The Do No Harm Act

HR 2725 & S 1206

Religious freedom laws should be a shield to protect, 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 reflect the state of the law prior to Smith: 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 do not trigger RFRA protection and even substantial burdens on religious exercise are 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 cause harm, discriminate, 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 nonreligious people. 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. And a federal judge in Texas recently ruled that employers can strip their employees’ insurance coverage for PrEP, an HIV prevention medication.

The problems with RFRA extend beyond blocking people’s access to healthcare. RFRA is also being misused to permit discrimination. An Office of Legal Counsel opinion cites RFRA to allow taxpayer-funded employment discrimination by organizations that take federal money to provide social services. In Bostock v. Clayton County, the Supreme Court held that Title VII barred discrimination against LGBTQ workers but invited exemptions under RFRA. And in 2021, a federal judge in Texas took up the Supreme Court’s invitation, ruling that for-profit
corporations can use RFRA to discriminate against LGBTQ workers.

Finally, in 2019, HHS exempted government-funded foster care agencies in South Carolina from a federal regulation that bars discrimination. As a result, one of these agencies was permitted to take nearly a million dollars in government funding to find homes for children in the state’s care — while refusing to work with Catholic, Jewish, and LGBTQ families who wanted to give the children loving homes. This exemption was revoked by the Biden administration, and the matter is currently subject to a lawsuit in federal court.

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, the right for migrants to get meals that comply with their religious diets from border officials, or the right to 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
- A federal judge in Texas ruled that for-profit businesses can use RFRA to discriminate against LGBTQ employees and applicants — in violation of Title VII of the Civil Rights Act of 1964.1
- A Department of Justice legal opinion uses RFRA to permit taxpayer-funded employment discrimination by organizations that take federal money to provide social services.2
- A 2020 Department of Labor regulation asserted that government contractors can use RFRA to discriminate in employment, against “protected classes, other than race.”3

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.4
- A federal district court held that RFRA also exempts for-profit corporations from a requirement to provide insurance coverage for PrEP, an HIV prevention medication.5
- One employee at a VA hospital has filed a lawsuit seeking to use RFRA to exert veto power over the scope of medical care provided the facility offers to veterans and their beneficiaries.6

Evade child labor laws
A witness successfully invoked RFRA to avoid testifying in a federal child labor case.7
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.8

Refuse to provide government-funded services under a contract or grant
In 2019 and 2020, the Department of Health and Human Services used RFRA to exempt federally funded foster care agencies in South Carolina, Michigan, and Texas from federal nondiscrimination requirements.9 In South Carolina, for example, one agency took nearly a million dollars in government funding to find homes for children in the state’s care—while turning away Catholic, Jewish, and LGBTQ families who wanted to provide the children loving homes.

Refuse to perform duties as a government employee
Legal advocacy organizations advised government employees that, under state RFRAs, government employees do not have to provide services equally to all who seek them.10

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.”11 Because people of color are overrepresented in the population in poverty,12 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.”13

Broad Support
More than 100 faith, LGBTQ, civil rights, reproductive rights, health, and labor groups have supported the Do No Harm Act, including organizations that supported RFRA’s passage.

Status of the Do No Harm Act
The Do No Harm Act was introduced by Representatives Bobby Scott (D-VA), Steve Cohen (D-TN), Jamie Raskin (D-MD), and Mary Gay Scanlon (D-PA) and Senator Cory Booker (D-NJ) on April 19, 2023. In the 117th Congress, the bill had 206 cosponsors in the House and 35 cosponsors in the Senate.
Endnotes

1 Bear Creek Bible Church v. EEOC, 571 F.Supp.3d 571 (N.D. Tex. 2021).
8 Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986).
9 E.g., 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).
12 Homelessness and Racial Disparities, National Alliance to End Homelessness (Apr. 2023).