-center/press-releases/conyers-scott-nadler-and-cohen-ask-doj-have-2007-olc-rfra-opinion.

[126] Sarah Posner, Obama Administration Gives Free Pass for Faith-Based Groups to Discriminate, REL. DISPATCHES (Aug. 3, 2012), https://religiondispatches.org/obama-administration-gives-free-pass-for-faith-based-groups-to-discriminate/.

[127] C-Span, Civil Rights Division Oversight (July 26, 2012), https://www.c-span.org/video/?307263-1/civil-rights-division-oversight.

[128] Memo by Public Rights/Private Conscience Project, supra note 94.

[129] Id. at 6-7.

[130] Id. at 14.

[131] P.L. 113-4, 113th Cong. (Jan 22, 2013), https://www.congress.gov/113/bills/hr11/BILLS-113hr11ih.pdf.

[132] Lisa N. Sacco and Emily J. Hanson, CONG. RSCH. SERV., R45410, The Violence Against Women Act (VAWA): Historical Overview, Funding and Reauthorization (2019), https://www.crs.gov/Reports/R45410.

[133] U.S. Dep't of Justice, Off. of Justice Programs, Off. for Civ. Rights, Frequently Asked Questions, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013 (Apr. 9, 2014), https://www.justice.gov/archives/ovw/file/29386/download.

[134] Rob Stein, Obama administration replaces controversial 'conscience' regulation for health care workers, THE WASH. POST (Feb. 19, 2011), https://www.washingtonpost.com/national/health-conscience-rule-replaced/2011/02/18/AB7s9iH_story.html; Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (codified at 45 C.F.R. Part 98), https://www.govinfo.gov/content/pkg/FR-2011-02-23/pdf/2011-3993.pdf.

[135] Stein, supra note 134. See also 76 Fed. Reg. at 9975, 9973-74 (stating that the section of the 2008 Conscience Rule that contained definitions of terms used in the Federal health care provider conscience statutes have been removed).

[136] 76 Fed. Reg. at 9972.

[137] P.L. 111-148, 124 Stat. 119-1025, 111th Cong. (Mar. 23, 2010), https://www.congress.gov/111/plaws/publ148/PLAW-111publ148.pdf.

[138] Harris Meyer, How a Texas Court decision threatens Affordable Care Act protections, NPR (Sept. 14, 2022), https://www.npr.org/sections/health-shots/2022/09/14/1122789505/aca-preventive-health-screenings (summarizing a conservative group's objections to paying for HIV prevention drugs and the potential impact if the ACA's preventive services coverage mandate is partly struck down because of such objections).

[139] Amendment to Interim Final Rules: Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621 (Aug. 3, 2011), https://www.federalregister.gov/documents/2011/08/03/2011-19684/group-health-plans-and-health-insurance-issuers-relating-to-coverage-of-preventive-services-under.

[140] 573 U.S. 682 (2014).

[141] Id.

[142] Braidwood Management Inc., et al, v. Xavier Becerra, et al., No. 4:20-cv-00283-O (N.D. Tex. Sept. 7, 2022), https://storage.courtlistener.com/recap/gov.uscourts.txnd.330381/gov.uscourts.txnd.330381.92.0.pdf.

[143] 42 U.S.C. § 18116.

[144] Id. § 18116(a). The meaning of the text of Section 1557 has been a point of contention in litigation and rulemaking during several administrations.

[145] 20 U.S.C. § 1681.

[146] Id. § 1681(a)(3).

[147] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,380 (May. 18, 2016), https://www.govinfo.gov/content/pkg/FR-2016-05-18/pdf/2016-11458.pdf. However, the 2016 final rule did apply the regulatory exceptions or limitations for Title VI of the Civil Rights Act of 1964, the Age Discrimination Act, and Section 504 of the Rehabilitation Act of 1973 as these statutes and their regulatory limitations apply broadly to federal financial assistance across federal programs thus ensuring consistency in the application across programs. Id. at 31, 378.

