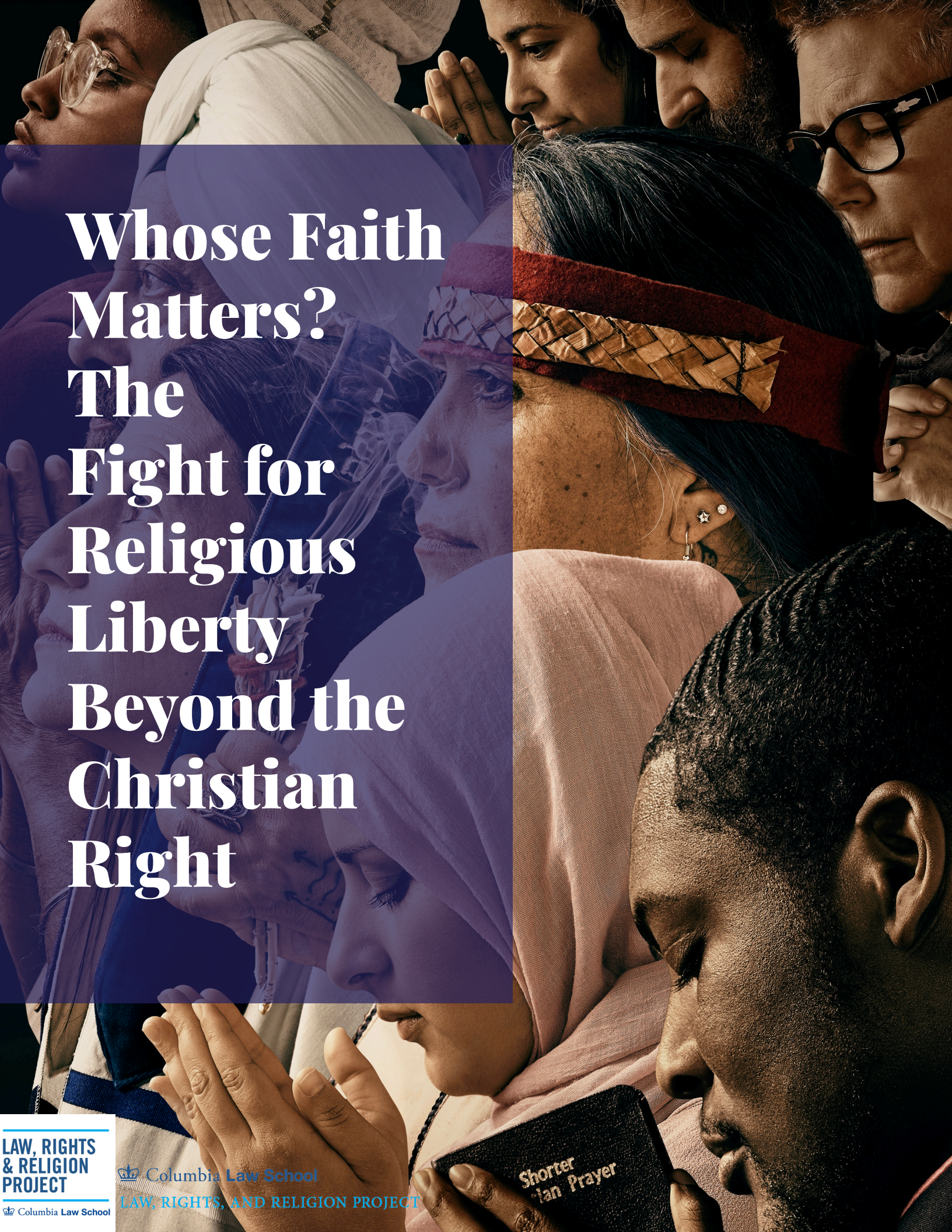

Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right

LAW, RIGHTS & RELIGION PROJECT
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Note

Much of the litigation described in this report is ongoing. We therefore apologize for any legal developments that occurred after our editing process was finalized, but before the report was released.

Cover Image

For Freedoms (Hank Willis Thomas and Emily Shur in collaboration with Eric Gottesman and Wyatt Gallery of For Freedoms), Freedom of Worship, 2018. Archival pigment print, 42 x 52.5 in.

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Executive Summary

Photograph by Jeff Antons. Interfaith clergy bless an abortion clinic in the Rio Grande Valley, Texas, 2019

Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right seeks to correct two widespread misconceptions: that the political left has abandoned the fight for "religious liberty," seeing religion as a threat to its values, and that Christian conservatives are resolutely dedicated to protecting religious liberty.

The battle over "religious liberty" in the U.S. is far more complex than many journalists, advocates, and politicians would have you believe. Far from abandoning this fundamental right, people of faith outside the conservative movement have taken up the fight for religious freedom in a wide variety of contexts. And while the Christian right has positioned itself as the sole defender of "religious liberty," this movement's strategy is to substitute the beliefs of a narrow band of conservative Christians for the nation's broad and pluralistic religious traditions. Right-wing Christians' troublingly successful capture of "religious liberty," rather than protecting this right, has resulted in the rapid erosion of religious freedom as policymakers have enshrined particular theological beliefs into U.S. law and policy, while erasing or even denigrating other religious traditions.

This report first documents the many contexts in which people of faith engaged in humanitarian and social justice work have fought for the right to exercise their religion. In recent years, members of many different religious groups have fought for the right to act out their faith by providing food and shelter to immigrants, performing marriages for same-sex partners, accessing abortion, protesting war and the death penalty, and protecting the environment—despite federal and state laws that sometimes restrict these activities. This rich history debunks the notion that religious liberty rights primarily advance the interests of right-wing conservative Christians.

Second, the report illuminates an under-appreciated truth about the right's investment in defending religious liberty: in fact, this movement ardently supports the free exercise of religion only for parties who hold conservative views regarding sexuality, marriage, reproduction, or the family. Thus, the kind of religious liberty its members promote is often antagonistic to the liberty rights of people in other faith traditions.

By offering a sweeping account of religious liberty activism being undertaken by numerous progressive humanitarian and social justice movements, and uncovering how right-wing

activists have fought for conservative Christian hegemony rather than "religious liberty" more generally, this report challenges the leading popular narrative of religious freedom.

It is not difficult to understand how the two misconceptions described above have developed. The Christian right has spent vast resources positioning itself as the leading defender of religious freedom against a hostile, secular left. In particular, it has advanced the idea that the expansion of reproductive and LGBTQ rights—two hugely important progressive social movements of the past half century—represent an existential threat to the right to religious liberty. In response to this alleged attack, its members have proposed laws and policies that purport to protect "religious liberty," though typically such laws only protect people of faith who hold conservative views regarding sex, sexuality, marriage, and reproduction.

Unfortunately, some supporters of LGBTQ and reproductive justice have accepted this idea of a zero-sum conflict between religious liberty and the right to equality. Instead of seeing how the policies proposed by the Christian right in fact erode, rather than defend religious freedom, some advocates on the left have limited their arguments to the idea that antidiscrimination laws should take precedence over any asserted right to religious liberty. For example, the commonly-held position that "religious liberty should not be a license to discriminate" seems to accept at face value the notion that carve-outs from antidiscrimination law for religious conservatives do in fact protect religious liberty in the first instance. As we explain in this report, the very opposite is true: weakening civil rights law necessarily weakens religious freedom. Ceding the domain of "religious liberty" to the Christian right overlooks the ways in which equality and religious freedom are mutually reinforcing rights, each dependent on the other.

