Statement for the Record of
Americans United for Separation of Church and State
Submitted to the House Committee on Oversight and Reform for
the hearing on "The Administration's Religious Liberty Assault on LGBT Rights"
February 27, 2020

Chairwoman Maloney, Ranking Member Jordan, and members of the Committee, thank you for the opportunity to submit a statement for the record for the hearing on "The Administration's Religious Liberty Assault on LGBT Rights." With a national network of more than 300,000 supporters, Americans United for Separation of Church and State has been safeguarding our American value of religious freedom for all people since 1947.

Our country was founded on the principle of religious freedom, a tradition and ideal that remains central to who we are today. The U.S. Constitution is clear: religious freedom is a fundamental right and the separation of church and state is what safeguards that freedom for all people. This means that everyone should be able to practice their religion or no religion at all, so long as they do not harm others.

Religious freedom is meant to be a shield that protects; it shouldn't be used as a sword to discriminate. Unfortunately, the Trump administration is misusing religious freedom to undermine the rights of others, particularly people in the LGBTQ community. It is using religious freedom as a guise to exclude LGBTQ people from government programs and services, taxpayer-funded jobs, and vital healthcare services.

The Misuse of the Religious Freedom Restoration Act

At the heart of the administration's misuse of religious freedom is its abuse of the Religious Freedom Restoration Act (RFRA).[1]

The History of RFRA

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

In 1990, in an opinion written by Justice Scalia, the Supreme Court ruled in *Employment Division v. Smith*[2] that neutral and generally applicable laws do not violate the Free Exercise Clause of the First Amendment of the U.S. Constitution—even if they result in a substantial burden on religious exercise. People from many faiths and denominations, legal experts, and civil liberties advocates across the political spectrum saw this as a drastic change that would lessen constitutional protection for the free exercise of religion, particularly for people who belong to minority faiths. Americans United joined this broad coalition to advocate for a congressional response to the *Smith* decision, and in 1993, Congress passed RFRA.

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[1] 42 U.S.C. § 2000bb *et seq.*
[2] 494 U.S. 872, 890 (1990).

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

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

Soon after enactment of RFRA, however, commercial landlords with religious objections to cohabitation outside of marriage argued that the RFRA standard granted them the right to ignore housing discrimination laws and refuse housing to unmarried couples.[3] This prompted concern by some of RFRA's leading proponents, including Americans United, that the federal law could be used as a defense to thwart civil rights claims. In fact, after the Supreme Court held in 1997 that RFRA could not apply to the states,[4] Congress attempted to pass a new bill[5] that would have applied the RFRA standard to the states, but the bill could not pass because of concerns that it would be used to justify discrimination.

Efforts to use RFRA to cause harm did not stop with the landlord cases. RFRA was soon used to refuse counseling to patients in same-sex relationships;[6] avoid ethics investigations;[7] obstruct criminal investigations;[8] shield religious organizations from bankruptcy and financial laws, which effectively denied compensation to victims of sexual abuse;[9] and thwart access to health

[3] *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000); *Smith v. Fair Emp't. & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Ala. 1994); *Attorney Gen. v. Desilets*, 636 N.E. 2d 233 (Mass. 1994).
[4] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[5] Religious Liberty Protection Act, S. 2081 (2000) & H.R. 1691 (1999), 106th Congress; S. 2148 & H.R. 4019, 105th Congress (1998).
[6] *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012) (arguing that offering counseling to individuals in a same-sex relationship burdened a counselor's religious exercise).
[7] *Doe v. La. Psychiatric Med. Ass'n*, No. 96-30232, 1996 WL 670414 (5th Cir. Oct. 28, 1996) (using federal RFRA to challenge an ethics investigation by the Louisiana Psychiatric Medical Association).
[8] *In re Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (claiming that RFRA prohibits the government from compelling a grand jury witness to testify against a rabbi); *United States v. Town of Colorado City*, No. 3:12-CV-8123-HRH, 2014 WL 5465104 (D. Ariz. Oct. 28, 2014) (arguing that RFRA prohibited the Department of Justice from compelling witness testimony in a civil-rights lawsuit against city).
[9] *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015) (arguing that RFRA should shield the archdiocese from bankruptcy laws that would make more funds available to pay victims of sexual abuse).

clinics.[10] In states with RFRAs that mirror the federal RFRA, the statutes have been invoked to avoid licensing requirements[11] and resist lawsuits over sexual abuse by clergy members.[12]

Then in 2014, the Supreme Court, in *Burwell v. Hobby Lobby Stores*,[13] held that a large, closely held, for-profit corporation could use RFRA to deny its employees benefits that are guaranteed by law. In the case, Hobby Lobby, a craft chain store that employs more than 37,500 people,[14] argued that the religion of the company's owners prohibited it from providing its employees with health insurance that covers FDA-approved methods of contraception without cost sharing, which was required under the Affordable Care Act. In an unprecedented ruling, the Court, for the first time, used RFRA to grant a for-profit corporation a religious exemption, allowing Hobby Lobby's owners to impose their religious beliefs on its company's employees. The opinion resulted in a RFRA test that is unbalanced: it is now easier to demonstrate a substantial burden on religious exercise and more difficult for the government to prove a law is the least restrictive means.