[148] Id. at 31,379.

[149] Id. at 31,376.

[150] Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 689 (N.D. Tex. 2016) ("Plaintiffs also claim the Rule's failure to incorporate Title IX's religious exemptions renders the Rule arbitrary, capricious, and contrary to law under the APA.").

[151] Id. at 691; Katie Keith, Judge Blocks Enforcement Against Franciscan Alliance Plaintiffs of Prohibition on Discrimination Based On Gender Identity, Pregnancy Termination, HEALTH AFF. (Aug. 11, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210811.110777/full (summarizing the decision issued by Judge Reed O'Connor, a federal judge in Texas; this case "is just one of several rulings from Judge O'Connor on Section 1557 of the ACA").

[152] Penn, supra note 103.

[153] Pub. L. No. 113-128 (2014).

[154] H.R. 803, 113th Cong., 160 Cong. Rec. H5971 (July 9, 2014), https://www.govinfo.gov/content/pkg/CREC-2014-07-09/pdf/CREC-2014-07-09-house.pdf.

[155] H.R. 5272, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/house-bill/5272.

[156] Id.

[157] Letter from Sen. Blumenthal, et. al. to Sen. McCain, et. al. (Oct. 25, 2016), https://www.blumenthal.senate.gov/imo/media/doc/2016.10.25%20-%20NDAA%20Section%201094.pdf.

[158] National Defense Authorization Act, H.R. 4909, Section 1094, 114th Cong., p. 458-59 (2016), https://www.congress.gov/114/cprt/HPRT99991/CPRT-114HPRT99991.pdf.

[159] Christine Grimaldi, Codified Discrimination Defeated in Congress—For Now, REWIRE NEWS GROUP (Nov. 30, 2016), https://rewirenewsgroup.com/2016/11/30/codified-discrimination-defeated-congress-for-now/.

[160] Policies and Procedures of the U.S. Department of Health and Human Services Before H. Comm. On Education and the Workforce, 112th Cong., 47 (2011), https://www.govinfo.gov/content/pkg/CHRG-112hhrg65963/pdf/CHRG-112hhrg65963.pdf.

[161] Id.

[162] Id.

[163] Id.

[164] See, e.g., supra Section III.B.1 (discussing how the Obama Administration improved protections for beneficiaries in federally funded social service programs but maintained the overall Charitable Choice framework and the Bush-era policy that faith-based grantees could engage in employment discrimination based on religion).

[165] Email from Douglas Steiner, HHS Staffer, to Ilana Brunner, Legislative Director, Office of Congressman Robert C. "Bobby" Scott (May 24, 2011, 3:14 PM EST) (on file).

[166] Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 4, 2017), https://www.govinfo.gov/content/pkg/FR-2017-05-09/pdf/2017-09574.pdf.

[167] Id. §§ 3, 4; 82 Fed. Reg. at 21,675; see also Sharita Gruberg et al., Religious Liberty for a Select Few: The Justice Department is Promoting Discrimination Across the Federal Government, COUNCIL FOR AM. PROG. (Apr. 3, 2018), https://www.americanprogress.org/article/religious-liberty-select/ ("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.").

[168] Specifically, E.O. 13831 amended President Bush's E.O. 13279 revoking the additions made by the President Obama in E.O. 13559 to require that each agency offer the following protections for beneficiaries: (1) permit a beneficiary access to an alternative provider if they object to the religious character of the organization; (2) establish polices to ensure that timely referrals are made; and (3) require that each beneficiary receive a notice of protections, including antidiscrimination requirements, prior to receiving services.

[169] Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82,037 (Dec. 17, 2020) (codified at 2 C.F.R. 3474, 34 C.F.R. Parts 75 and 76, 6 C.F.R. Part 19, 7 C.F.R. Part 16, 22 C.F.R. Part 16, 22 C.F.R. Part 205, 24 C.F.R. Parts 5, 92, and 578, 28 C.F.R. Part 38, 29 C.F.R. Part 2, 38 C.F.R. Parts 50, 61, and 62, 45 C.F.R. Parts 87 and 1050).

