Testimony

Before the Committee on Education and Labor

on

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

by

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[7] 42 U.S.C. § 2000bb *et seq.*

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

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

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

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

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

History of the Religious Freedom Restoration Act

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

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

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

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

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

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

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

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

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[12] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 244 (1994).

[13] *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong., 2d Sess. 1 (1992) (statement of Rep. Edwards, Subcomm. Chairman).

[14] *Religious Freedom Restoration Act of 1991: Hearings on S. 2969 Before the Subcomm. on the Judiciary*, 102nd Cong. 2 (1992) (statement of Sen. Kennedy).

[15] *H. Comm. on the Judiciary, Religious Freedom Restoration Act of 1993*, H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993).

[16] 521 U.S. 507 (1997).

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

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

RFRA's Protections for Diverse Religious Minorities

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

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

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

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

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

For example, because of RFRA's balancing test:

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

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

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

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

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

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

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

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

Finally, practically no RFRA claims involved LGBT individuals:

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

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

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

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

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

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

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

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

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

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

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

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

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

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39 Letter from Steven Wagner, Principal Deputy Assistant Secretary, U.S. Dep't of Health and Human Services Admin. for Children and Families to South Carolina Gov. Henry McMaster (Jan. 23, 2019) *available at* https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf.
40 *Id.* at 3.
41 Press Release, U.S. Dep't of Education, U.S. Department of Education Finds ESEA Restriction on Religious Organizations Unconstitutional, Will No Longer Enforce, (Mar. 11, 2019) *available at* https://www.ed.gov/news/press-releases/us-department-education-finds-esea-restriction-religious-organizations-unconstitutional-will-no-longer-enforce.
42 The Dep't of Education's announcement was heavily influenced by the U.S. Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017), which held that eligible recipients of government funding cannot be disqualified because of their religious identity.
43 Press Release, U.S. Dep't of Health and Human Services, HHS Announces Final Conscience Rule Protecting Health Care Entities and Individuals, (May 2, 2019) *available at* https://www.hhs.gov/about/news/2019/05/02/hhs-announces-final-conscience-rule-protecting-health-care-entities-and-individuals.html.
44 Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23225 (May 21, 2019).

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

Gutting RFRA Will Harm Religious Minorities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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