The popular media, too, have enabled and reinforced the Christian right's capture of "religious liberty." The vast majority of reporting on religious liberty issues has been limited to discussions of the ways in which sexual and reproductive rights threaten the beliefs of conservative Christians. Meanwhile, dozens of religious liberty rights lawsuits brought by people of faith who seek a right to assist immigrants, offer harm reduction services to drug users, resist government surveillance, or engage in other forms of humanitarian or social justice work, have been largely overlooked or framed as matters of political opinion rather than religious freedom.

Together, advocates, legislators, courts, and journalists have contributed to a climate in which

only the religious liberty claims of conservative people of faith "count" as religious, while the claims and rights of progressive people of faith are dismissed or ignored as "merely" political in nature. That said, it is important to acknowledge that not all religious beliefs may be fully or fairly described in political terms, and that the report's references to religious "progressives," "conservatives," "left," and "right" may not be terminology that all people of faith identify with or embrace.

Section I of this report provides a concise history of the right to religious liberty in the U.S. over the past two and a half centuries. It outlines how the meaning of this right has evolved several times over since the very first religious freedom laws were enacted by colonial governments even prior to the founding of the United States. For those unfamiliar with contemporary religion law, it offers important context for understanding the legal theories and arguments discussed in sections II and III.

Section II provides a detailed overview of the many people of faith engaged in humanitarian and social justice work who have gone to court seeking the right to exercise their religious beliefs. Examples include:

- Humanitarian aid workers who are being prosecuted by the federal government for providing food, water, and other aid to migrants in southern Arizona, allegedly in violation of U.S. immigration and other laws, and who have defended their actions as an exercise of their religious liberty;

- "Mary Doe," who argued that her religious belief in bodily autonomy should permit her to access abortion services without having to undergo a state-mandated ultrasound and 72-hour waiting period, and;

- Safehouse and the Church of Safe Injection, interfaith religious nonprofits that are seeking to open supervised injection sites for drug users—notwithstanding federal drug laws that may prohibit such sites—as part of their religious mission.

Section II also contains a short discussion envisioning additional religious liberty arguments

that might be made in other contexts. It offers a clear rebuttal to the claim that conservatives are the only contemporary advocates for religious liberty in the public square.

Section III provides a brief account of the various legislative, administrative, and litigation activities of the modern Christian right, including the ways in which these campaigns aim to enact into law conservative religious views about sex, sexuality, marriage, reproduction, and the family—all in the name of "religious liberty."

Finally, **Section IV** provides a set of overarching guidelines for how to assess the extremely diverse "religious liberty" claims that have been made across the theological and political spectrums. It provides a framework for understanding how we might best protect the fundamental right to religious liberty—not for some religious believers, but for everyone. It also explains how the protection of those rights need not undermine other fundamental rights, such as the right to equality.

The report concludes with a call to rethink how the fundamental right to religious liberty in an increasingly pluralistic nation is understood, discussed, and protected.

Introduction

Over the past several years, immeasurable ink has been spilled examining the clash between conservative Christianity, and sexual and reproductive liberty. Media coverage of "religious liberty" issues has been overwhelmingly dominated by articles dissecting the impact of marriage equality and reproductive rights on conservative Christian practitioners. As one report on religion in the media put it: "[t]hrough the use of their own media outlets, but perhaps even more so through the assertive presentation of their viewpoints in the mainstream media, conservative evangelical spokespeople have positioned themselves as the voice of Christianity—if not religion as a whole—in the public square."[1] This limited focus on the religious beliefs and practices of social conservatives paints a deeply misleading portrait of both religion and religious freedom. For one, it ignores the fact that there are many today whose religious beliefs compel them to act in ways that would be labeled liberal or progressive.

The three most closely-watched Supreme Court religious liberty cases since 2014 have all been brought by socially conservative Christian claimants seeking to be exempted from laws intended to protect reproductive health and LGBTQ civil rights. During this same time, however, people of faith across the country have brought religious liberty lawsuits involving the right to seek an abortion, perform same-sex marriages, protect refugees within the U.S., fight nuclear proliferation, provide harm reduction services to drug users, shelter the homeless, prevent environmental degradation, and resist ethnic and religious profiling.

Scott Warren being blessed. Photograph by Ash Nunez, courtesy of the Unitarian Universalist Service Committee.

"My conscience...is what drives me to act. It's what drives me to show up fully for those who are suffering."

~Scott Warren

Take Scott Warren, who was arrested in 2018 for providing food and water to two migrants in the Arizona desert and charged with several felonies for "harboring" undocumented immigrants. Warren has argued in federal court that he has a religious right to provide humanitarian aid to migrants at the U.S. border. In Georgia, Martha

Hennessy was among a group of Catholics arrested the same year for breaking into and symbolically disarming a nuclear facility. Like Warren, Hennessy has brought a legal defense based on her right to religious liberty. And in Arkansas, after state judge and Baptist minister Wendell Griffen was barred from hearing death penalty cases in 2017 because of his religious opposition to capital punishment, he argued that this bar amounted to a violation of his religious liberty. These three claimants are far from the only religious practitioners that defy the narrative of religious freedom fighter as conservative Christian.

Thus, faith-based values are not the sole province of social conservatives, and conflicts between individuals' religious practices and the mandates of the law are far more diverse and nuanced than the popular media would suggest. By discussing free exercise claims brought by religious minorities and people of faith outside the Christian right, this report will confront and challenge the largely-successful campaign to conflate "religious liberty" with conservative Christianity, and to paint those outside the right as irreligious or "anti-faith."[2]

The report will also take a critical look at the ways in which "religious liberty" has been used as a cover for laws and policies that in fact weaken religious freedom by elevating the beliefs and practices of conservative Christians above all other religious and secular rights. While the overwhelming popular focus on how laws affect conservative Christians is misrepresentative, government actors' intentional efforts to conflate "religious liberty" with conservative Christianity is far more troubling. Policymakers at the federal, state, and local levels in recent years have actively sought to redefine "religious liberty" in conservative Christian terms, elevating and providing special legal protections to the rights and beliefs of the religious right. At the same time, many of these same actors, including the current presidential administration, have been hostile towards the issues most important to progressive religious communities and religious communities of color, including economic inequality, racism, and harsh immigration policies.[3] The same Justice Department that, under President Donald Trump, has pledged to protect religious freedom "to the greatest extent practicable and permitted by law"[4] is criminally prosecuting some religious adherents for their faith-based activities that challenge U.S. government policies. And the administration has targeted religious minorities, particularly Muslims, with inflammatory rhetoric and discriminatory policies.

The report will conclude by offering a set of free exercise principles intended to ensure that,

rather than treating "religious liberty" as a right exclusive to socially conservative Christians, we treat the religious beliefs and practices of all faith practitioners—including those of no religious faith—with the respect and neutrality that the Constitution demands.