Unfortunately, attempts to use religion to undermine civil rights are nothing new. In *Newman v. Piggie Park Enterprises, Inc.*,[15] a business owner refusing to serve African Americans argued his religious beliefs "compel[led] him to oppose any integration of the races"[16] and that the Free Exercise Clause gave him a right to violate Title II of the Civil Rights Act.[17] The Supreme Court rejected his claim as "patently frivolous."[18] And in *Bob Jones University v. United States*[19] a university sought to use religion to justify its racially discriminatory admission policies. The Court rejected this argument and upheld the nondiscrimination requirements that apply to tax-exempt organizations, explaining that the government's interest in preventing the harm caused by race discrimination in education "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[20]

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

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[10] *E.g.*, *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (challenging the Freedom of Access to Clinic Entrances Act under RFRA).
[11] *Youngblood v. Fla. Dep't of Health*, No. 06-11523, 2007 WL 914239 (11th Cir. Mar. 28, 2007) (claiming the health inspection of a school operated by a church violated Florida RFRA); *McGlade v. State*, 982 So. 2d 736 (Fla. Dist. Ct. App. 2008) (claiming that a law requiring midwifery license burdened religious exercise).
[12] *E.g.*, *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHDX07CV125036425S, 2013 WL 3871430 (Conn. Super. Ct. July 8, 2013) (arguing that the Connecticut RFRA precludes claims against the church for negligent supervision and retention of an alleged abuser).
[13] 573 U.S. 682 (2014).
[14] *Our Story,* Hobby Lobby, https://bit.ly/2X4680M.
[15] 390 U.S. 400 (1968) (per curiam).
[16] *Newman v. Piggie Park Enters., Inc*., 256 F. Supp. 941, 944 (D.S.C. 1966), *aff'd*, 390 U.S. 400 (1968) (per curiam).
[17] 42 U.S.C. § 2000a *et seq.* (the principal federal public accommodations law).
[18] *Piggie Park Enters.*, 309 U.S. at 402 n.5.
[19] 461 U.S. 574, 602 n.28 (1983).
[20] *Id*. at 604.
[21] *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397-99 (4th Cir. 1990) (the Fair Labor Standards Act's requirement of equal pay for women did not violate an employer's free exercise rights); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1367-69 (9th Cir. 1986) (an employer's religious beliefs about proper gender roles did not support a free-exercise exemption from the Equal Pay Act and Title VII).

discrimination on the basis of sex, simply because the discrimination was based on religious beliefs.

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

RFRA's Reach Is Limited by the Establishment Clause

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

The Establishment Clause prohibits the government from granting religious exemptions that would detrimentally affect any third party.[24] Thus, when crafting an exemption, the government "must take adequate account of the burdens" an accommodation places on nonbeneficiaries[25] and ensure it is "measured so that it does not override other significant interests."[26] In short, the government may not make a person bear the costs of another person's religion.

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

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[22] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[23] *Corp. of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). As an initial matter, an accommodation must lift an identifiable government-imposed burden on free exercise rights. *See, e.g.*, *Cnty of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 601 n.51 (1989) ("[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion"); *Texas Monthly v. Bullock*, 489 U.S. 1, 15 (1989) (plurality op.) (an accommodation must "remov[e] a significant state-imposed deterrent to the free exercise of religion"); *Wallace v. Jaffree*, 472 U.S. 38, 84 (1985), (O'Connor, J., concurring) (an accommodation must lift a "state-imposed burden on the exercise of religion").
[24] *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not "impose unjustified burdens on other[s]"); *Texas Monthly*, 489 U.S. at 18 n.8 (may not "impose substantial burdens on nonbeneficiaries").
[25] *Cutter*, 544 U.S. at 720; *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).
[26] *Cutter*, 544 U.S. at 722.
[27] 472 U.S. at 710-11.
[28] *Id.* at 708-09.
[29] *Id*. at 710.
[30] *Id*.