[170] In federally-funded voucher programs, several of the final rules permit faith-based organizations to require beneficiaries to attend religious activities. See, e.g., 2 C.F.R. § 3474.15(f); 34 C.F.R. § 75.52(e); 34 C.F.R. § 76.52(e); 34 C.F.R. § 87.3(d); 45 C.F.R. § 87.3(d); 29 C.F.R. § 2.33(a); and 29 C.F.R. § 38.5(c).

[171] 2 C.F.R. § 3474.15(b)(3); 34 C.F.R. §§75.52(a)(3), 76.52(a)(3).

[172] 2 C.F.R. § 3474.15(g); 34 C.F.R. §§ 75.52(g); 76.52(g); and 45 C.F.R. § 87.3(f).

[173] Under the final rules for ED and HHS, the prohibition against beneficiary discrimination does not apply to voucher programs, only to direct grant programs. 2 C.F.R. §§ 3474.15(a) and (f); 34 C.F.R. §§ 75.52(c)(3)(iii) and (e); 34 C.F.R. §§ 76.52(c)(3)(iii) and (e); 45 C.F.R. §§ 87.1(d) and 87.3(d). See also Exec. Order No. 13279, § 2(d).

[174] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79,324 (Dec. 9, 2020), https://www.govinfo.gov/content/pkg/FR-2020-12-09/pdf/2020-26418.pdf.

[175] Id. at 79,353.

[176] Id.

[177] Id. at 79,331-79,341.

[178] Letter from Coalition of Civil Rights Organizations to the U.S. Equal Emp. Opp. Comm'n, Re: RIN 3046-ZA01, Comments in Response to EEOC' s Proposed Updated Compliance Manual on Religious Discrimination (Dec. 17, 2020), https://www.regulations.gov/comment/EEOC-2020-0007-0065.

[179] 85 Fed. Reg. at 79, 332-33. The legislative history on the religious exemption is clear that it was intended to have a narrow construction. "Congress's conception of the scope of Section 702 was not a broad one. All [Members] assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm." EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610, 613 (9th Cir. 1988) (finding that "Congress did not intend 702's exemption for religious corporations to shield corporations such as Townley."). In fact, legislators at the time of the 1964 consideration of the Civil Rights Act viewed the bill's exemption language for "religious corporation, association or society" so narrowly that they adopted an amendment to make it clear that religious education institutions would also be exempt from the bill's prohibition on religious discrimination. Id. at 617. Case law is supportive of this narrow construction of the exemption, and courts have specifically rejected a religious for-profit company from qualifying for the exemption and several non-profits from qualifying for the exemption as the non-profit organizations were not sufficiently religious enough. See Spencer v. World Vision, Inc., 633 F.3d 723, 729 (9th Cir. 2011)

("[T]here is no denying that we have held that section 2000e-1 should be construed 'narrowly.'"); see also EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993); Fike v. United Methodist Church Children's Home of Virginia, Inc., 547 F. Supp. 286 (E.D. Va. 1982).

[180] 85 Fed. Reg. at 79,349-54.

[181] Guidance Regarding Department of Labor Grants, 86 Fed. Reg. 4126 (Jan. 15, 2021), https://www.federalregister.gov/documents/2021/01/15/2021-00853/guidance-regarding-department-of-labor-grants.

[182] Id. at 4128 ("If the Assistant Secretary or relevant Agency Head takes no action by the close of the 14-calendar day period, the certification will be deemed approved.").

