

United States House of Representatives
Committee on Oversight and Reform
The Administration's Religious Liberty Assault on LGBTQ Rights
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Testimony of Sarah Warbelow, Legal Director of the Human Rights Campaign

Thank you for the opportunity to submit testimony to the Committee on Oversight and Reform regarding the Administration's misuse of religious liberty to limit and undermine lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights. My name is Sarah Warbelow, and I am the legal director at the Human Rights Campaign, America's largest civil rights organization working to achieve LGBTQ equality. It is both an honor and a privilege to submit this testimony on behalf of our over 3 million members and supporters nationwide. In addition to submitting this testimony as a legal expert on nondiscrimination law, I do so as a bisexual woman who is the proud parent of my transgender daughter.

Since taking office, the Trump administration has consistently attacked our community's most vulnerable – asylum seekers and children, hospital patients and service members. The administration's playbook relies on dividing people and groups. This strategy has not spared our community -- and has instead intentionally sought to alienate LGBTQ people from the faith communities that so many of us hold dear. Despite these dangerous efforts to create a narrative of opposition, faith and civil rights communities continue to recognize our shared values and our shared future.

Through regulations, executive orders, and the bully pulpit, the Trump administration has worked to systematically dismantle the civil rights safety net that so many of us have come to rely upon. Time and again this administration has manipulated institutions designed to protect the most vulnerable into tools to facilitate discrimination. Under Trump's leadership, federal agencies have engaged in a dangerous effort to redesign the evidence-based approaches to our nation's administrative infrastructure. In the absence of legal or empirical support for these changes, agencies have instead relied on often-times dramatically myopic and disingenuous legal interpretations. To accomplish this, the administration is exploiting our nation's precious religious-freedom traditions -- rebranding discrimination and anti-LGBTQ bias as free exercise. This not only disrespects our nation's longstanding commitment to civil rights and equality, but also degrades our shared, core values of religious freedom and free exercise under the First Amendment.

Misrepresentation of Supreme Court Precedent to Establish a License to Discriminate

The Trump Administration's regulatory agenda regarding religious exemptions has been explicitly or implicitly predicated upon a misrepresentation of three decisions from the Supreme

Court of the United States: *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,¹ *Trinity Lutheran Church of Columbia v. Comer*,² and *Burwell v. Hobby Lobby Stores*.³ As I will discuss below, numerous federal agencies have cited these cases as mandates to incorporate expansive religious exemptions into the federal register through Notice of Proposed Rulemakings (NPRM). In citing these cases, however, these agencies rely on a flawed interpretation of case law resulting in disingenuous and misleading representations of the legal theories behind them. The NPRMs mischaracterize these Supreme Court decisions by ignoring the narrowed or limiting language of the holdings, and instead suggest that they require the federal government to grant expansive exemptions to federal contractors and grantees. Troublingly, the Departments tie together their erroneous analysis of the cases to justify unprecedented broad exemptions for both nonprofit and for-profit entities.

Across the federal register, agencies have referenced these cases to support capacious exemptions for federal contractors and grantees. These agencies fail to recognize the narrow, fact-dependent nature of each decision. In *Masterpiece*, the Court declined to hold that a for-profit bakery was entitled to a religious exemption from a general nondiscrimination law.⁴ Rather, the Court's narrow decision found that statements made during a hearing suggested the government had hostility to the baker's beliefs, concluding that the process-- rather than the law - - violated the baker's rights.⁵ The Court expressly held that, "While those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."⁶

The Court employed similarly limiting language in *Trinity Lutheran*, holding that a church's mere status as a religious entity should not preclude its participation in specific government grant programs.⁷ However, the Court explicitly distinguished governmental decisions made on the basis of status as a religious entity from decisions made due to an entities' activities.⁸ The Court concluded that, "This case involves express discrimination based on religious identity with

¹ 138 S.Ct. 1719 (2018).

² 137 S. Ct. 2012 (2017).

³ 573 U.S. 682 (2014).

⁴ 138 S. Ct. at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.").

⁵ *Id.* at 1731 (finding that the Commission's treatment of the baker's case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint).

⁶ *Id.* at 1727.

⁷ 137 S. Ct. at 2025 ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.").

⁸ *Id.* at 2024 ("The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far.").

respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”⁹ The agencies fail to recognize this qualification, which legal scholars have broadly accepted as limiting to the overall decision.

