



THE DO NO HARM ACT

H.R. 1378 & S. 2752

Religious freedom laws should be a shield to protect religion, not a sword to harm others.

Background

When enacted, the Religious Freedom Restoration Act (RFRA) was intended to protect religious freedom, especially for religious minorities. Supported by a broad coalition, including organizations representing many faiths and denominations, legal experts, and civil liberties advocates, it was a response to the 1990 Supreme Court decision, *Employment Division v. Smith*, which many saw as a significant change that lessened constitutional protections for religious freedom. RFRA was designed to restore these protections: to provide heightened but not unlimited protections for religious exercise.

Specifically, RFRA prohibits the federal government from “substantially burden[ing]” a person’s religious exercise unless doing so is the least restrictive way to further a compelling governmental interest. The reach of RFRA is supposed to be limited: Minimal burdens should not trigger RFRA protection and even substantial burdens on religious exercise should be permitted when necessary to achieve a compelling governmental interest (e.g., prohibiting discrimination).

The Problem

Many things have changed since RFRA’s passage nearly 30 years ago and it is now being misused to harm others. For example, it is being used to undermine nondiscrimination laws and deny people healthcare. These bad-faith interpretations, which push RFRA far beyond its original intent and purpose, most often cause harm to LGBTQ people, women, religious minorities, and the nonreligious. That is why an increasing number of organizations and individuals, including many who supported RFRA in 1993, agree that RFRA needs to be fixed.

In 2014, the U.S. Supreme Court ruled in *Burwell v. Hobby Lobby Stores* that large, for-profit, closely held corporations can use RFRA to evade the law that would otherwise require them to provide employees with insurance coverage for contraception. The Court held that the Affordable Care Act’s birth control benefit substantially burdened business owners and that the law was not the least restrictive way to achieve the government’s interest, because the Court claimed the government had other ways to achieve its interest.

Then in 2017, the Trump administration, relying on an even more extreme interpretation of RFRA, issued new regulations that allow *any* employer or university to use religion to deny contraception insurance coverage to their employees and students. In a June 2020 Supreme Court case, *Trump v. Pennsylvania*, the majority opinion upheld this sweeping exemption, and the concurring opinion set out a dangerous view of RFRA that would all but require sweeping exemptions to federal laws and policies that protect people’s rights and health, even when these exemptions would harm others.

The problems with RFRA extend beyond blocking people’s access to healthcare. In 2017, the Department of Justice released guidance titled “Federal Law Protections for Religious Liberty.” The guidance, which applies to all federal agencies, presents a dangerous interpretation of RFRA. The guidance states that RFRA “might require an exemption or accommodation for religious organizations from antidiscrimination laws”—even when that organization accepts government funds—and points to an Office of Legal Counsel opinion that says grantees can use RFRA to discriminate in employment for jobs funded by taxpayer dollars.

Since then, federal agencies—relying on this extreme interpretation—have cited RFRA to create sweeping religious exemptions. For example in January 2019, HHS misused RFRA to grant an exemption to federally funded foster care agencies in South Carolina that discriminate against potential parents. As a result, one of these agencies was permitted to take nearly a million dollars in government funding—while refusing to work with potential parents, including families who are Catholic, Jewish, or LGBTQ, who will not sign an evangelical Protestant statement of faith. This policy punishes children in the foster care system and denies them the loving homes they deserve simply because families don't meet the agency's religious litmus test.

In June 2020, the Supreme Court ruled in *Bostock v. Clayton County* that the employment nondiscrimination protections in Title VII of the Civil Rights Act protect employees from being fired because they are LGBTQ. The Court, however, noted that it expects there will be future cases to decide whether RFRA, which it called a “super statute,” gives employers a right to discriminate, nonetheless—and lower courts are already considering these cases. If RFRA can be used to supersede Title VII's protections, the rights of LGBTQ people could be undermined.

The Do No Harm Act

The Do No Harm Act is designed to restore RFRA to its original intent. It would preserve the law's power to protect religious freedom and clarify that it may not be used to harm others.

Under the bill, people could still use RFRA to protect their religious exercise, including the right to attend worship services while in federal prisons or immigration detention centers or wear religious attire while serving in the military. RFRA, however, could not be used to bypass federal protections in ways that harm other people. The Do No Harm Act responds to real instances in which people have tried to misuse—sometimes successfully—the RFRA standard.

The bill would bar RFRA from being used to:

- **Undermine nondiscrimination laws:**
 - The Department of Health and Human Services [used RFRA to exempt](#) federally funded foster care agencies in South Carolina from federal regulations barring discrimination on the basis of religion.
 - A Department of Justice [legal opinion](#) uses RFRA to permit organizations that provide government-funded services to discriminate in employment with government dollars.
 - A Department of Labor [regulation](#) asserts that government contractors can use RFRA to discriminate in employment, against “protected classes, other than race.”
 - A federal court ruled that a funeral home could use RFRA as a defense to an employment discrimination case under Title VII brought by a transgender employee. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016) (the 6th Circuit overturned the district court decision in favor of the transgender employee).
- **Deny access to healthcare:** The Supreme Court held that RFRA exempts large, for-profit, closely held corporations from the law that would otherwise require them to provide employees with insurance coverage for contraception. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
- **Evade child labor laws:** A witness successfully invoked RFRA to avoid testifying in a federal child labor case. *Perez v. Paragon Contractors Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572 (D. Utah Sept. 11, 2014).
- **Thwart laws that protect workers' rights:** Religiously affiliated institutions have argued that they may use the RFRA standard to justify paying women less because they are not

heads of households. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

- **Refuse to provide government-funded services under a contract or grant:** In 2020, eight federal agencies adopted [rules](#) that cite RFRA to strip requirements that protected the religious freedom of people who use taxpayer-funded social service programs. The rules invite social service providers to use RFRA to request exemptions from program requirements. With these exemptions, taxpayer-funded providers could seek to refuse to follow program requirements and policies that bar discrimination. Indeed, the agencies' rule claimed that even the simple act of referring a beneficiary to an alternative provider merits an exemption.
- **Refuse to perform duties as a government employee:** Legal advocacy organizations advised government employees that, under state RFRA, government employees do not have to provide services equally to all who seek them.

