

# 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, RFRA was a response to the 1990 Supreme Court decision in *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 the law is now being misused to cause harm, discriminate, and deny people healthcare. These bad-faith interpretations of RFRA, which push the law 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. More recently, in 2022, a federal judge expanded upon *Hobby Lobby*, ruling that employers can use RFRA to 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. In *Bostock v. Clayton County*, the Supreme Court held that Title VII—the federal law that prohibits employment discrimination—barred discrimination against LGBTQ workers, but the Court invited potential exemptions under RFRA. The Fifth Circuit Court of Appeals took up the Supreme Court’s invitation, and then ruled that for-profit corporations can use RFRA to discriminate against LGBTQ workers.

And in 2019, the Department of Health and Human Services under President Donald Trump 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.

## 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

- The U.S. Court of Appeals for the Fifth Circuit 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.<sup>1</sup>
- A Department of Justice Office of Legal Counsel opinion uses RFRA to permit taxpayer-funded employment discrimination by organizations that take federal money to provide social services.<sup>2</sup>
- In 2020, President Trump's Department of Labor issued a regulation that asserted that government contractors can use RFRA to discriminate in employment, against "protected classes, other than race."<sup>3</sup>

### 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.<sup>4</sup>
- A federal district court held that RFRA exempts for-profit corporations from a requirement to provide insurance coverage for PrEP, an HIV prevention medication.<sup>5</sup>

### Evade child labor laws

A witness successfully invoked RFRA to avoid testifying in a federal child labor case.<sup>6</sup>

### 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.<sup>7</sup>

### Refuse to provide government-funded services under a contract or grant

In 2019 and 2020, President Trump's 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.<sup>8</sup> 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 RFRA, government employees do not have to provide services equally to all who seek them.<sup>9</sup>

## RFRA and Race Discrimination

Courts have made clear that RFRA cannot be used to undermine laws that bar race discrimination, but the misuse of RFRA may still disproportionately harm people of color. For example, religious exemptions to LGBTQ employment protections likely will have a significant impact on people of color: One-third of LGBTQ employees of color already report facing discrimination in the workplace because of their sexual orientation or gender identity.<sup>10</sup> Furthermore, of LGBTQ employees who have experienced workplace discrimination or harassment, 63.5% of LGBTQ employees of color reported that “religion was a motivating factor.”<sup>11</sup> Because people of color are overrepresented in the population in poverty,<sup>12</sup> 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 racial and ethnic health disparities: for example, Black people and American Indian/Alaska Native (AIAN) are already “more likely to die from treatable conditions; more likely to die during or after pregnancy and to suffer serious pregnancy-related complications; and more likely to lose children in infancy.”<sup>13</sup>

## 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. Currently, there are 126 cosponsors in the House and 29 in the Senate. In the 117th Congress, the bill had 206 cosponsors in the House and 35 cosponsors in the Senate.

## Endnotes

<sup>1</sup> *Braidwood Mgmt. v. EEOC*, 70 F. 4th 914 (5th Cir. 2023).

<sup>2</sup> Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, [31 Op. Off. Legal Counsel 162](#) (2007).

<sup>3</sup> Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, [85 Fed. Reg. 79,324](#) (Dec. 9, 2020). In 2023, the Department of Labor rescinded this rule. Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Rule, [88 Fed. Reg. 12,842](#) (Mar. 1, 2023). See also, Memo. from the Att'y Gen'l for All Executive Dep'ts and Agencies, [Federal Law Protections for Religious Liberty](#) (Oct. 6, 2017).

<sup>4</sup> *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

<sup>5</sup> *Braidwood Mgmt. v. Becerra*, 627 F.Supp.3d 624 (N.D. Tex. 2022).

<sup>6</sup> *Perez v. Paragon Contractors Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572 (D. Utah Sept. 11, 2014).

<sup>7</sup> *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

<sup>8</sup> E.g., [Letter](#) from Steven Wagner, Principal Deputy Ass't Sec'y, U.S. Dep't of Health and Human Services Admin. for Children and Families, to Henry McMaster, Gov. of S.C. (Jan. 23, 2019). In 2021, the Department of Health and Human Services revoked the exemption. [Letter](#) from Joo Yeun Chang, Principal Deputy Ass't Sec'y, Admin. for Children and Families, to Henry McMaster, Gov. of S.C., re Withdrawal of Approval of Exception from Religious Non-Discrimination Requirement of 45 CFR 75.300(c) (Nov. 18, 2021).

<sup>9</sup> Mem. to Va. Clerks Responsible for Issuing Marriage Licenses, from Alliance Defending Freedom (Oct. 10, 2014).

<sup>10</sup> Brad Sears, Christy Mallory, Andrew R. Flores, & Kerith J. Conron, [LGBT People's Experiences of Workplace Discrimination and Harassment](#), *UCLA School of Law Williams Institute* (Sept. 2021).

<sup>11</sup> *Id.*

<sup>12</sup> [Homelessness and Racial Disparities](#), *National Alliance to End Homelessness* (Apr. 2023).

<sup>13</sup> [Achieving Racial and Ethnic Equity in U.S. Health Care](#), *Commonwealth Fund* (Nov. 18, 2021).