Endnotes

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3 Janelle Wong, *Untapping the Potential of Black, Latino, and Asian American Evangelical Voters*, The American Prospect (June 6, 2018), https://prospect.org/article/untapping-potential-black-latino-and-asian-american-evangelical-voters; Eliza Griswold, *Evangelicals of Color Fight Back Against the Religious Right*, New Yorker (Dec. 27, 2018), https://www.newyorker.com/news/on-religion/evangelicals-of-color-fight-back-against-the-religious-right. This narrow focus on the needs and beliefs of conservative white Christian communities has prompted some to label the administration's ideology a form of "white Christian supremacy." *See, e.g.*, Kira Shepherd, Naomi Washington-Leapheart, and Rev. Alba Onofrio, *Trump's New Birth Control Rules are White Christian Supremacy Veiled as Religious Freedom*, Rewire (Oct. 18, 2017), https://rewire.news/article/2017/10/18/trumps-new-birth-control-rules-white-christian-supremacy-veiled-religious-freedom/; Terrell Jermaine Starr, *Donald Trump's White Christian Supremacy*, The Root (Sept. 13, 2017), https://www.theroot.com/donald-trump-s-white-christian-supremacy-1803816026.

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I An Overview of Religious Liberty Law

Before detailing the broad array of religious liberty activism and litigation that has arisen out of social justice, humanitarian, and progressive movements, the report provides a basic background on religious liberty law. Below is a timeline demonstrating how religious liberty rights—including the right to religious exemptions—have evolved over time.

Religious Liberty Law Timeline

Pre-Revolutionary War: Several colonies adopted some of the very first religious exemption laws—conscientious objector statutes, which exempted Quakers and other religious pacifists from militia service.[1]

1791: First Amendment to the U.S. Constitution was ratified, including the two "religion clauses"—the "Establishment Clause" and the "Free Exercise Clause," which together state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

1879: In the first Supreme Court religious exemption case, *Reynolds v. United States*,[2] a Mormon man argued that the Free Exercise Clause barred the federal government from prosecuting him under a law that criminalized bigamy, because polygamy was an essential requirement of his religious faith. The Supreme Court disagreed, finding that the Free Exercise Clause protects religious belief, but not "actions which were in violation of social duties or subversive of good order." The Court voiced the concern that granting a faith-based exemption from the law "would

What is a "Religious Exemption"?

A religious exemption is a legal right to avoid compliance with a government law, regulation, or policy because it substantially burdens your religious beliefs and/or practices.

Religious exemptions range from the modest and relatively uncontroversial (say, an exemption from a public school's no-hats policy for a Jewish student to wear a yarmulke) to the hotly contested (an exemption from a state mandatory vaccination law).

Religious exemptions may be explicitly guaranteed under a federal, state, or local law or administrative policy. Or they may be granted as part of a lawsuit. Examples include:

Congress exempts Native Americans who use peyote during religious rituals from compliance with a federal law criminalizing peyote use.

A city police department exempts observant Muslim and Sikh officers from a policy requiring officers to be clean-shaven.

The federal government files discrimination charges against a religious school for firing a teacher with a disability. The Supreme Court finds that the Free Exercise Clause exempts the school from compliance with the Americans with Disabilities Act with regards to the selection of its 'ministers," including the teacher.

be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself." This rejection of a constitutional right to religious exemptions held sway for nearly 100 years—though during this time, legislators were free to pass religious exemption laws, like those protecting conscientious objectors to military service.

1961: In a series of decisions starting in the 1960s, the Supreme Court, led by Chief Justice Earl Warren, began to construe the Free Exercise Clause in broader terms than it had previously. In the 1961 case Braunfeld v. Brown, for example, an Orthodox Jewish business owner sought the right to open his store on Sundays, despite a state law requiring businesses to close on Sundays.[3]

While the Court ruled against the shopkeeper, it noted that upholding any law that burdens religious practice, so long as it applies generally to all people, would be a "gross oversimplification."[4]

It is worth noting that during this era, the Warren Court decided numerous other landmark cases expanding individual rights, including *Loving v. Virginia*[5] (striking down anti-miscegenation laws as unconstitutional), *Gideon v. Wainwright*[6] (recognizing a right to a free attorney for criminal defendants), and *Griswold v. Connecticut*[7] (recognizing a right to privacy, including the use of contraceptives).

1963: In S*herbert v. Verner*[8], the Supreme Court departed from its interpretation of the Free Exercise Clause in Reynolds v. United States, ruling that South Carolina violated the Free Exercise Clause when it denied unemployment insurance benefits to a Seventh Day Adventist because she refused to work on Saturdays, her Sabbath. Thus, the Court introduced for the first time the constitutional requirement that religious believers be exempted from government laws and policies that burden their faith—even if the laws or policies do not intentionally target religious believers—where the government cannot show a compelling reason for imposing such a burden.

1964: Congress passed the Civil Rights Act, which prohibited religious discrimination in public accommodations and employment.[9] The Act was amended in 1972 to require employers to reasonably accommodate the religious practices of their employees.[10]

1960s-1990: Sherbert was expanded upon in a series of decisions that interpreted the Free Exercise Clause far more broadly than under the earlier Reynolds standard. These decisions allowed people of faith, in some circumstances, to violate laws that conflicted with their religious practice. Most notably, in the 1972 case *Wisconsin v. Yoder*,[11] the Supreme Court ruled that Amish families who wanted to remove their children from public school after 8th grade, despite a state law requiring school attendance until 16 years of age, should be permitted to do so without facing punishment.

In these cases the Supreme Court established the principle that where a law or government policy, even if generally applicable to all people regardless of their faith, imposes a substantial burden on a person's sincerely held religious practice, the person may claim an exemption from the law or policy—unless the government can demonstrate that enforcing the law is necessary to accomplishing an important state interest.

The Court's Free Exercise opinions during this period drew a connection between the protection of religious liberty and principles of nondiscrimination. In Sherbert v. Verner, for instance, the Court grounded its constitutional standard of review for religious liberty claims in the standard of review honed in Fourteenth Amendment equal protection cases.[12]

Thus, religious liberty rights and rights to equality were understood to be mutually reinforcing values. During this period, the Court granted faith-based exemptions from generally applicable laws to members of minority Christian sects, including Jehovah's Witnesses,[13] Seventh Day Adventists,[14] and the Amish.[15] That said, even during this time, many exemption claims—including cases brought by Native American religious practitioners and Jews—were denied.[16]

1990: Less than three decades after *Sherbert*, the Supreme Court reversed course again in *Employment Division v. Smith*.[17] Thi s case involved two Native American men who were denied unemployment benefits because they had been fired for illegally smoking peyote as part of a religious ritual, which the state of Oregon considered "misconduct." Rather than find that their religious beliefs justified an exemption from the law, as the Court had ruled in Sherbert, the Court upheld Oregon's decision to deny them benefits.[18]

Al Smith. Courtesy of Jane Farrell-Smith.