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

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

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

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[31] 544 U.S. at 720; *see also Hobbie v. Unemp't. Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987) (holding that granting state-funded unemployment compensation to a person who was laid off because she could not work on the Sabbath did not violate the Establishment Clause because it, unlike the Sabbath law in *Caldor*, did not single out religious employees as the only persons entitled to such treatment).
[32] 42 U.S.C. §§ 2000cc - cc-5.
[33] *Cutter,* 544 U.S. at 722.
[34] *Id.*
[35] Compare 42 U.S.C. § 2000bb-1, with 42 U.S.C. § 2000cc-1. *See generally Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006). Accordingly, courts rely on RFRA and RLUIPA cases interchangeably in interpreting and applying the statutes. *Grace United Methodist Church*, 451 F.3d at 661; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226-27 (11th Cir. 2004). Furthermore, RFRA itself makes clear that it does not affect the Establishment Clause and is bound by the well-understood confines of the Establishment Clause. *See* 42 U.S.C. § 2000bb-4 ("Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "'Establishment Clause'")). Congress never contemplated that RFRA would afford exemptions or accommodations that impose material harms on third parties. *See, e.g.*, 139 Cong. Rec. S14,350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) ("The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail, just as not every claim prevailed prior to the *Smith* decision."); 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (RFRA "does not require the Government to justify every action that has some effect on religious exercise").
[36] 573 U.S. 682 (2014).
[37] *Id*. at 727.
[38] *Id.* at 737-40 (Kennedy, J., concurring).
[39] *See id*. at 693; *id*. at 739 (Kennedy, J., concurring); *id.* at 745 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

The Trump Administration's Misinterpretation of RFRA

In October 2017, then-Attorney General Jeff Sessions issued "guidance interpreting religious liberty protections in federal law."[40] A blueprint for discrimination, the guidance offers extreme interpretations of RFRA. It "guide[s] all administrative agencies and executive departments in the execution of federal law"[41] and all Department of Justice (DOJ) attorneys must "adhere to the interpretative guidance" and implement it in litigation.[42] The far-reaching consequences of the guidance cannot be understated.

Its interpretation of RFRA tips the scales in favor of those seeking a religious exemption and makes clear that the Trump administration has no interest in enforcing existing nondiscrimination provisions in the face of religious freedom claims. Indeed, the guidance even asserts that RFRA "might *require* an exemption or accommodation for religious organizations from antidiscrimination laws"—even when that organization accepts government funds.[43]

To further entrench the guidance, the administration is creating an infrastructure that ensures its harmful interpretation of RFRA is incorporated into administration policies and procedures. In January 2018, for example, the Department of Health and Human Services (HHS) published directives to create a new "Conscience and Religious Freedom Division" of the Office for Civil Rights. The division is tasked with enforcing the administration's drastic interpretation of RFRA throughout all HHS programs.[44] Among other things, it can "conduct RFRA compliance reviews of departmental programs and activities" and "accept and investigate complaints" from individuals and entities alleging a failure to comply with RFRA.[45] Essentially, the administration has transformed HHS's Office for Civil Rights, which has always enforced nondiscrimination protections, into an office that sanctions discrimination in the name of religion.

Also in January 2018, DOJ updated its Attorneys' Manual and directed the designation of a religious point of contact in all U.S. Attorney's offices.[46] The designee "will ensure that the Attorney General's Memorandum is effectively implemented" and "will be responsible for working directly with the leadership offices on civil cases related to religious liberty, ensuring that these cases receive the rigorous attention they deserve."

Then, in July 2018, DOJ created a "Religious Liberty Task Force" to "identify new opportunities for the Department to engage with the issue of religious liberty" and "continue the Department's ongoing work to implement the Religious Liberty Memorandum and the implementation memorandum."[47] The Task Force undermines one of the key goals of the DOJ: the agency meant to "uphold the civil and constitutional rights of all Americans, particularly some of the

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[40] Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668 (Oct. 6, 2017), *available at* https://bit.ly/2xtbG3H.
[41] *Id.*
[42] Memorandum from the U.S. Attorney General for Component Heads and U.S. Attorneys: Implementation of Memorandum on Federal Law Protections for Religious Liberty (Oct. 6, 2017), *available at* https://bit.ly/2WZDg9Q.
[43] *Id.* (emphasis added).
[44] Office for Civil Rights; Statement of Delegation, 83 Fed. Reg. 2804 (Jan. 19, 2018), *available at* https://bit.ly/2N3sw5P.
[45] *Id.*
[46] *Justice Department Announces Religious Liberty Update to U.S. Attorneys' Manual and Directs the Designation of Religious Liberty Point of Contact for All U.S. Attorney's Offices*, Dep't of Justice (Jan. 31, 2018), https://bit.ly/31G9ENg.
[47] Memorandum from the U.S. Attorney General for Heads of Dep't Components: Religious Liberty Task Force (July 30, 2018), *available at* https://bit.ly/2XrUawZ.

most vulnerable members of our society,"[48] is now tasked with using religion to undermine these very same civil rights.

Federally Funded Social Service Programs

Discrimination in Foster Care Programs

Aimee Maddonna is a devout Catholic and mother of three. Aimee's father was in the foster system and wanted to make the lives of other kids in the system better, so he opened his home, and Aimee grew up with many foster brothers and sisters. Now, as Aimee is raising her own family, she wants to open her home to kids in foster care as well.