Finally, many agencies have relied heavily on the decision in *Burwell v. Hobby Lobby Stores* to support the broad expansion of exemptions to cover for-profit entities. In doing so, the proposed rules ignore several key pieces of the decision. In *Hobby Lobby*, the Court held that some “closely held” for-profit companies could make claims under RFRA but neither granted for-profit nor nonprofit entities carte blanche to refuse to comply with laws or government policies with which the entity disagrees.¹⁰ As Justice Alito wrote for the majority in *Hobby Lobby v. Burwell* “the possibility that discrimination in hiring... might be cloaked as a religious practice to escape legal sanction.”¹¹ He wrote, “our decision today provides no such shield. The Government has a compelling interest in providing equal opportunity to participate in the workforce[.]”¹²

Examples of Trump’s Attempt to Regulate Divisiveness by Exploiting Sincere Religious Beliefs

Adopting a Regulatory Scheme to Undermine Protections for LGBTQ Employees of Federal Contractors and Subcontractors

Executive Order 11,246 has provided meaningful protections for employees of federal contractors and subcontractors from discrimination on the basis of race, color, religion, and national origin since 1965.¹³ Over the past five decades, additional protections have been added to include discrimination because of sex, sexual orientation, and gender identity.¹⁴ These protections provide security to workers and equip them with meaningful administrative recourse.¹⁵ Importantly, it also provides contractors with a clear set of expectations and standards regarding their treatment of employees.¹⁶

In August 2019, the Department of Labor adopted a regulation designed to severely undermine the original mission of EO 11,246, by stripping workers of basic protections, and empowering businesses and organizations receiving taxpayer dollars to discriminate against their employees

⁹ Id. at 2024 (including the narrowing language as Footnote 3 to the Court’s finding that the Missouri rule amount to “churches need not apply.”).

¹⁰ 573 U.S. at 719 (specifying for profit closely held corporations).

¹¹ Id. at 733.

¹² Id.

¹³ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

¹⁴ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

¹⁵ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 at § 209 (Sept. 24, 1965).

¹⁶ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 at § 202 (Sept. 24, 1965).

with few safeguards from abuse.¹⁷ This expansion is unprecedented, harmful, and flatly unacceptable.

The support that the Labor Department cited for incorporating new and expansive exemptions into the federal register is fundamentally flawed. Specifically, the Department mischaracterized the three major Supreme Court decisions discussed above -- ignoring the narrowed or limiting language of the holdings and instead suggesting that, for the first time, the decisions require the federal government to grant expansive exemptions to federal contractors.¹⁸

The Labor Department also engaged in an acrobatic legal interpretation of foundational case law used by the courts to determine what type of entity constitutes a “religious organization.” The Department manipulates and fundamentally changes the legal test developed by the Court of Appeals for the 9th Circuit in *World Vision v. Spencer*, including by excluding the provision of the test that the organization, “not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”¹⁹ Notably, even the O’Scannlain concurrence -- which the proposed rule treats as the *per curiam* opinion – unequivocally articulates that, “the initial consideration, whether the entity is a nonprofit, is especially significant.”

The *per curiam* opinion in *World Vision* determined that an entity meets the definition if the entity:

- is organized for a religious purpose,
- is engaged primarily in carrying out that religious purpose,
- holds itself out to the public as an entity for carrying out that religious purpose, *and*
- does NOT engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.²⁰

As adapted by the Department, the test would permit a contractor to be considered a religious organization if the contractor:

- is organized for a religious purpose,
- holds itself out to the public as carrying out a religious purpose, and

¹⁷ Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 FR 41,677 (proposed on Aug. 15, 2019) (to be codified at 41 C.F.R. pt. 60).

¹⁸ *Id.* at 41,679.

¹⁹ 633 F.3d 723, 724 (9th Cir. 2011) (*per curiam*).

²⁰ *Id.*

- exercises religion consistent with, and in furtherance of, a religious purpose.²¹

In addition to blatantly removing a core and fundamental element of the legal test, the Labor Department goes further in gutting the legal test through the description of how the Department plans to apply the elements. The Department makes clear that it will accept the contractor as a religious organization if the entity was conceived for any “self-identified” religious purpose which need not be the contractor’s primary nor predominate purpose.²² This is clearly incorrect, as the O’Scannlain concurrence sets forth that the appropriate standard for evidencing religious purpose is through “Articles of Incorporation or similar foundational documents.”²³ Further, the Department adopts an extensive list of acceptable ways for demonstrating that the entity holds itself out to the public as religious that includes antiquated and secretive methods such as letterhead and response to private inquiries by a member of the public or a government entity. In adopting this approach, the Department gives tacit permission for an entity to hide or obscure its intentions while still availing itself of the exemption.