[183] U.S. Dep't of Labor, The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance, https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act/guidance (last visited Jan. 5, 2023). See also U.S. Gov't Accountability Off., GAO-18-164, Faith-Based Grantees Few Have Sought Exemptions from Nondiscrimination Laws Related to Religious-Based Hiring, GAO Highlights (2017), https://www.gao.gov/assets/gao-18-164.pdf [hereinafter GAO Faith-Based Grantee Report] (This report, which was published prior to the Trump Administration's implementation of its DOL RFRA policy, found that "DOJ, DOL, and HHS have policies requiring grantees to submit their exemption self-certification, but only DOL reviews exemption requests and either approves them or provides a reason for denial.").

[184] 29 U.S.C. § 203 et. seq., as amended., 52 Stat. 1060-1070.

[185] See e.g., U.S. Dep't of Labor, Handy Reference Guide to the Fair Labor Standards Act https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa (last visited Jan. 5, 2023).

[186] U.S. Dep't of Labor, Final Rulings and Opinion Letters, https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance (last visited Jan. 5, 2023).

[187] U.S. Dep't of Labor, Wage and Hour Division, Opinion Letter, FLSA2021-2, 1 (Jan. 8, 2021), https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_08_02_FLSA.pdf [hereinafter WHD Opinion Letter].

[188] Valerie C. Brannon, CONG. RSCH. SERV., LSB10455, UPDATE: Our Lady of Guadalupe and the Ministerial Exception to Antidiscrimination Laws, 1, 2 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10455.

[189] WHD Opinion Letter, supra note 186, at 3.

[190] Id. at 2.

[191] Id.

[192] The analysis from WHD's opinion letter has other implications because conservative groups and law firms are counseling religious employers on how to ensure their employees are covered as ministers and courts are poised to continue the expansion of what was once a narrowly tailored exception. Bryce Covert, The Right's Religious Liberty Agenda is on a Collision Course with Labor Law, THE NATION (Oct. 17, 2022), https://www.thenation.com/article/society/religious-employers-discrimination-supreme-court/. Employees covered by the ministerial exception have little to no recourse against religious employers that violate their civil rights, however that issue is beyond the scope of this report. Id.

[193] Direct Grant Programs, State Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic Serving Institutions Program, Strengthening Institutions Program, and Strengthening Historically Black Colleges and Universities Program, 85 Fed. Reg. 59916 (Sept. 23, 2020) (codified at 34 C.F.R. Parts 606, 607, 608, and 609), https://www.govinfo.gov/content/pkg/FR-2020-09-23/pdf/2020-20152.pdf [hereinafter ED 2020 Non-Discrimination Grant Program].

[194] Educational institutions controlled by religious organizations are not bound by Title IX when compliance would "not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3).

[195] U.S. Dep't of Educ., Memorandum: Title IX Religious Exemption Procedures and Instructions for Investigating Complaints at Institutions with Religious Exemptions (Oct. 11, 1989), https://www2.ed.gov/about/offices/list/ocr/docs/smith-memo-19891011.pdf ("The regulation does not require that a religious institution submit a written claim of exemption, nor is an institution's exempt status dependent upon its submission of a written statement.").

[196] 20 U.S.C. § 1681(a)(3).

[197] U.S. Dep't of Agric., Nat'l Inst. of Food and Agric., Title IX of the Education Amendments Act of 1972 (Aug. 3, 2022), https://www.nifa.usda.gov/civil-rights/title-ix-education-amendments-act-1972.

[198] Jeff Byers, Trump creates HHS Conscience and Religious Freedom unit, sparking protest, HEALTHCARE DIVE (Jan. 18, 2018), https://www.healthcaredive.com/news/hhs-religious-freedom-division/515067/.

[199] Sharita Gruberg, HHS Budget Would Fund Discrimination at Expense of Civil Rights Enforcement, , CTR FOR AM. PROG. (Apr. 25, 2019), https://www.americanprogress.org/article/hhs-budget-fund-discrimination-expense-civil-rights-enforcement/.

[200] Press Release, U.S. Dep't of Health and Human Serv., Admin. for Children & Families, National Data Shows Number of Children in Foster Care Decreases for the Third Consecutive Year (Nov. 19, 2021), https://www.acf.hhs.gov/media/press/2021/national-data-shows-number-children-foster-care-decreases-third-consecutive-year.