Aimee was thrilled when Miracle Hills Ministries, a local federally funded foster care agency, told her that her family would be a good fit. But after inquiring about Aimee's religion, Miracle Hill rejected her because she couldn't agree to their statement of faith.

Despite accepting $600,000 of federal and state taxpayer money in 2018 alone[49] and having been assigned more than 90% of children in foster care who go to child-placement agencies over the last five years,[50] Miracle Hill imposes a religious litmus test on potential parents and volunteers.

Aimee couldn't pass Miracle Hill's test because she's Catholic. Neither could Beth Lesser or Lydia Currie, who were denied the opportunity to mentor children because they are Jewish. Miracle Hill also rejected Eden Rogers and Brandy Welch, a same-sex Unitarian couple, who wanted to open their home to children in foster care. Miracle Hill's statement of faith, which all volunteer mentors and prospective parents must sign, says "that God's design for marriage is the legal joining of one man and one woman in a life-long covenant relationship"—a requirement that excludes same-sex couples of any faith.

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

Perversely, Miracle Hill says it has a religious freedom right to engage in this blatant religious discrimination. And instead of enforcing the federal regulation that prohibits this kind of discrimination, the Trump administration has issued a religious exemption to Miracle Hill and similar providers in South Carolina from complying with the law.

After receiving complaints that Miracle Hill Ministries, the state's largest foster care agency, refused to work with non-evangelical Protestant volunteers and potential parents, the South Carolina Department of Social Services (DSS) investigated. It concluded that Miracle Hill was

[48] Civil Rights Div., *About the Division,* Dep't of Justice, https://bit.ly/2fxQUac.
[49] Meg Kinnard, *Lawsuit Claims Discrimination by Foster Agency*, Associated Press (Feb. 15 2019), *available at* https://bit.ly/2TlqE82.
[50] *Maddonna v. U.S. Dep't of Health and Human Servs*., No. 6:19-cv-03552-TMC at ¶ 50 (D.S.C. filed on Dec. 20, 2019).

violating both state and federal nondiscrimination laws and policies that prohibit discrimination with government dollars.[51]

When South Carolina Governor Henry McMaster found out about the violation, he did not denounce the religious discrimination. Instead he issued an executive order specifically to allow state-funded foster care agencies to continue applying religious tests on potential foster families.[52] Recognizing he lacked the authority to waive federal nondiscrimination protections provided by 45 C.F.R. § 75.300, however, McMaster also wrote to HHS, requesting that it grant faith-based foster care agencies in South Carolina a religious exemption to these provisions.[53]

On January 23, 2019, the Trump administration granted that exemption.[54] Using a gross misinterpretation of RFRA, the administration set out a new policy that allows taxpayer-funded child placement agencies to turn away potential parents and volunteers who cannot meet a religious test—in violation of a federal nondiscrimination provision.

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

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

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

Aimee Maddonna and Eden Rogers and Brandy Welch filed lawsuits to challenge the exemption in federal court.[55]

Because the exemption to § 75.300 was morally and legally indefensible, the Department put forth an extraordinary response. In November 2019, it issued a notice that it was no longer enforcing these regulations and a proposed rule to strip these protections against discrimination altogether.[56] The existing regulations provide explicit protections against discrimination based

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[51] Letter from Jacqueline Lowe, Licensing Director, South Carolina Department of Social Services Child Placing Agency and Group Home Licensing, to Beth Williams, Miracle Hill Ministries (Jan. 26, 2018).
[52] S.C. Exec. Order No. 2018-12, 42-4 S.C. Reg. 11-12 (March 13, 2018).
[53] Letter from Henry McMaster, Governor of South Carolina, to Steven Wagner, Acting Assistant Secretary, U.S. Department of Health and Human Services Administration for Children and Families (Feb. 27, 2018), https://bit.ly/2KtY0zP.
[54] Letter from Steven Wagner, Principal Deputy Assistant Secretary, U.S. Department of Health and Human Services Administration for Children and Families, to Henry McMaster, Governor of South Carolina (Jan. 23, 2019), https://bit.ly/2Ejqhn7.
[55] *Maddonna,* No. 6:19-cv-03552-TMC; *Rogers v. U.S. Dep’t of Health and Human Servs.*, No. 6:19-CV-01567-TMC (D.S.C. filed on May 30, 2019).
[56] Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, 84 Fed. Reg. 63,831 (Nov. 19, 2019) (to be codified at 45 C.F.R. pt. 75); Notification of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63,809 (Nov. 19, 2019).

on sexual orientation and gender identity and now only program-specific protections apply. The patchwork of protections that would result from the proposed rule would be made worse by the Department's intent, as explained in the preamble, to use RFRA to trump remaining nondiscrimination protections.