Al Smith speaking after the Supreme Court's decision in Employment Division v. Smith

In language very similar to the 1879 Reynolds case, the Court emphasized the difference between religious belief and religious practice, and said "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law" conflicts with his religious observance.[19]

Justice Antonin Scalia, the author of the Court's majority opinion, even claimed that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[20]

While Smith greatly reduced the circumstances under which the Free Exercise Clause entitled people of faith to religious exemptions, it did not eliminate such exemptions entirely. For example, the Supreme Court has since held that under the Free Exercise Clause, religious institutions should be exempt from certain employment laws with respect to their employment of ministers.[21]

And nearly every scholar of religion law would agree that the First Amendment protects the performance of most religious rites according to terms set by the religion—even if those terms might conflict with secular legal rules, such as laws prohibiting discrimination. Thus, a woman cannot sue the Catholic Church to be ordained as a priest on the grounds that the church is discriminating on the basis

of sex, and a same-sex couple cannot sue an Orthodox Rabbi to marry them on the grounds that the congregation is discriminating on the basis of sexual orientation.

1993: *Employment Division v. Smith* proved to be a highly unpopular decision, and provoked Congress to pass the Religious Freedom Restoration Act (RFRA). This law recreated the robust right to religious exemptions outlined in *Sherbert v. Verner* and *Wisconsin v. Yoder*. RFRA was passed with the support of a broad coalition of advocates from across the political spectrum—from the deeply conservative Traditional [22]Values Coalition to the liberal American Civil Liberties Union (ACLU)[23] — and was signed into law by President Bill Clinton.

Clinton signing RFRA . Courtesy of U.S. National Archives.

RFRA was initially understood by many advocates and policymakers to be a civil rights law intend to prevent unintentional discrimination against religious minorities. In 1992, Senator Orrin Hatch, an ardent supporter of RFRA, called the bill "a civil rights bill for religious belief."[24] A Senate report on the bill stated that it was necessary because "State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their

faiths."[25] In fact, only three Senators voted against the bill, two of whom, Senators Jesse Helms and Robert Byrd, had previously filibustered civil rights legislation.[26] Many supporters of the bill argued that religious exemptions were essential for the protection of small or unpopular religious groups, whose beliefs and practices were unintentionally restricted by numerous laws and policies that failed to consider or understand their faiths.[27]

RFRA, 42 U.S. Code § 2000bb–1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

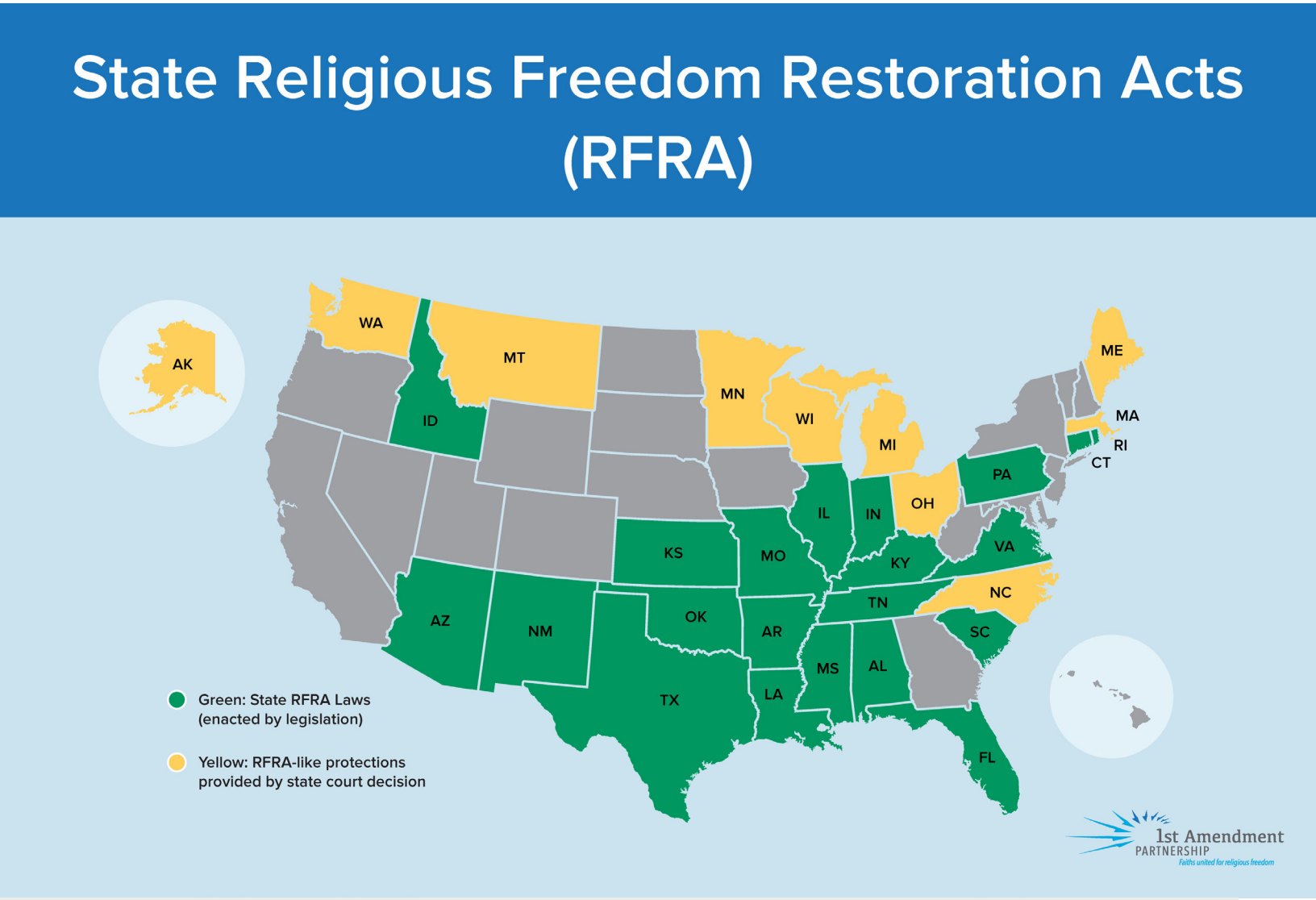
(2) is the least restrictive means of furthering that compelling governmental interest.

Considering that anti-abortion groups have since benefited greatly from RFRA, it is worth noting that the passage of RFRA took several years in significant part due to opposition from religious groups opposed to abortion. The U.S. Catholic Conference and the National Right to Life Committee were concerned that RFRA could establish a religious right to abortion that could be used in the event that Roe v. Wade was overturned.[28] RFRA was eventually signed into law three years after the Supreme Court's decision in Employment Division v. Smith.

Under RFRA, whenever a federal law, policy, or action substantially burdens a person's sincere religious exercise, they have the right to an exemption unless the government can show that the religious objector's compliance with the law is necessary to further a compelling government interest. For example, in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,[29] a church whose members used hoasca (a substance made illegal under federal law) during religious services argued that it was entitled to a RFRA exemption from federal enforcement of the Controlled Substances Act (CSA). The Supreme Court agreed, holding that the government had failed to show that enforcing the CSA against the church was necessary to furthering any compelling government interest.