[201] Laura Meckler, Trump administration grants waiver to agency that works only with Christian families, THE WASH. POST (Jan. 23, 2019), https://www.washingtonpost.com/local/education/trump-administration-grants-waiver-to-agency-that-works-only-with-christian-families/2019/01/23/5beafed0-1f30-11e9-8b59-0a28f2191131_story.html.

[202] Health and Human Services Grants Regulation, 86 Fed. Reg. 2257 (Jan. 12, 2021) (codified at 45 C.F.R. Part 75).

[203] Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020) (to be codified at 42 C.F.R. Parts 438, 440, and 460; 45 C.F.R. Parts 86, 92, 147, 155, and 156).

[204] Id.

[205] Whitman-Walker Clinic v. HHS, Civil Action No. 20-1630 (JEB) (D.D.C. 2020), https://www.hhs.gov/sites/default/files/whitman-walker-clinic-2020-9-2-memorandum-opinion.pdf; Whitman-Walker Clinic, Inc. et al., v. HHS, 485 F. Supp. 3d 1 (Sept. 2, 2020).

[206] 485 F. Supp. 3d at 43-46 (concluding that HHS did not consider the effect of "a blanket religious exemption on the ability for individuals to access care on a prompt and nondiscriminatory basis").

[207] 45 C.F.R. § 92.6(b) (2020).

[208] Exec. Order No. 13798, § 3; Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 CFR Part 88).

[209] Alison Kodjak, New Trump Rule Protects Health Care Workers Who Refuse Care for Religious Reasons, NPR (May 2, 2019), https://www.npr.org/sections/health-shots/2019/05/02/688260025/new-trump-rule-protects-health-care-workers-who-refuse-care-for-religious-reason ("The rule . . . allows health care workers who have a 'religious or conscience' objection to medical procedures such as birth control or sterilization to refuse to participate in those procedures, even in a tangential way. This represents an expansion of existing protections."). Rob Boston, Trump's Denial of Care Rule Risks People's Lives – That's Why AU is Challenging it in Court, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (May 29, 2019), https://www.au.org/the-latest/articles/trumps-denial-of-care-rule-risks-peoples-lives-thats-why-au-is-challenging/ ("Under this rule, ... [j]ust about anyone connected with the health care industry, from doctors and nurses to ambulance drivers and orderlies, could believe they have the right to deny care.").

[210] Washington v. Azar, 426 F. Supp. 3d 704 (E.D. Wash. 2019), appeal pending, No. 20-35044 (9th Cir.); City & Cnty. Of San Francisco v. Azar, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), appeal pending, Nos. 20-15398 et al. (9th Cir.); New York et al. v. HHS et al., 414 F. Supp. 3d 475 (S.D.N.Y. 2019). Although complaints about conscience rights violations have generally averaged one per year, during the litigation in the New Yor district court, HHS argued that the increase in conscience complaints justified the rulemaking—it alleged receiving 34 such complaints between November 2016 and January 2018, and 343 such complaints during fiscal year 2018. New York, 414 F. Supp. 3d at 542, 543. The federal district court found, however, that the increase in complaints HHS cited was "demonstrably false"; only a mere 6% of such complaints were "potentially related" to religious based objections to delivering care. Id. at 541-542.

[211] See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (codified at 26 C.F.R. Part 54, 29 C.F.R. Part 2590, and 45 C.F.R. Part 147); Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (codified at 26 C.F.R. Part 54, 29 C.F.R. Part 2590, and 45 C.F.R. Part 147).

[212] 83 Fed. Reg. at 57,544.

[213] 140 S. Ct. 2367, 591 U.S. ___ (2020).

[214] Id. at 2381.