The Faith-Based Regulations

On January 16, 2020, the Trump administration announced nine proposed rules that would significantly change the existing regulations that govern the partnerships between the government and faith-based social service providers.[57] Citing the DOJ Guidance, RFRA, and *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[58] the proposed changes would strip away protections from people, often vulnerable and marginalized, who use government-funded social services. Many of these changes will cause harm to LGBTQ people, in particular. People in need should never be faced with the stark choice between accessing the services they need or being their true selves.

These Faith-Based regulations, first adopted by the George W. Bush administration, were designed to strip away key church-state protections that had applied to the partnerships between the government and faith-based organizations for decades. The Bush-era regulations made it easier for faith-based organizations to proselytize those who seek services. For example, they allow taxpayer-funded providers to display religious iconography and scripture in spaces where social services take place.

In 2016, the Obama administration amended the Faith-Based regulations to add important protections for people who use social service programs. The changes were based on 12 unanimous recommendations made by the President's Advisory Council on Faith-Based and Neighborhood Partnerships. The recommendations were designed to improve social service delivery and strengthen religious freedom. The Council comprised a diverse group and, in its report, said: "As far as we know, this is the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek

[57] Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2897 (to be codified at 7 C.F.R. pt. 16); Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190 (to be codified at 2 C.F.R. pt. 3474; 34 C.F.R. pt. 75 & 76); Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974 (to be codified at 45 C.F.R. pts. 87 & 1050); Equal Participation of Faith-Based Organizations in DHS's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2889 (to be codified at 6 C.F.R. pt. 19); Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 8215 (to be codified at 24 C.F.R. pts. 5, 92 & 578); Equal Participation of Faith-Based Organizations in Department of Justice's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2921 (to be codified at 28 C.F.R. pt. 38); Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2929 (to be codified at 29 C.F.R. pt. 2); Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2938 (to be codified at 38 C.F.R. pts. 50, 61 & 62); Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2916 (to be codified at 22 C.F.R pt. 205).

[58] 137 S. Ct. 2012 (2017).

common ground in this area."[59] Council members included the President and CEO of Catholic Charities USA; General Counsel of the United States Conference of Catholic Bishops; and the Vice-President of Evangelization, North American Mission Board and Past President of the Southern Baptist Convention.

The Obama regulations require providers to give beneficiaries written notice of their rights, including that the provider cannot discriminate against beneficiaries based on their religion or force beneficiaries to participate in religious activities. People cannot exercise rights if they aren't aware they have them.

The Obama regulations also require providers to take "reasonable efforts" to refer beneficiaries to an alternative provider, if requested. This is a critical religious freedom protection for vulnerable people who use government social service programs. It ensures that people who are uncomfortable at a provider because of its religious character will be referred to an alternative provider. For example, an LGBTQ person might not feel comfortable going to a religious provider if they know the entity professes religious beliefs that reject LGBTQ people and rights. Removing this provision could cause beneficiaries significant harm, and could even result in them receiving no government services at all.

The Trump administration falsely claims that these rules are unfair and place a burden on faith-based providers. Their proposed rule, therefore, would strip away these protections, leaving people without the protections they need.

At the same time that the Trump administration is stripping the requirement that providers give beneficiaries written notice of their rights, it is adding a requirement that the government provide written notice to faith-based organizations about their ability to get additional religious exemptions, including under RFRA. Based on the Trump administration's continued misuse of RFRA and its expansive views of religious exemptions, this change paves the way for providers to refuse to provide key services and opens the door to discrimination in taxpayer-funded programs. LGBTQ people will bear the brunt of these harmful changes.

Federally Funded Employment Discrimination

The Trump administration is also expanding existing religious exemptions that allow federal funds to be used to discriminate in hiring, including making it easier for federal contractors and grantees to use religion as a pretext to discriminate against LGBTQ people.

Employment Discrimination by Government Contractors

According to the Office of Federal Contract Compliance Programs (OFCCP), one-fifth of the entire U.S. workforce is employed by government contractors—millions of Americans depend on these employers to treat them fairly.[60] That is why it is important to maintain strong nondiscrimination protections for government contractors. If an organization gets government funding through a government contract, it should not be allowed to discriminate against qualified job applicants and employees because they cannot meet the contractor's religious litmus test.

[59] President's Advisory Council On Faith-based And Neighborhood Partnerships, A New Era Of Partnerships: Report Of Recommendations To The President 120 (2010), *available at* https://bit.ly/3cdXIaG.
[60] Office of Federal Contract Compliance Programs (OFCCP), *Facts on Executive Order 11246*, https://bit.ly/3cbCsmg.

In 1941, President Franklin D. Roosevelt ordered federal agencies to condition defense contracts on an agreement not to discriminate based on race, creed, color, or national origin.[61] This was the first action taken by the government to promote equal opportunity in the workplace for all Americans, and the start of our longstanding, national commitment to barring private organizations from discriminating in hiring using federal funds. In subsequent executive orders, Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Obama expanded these protections. Indeed, Executive Order 11246, signed by President Lyndon B. Johnson in 1965, prohibits discrimination in virtually all government contracts.[62] Today, this executive order prohibits almost all businesses that contract with the federal government—covering workers that collectively represent approximately one-fifth of the entire labor force—from engaging in discrimination on the basis of race, color, religion, sex, national origin, sexual orientation, and gender identity.