The Do No Harm Act would maintain RFRA's important protections for the exercise of religion, while responding to the very real instances in which the RFRA standard has been misappropriated.

RFRA and Race Discrimination

Courts have made clear that RFRA cannot be used to undermine laws that bar race discrimination, but that doesn't mean that the misuse of RFRA doesn't disproportionately harm people of color. For example, religious exemptions to LGBTQ employment protections likely will have a significant impact on people of color: "[LGBTQ people of color are more than twice as likely](#) as their white counterparts to say they've been discriminated against because they are LGBTQ in applying for jobs." Because people of color are [overrepresented in the population in poverty](#), the use of RFRA to discriminate against beneficiaries of social service programs will disproportionately affect them. And the use of RFRA to undermine access to healthcare will exacerbate existing health inequities among communities of color: for example, Black women are already "[disproportionately likely to suffer from a chronic health condition](#)," and "are less likely to receive timely and aggressive medical treatment, compared to their white counterparts."

Broad Support

One hundred LGBTQ, civil rights, health, labor, and faith groups have endorsed the Do No Harm Act, including organizations that supported RFRA's passage. Please see attached for the complete list.

Status of the Do No Harm Act

The Do No Harm Act, H.R. 1378, was introduced in the House of Representatives by Representatives Bobby Scott (D-VA), Steve Cohen (D-TN), Jamie Raskin (D-MD), and Mary Gay Scanlon (D-PA) on February 25, 2021. It had 102 original co-sponsors. In the 116th Congress, the bill had 215 co-sponsors. On September 15, 2021, Senator Cory Booker introduced the Do No Harm Act, S. 2752, in the Senate with 29 original co-sponsors.

For more information, please contact:

Maggie Garrett, garrett@au.org

Dena Sher, sher@au.org

Do No Harm Act Endorsing Organizations

Advocates for Youth
AFL-CIO
AFSCME
American Atheists
American Baptist Home Mission Societies
American Civil Liberties Union
American Federation of Teachers
American Humanist Association
American Psychological Association
Americans United for Separation of Church and State
Anti-Defamation League
Basic Rights Oregon
Bend the Arc Jewish Action
BiNet USA
Black Nonbelievers
Call To Action
Catholics for Choice
The Center for American Progress
Center For Black Equity
Center for Inquiry
Center for Reproductive Rights
CenterLink: The Community of LGBT Centers
Circle Sanctuary
Compassion and Choices
DignityUSA
Disciples Center for Public Witness
Disciples Justice Action Network
Equal Partners in Faith
Equality California
Equality Federation
Family Equality
Feminist Majority
FORGE, Inc.
Freedom for All Americans
Freedom From Religion Foundation
Friends Committee on National Legislation
GLBTQ Legal Advocates & Defenders (GLAD)
Global Justice Institute, Metropolitan
Community Churches
GLSEN
Hindu American Foundation
Human Rights Campaign
Interfaith Alliance
Jewish Women International
KARAMAH
Lady Liberty League
Lambda Legal
The Leadership Conference on Civil
and Human Rights
Legal Voice
LGBT Technology Partnership & Institute
Medical Students for Choice
Modern Military Association of America
Movement Advancement Project
Muslim Advocates
Muslims for Progressive Values
NAACP
NARAL Pro-Choice America
National Asian Pacific American Women's
Forum (NAPAWF)
National Association of Social Workers
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Churches
National Council of Jewish Women
National Employment Law Project
National Employment Lawyers Association
National Gay & Lesbian Chamber of Commerce
National Health Law Program
National LGBTQ Task Force Action Fund
National Organization for Women (NOW)
National Partnership for Women and Families
National Women's Health Network
National Women's Law Center
NEAT — National Equality Action Team
New Ways Ministry
NMAC
Nurses for Sexual & Reproductive Health
Out & Equal Workplace Advocates
PFLAG National
Physicians for Reproductive Health
Planned Parenthood Federation of America
Presbyterian Church (U.S.A.)
Pride at Work
Religious Coalition for Reproductive Choice
Reproductive Health Access Project
SAGE
Secular Coalition for America
Secular Policy Institute
Sexuality Information and Education
Council of the U.S. (SIECUS)
Society for Humanistic Judaism
T'ruah: The Rabbinic Call for Human Rights
The Trevor Project
Unitarian Universalist Association
United Church of Christ, Justice and Witness
Ministries
The United Methodist Church — General Board of
Church and Society
Uri L'Tzedek: Orthodox Social Justice
Whitman-Walker Health
Women's Alliance for Theology, Ethics,
and Ritual (WATER)
YATOM: The Jewish Foster & Adoption Network