Throughout this proposed rule, the Labor Department relies solely on the concurrence in *World Vision* to include any activity to which the contractor ascribes religious meaning as an eligible exercise of religion. This would allow for-profit entities to be religious organizations entitled to a religious exemption for employment purposes. It would also apply the religious exemption to organizations conditioning employment on adoption of or adherence to religious tenets. Further, the Department will not require uniformity in application of these tenets to various protected populations²⁴. This will undoubtedly lead to discrimination that otherwise protected individuals cannot predict or seek recourse. For example, this exemption would allow employers to terminate a lesbian, gay, or bisexual worker when they marry someone of the same-sex, rather than when they first learn of their identity. Employers could also refuse equal access to spousal benefits, all with taxpayer funds.

Empowering Organizations to Discriminate, Regardless of Impact on Beneficiaries

Empowering Discrimination in Child Welfare

In 2016, only 433 South Carolina children were adopted out of foster care, while 1,344 children remained in foster care despite being eligible for adoption.²⁵ Two-thirds of eligible children looking for a forever home stayed in the system, because they were not matched with a permanent family. The failure to place children was not due to scarcity since there is evidence

²¹84 FR 41,691.

²² *Id.* at 41,682.

²³ 633 F.3d at 734.

²⁴ 84 FR 41,685.

²⁵ Children’s Bureau, *Child Welfare Outcomes 2016: Report to Congress*, U.S. Dep’t of Health and Human Services, 13-14 (2017).

that eligible, waiting families in South Carolina were eager to give many of these children a home. However, in 2018 the Trump administration granted a waiver to the state's largest foster care agency allowing this agency to discriminate against prospective foster parents on the basis of religion.²⁶ This waiver allowed the agency to continue its policy of turning away any family who does not practice the sect of evangelical Christianity that the agency recognizes resulting in the exclusion of Jewish families, non-evangelical Christian families, and interfaith families, while placing LGBTQ families and single parents in a troubling gray category at risk of discrimination.

The Department of Health and Human Services has also proposed stripping critical protections for beneficiaries across all Departmental programs.²⁷ In November 2019, HHS published a regulation adopting the federal Uniform Administrative Requirements for grant programs. The Trump administration's proposed revision to this regulation strips explicit nondiscrimination provisions from the existing text. The Obama administration originally adopted these regulations in December 2016 specifically prohibiting discrimination by HHS grantees on the basis of age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation.²⁸ In the absence of this protection, LGBTQ people, women, and religious minorities face an increased risk for discrimination or denial of taxpayer-funded services without recourse. These programs include foster care and adoption programs, effectively granting the South Carolina waiver to all states, as well as Headstart, substance abuse support, HIV community supports, runaway and homeless youth services, and senior services.²⁹

Similarly, in January and February 2020, the Trump administration published a series of 9 proposed rules revising the regulations that guide how religious organizations operate and engage with federally funded services and programs, including Departments of Health and Human Services, Education, Veterans Affairs, Justice, Agriculture, Labor, Homeland Security, and Housing and Urban Development in addition to the Agency for International Development.³⁰ These proposals strip safeguards incorporated in 2015 designed to provide greater protections for beneficiaries from discrimination on the basis of religion, including requiring organizations to notify beneficiaries of their rights. These changes would also allow providers operating a voucher program to require a beneficiary to engage in religious activities.³¹

²⁶ Rob Boston, *Trump Administration Allows S.C. Foster Care Agency To Engage In Discrimination*, Americans United for Separation of Church and State (Mar. 2019).

²⁷ Health and Human Services Grants Regulation, 84 Fed. Reg. 63,831 (proposed on Nov. 19, 2019) (to be codified at 45 C.F.R. pt. 75).

²⁸ 45 C.F.R. § 75 (2020).

²⁹ *Social Services*, Dep't of Health and Human Services (June 16, 2018), <https://www.hhs.gov/programs/social-services/index.html>.

³⁰ Proposed Rules, 85 FR 2,889, 2,897, 2,916, 2,921, 2,929, 2,938, 2,974, 3,190, 8,215.

³¹ Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831, 85 FR 2,937 (proposed Jan. 17, 2020) (to be codified at 29 C.F.R. pt. 2).

Under these regulations, organizations operating critical social services will be empowered to turn LGBTQ people away from programs if they believe that recognizing an individual's gender identity or same-sex relationship violates their religious belief. LGBTQ people receiving voucher assistance can be refused a secular provider and can be required to participate in religious activities as part of a social service program. Every year HHS provides billions of taxpayer dollars to fund critical programs for vulnerable populations including Head Start, foster care and child welfare programming, and support for runaway and homeless youth. Without these critical protections these populations are at an increased risk of harassment or hostility at the hands of federally funded providers.