1997-Present: In the 1997 decision City of Boerne v. Flores,[30] the Supreme Court held RFRA to be unconstitutional as applied to state laws and policies. After this decision, RFRA only provides religious exemptions from federal laws and policies. In response to City of Boerne, many states passed their own RFRA laws, or "mini-RFRAs," which apply

the RFRA standard to state and local activities. Today, nearly half the states have such laws.[31] In addition, several states have a right to religious exemptions under their state



RFRA Map. Courtesy of 1st Amendment Partnership .

constitutions, thus providing broader protections for religious practices than the U.S. constitution after Smith.[32]

2000: Three years after City of Boerne v. Flores, Congress passed another significant religious liberty law, the Religious Land Use and Institutionalized Persons Act (RLUIPA).[33] This law applied the RFRA test to state and local actions in two specific contexts—land use regulations that burden religion (such as the use of zoning laws to prevent the construction of a house of worship), and regulations on persons being held in state institutions (such as jails and public psychiatric facilities). RLUIPA is commonly used to ensure that detained and incarcerated people have access to

religious necessities like Kosher or Halal food, religious books, devotional practices, and clothing.

2014-Present: In response to the marriage equality movement and policies that have increased access to contraception, religious conservatives have initiated a wave of religious exemption lawsuits, several of which have succeeded before the Supreme Court. In the 2014 decision Burwell v. Hobby Lobby,[34] the Court held that RFRA provides a religious exemption to for-profit businesses that object to providing their employees with insurance coverage for contraceptives, as required by the Affordable Care Act (ACA). The Court's decision to grant large corporations religious liberty rights was highly controversial among religion scholars and the broader public. Two years later, in Zubik v. Burwell, an eight-person Court declined to rule on the question of whether requiring nonprofit organizations to submit a form opting out of the contraceptive mandate also violated RFRA.[35]

Hobby Lobby Boycott. Photograph by Joe Brusky via flickr.

In the 2018 case Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission, the Supreme Court dismissed a civil rights case that the State of Colorado had brought against a bakery for refusing to make a wedding cake for a same-sex couple, in violation of the state's antidiscrimination law.[36] The Court declined to hold that companies have a constitutional right to an exemption from compliance with civil rights laws, instead finding that the state human rights commission had not given the bakery owner an impartial hearing, and had expressed bias towards his religious views. The question of whether religious adherents are entitled to any constitutional exemption from antidiscrimination laws is likely to come back before the Supreme Court soon.

In addition to these cases, many other lawsuits requesting similar exemptions from health and civil rights laws have been brought in state and federal courts across the country.[37] Moreover, in July 2019, an appeal was filed to the Supreme Court asking the Court to revisit its holding in Employment Division v. Smith.[38] While the case does not involve reproductive or LGBTQ rights, it could create a sea change in Free Exercise law.

In summary—today, most religious exemptions are secured through legislation rather than the Free Exercise Clause of the U.S. Constitution. In addition to RFRA and RLUIPA, there are hundreds if not thousands of more discrete religious exemptions within federal, state, and local law—from those exempting religious objectors from state vaccine laws to those exempting Jehovah's Witnesses and others from certain oath requirements. While the initial decision to pass RFRA was largely motivated by a concern for religious minorities, several recent Supreme Court cases have led to a widespread focus on claims brought by Christian conservatives. However, as will be discussed in the following section, the Christian right by no means holds a monopoly on contemporary religious liberty rights.

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3 *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961).

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5 *Loving v. Virginia*, 388 U.S. 1 (1967).

6 *Gideon v. Wainright*, 372 U.S. 335 (1963).

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8 *Sherbert v. Verner*, 374 U.S. 398 (1963).

9 42 U.S.C. § 1981 et. seq.

10 John D. Dadakis and Thomas M. Russo, Religious Discrimination in Employment: The 1972 Amendment— A Perspective, 3 FORDHAM URB. L. J. 327, 328 (1975), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1460&context=ulj.

11 *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972).

12 Sherbert, 374 U.S. at 403 ("If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'").

13 *Thomas v. Review Bd. of the Indiana Emp't Sec. Div.*, 450 U.S. 707, 719 (1981).

14 *Hobbie v. Unemp't Appeals Comm'n of Fla*., 480 U.S. 136, 146 (1987).

15 Yoder, 406 U.S. at 234.

16 *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying an Orthodox Jew's request for an exemption from a military regulation prohibiting headwear so that he could wear a yarmulke); Bowen v. Roy, 476 U.S. 693 (1986) (denying a claim brought by Native American parents requesting that their daughter not be assigned a social security number, as this would violate their religious beliefs); Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) (denying an exemption request from three tribes seeking to prevent the construction of a road on holy land essential to their religious practice).

17 *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

18 *Id*. at 884 ("Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").

19 *Id*. at 879 (internal citations omitted).

20 *Id.* at 878-79.

21 Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 174-5 (2012).

22 42 U.S.C. § 2000bb et. seq.

23 *The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY 6, https://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf. The ACLU has since advocated amending the law. Louise Melling, ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law, WASH. POST (June 26, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html ("It's time for Congress to amend the RFRA so that it cannot be used as a defense for discrimination.").

24 *The Religious Freedom Restoration Act: Hearing on H.R. 1308 before the S. Comm. on the Judiciary*, 102nd Cong. 241 (1992) (statement of Sen. Hatch). *See also id.* at 171 (statement of Nadine Strossen, President, American Civil Liberties Union) ("the Religious Freedom Restoration Act, [is] the civil rights act of first amendment law"); *Id.* at 74 (statement of Douglas Laycock, Professor, University of Texas Law School) ("Racial and ethnic minorities are often also religious minorities. The civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice").

25 S. Rep. No. 103-111, at 8 (1993).

26 R. Laurence Moore and Isaac Kramnick, Godless Citizens in a Godly Republic: Atheists in American Public Life 147 (2018); Rob Boston, *Past Due Bill: Religious Freedom Restoration Act Finally Becomes Law*, Church & State 7-8 (Dec. 1993), https://www.au.org/sites/default/files/2018-11/RFRA%20Dec.%201993.pdf.

27 *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 22 (1990), https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/05/hear-150-1990.pdf (statement of Rep. Lamar Smith) ("For over 40 years we have condemned Communist countries for…persecution of religious minorities…We have to practice what we preach."); *id.* at 20 (statement of Rep. Stephen J. Solarz) ("Even today, Jews from the Soviet Union, Buddhists from Southeast Asia, Catholics from Northern Ireland, Bahais from Iran, and many more, willingly

renounce their homelands and risk their lives for the 'luxury' of religious freedom. Respect for diversity, and particularly religious diversity, was one of the fundamental principles that guided the framers of the Constitution."); *id.* at 66 (statement of American Jewish Congress) ("Some may question why federal legislation to undo the Smith decision is considered so essential. But that is to underestimate the role of the courts in protecting the rights of religious minorities."). *See also Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 54-55 (1992), https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf (Statement of Rep. Craig Washington) ("It is the people who are in the minority…on the question of religion, who need the protection the most, so they can practice it"); *id.* at 25 (statement of Elder Dallin Oaks) ("The worshipers who need its [The Bill of Rights'] protections are the oppressed minorities, not the influential constituent elements of the majority"). *See also* 139 Cong. Rec. 7, 9677 (1993) (statement of Rep. Karen F. Shepherd); *id.* at 9686 (statement of Rep. Bruce Vento) ("Today the balance is tipped against the exercise of religion and especially against those that are minorities in our society, either ethnically, as my colleagues mentioned, the native Americans groups, the Hmong… and/or other minority religious groups"; *id.* at 9687 statement of Rep. Bob Franks) ("Its [Smiths'] implications are especially burdensome for those whose beliefs lie within the religious minority"); 137 Cong. Rec. 16, 23376 (1991) (statement of Rep. Glenn M. Anderson) ("the illogical refusal to examine any State infringements on religious practices is disastrous to those religious practices which may not conform to general law and do not have the popular support to find politically granted exceptions"); 137 Cong. Rec. 12, 17036 (1991) (statement of Rep. Stephen J. Solarz) ("The test strikes an appropriate balance between the needs of the majority and the rights of religious minorities").