Unfortunately, these employment protections for which we as a nation can be proud, have been tarnished. President George W. Bush amended Executive Order 11246 to permit religiously affiliated nonprofit organizations that receive government contracts to discriminate on the basis of religion in employment.[63]

Instead of rescinding the exemption, however, the Trump administration is betraying American workers by extending it. The Department of Labor's OFCCP proposed a rule in August 2019 that would amend the regulation that implements EO 11246 to expand both the pool of entities OFCCP will allow to use the exemption and the scope of the exemption itself.[64]

First, the proposed rule would allow organizations that are only nominally religious to qualify for the religious exemption, including in an unprecedented move, even for-profit corporations. Second, the proposed rule would also make it easier for federal contractors to use religion as a pretext to discriminate against other protected classes.

This loss of protections could be especially harmful for LGBTQ workers. It appears OFCCP would not enforce Executive Order 11246 protections when an employer claims a right under the religious exemption to fire a man who marries his same-sex partner, deny employment or health benefits to married same sex couples, fire an employee who the employer discovers is transgender, or refuse to allow transgender employees to dress and utilize facilities consistent with their gender identity.

Thirty-seven percent of lesbian and gay people and forty-seven percent of bisexual people report experiencing discrimination at work because of their sexual orientation and almost half (46%) of LGBTQ workers report actively concealing their identity out of fear of discrimination. For LGBTQ workers living in a state without explicit statutory protections, this change will be even more devastating.

Employment Discrimination in Government Grants

At the same time that the George W. Bush administration amended EO 11246 to allow faith-based federal *contractors* to discriminate in hiring, it amended federal regulations to allow

[61] Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).
[62] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).
[63] Exec. Order No. 13,279, 67 Fed. Reg. 77,139 (Dec. 12, 2002) ("to prefer individuals of a particular religion when making employment decisions relevant to the work connected with its activities").
[64] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 (Aug. 15, 2019) (to be codified at 45 C.F.R pt. 60).

federally funded *grantees* to discriminate in hiring. Between 2003 and 2004 the administration adopted more than 30 regulations to change the rules that apply to partnerships between the government and faith-based social service providers. Inviting federally funded providers to prefer co-religionists in employment with grant funding was a key part of these regulatory changes.[65]

Some statutes that govern grant programs, however, explicitly prohibited such discrimination. The George W. Bush administration's Office of Legal Counsel, therefore, issued a memorandum opinion wrongly asserting that RFRA can be used to circumvent statutory employment nondiscrimination protections that apply to federal grant programs.[66] According to the memorandum opinion, faith-based grant recipients have a religious freedom right to impose a religious litmus test on who they will hire for federally funded jobs. This OLC memo continues to be used to justify employment discrimination in programs like the Violence Against Women Act, the Workforce Innovation and Opportunity Act, the Juvenile Justice and Delinquency Prevention Act, and Head Start, despite the clear language in each statute prohibiting such discrimination.

The Trump administration's proposed Faith-Based rules that were announced in January 2020 would expand the existing religious exemption. Under the proposed rules for six agencies, taxpayer-funded social service providers would be able to select employees who work in the program on the basis of their adherence to the religious tenets or requirements of the organization.[67]

Religious employers, however, do not get a license to discriminate on grounds other than religion, even when motivated by religion. For example, courts have consistently held that it is "fundamental that religious motives may not be a mask for sex discrimination in the workplace."[68] Therefore, even if a religious employer may demand that its employees adhere to a particular religious code of conduct, "Title VII requires that this code of conduct be applied equally" to all employees regardless of sex.[69]

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[65] The scope of the exemption was limited to preferring co-religionists, but one of the factors motivating these regulations was the desire to allow taxpayer-funded organizations to discriminate against LGBTQ people in employment. *See, e.g.*, Dana Milbank, *Salvation Army, Bush Work to OK Hiring Bias on Gays*, WASH. POST (July 10, 2001) (explaining controversy linked to legislation that was the precursor to these regulations).

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

[67] Dep't of Educ., 85 Fed. Reg. 3224 (to be codified at 2 C.F.R. § 3474.15(g); Dep't of Health & Human Servs., 85 Fed. Reg. at 2984 (to be codified at 45 C.F.R. § 87.3(f)); Dep't of Housing and Urban Dev't, 85 Fed. Reg. at 8224 (to be codified at 24 C.F.R. § 5.109(d)(2)); Dep't of Labor, 85 Fed. Reg. at 2937-38 (to be codified at 29 C.F.R. § 2.37); Dep't of Veterans Affairs, 85 Fed. Reg. at 2948 (to be codified at 38 C.F.R. § 50.2(f)); U.S. Agency for Int'l Dev't, 85 Fed. Reg. at 2920, 2921 (to be codified at 22 C.F.R § 205.1(g)).