For example, The Unaccompanied Alien Children (UAC) and the Unaccompanied Refugee Minor (URM) Programs operated by the Office of Refugee Resettlement of HHS provide care and resources for hundreds of thousands of individual unaccompanied migrant children every day. The Office's responsibilities under both programs include awarding and administering grants to child welfare organizations to provide critical services on behalf of the federal government. The Office provides services to children in its custody through these grants and cooperative agreements with child welfare organizations. These organizations match children in their care with qualified foster families.

Following a referral from the Department of Homeland Security, HHS places children in one of 170 different federally funded facilities across 23 states, which provide congregate care. In order to be removed from this facility, a child must have a sponsor. Children placed in congregate facilities are intentionally segregated from the local communities and are not permitted to enter a local town or enjoy area attractions at will. They are also not enrolled in local schools until they enter a sponsor's home. In many cases, this sponsor can be a licensed foster parent. These foster parents play an essential role in providing a safe, supportive home for children who have already suffered so much and are separated from loved ones.

The federal government entrusts non-governmental organizations to work collaboratively with communities to provide these essential services. The majority of organizations trusted to make this critical link are religious organizations. Under the proposed regulations, providers will be further empowered to discriminate against diverse families. It also provides specific guidance for organizations wishing to request exemptions in order to refuse to work with prospective foster parents that are LGBTQ. These fears are not conjecture. Last year, Catholic Charities of Fort Worth refused to work with a lesbian couple in Texas that had volunteered to foster refugee and migrant children. As a result, vulnerable children were denied access to another loving foster home and were instead forced to stay in congregate care without access to community or local educational opportunities.

Empowering Discrimination in Health Care

LGBTQ patients face an increased risk of discrimination at the hands of healthcare providers. Numerous surveys, studies, and reports have documented the widespread extent of the discrimination faced by LGBT individuals and their families in the health care system. One nationwide study found that 56 percent of lesbian, gay, and bisexual (LGB) respondents and 70 percent of transgender respondents reported experiencing discrimination by health care providers, including providers being physically rough or abusive, using harsh or abusive language, or refusing to touch them.³² In the same study, 8 percent of LGB respondents and 27 percent of transgender respondents reported being refused necessary medical care outright.³³

Similarly, the 2015 National Transgender Discrimination Survey found that 33 percent of respondents had negative experiences when seeing a health care provider in the past year.³⁴ The survey also found that respondents were three times more likely to have to travel more than 50 miles for transgender-related care than for routine care.³⁵ Beyond each of these numbers is an individual story – and too often a nightmare. The Human Rights Campaign gathered over 13,000 individual comments and stories in response to the Department’s request for public comment regarding the proposed regulation implementing Section 1557 of the Affordable Care Act. Thousands of our members shared personal, heartbreaking stories of discrimination and denial when seeking healthcare. Our members recounted incidents of hostility including homophobic statements, intrusive and unnecessary questioning, and unwarranted physical removal of a same-sex partner from a doctor’s visit. One of the most common stories of hostility and harassment reported by our members in their public comments included unwanted proselytizing by hospital or clinic staff. Unwanted proselytizing is a distinct form of bullying. It undermines patient care and can prevent individuals from seeking much needed care in the future.

Over the past three years, thousands of HRC members and supporters have shared painful stories of discrimination including many stories of outright denial of care. For example, a nurse assigned to care for an elderly gay man in an assisted living facility refused to bath him or provide the necessary day-to-day care that he needed and deserved simply because he was gay. We have also received calls from individuals who have been denied access to treatment on the basis of religion simply because they are in a same-sex couple. In one particular instance two nurses serving in the military and stationed in Missouri had been denied fertility treatment by every local clinic and by the military hospital because of their sexual orientation. The couple was forced to drive five hours round trip to a clinic in another city to receive treatment.

³² Lambda Legal, *When Health Care Isn’t Caring: Lambda Legal’s Survey on Discrimination Against LGBT People and People Living with HIV*, 10-11 (2010), <http://www.lambdalegal.org/publications/when-health-care-isnt-caring>.

³³ *Id.*

³⁴ S.E. James, C. Brown, & I. Wilson, *2015 U.S. Transgender Survey*, 97 (National Center for Transgender Equality 2017).

³⁵ *Id.* at 98.