28 *See, e.g*., *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary,* 102nd Cong. 129-35 (1992) (Statement of Mark Chopko, General Counsel, United States Catholic Conference) ("The Conference has legitimate concerns that S. 2969 will be utilized to attempt to promote the destruction of innocent unborn human lives"); *id.* at 206-37 (Statement of James Bopp, Jr., General Counsel, National Right to Life Committee, titled "Why the Religious Freedom Restoration Act Must Expressly Exclude a Right to Abortion.").

29 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

30 *City of Boerne v. Flores*, 521 U.S. 507 (1997).

31 *State Religious Freedom Restoration Acts*, Nat'l Conf. of St. Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

32 *See State RFRA Map*, Protect Thy Neighbor (last visited Mar. 9, 2019), http://www.protectthyneighbor.org/rfra (noting RFRA-like protections under state constitutions in Alabama, Alaska, Maine, Massachusetts, Minnesota, Ohio, New York, and Wisconsin).

33 42 U.S.C. § 2000cc *et. seq.*

34 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751 (2014).

35 *Zubik v. Burwell*, 578 U.S. __, 136 S. Ct. 1557 (2016).

36 *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, 584 U.S. __, 138 S. Ct. 1719 (2018).

37 For a list of additional litigation, see *infra* note XXX. In addition, two other religion cases were recently heard by the Supreme Court. In one, the Court held that the state of Missouri violated the Free Exercise Clause of the Constitution when it withheld a grant to a church-affiliated preschool because of a state ban on funding religious institutions. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S.__, 137 S. Ct. 2012 (2017). In the other, the Court found that a 40-foot Latin cross dedicated to soldiers killed in WWI, built in 1925 and displayed on government-owned land, did not violate the Establishment Clause. *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. _, 139 S. Ct. 2067 (2019).

38 *Ricks v. State Contractors Bd.*, 435 P.3d 1 (Idaho Ct. App. 2019) *appeal docketed*, No. 19-66 (U.S. Jul. 12, 2019).

II

Sikhs and Satanists, Sanctuary and Safe Drug Use: Religious Liberty Law Beyond the Christian Right

Scott Warren being blessed . Photograph by Ash Nunez, courtesy of the Unitarian Universalist Service Committee

Long before U.S. courts began to grant religious exemption claims under the Free Exercise Clause, many early progressive and social justice movements were led by people of faith and inspired by religious beliefs. In the 18th century, members of the Religious Society of Friends, also known as Quakers, were some of the first organized abolitionists, believing that slavery violated Christian principles, including their belief that all were equal in the eyes of God. Religion was also an inspiration for many Black abolitionists: Frederick Douglass was an ordained minister of the African Methodist Episcopal Zion Church, and Harriet Tubman, nicknamed "Moses" during her lifetime for her fearless leadership of the Underground Railroad, was guided by dreams and visions that she considered to be messages from God. Later movements of the Progressive Era, including the settlement house movement and the temperance movement, also had significant religious factions.

Perhaps most famously, religious leaders including Rev. Dr. Martin Luther King, Jr.—who according to one biographer "fused the political promise of equal votes with the spiritual doctrine of equal souls" —were key organizers of the civil rights movement of the 1950s and 60s. Notably, the primary tactic of the civil rights movement was civil disobedience, which required activists to accept the mandated punishment for violating segregation and other laws rather than to request religious or other legal exemptions. This approach, echoing a kind of religious martyrdom, was used to draw attention to the laws' immorality, not just as applied to those of particular religious faiths, but to everyone. Some civil rights activists even adopted a "jail, no bail" approach, choosing to stay behind bars rather than pay into a corrupt legal system. Thus, these early social justice movements, though closely intertwined with religious faith, sought to transform laws rather than gain individual, faith-based exemptions from compliance with the law.

Since religious exemption litigation became more prevalent in the 1960s, however, it has been used as a tool by many faith-based social justice movements. From the right to "welcome the stranger" to the right to protect sacred land, religious practitioners have turned to the courts seeking protection for faith-based activities in an enormous variety of contexts.

Unfortunately, the diversity of beliefs represented in current religious liberty litigation is not often well reflected in mainstream reporting and political commentary on religion, resulting in a public discourse that collapses "religious liberty" into a discussion about conservative Christian beliefs. As political scientist Laura Olson wrote in her examination of religious progressives, since the 1980s "[t]he right benefited from the fact that the media focused a great deal of attention on its conservative brand of faith-based politics, to the virtual exclusion of religious progressivism.

The religious left, to the extent that it has remained visible at all, seems largely to have been perceived as a dinosaur." Similarly, history professor Timothy J. Williams has reflected "since the 1970s, it is the Christian right that has set the discourse about religion in America."

Even the titles of recent news articles—such as "You Know the Religious Right. Here's the Religious Left" and "The Christian Left—Possibly the Most Interesting Group You've Never Heard Of" underscore the lack of attention that has been paid to religious movements outside the Christian right. And while some observers have noted a modest uptick in coverage of religious progressives over the past year, even this reporting often fails to acknowledge those outside the Christian tradition. This intense focus on the beliefs and practices of conservative Christians in the press has been, unsurprisingly, absorbed by media consumers. A 2016 study found that "religious and political conservatives who follow the news closely perceive [religious] freedoms as increasingly under assault."

The discussion of religious liberty advocacy that follows seeks to correct this narrow focus on the religious beliefs and practices of conservative Christians by shining a spotlight on religious liberty advocacy that has been largely forgotten, overlooked, or mistakenly described as secular rather than religious.

Religious Minority Rights

Before addressing more cutting-edge religious liberty litigation, it is important to note the ways in which religious liberty laws have been used to secure significant but typically modest religious exemptions for members of minority faiths. Prior to the enactment of RFRA, nearly every Supreme Court case involving the Free Exercise Clause was brought by a religious minority, including Seventh Day Adventists, the Amish, Jews, and members of Native American religions. Religious exemptions continue to be a critical legal tool for ensuring that the faith practices of religious minorities are not unintentionally restricted by government policies.