[215] U.S. Dep't of Justice, Memorandum from U.S. Attorney Jeff Sessions to All Executive Departments and Agencies, Federal Law Protections for Religious Liberty (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download [hereinafter 2017 DOJ Guidance].

[216] Sharita Gruberg et al., Religious Liberty for a Select Few, Center for American Progress, CTR FOR AM. PROG., 1 (2018), https://www.americanprogress.org/article/religious-liberty-select/.

[217] 2017 DOJ Guidance, supra note 215.

[218] Gruberg, supra note 216.

[219] Matt Zapotosky and Sarah Pulliam Bailey, Civil liberties groups decry Sessions's guidance on religious freedom, THE WASH. POST (Oct. 7, 2017), https://www.washingtonpost.com/world/national-security/civil-liberties-groups-decry-sessionss-guidance-on-religious-freedom/2017/10/06/cd5cfcde-aaa7-11e7-92d1-58c702d2d975_story.html.

[220] U.S. Dep't of Justice, Off. of Justice Programs, Certification Regarding Hiring Practices on the Basis of Religion (2018), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/certificationregardinghiring.pdf.

[221] Id.

[222] GAO Faith-Based Grantee Report, supra note 183, at GAO Highlights.

[223] H.R. 1450, Do No Harm Act, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1450.

[224] S. 593, Do No Harm Act, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/593.

[225] Do No Harm: Examining the Misapplication of the Religious Freedom Restoration Act, Hearing Before the H. Comm. on Educ. & Labor, 116th Cong. (June 25, 2019), https://www.congress.gov/event/116th-congress/house-event/109695.

[226] Exec. Order No. 14,015, 86 Fed. Reg. 10,007 (Feb. 18, 2021).

[227] Id. § 2.

[228] Id.

[229] Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, Partnerships with Faith-Based and Neighborhood Organizations, Off. of Mgmt. and Budget, Off. of Info. and Regul. Affairs (Jan. 4, 2023) https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=0991-AC31.

[230] Press Release, U.S. Dep't of Health and Human Serv., HHS Takes Action to Prevent Discrimination and Strengthen Civil Rights (Nov. 18, 2021), https://www.acf.hhs.gov/media/press/2021/hhs-takes-action-prevent-discrimination-and-strengthen-civil-rights [hereinafter HHS Press Release]. On May 12, 2021, Chairman Robert C. "Bobby" Scott of the House Committee on Education and Labor wrote to Secretary Becerra requesting HHS to withdraw these RFRA waivers. Letter from Chairman Robert C. "Bobby" Scott, H. Comm. on Educ. and Labor to Secretary Xavier Becerra, U.S. Dep't of Health and Human Servs., 3 (May 12, 2021) (on file).

[231] See, e.g., Majority Staff of Comm. on Ways and Means, 116th Cong., Children at Risk: The Trump Administration's Waiver of Foster Care Nondiscrimination Requirements, 12-14 (Aug. 19, 2020) (finding that the HHS waiver allowed a South Carolina foster program to discriminate against potential foster parents based on their status as a religious minority or sexual minority).

[232] HHS Press Release, supra note 230.

[233] Examining the Policies and Priorities of the U.S. Department of Health and Human Services Before the H. Comm. on Education and Labor, 117th Cong. (2022), https://democrats-edworkforce.house.gov/hearings/examining-the-policies-and-priorities-of-the-us-department-of-health-and-human-services-labor.

[234] Id.

[235] Id.

[236] Id.

[237] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022) (to be codified 42 C.F.R. Parts 438, 440, 457, and 460; 45 C.F.R. Parts 80, 84, 86, 91,92, 147, 155, and 156.).

[238] Id. at 47,831.

[239] Id. at 47,839-41, 47,885.

[240] Id. at 47,886.