In 2016, Evan Minton was informed that the Catholic hospital where his hysterectomy had been scheduled to be performed in two days would not allow his physician to perform the operation because it was to treat gender dysphoria. This refusal contradicted with his physician's determination that it was medically necessary, and his physician objected to the cancellation. The hospital did allow the physician to perform the procedure on non-transgender patients the same day that Minton's had been scheduled for. Hospital administrators cited religious objections as the cause for the cancellation. Denial of care not only threatens healthcare outcomes and individual dignity, but often requires locating a costly and time-consuming alternative.

LGBTQ People will be Disparately Impacted by the Proposed Regulation's Expansive Interpretation of Conscience Laws

The Trump HHS has issued rule after rule that does nothing to stem the gaping health disparities facing our community. Rather, they adopt regulations and mandate policies that directly undermine positive health outcomes. In addition to the regulations regarding faith-based organizations and HHS grant funding discussed above, in 2018 the Department revised the implementing regulations for statutory conscience provisions. The Department also announced the creation of an entire conscience division within the Office of Civil Rights.

The conscience regulation purports, among other things, to clarify current "religious refusal clauses" related to abortion and sterilization in three federal statutes. Each of these statutes refers to specific, limited circumstances in which health care providers or health care entities may not be required to participate in abortion and sterilization procedures. The regulation, however, creates ambiguity about these limited circumstances and encourages an overly broad interpretation that goes far beyond what longstanding legal tradition and public policy understanding have understood the statutes permit.

For example, section (d) of the Church Amendments refers to circumstances when a person may refuse to participate in any part of a health service program or research activity that "would be contrary to his religious beliefs or moral convictions."³⁶ Even though longstanding legal interpretation has applied this section singularly to participation in abortion and sterilization procedures, the proposed rule does not make this limitation clear. This ambiguity can encourage an overly broad interpretation of the statute that empowers a provider to refuse to provide *any* health care service or information for a religious or moral reason—potentially including not just sterilization and abortion procedures, but also Pre-Exposure Prophylaxis (PrEP), infertility care, treatments related to gender dysphoria, and even HIV treatment. Some providers may try to claim even broader refusal abilities, as a recent analysis of complaints to HHS showed that

³⁶ 42 U.S. Code § 300a-7(d).

transgender patients are most often discriminated against simply for being who they are rather than for the medical care they are seeking.³⁷

Under this regulation, doctors may be misled into believing they may refuse to administer an HIV test or prescribe PrEP to a gay or bisexual man, or refuse screening for a urinary tract infection for a transgender man.³⁸ In fact, medical staff may interpret the regulation to indicate that they can not only refuse, but decline to tell the patient where they would be able to obtain these lifesaving services or even inform patients of their treatment options. This puts the health of the patient, and potentially that of others, at risk. The regulation could lead a physician to refuse to provide fertility treatments to a same-sex couple, or a pharmacist to refuse to fill a prescription for hormone replacement therapy for a transgender customer. In addition, by unlawfully redefining the statutory term “assisting in the performance” of a procedure, the rule could encourage health care workers to obstruct or delay access to a health care service even when they have only a tangential connection to delivering that service, such as scheduling a procedure or running lab tests to monitor side-effects of a medication. The extension and broadening of this clause will impair LGBTQ patients’ access to care services by permitting providers to choose patients based upon sexual orientation, gender identity, or family structure.

We are particularly concerned that this rule will be used to refuse medically necessary care to transgender patients. The rule employs sweeping terms and discusses a case involving a transgender patient seeking gender affirming surgery as sterilization. This inappropriate legal interpretation and categorization encourages the mistaken belief that treatments that have an incidental impact on fertility, such as some procedures used to treat gender dysphoria, are sterilization procedures. Treatments for serious medical conditions may have the incidental effect of causing or contributing to infertility: for example, a hysterectomy to treat gender dysphoria, chemotherapy to treat cancer, and a wide range of medications can have the incidental effect of temporarily or permanently causing infertility. The primary purpose of such procedures, however, is not to sterilize, but to treat an unrelated medical condition. If religious or moral exemptions related to sterilization are misinterpreted to include treatments that have simply an incidental effect on fertility—as the vague and sweeping language of this rule encourages—it can lead to refusals that go even further beyond what federal law allows and unlawfully encourages individuals and institutions to refuse a dangerously broad range of medically needed treatments.

Rollback of ACA Nondiscrimination Protections will Impact LGBTQ People.

³⁷ Sharita Gruberg and Frank J. Bewkes, *The ACA’s LGBTQ Nondiscrimination Regulations Prove Crucial*, Center for American Progress (Mar. 7, 2018) <https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/>.