[68] *Ganzy v. Allen Christian Sch.*, 995 F. Supp 340, 250 (E.D.N.Y. 1998; *see also, e.g.*, *Hamilton v. Southland Christian Sch*., 680 F.3d 1316 (11th Cir. 2012); *see E.E.O.C. v. Fremont Christian Sch.,* 781 F.2d 1367 (9th Cir. 1986); *Pac. Press*, 676 F.2d at 1276; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014); *Vigars v. Valley Christin Ctr.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992).

[69] *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410, 414 (6th Cir. 1996); *see also*, *e.g., Cline v. Catholic Diocese of Toledo,* 206 F.3d 651, 658 (6th Cir. 2000); *Ganzy*, 995 F. Supp. at 348; *Dolter v. Wahlert High Sch.*, 483 F. Supp 266, 270 (N.D. Iowa 1980).

The proposed rules could invite religious organizations to engage in broad discrimination against employees. For example, faith-based employers might claim that the religious exemption allows them to refuse to hire qualified applicants who are transgender or fire someone who gets married to his same-sex partner.

Student Groups at Colleges and Universities

The opportunity to both join and lead student groups is an essential part of the educational experience. Student groups contribute to the breadth and quality of collegiate life. They allow students to expand their knowledge and their resumes and explore different ideas and identities. Research shows that they contribute to overall student satisfaction and success. They provide opportunities for peer-to-peer connection, reduce isolation, develop leadership skills, and relieve stress.

Recognizing the importance of student groups, public colleges and universities often provide significant benefits to recognized groups: funding, meeting space, promotion in school media, advertising space, inclusion on student organization fairs, and use of school communication platforms. Students are usually charged a student fee in order to help fund student organizations and pay for these benefits.

To ensure all students can participate, colleges and universities often have nondiscrimination or "all-comers" policies that require officially recognized student groups to allow any student to join, participate in, and seek leadership in those groups. These policies promote equality by ensuring that public colleges and universities do not subsidize discrimination, including discrimination against LGBTQ students, with tax dollars and tuition fees. They also guarantee that students are not forced to fund a student group that would reject them as members. Groups that do not want to follow the nondiscrimination policies can still exist, they just don't get the school's official recognition.

The Department of Education, however, has proposed a rule[70] that would allow religious groups to circumvent all-comers policies and discriminate against LGBTQ students at public institutions. The proposed rule states that "religious student organizations" cannot be denied any benefit afforded to other student organizations because of their "beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization."[71] Accordingly, a public institution won't be able to require student organizations to adhere to the nondiscrimination policies that apply to all secular student groups.

All-comers policies, however, are constitutional. In *Christian Legal Society v. Martinez*,[72] the Supreme Court upheld as constitutional a public university's all-comers policy that required student groups seeking official recognition to allow any student to join and participate in that group, including in elections for leadership positions. The Court held that such policies do not violate the free speech, expressive association, or free exercise rights of the students.[73] The Court also concluded that all-comers policies do not violate the Free Exercise Clause.[74] Rejecting the argument that such policies are not neutral but rather they target religion, the

[70] Dep't of Educ., 85 Fed. Reg. at 3223, 3226 (to be codified at 34 C.F.R. §§ 75.500, 76.500).
[71] *Id.*
[72] 561 U.S. 661, 697 (2010).
[73] *Id*. at 683.
[74] *Id.* at 697 n.27 (explaining that its decision in *Employment Division v. Smith*, which held that neutral and generally applicable laws do not violate the Free Exercise Clause, "forecloses that argument.").

Court explained that exempting religious groups from all-comers policies would provide them "preferential, not equal, treatment."[75]

Instead of treating all groups equally, this proposed rule would treat religious student groups specially. Only religious clubs would be exempt from the nondiscrimination requirement, which applies to all other clubs.

The proposed rule would also force schools to support discrimination. Colleges and universities have a legitimate interest in preventing discrimination on campus and fostering inclusionary practices for student organizations. All public institutions of higher education should have the right to ensure that the mandatory student activity fees only support those groups that are open to all students.

Discrimination in Healthcare

Section 1557 of the Affordable Care Act (ACA)

Section 1557 of the ACA protects individuals from discrimination on the basis of race, color, national origin, sex, (including gender identity, sexual orientation, and sex stereotypes; and pregnancy, childbirth, and related medical conditions), age, and disability in many health programs and activities. The provision bars hospitals, doctors, and insurers from discriminating against individuals seeking healthcare services or coverage.