RFRA was passed with support from many progressive groups precisely because the beliefs and practices of religious minorities—unlike mainstream Christians—are not already incorporated into U.S. law. Federal and state RFRA laws have been used, for example, to ensure that members of the military can wear religious headwear, male Native American schoolchildren can wear their hair in traditional braids, Santería practitioners can perform ritual animal sacrifice, and Sikh federal employees can carry a kirpan (a small, blunt, ceremonial knife) to work. In addition to RFRA, federal antidiscrimination law requires

most private employers to accommodate the religious beliefs of their employees unless this would cause a significant hardship. For example, in E.E.O.C. v. Abercrombie & Fitch, the Supreme Court found that a clothing store could not deny a job to Samantha Elauf, a Muslim woman, because her headscarf violated their dress code requiring an "All American look."

These protections are especially important for people in prison and immigration

Samantha Elauf.
Courtesy of Samantha Elauf Mustapha

"Wearing a headscarf every day, it's a reminder of my faith."

~Samantha Elauf, litigant in EEOC v. Abercrombie & Fitch

detention, where other rights and liberties are severely restricted. Countless inmates have relied on the protections afforded by RLUIPA and RFRA to secure access to kosher and halal food, exemptions from prison clothing and grooming rules, access to sweat lodges and other religious rituals and services, and permission to keep religious books and other materials in their living spaces. In the Supreme Court's 2015 opinion in Holt

v. Hobbs, for example, the Court held that RLUIPA guaranteed a Muslim inmate's right to grow a short beard, notwithstanding a state prison rule that prohibited facial hair.

While exemption laws have undoubtedly been helpful to many religious minorities, it is worth mentioning that the vast majority of RFRA claims are unsuccessful. A sampling of rejected RFRA claims includes a number of appellate court opinions which deny Native American religious practitioners an exemption from laws banning the collection of eagle feathers; a Seventh Day Adventist mail carrier who was denied the right to take Saturdays, his Sabbath, off work; and Orthodox Jewish children who were denied an exemption from having to testify against their parents contrary to their religious beliefs.

In 2019, the Supreme Court received widespread condemnation when it refused to suspend the execution of a Muslim man on death row so that he could pursue a religious liberty claim. The Alabama Department of Corrections had refused to allow the man's Imam to join him in the execution chamber, despite the fact that it allowed a Christian chaplain who was a prison employee to enter the chamber for other inmates. The man argued that this violated his rights under RLUIPA and the U.S constitution. In a dissent, Justice Elena Kagan called the majority's decision "profoundly wrong." Only weeks later, perhaps in response to the public outcry, the Court halted another execution so that a Buddhist inmate in Texas could pursue a religious liberty claim with nearly identical facts.

Thus, while RFRA, RLUIPA, and other exemption laws have been used to protect the religious exercise of many minority practitioners, such claims have by no means been universally successful.

Immigration & Immigrants' Rights

For decades (if not centuries), people of faith have been moved to provide support to refugees and other migrants as part of their religious practice—in some cases guided by the Bible's repeated calls to "love the stranger." In the U.S., some of these activities, such as the provision of food, water, transportation, and shelter to undocumented people, have occasionally triggered prosecution by the federal government under criminal laws including the prohibition on "bringing in and harboring certain aliens." This has led people of faith to seek religious exemptions as a means of protecting their work with and for migrants.

The first significant wave of religious liberty litigation in the immigration context occurred

in the 1980s. After the Reagan administration denied refugee status to thousands of people escaping violence in Central America, church leaders as well as religious and secular activists created an underground network to help refugees cross the border and provide them with shelter and assistance. At its peak, this "sanctuary movement" included more than 500 congregations of many different denominations, who by some estimates aided up to 500,000 migrants. Eventually, the FBI launched a covert investigation of several sanctuary communities using paid informants. Two groups of sanctuary volunteers were subsequently charged with violations of federal law for conspiracy, "bringing in and landing," "transporting," "harboring," and "aiding and abetting the unlawful entry of aliens." The arrests led to two "sanctuary trials." In both cases, the volunteers argued that they should be entitled to a religious exemption from federal "harboring" laws. None of their claims succeeded.

In U.S. v. Merkt the Fifth Circuit Court of Appeals held that the Free Exercise Clause did not entitle the volunteers to an exemption because, according to the court, "[i]n this case, the claims of conscience must yield to the twin imperatives of evenhanded enforcement of criminal laws and preservation of our national identity." Similarly, in U.S. v. Aguilar, the Ninth Circuit found that "a religious exemption for these particular appellants would seriously limit the government's ability to control immigration." Other cases of the sanctuary movement era—including a case brought by religious nonprofits that sought permission to hire undocumented immigrants in violation of the Immigration Reform and Control Act (ICRA)—were also unsuccessful.

"[T]here is no question that faith communities will continue to provide sanctuary whenever refugees need protection from government officials, that many of these communities consider sanctuary to be an essential part of what it means for the church to be the church..."

~Jim Corbett, Defendant in U.S. v. Aguilar

1980s Sanctuary photo

Photo by Ron Medvescek, © 1984 Arizona Daily Star

Now, thanks to the more expansive right to religious exemptions created by RFRA—as well as increasingly aggressive federal policies related to migrants and those who assist them—religious practitioners are again turning to the courts to protect their faith-based commitment to serving immigrants. In 2018, volunteers working with the Unitarian-affiliated organization No More Deaths/No Más Muertes in Arizona were criminally charged for providing food, water, and shelter to migrants in the Arizona desert. While the volunteers were of varying religious backgrounds, all considered their work with No More Deaths to be motivated by their religious and spiritual commitments.

One of the volunteers, geographer Dr. Scott Warren, was charged with two felony counts of "harboring" and one count of "conspiracy to commit harboring" after he provided food and water to two men he encountered in the desert—charges that could have resulted in up to a 20-year prison sentence. Dr. Warren sought to have the charges dismissed based on RFRA. He argued that assisting the migrants was motivated by his sincerely-held religious views, including the responsibility to "do unto others as we would want to have done unto us," and as such he was

No More Deaths banner.
Courtesy of No More Deaths

entitled to a religious exemption from prosecution. In his legal papers and at trial, Dr. Warren and the other No More Deaths volunteers emphasized the perils of crossing the desert, explaining that "in the deadly border region in which at least 412 individuals died in 2017 alone, Dr. Warren could not, consistent with his conscience, turn away two exhausted, injured men seeking food, water, and shelter." It is worth mentioning that much of the media coverage surrounding Dr. Warren's trial neglected to discuss his religious liberty defense, and even news sources specializing in religion issues referred to him as a "border activist" rather than a person of faith.

In June 2019, Dr. Warren's trial resulted in a hung jury, with eight jurors who wished to acquit im and four who voted to convict. The government will retry Dr. Warren for harboring, but is dropping the conspiracy charge.

Eight additional No More Deaths volunteers were charged with misdemeanors for entering a national wildlife refuge without a permit and discarding property (jugs of drinking water) in the refuge. All of the volunteers brought defenses based on RFRA and four were tried before a magistrate judge (appointed to assist district court judges) in January 2019. Only hours after the non-jury trial ended, the judge issued an opinion finding the volunteers guilty. The opinion openly demeaned the volunteers' RFRA claim, calling it "a modified Antigone defense, in that they are acting in accordance with a higher law." As noted by a group of religious scholars responding to the judge, RFRA is, of course, not a "higher law" but a federal statute that requires judges to undertake a complex multi-step analysis. Instead, the judge treated the claim as little more than a whim and refused to offer even cursory scrutiny of the RFRA defense. While the volunteers faced up to six months in prison, they were ultimately sentenced to fifteen months of probation as well as monetary fines. They have appealed the decision to the District Court. In February 2019, charges against the other four volunteers were dropped after they pled to civil infractions.