[241] Franciscan Alliance, Inc., et al. v. Becerra, et al., v. ACLU of Texas et al., No. 7:16-cv-00108-O (N.D. Tex. 2021). The case, initially filed in 2016, was redesignated from Burwell to Becerra to reflect the new Administration. In August 2022, the Fifth Circuit affirmed the district court's injunction against HHS. Franciscan Alliance Inc., et al. v. Becerra, et al. v. ACLU of Texas et al., No. 21-11174 (5th Cir., 2022), https://www.ca5.uscourts.gov/opinions/pub/21/21-11174-CV0.pdf.

[242] Challenges to Trump Administration "Denial of Care" Rule, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (Apr. 28, 2022), https://www.au.org/how-we-protect-religious-freedom/legal-cases/cases/challenges-to-trump-administration-denial-of-care-rule/#. See also Washington v. Azar, 426 F. Supp. 3d 704 (E.D. Wash. 2019), appeal pending, No. 20-35044 (9th Cir.); City & Cnty. Of San Francisco v. Azar, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), appeal pending, Nos. 20-15398 et al. (9th Cir.); New York et al. v. HHS et al., 414 F. Supp. 3d 475 (S.D.N.Y. 2019).

[243] See, e.g., Natasha Ishak, State-level Republicans are going all in on extreme anti-trans, anti-abortion laws, VOX (Mar. 20, 2022), https://www.vox.com/2022/3/20/22987539/anti-trans-anti-abortion-laws-texas-florida-idaho; Victoria Hansen, S.C. law lets health care providers refuse nonemergency care based on beliefs, NPR (June 21, 2022), https://www.npr.org/2022/06/21/1106448411/south-carolina-law-health-care-doctors-refuse-nonemergency-care-beliefs.

[244] Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820 (Jan. 5, 2023), https://www.federalregister.gov/documents/2023/01/05/2022-28505/safeguarding-the-rights-of-conscience-as-protected-by-federal-statutes.

[245] Id. at 823, 824.

[246] Id. at 825.

[247] Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 86 Fed. Reg. 62,115 (Nov. 9, 2021) (to be codified at 41 C.F.R. Part 60-1).

[248] Id. at 62,115-16.

[249] Id. at 62,117.

[250] Id. at 62,118, 62,121.

[251] Id. at 62,121.

[252] ED 2020 Non-Discrimination Grant Program, supra note 193.

[253] Complaint, Secular Student Alliance et al. v. U.S. Dep't of Educ., No. 1:21-cv-00169 (D.D.C. Jan. 19, 2021), https://www.atheists.org/wp-content/uploads/2021/01/SSA-v.-U.S.-Dept-of-Educ.-Complaint.pdf; Kevin Bolling, Secular Student Alliance v. U.S. Dep't of Educ., SECULAR STUDENT ALLIANCE (Aug. 19, 2021), https://secularstudents.org/secular-student-alliance-v-u-s-department-of-education/.

[254] Michelle Asha Cooper, Ph. D., Update on the Free Inquiry Rule (Aug. 19, 2021), https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/. See also Hansen, supra note 243.

[255] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022) (to be codified at 34 C.F.R. Pt. 106), https://federalregister.gov/d/2022-13734.

[256] Id.

[257] See e.g., Letter to U.S. Dep't of Educ. from Chairman Robert C. "Bobby" Scott, House of Rep., Comm. on Educ. and Labor, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (Sept. 12, 2022), https://www.regulations.gov/comment/ED-2021-OCR-0166-234400.

[258] Id.

[259] U.S. Dep't of Agric., Food and Nutrition Serv., Application of Bostock v. Clayton County to Program Discrimination Complaint Processing – Policy Update, 1 (May 5, 2022), https://fns-prod.azureedge.us/sites/default/files/resource-files/crd-01-2022.pdf [hereinafter FNS Bostock Guidance].

[260] Id.

[261] Id. at 2. See also Bostock v. Clayton Cty., 140 S. Ct. 1731, 590 U.S. _ (2020).

[262] FNS Bostock Guidance, supra note 259, at 2.