The Trump administration has proposed a rule,[76] however, that seeks to change how the law is administered by removing protections that are guaranteed under the statute. As a result, women, the LGBTQ community, people of color, people with disabilities, and people with limited English proficiency—people who already experience significant barriers to accessing healthcare—would face even greater burdens when trying to get the healthcare they need.

In particular, the proposed rule erases any mention of gender identity or sex stereotyping as part of sex discrimination in the law. This opens the door for hospitals, clinics and insurance companies to discriminate against people based on who they are or who they love.

The proposed rule would also include a sweeping religious exemption, compounding the harm the rule would cause. Although religious liberty is a constitutionally protected and fundamental freedom, it cannot be wielded as a sword to harm others by denying them the healthcare they need. The government should never allow the religious beliefs of a healthcare provider to come before what is best for the patient.

The Denial of Care Rule

In May 2019, HHS published the Denial of Care rule,[77] which, shortly after, was blocked into going into effect by three federal courts.[78] The rule allows institutions and individuals—ranging from hospitals and insurance companies to providers and support staff—to refuse to provide

[75] *Id.*
[76] Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019) (to be codified at 45 C.F.R pts. 86, 92, 147, 155, and 156).
[77] Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88).
[78] *E.g., San Francisco v. Azar*, 411 F.Supp.3d 1001 (N.D. Cal. 2019).

care to patients in need. At the same time, it fails to account for the increased discrimination and flat-out denials of care that some of the most vulnerable members of our communities could face if it were implemented. Its broad scope could potentially affect patients who need services and information in a wide range of areas. Most clearly, it would exacerbate barriers to care that already exist for women, people of color, LGBTQ people, people with disabilities, immigrants, and people who live in rural areas. It could also make getting care for HIV/AIDS, drug addiction, infertility, vaccinations, mental illness, sexually transmitted infections, and end-of-life care, for example, difficult for patients.

The rule could allow providers and healthcare institutions to refuse care, including transition-related care, to LGBTQ patients. This ignores both the well-established consensus in the medical community that transition-related care is medically necessary and the reality that this care is often life-saving. Its vague and sweeping language could encourage providers to refuse other care to LGBTQ patients as well. A provider could argue that it can refuse to administer an HIV test, prescribe PrEP, or screen a transgender man for a urinary tract infection. Moreover, the rule could also encourage providers to deny any care to an LGBTQ patient simply because of the provider's personal disapproval of the patient's sexuality or gender identity.

Taken together, the health of many LGBTQ people is on the line.

What Congress Can Do

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

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

Under the bill, people could still invoke RFRA in the cases it was intended to cover. For example, a Sikh airman could still use RFRA to challenge regulations that would otherwise bar him from serving with a beard, turban, and unshorn hair. Or a Muslim officer could use RFRA to challenge regulations that would prohibit her from wearing a hijab during her training and service.[79] RFRA, however, could not be used in ways that harm other people, including to: trump nondiscrimination laws; evade child labor laws; undermine laws guaranteeing equal pay and benefits; deny access to healthcare; refuse to provide government-funded services under a contract; or refuse to perform duties as a government employee.

For example, the Do No Harm Act would ensure RFRA could not be used by a taxpayer-funded homeless shelter to turn away a transgender person;[80] by a for-profit business to get out of the

[79] *See* Aleksandr Sverdlik, *Air Force Approves Historic Religious Accommodation for Active Sikh Airman*, ACLU Blog,(June 6, 2019), https://bit.ly/2Fnzzju; Letter from ACLU, ACLU of Michigan, & Hammoud, Dakhlallah & Associates PLLC, to Lt. Gen. Christopher F. Burne, Judge Advocate General, U.S. Air Force, RE: Religious Accommodation for Muslim Air Force JAG Cadet (Nov. 17, 2017), *available at* https://bit.ly/2N3Mnl7.

[80] *See* Revised Requirements Under Community Planning and Development Housing Programs, Regulation Identification No. 2506-AC53 (Publication ID Spring 2019) (to be codified at 24 C.F.R. pt. 5).

prohibitions on employment discrimination under Title VII;[81] by a hospital to trump the protections against sex discrimination in the Health Care Rights Law;[82] or to avoid testifying in a federal child labor case.[83]

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

* * *

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

If you have any questions about this statement for the record, please contact Maggie Garrett (garrett@au.org) or Dena Sher (sher@au.org).

[81] *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016), *cert. granted on different question*, No. 18-107 (U.S. Apr. 22, 2019) (holding that funeral home that fired transgender employee could use RFRA as a defense to sex discrimination claim under Title VII).
[82] *See* Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440, and 460, 45 C.F.R. pts. 86, 92, 147, 155, and 156).
[83] *See Perez v. Paragon Contractors Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572 (D. Utah Sept. 11, 2014). *See also Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196 (4th Cir. 1989) (company that arranged with a church for children to work in a vocational training program that included hazardous work was not entitled to use RFRA standard to get out of child labor laws).