³⁸ *Id.*

HHS published a proposed regulation in June 2019 revising the rules implementing Section 1557 of the Affordable Care Act (ACA).³⁹ The proposal eliminates all explicit protections in healthcare for LGBTQ people. More specifically, it eliminates the explicit inclusion of discrimination on the basis of “gender identity” within the regulation’s sex nondiscrimination protections. Section 1557 and the current implementing regulations have been a sea change for LGBTQ patients accessing health care services and insurance coverage. It has proven to be a critical tool in bridging the health disparity gap that has consistently plagued the LGBTQ community.⁴⁰ The Administration’s proposed revisions are unnecessary, unwarranted, and undermine public health.

To support these blanket recisions in coverage, the Office of Civil Rights has argued that the changes were mandated by the courts as a result of the case *Franciscan Alliance, Inc. et al v. Azar*.⁴¹ In this case, plaintiffs challenged the Department's regulation implementing this section to include gender identity and termination of pregnancy protections under the statutory sex discrimination provision. Plaintiffs presented arguments on the basis of the Administrative Procedures Act and the Religious Freedom Restoration Act (RFRA). Judge Reed O’Connor of the Federal District for North Texas issued a nationwide injunction, determining, among other findings that the HHS rule unlawfully burdened religious exercise. In applying RFRA exclusively in his 2019 final decision vacating the rule, Judge O’Connor determined that the nondiscrimination protections for transgender people created a substantial burden on religious organizations and were not the least restrictive means for accomplishing the compelling government purpose of ensuring equal access to health care. Under Trump, HHS and DOJ no longer defended the 2016 regulation, and did not provide additional information supporting the government’s compelling interest to ensure access to nondiscriminatory health care and coverage. As a result, Judge O’Connor held that despite private intervenor’s efforts to do so, only the government could carry this burden under the statute.

Under the leadership of Roger Severino, the Office of Civil Rights revised the implementing regulations and removed not only "gender identity," but also "sex stereotyping" as factors that would be included within the definition of "sex" for purposes of enforcement. This was not required by the *Franciscan Alliance* case, nor is it legally supported. Sex stereotyping is a legal reality accepted by the Supreme Court 30 years ago.⁴² It also provides critical protection for individuals who do not conform to gender norms, including many who are members of the LGBTQ community.

³⁹ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (proposed June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440, 460 and 45 C.F.R. pts. 86, 92, 147, 155, 156).

⁴⁰ IOM (Institute of Medicine). 2011. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*. Washington, DC: The National Academies Press.

⁴¹ *Franciscan All., Inc. v. Azar*, Civil Action No. 7:16-cv-00108-O (N.D. Tex. Oct. 15, 2019).

⁴² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

The government's willingness to acquiesce to a district court judge's flawed RFRA analysis is troubling, but telling. The Supreme Court's decision in *Hobby Lobby* is easily distinguishable from the plaintiffs' argument in *Fransiscan Alliance* and in other similar cases asserting the right to discriminate under RFRA. Although arguably impracticable, the Supreme Court in *Hobby Lobby* found that the government could provide comprehensive reproductive health care coverage if an employer refused to do so because of religious belief. Therefore, the Court concluded that contraceptive mandate at issue in *Hobby Lobby* was not the least restrictive means of accomplishing the compelling government interest of ensuring access to healthcare.

Here, however, *Fransiscan Alliance* was tasked with proving that providing transition related care substantially burdened their religious exercise. Arguably, here as in many cases, this was achieved. However, the progress of such a claim should have ended here. Given the clear and compelling interest in ending discrimination in healthcare, Fransiscan Alliance should have been required to show that Section 1557 was not the least restrictive means for furthering this interest. In *Hobby Lobby*, Justice Alito concluded that the harm to women was not inevitable if the government would step in. It was not, in short, a zero sum game. Nondiscrimination provisions, like Section 1557, are. Regardless of the burden imposed, if the interests are compelling, RFRA only requires that the government show that the law in question is the least restrictive. The government is left with no other means to end discrimination on the basis of gender identity than to prohibit discrimination on the basis of gender identity. To decide otherwise shifts the burden from the RFRA claimant directly to the shoulders of the vulnerable population these laws were designed to protect with no alternative or recourse. The Departments of Justice and Health and Human Services' willingness to embrace this harmful interpretation in order to further a political end is troubling and threatens enforcement of all federal nondiscrimination regulations.