[263] Teny Sahakian, Biden admin holding school lunch money 'hostage' to force transgender policies, activist parent says, FOX NEWS (June 3, 2022), https://www.foxnews.com/politics/biden-admin-holding-school-lunch-money-hostage-force-transgender-policies. Many of these entities are already required to comply with Title IX requirements because they receive other federal, educational funding outside of the receipt of nutrition funding. Nutrition funding applies to a broader range of entities which could include day care centers and adult feeding centers.

[264] U.S. Dep't of Agric., Off. of the Asst. Sec'y for Civil Rights, Religious Exemption Under Title IX of the Education Amendments of 1972 (Aug. 12, 2022), https://fns-prod.azureedge.us/sites/default/files/resource-files/religious-exemption-clarification.pdf.

[265] Complaint, Faith Action Ministry Alliance, Inc. d/b/a Grant Park Christian Academy v. Nikki Fried, et al., No. 8:22-cv-01696 (M.D. Fla. July 27, 2022), https://adflegal.org/sites/default/files/2022-07/Grant-Park-Christian-Academy-v-Fried-2022-07-27-Complaint.pdf.

[266] Brooke Migdon, USDA say religious schools will be granted automatic Title IX exemption, THE HILL (Aug. 15, 2022), https://thehill.com/changing-america/respect/equality/3603091-usda-says-religious-schools-will-be-granted-automatic-title-ix-exemption/; Complaint, Tenn.et al. v. U.S. Dep 't of Agric. et al., No. 3:22-cv-00257 (E.D. Tenn. July 26, 2022), https://content.govdelivery.com/attachments/INAG/2022/07/26/file_attachments/2228235/Lawsuit%20against%20USDA.pdf.

[267] Id.

[268] Tenn.et al. v. U.S. Dep 't of Agric. et al., No. 3:22-cv-00257, Docket No. 71 (E.D. Tenn. Dec. 5, 2022).

[269] Orion Rummler, Block on Biden's Title IX rule is part of broader attack on key LGBTQ+ rights case, experts say, 19TH NEWS (Aug. 1, 2022), https://19thnews.org/2022/08/block-title-ix-rules-lgbtq-case-bostock-clayton-county/.

[270] Do No Harm Act, H.R. 1378, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1378.

[271] Do No Harm Act, S. 2752, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/2752.

[272] Lifting Local Communities Act, S. 4735, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/4735/actions. Additionally, on May 13, 2022, in the 117th Congress, the House passed H.R. 5129, the Community Services Block Grant Modernization Act of 2022, by a bipartisan vote of 246 Yeas and 169 Nays. H.R. 5129, the Community Services Block Grant Modernization Act of 2022, 117th Cong. (as passed by House, May 13, 2022), https://www.congress.gov/bill/117th-congress/house-bill/5129. Congress last reauthorized the Community Services Block Grant (CSBG) program in 1998 when Charitable Choice was added to its statute. 41 U.S.C. § 9920. H.R. 5129, as introduced and passed by the House, removed CSBG's Charitable Choice provision, which did not include any beneficiary antidiscrimination protections. However, existing HHS regulations continue to apply Charitable Choice rules to CSBG and offer better protections for beneficiaries against religious discrimination than the Charitable Choice provision in CSBG's statute. 45 C.F.R. § Pt. 1050. 45 C.F.R. § Pt. 87. 42 U.S.C. § 9920.

[273] The Lifting Local Communities Act, Off. of Sen. Marco Rubio (Aug. 2, 2022), https://www.rubio.senate.gov/public/_cache/files/3967e5c5-44db-44b1-920c-de221ec0af88/86943D32E503E4AB6CE2244EE03EAA05.rubio-lifting-local-communities-act-one-pager.pdf.

[274] Lifting Local Communities Act, S. 4735, 117th Cong. § Sec. 1990A(c)(2)(D) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/4735/actions.

[275] As noted throughout this report, federal policymakers should also be aware of, and respond to, judicial decisions that advance religious liberty interests at the expense of civil and legal rights.

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