Discrimination in Housing

Secretary Carson has proposed revisions to the Department of Housing and Urban Development's Equal Access regulation – a landmark housing protection that prohibits discrimination in all HUD funded programs including rental assistance, emergency shelters, and FHA loan programs published in 2011 and revised in 2016.⁴³ This regulation provides meaningful guidance to HUD funded organizations regarding equal access to services and empowers and educates those seeking housing assistance. No one should be turned away from a shelter or an apartment, or denied a home loan because of who they are or whom they love. Secretary Carson's revisions specifically target transgender people seeking critical emergency

⁴³ 24 C.F.R. § 5.106 (2020).

shelter.⁴⁴ These revisions would allow shelters receiving taxpayer dollars to turn transgender people away entirely or provide unsafe housing.

Under the current regulation, HUD funded emergency shelters house shelter seekers in sex segregated housing that is appropriate for their gender identity.⁴⁵ The language provided by HUD to the Office of Management and Budget allows providers to consider a range of factors in making housing determinations including “religious beliefs.” Because of systemic discrimination across many areas of life, transgender people face increased rates of homelessness, housing insecurity, and violence.⁴⁶ As a result, access to safe emergency shelters and services is fundamental to short term survival and long term stability. Domestic violence advocates and law enforcement have long agreed that providing housing to transgender people in accordance with their gender identity is not only the right policy choice, but is safe in practice.⁴⁷ As drafted, the HUD proposal would empower a religious organization operating a HUD-funded program to turn away a transgender woman because of her gender identity, or refuse to provide family services or housing to a same-sex couple because of its views on marriage.

Similarly, the regulations adopted by HHS discussed above undermine the rights of young people struggling with homelessness and housing insecurity.⁴⁸ At-risk communities including many of the LGBTQ young people served by Runaway and Homeless Youth Act programs operated by the Administration on Children and Families may not be comfortable fully accessing the services they need in a religious environment. Under the proposed faith-based regulation, it could be possible for a provider to refuse to recognize a youth’s gender identity or sexual orientation for purposes of delivering services. Similarly, an organization receiving funds under the Older Americans Act to operate spousal and caregiving support groups could refuse to recognize a same-sex spouse. The unwillingness of an organization to recognize and respect our identities is tantamount to a denial of care altogether – the negative outcomes are the same.

The Department of Justice and the Systematic Coordination of Religious-Based Exemptions and Attacks on Civil Rights

⁴⁴ Department of Housing and Urban Development, Revised Requirements Under Community Planning and Development Housing Programs (Spring 2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>.

⁴⁵ *Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs*, 81 FR 64763.

⁴⁶ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

⁴⁷ *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, April 13, 2008, available at: <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community>.

⁴⁸ June Crenshaw, Re: Public Comment in Response to the Proposed Regulation, Ensuring Equal Treatment of Faith-Based Organizations RIN 0991-AC13 (Feb. 17, 2020).

In 2017, Trump issued an Executive Order directing the Attorney General to look across the federal government and assess ways in which the administration could license discrimination through government agencies.⁴⁹ As a result, DOJ published a memorandum implementing a sweeping directive to federal agencies regarding religious exemptions in part utilizing an overly broad interpretation of the Religious Freedom Restoration Act.⁵⁰ This memo directed all agencies to evaluate existing regulations for potential intersections with religious rights and to engage in rulemaking to amend any relevant policies to explicitly allow religious organizations and individuals to discriminate. This memorandum employed an expansive interpretation of RFRA in the context of federal programming and funding unsupported by precedent. In addition to this memo, then Attorney General Jeff Sessions created a Department of Justice religious liberty task force designed to coordinate this cross-governmental effort. At the announcement of this taskforce, Sessions stood alongside anti-LGBTQ extremists. Jesse Panuccio, who was an attorney in 2010 for supporters of Proposition 8 California's same-sex marriage ban, was chosen to lead the taskforce.

In addition to coordinating the government's agenda for discrimination under the guise of religious liberty, the Department of Justice has also actively engaged in litigation to undermine rights for the LGBTQ community. Specifically, despite not being a party to the case, the Justice Department filed an amicus brief in 2019 in support of the petitioner in *Masterpiece Cakeshop*.⁵¹ In this brief, DOJ argued that the First Amendment's guarantee of freedom of expression precludes the application of Colorado's general antidiscrimination law to a bakery that produces wedding cakes.⁵² DOJ adopted the position that businesses should be able to refuse service on any basis but race provided that the business asserted a religiously motivated reason to do so. This position raises serious concerns regarding the Justice Department's enforcement of Title II of the Civil Rights Act of 1964 and the public accommodations provision of the Americans with Disabilities Act when the Acts intersect with religiously-motivated complaints.⁵³

⁴⁹ Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

⁵⁰ Memorandum from Attorney General Jeff Sessions to All Component Heads and United States Attorneys (Oct. 6, 2017) (on file with Department of Justice), https://www.justice.gov/opa/press-release/file/1001886/download?utm_medium=email&utm_source=govdelivery; see also Press Release, Department of Justice Office of Public Affairs, Attorney General Sessions Issues Guidance on Federal Law Protections for Religious Liberty, (Oct. 6, 2017) (on file with Department of Justice), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty>.

⁵¹ Brief for the United States as Amicus Curiae Supporting Petitioners at 7, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018) (No. 16-1631).

⁵² *Id.* at 31.

⁵³ The Department of Justice has also taken additional hostile positions on LGBTQ equality even in cases not related to religion. See Brief For The United States As Amicus Curiae Supporting Affirmance In No. 17-1618 And Reversal In No. 17-1623, *Altitude Express Inc. v. Zarda*, No. 17-1618, 1623 (Aug. 23, 2019); Brief For the Federal Respondent Supporting Reversal, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (Aug. 16, 2019).

Engraining Anti-LGBTQ Policies into International Affairs: Creation of the Commission on Unalienable Rights

In July 2019, Secretary of State Pompeo announced the creation of a new “Commission on Unalienable Rights” that would embark upon “one of the most profound reexaminations of the unalienable rights in the world since the 1948 Universal Declaration” of Human Rights (UDHR).⁵⁴ Noting that gross human rights violations continue throughout the world more than seven decades since the passage of the UDHR, Pompeo claimed that “international institutions designed and built to protect human rights have drifted from their original mission” and that some human rights claims “have come into tension with one another, provoking questions and clashes about which rights are entitled to gain respect.”⁵⁵

The Commissioners appointed to the new body were primarily academic scholars whose expertise was solely issues of religious freedom.⁵⁶ Only one, Katrina Lantos Swett, had any direct experience working as a human rights practitioner. The Chair of the Commission, Harvard professor Mary Ann Glendon, has built a career as a longstanding champion of “religious liberty” and opponent of LGBTQ rights and abortion rights.⁵⁷ A number of the commissioners also arrived with long records in opposition to LGBTQ and women’s rights, and none had any record in support of abortion rights or LGBTQ people.⁵⁸

The federal register describes the mission of the body to “provide fresh thinking about human rights discourse where such discourse has departed from our nation’s founding principles of natural law and natural rights.”⁵⁹ This language is troubling, given that in the context of international human rights, use of the terms “natural law” and natural rights have historically implied that same-sex relationships or gender transitions are outside the realm of “natural law and natural rights” and therefore unworthy of protection under law.

Conclusion

The right to believe and the right to worship -- or not, are core American values. These Constitutionally protected rights have shaped our nation and have fostered the founders’ dream of a pluralistic and free society. The right to discriminate does not share such a lauded place.

⁵⁴ Michael R. Pompeo, Secretary of State, Remarks to the Press (Jul. 8, 2019) (transcripts available at the U.S. Department of State website).

⁵⁵ *Id.*

⁵⁶ *Commission on Unalienable Rights: Member Bios*, U.S. Dep’t of State, <https://www.state.gov/commission-on-unalienable-rights-member-bio> (last visited Feb. 25, 2020).

⁵⁷ Jayne Huckerby, Sarah Knuckey, Meg Satterthwaite, Trump’s “Unalienable Rights” Commission Likely to Promote Anti-Rights Agenda, *Just Security* (Jul. 9, 2019) <https://www.justsecurity.org/64859/trumps-unalienable-rights-commission-likely-to-promote-anti-rights-agenda/>.

⁵⁸ *Id.*

⁵⁹ Department of State Commission on Unalienable Rights, 84 FR 25,109.

Rather, we are a nation built on the values of equality, access to opportunity, individual inherent dignity, and a belief that each one of us must be allowed to shape our future free from the limiting stranglehold of bias. The leaders we elect are entrusted to safeguard and support these most basic values. Trump and his administration have fallen far short.

The Trump administration has routinely and systematically distorted federal agency rulemaking and policy development to harm LGBTQ people and other vulnerable populations. Relying on flawed, unsupported legal reasoning, the White House has time and again prioritized the rights of big organizations to discriminate against people who rely on the government for support and protection. Protecting discrimination and providing a safe haven for hostility and bias do nothing to preserve the promises of the First Amendment. Rather, these divisive actions alienate us from each other and from the core values that make us all Americans.