In addition to the No More Deaths cases, in May 2019 the District Court of Nebraska adopted a magistrate judge's recommendation rejecting a claimant's argument that the government's prosecution of him for "harboring" violated his religious liberty rights under RFRA and the Free Exercise Clause. The claimant had argued that his actions were a "living expression of sincerely held religious convictions as espoused by The United Methodist Church." The magistrate, relying on pre-RFRA cases of the sanctuary movement era, held that "[a] judicially created religious exemption to the uniform application and enforcement of border security laws

Zaachila Orozco-McCormick.
Photograph by/courtesy of Mary Orozco

"I have a strong and abiding moral, ethical and spiritual belief that every person has a right to basic human necessities such as food and water and shelter, regardless of their status, even if that means taking the shirt off my back or the food off my plate."

~ Zaachila Orozco-McCormick, No More Deaths volunteer

would fatally undermine the alien residency requirements promulgated and enforced pursuant to the Immigration and Nationality Act of 1952."

The two ongoing No More Deaths cases will be closely watched by members of what has been deemed the "new sanctuary movement." Inspired by the sanctuary movement of the 1980s, over the past decade clergymembers and people of faith, as well as secular activists, have embraced a range of tactics to resist immigration laws, including providing physical shelter to people at risk of deportation. This movement has grown enormously since the 2016 presidential election; there are now dozens of people who have publicly gone into sanctuary in houses of worship to escape deportation orders. Furthermore, hundreds of houses of worship—as well as individuals, hospitals, schools, and other institutions—have expressed willingness to offer sanctuary to migrants. This puts them at risk of prosecution for harboring as well as other punishments, such as loss of 501(c)(3) tax-exempt status. Many are, therefore, considering bringing RFRA defenses in the event that they are targeted for their faith-based sanctuary activities. Moreover, given that the No More Deaths volunteers were prosecuted for little

more than providing food to migrants, religious facilities including homeless shelters and soup kitchens may similarly turn to RFRA defenses if they are prosecuted for providing assistance to undocumented people.

One leader of the new sanctuary movement has already brought a RFRA claim challenging the harassment she has suffered from the U.S. government on account of her ministry to migrants. Kaji Douša, a Christian pastor and co-chair of the New Sanctuary Coalition in New York City, filed a case in federal district court in July 2019 arguing that she was being subject to government harassment and surveillance because of her religiously-motivated activities on behalf of migrants, in violation of the First Amendment and RFRA. As she explains in her legal papers, Pastor Douša has been "called to pray with and protect refugees, asylum seekers, and other migrants." As a means of answering this call, she was a lead organizer and participant of several "sanctuary caravans" beginning in 2018 that brought religious leaders to Tijuana, Mexico to minister to Central American migrants seeking refuge in the U.S.

Upon reentering the U.S. after a trip to the border in January 2019, Pastor Douša was detained and interrogated by border agents, and her access to expedited border crossing was revoked. The interrogation revealed that the government had been surveilling and collecting information about her pastoral work in New York. Pastor Douša later learned that a migrant whose marriage had been blessed by another member of the sanctuary caravan was subsequently interrogated by immigration officials about her relationship to Pastor Douša. Douša is arguing that this type of surveillance and questioning thwarts her religious exercise, in part by making it impossible for her to provide pastoral guidance,

Pastor Kaji Douša.
Courtesy of Park Avenue Christian Church

"My faith teaches me to see Jesus Christ in those who suffer as he suffered… I am thus called to pray with and protect refugees, asylum seekers, and other migrants—remembering that Jesus, too, was received as a refugee in Egypt."

~ Zaachila Orozco-McCormick, No More Deaths volunteer

including the rites of confession and absolution, with a guarantee of confidentiality.

Religious organizations whose tenets motivate them to assist in resettling refugees have also made claims under RFRA. In 2016, a group of clergymembers filed an amicus brief in Texas Health & Human Services Commission v. U.S. arguing that Texas' attempt to prevent the U.S. government from settling refugees in the state violated their rights under the Texas state RFRA. This case did not explicitly involve a state RFRA claim. Rather, the state of Texas filed a complaint against the federal government arguing that the U.S. was resettling Syrian refugees without consulting the state, in violation of the Refugee Act of 1980. Texas religious leaders' amicus brief in support of the federal government argued that the faith groups had a religious right to serve Syrian refugees. A federal court dismissed Texas' lawsuit without discussing the organizations' religious liberty claim.

The Trump administration's efforts to build a wall along the U.S.-Mexico border as a method of immigration control has also been subject to RFRA challenges. In 2018, the federal government filed a condemnation suit to conduct surveying for the planned construction of a border wall on land owned by a Roman Catholic diocese in Texas and containing the historic La Lomita Chapel. The diocese responded with an argument based on RFRA. The church raised several objections: the border wall would chill their congregants' religious practice; it would prevent the Church from ensuring that its property is used "in a manner that protects rather than injures human life"; and it would "stand as a counter-sign to the Church's teachings on the universal nature of humanity."

The Church explained that some of its members were undocumented, and that even documented Latinx worshipers might cease coming to La Lomita Chapel if doing so required crossing a border wall, for fear of being stopped or detained. Even for those willing to cross a barrier to visit the chapel, the Church argued that turning the property into an immigration enforcement zone—"cleared of vegetation, lighted, and subjected to surveillance cameras"—would impair the Chapel's identity as a sacred space. Further, the Church argued that it had "a moral obligation to adhere to and uphold Catholic social teaching in all of its actions, including in its stewardship of Church-owned lands," and therefore it could not consent to a use of its land that "threatens life and limb." Lastly, the church explained that "[u]niversality—the understanding that all people share a common humanity and dignity" was a key element of Catholic faith, and that "[t]he proposed border wall is the antithesis of this message of universality." Thus, it explained, "the Diocese cannot consent to the erection of a physical symbol of division and dehumanization on its Property."

La Lomita.
© 2008 Anthony Acosta via flickr

"I consider a border wall likely to increase human suffering in the local community and in the world, in contravention of Catholic moral principles. The foundation of Catholic social teaching is that all human life is sacred."

~Bishop of Brownsville, Texas Daniel E. Flores

In February 2019, a District Court Judge allowed U.S. government surveyors initial entry onto the land to conduct surveillance. Shortly thereafter, however, Texas Representative Henry Cueller secured language in an appropriations bill that prohibited funding for construction of a wall on La Lomita and several other locations. While this has provided some temporary protection to the chapel, President Trump's subsequently issued Declaration of Emergency and continuing efforts to secure money for the border wall leave the fate of La Lomita, and its RFRA claim, unclear.

In a recently-filed amicus brief, a group of 75 religious organizations argued that

Trump's appropriation of funds for the border wall threatened their religious liberty. They argued that the President had "on multiple occasions drawn a connection between the supposed threat of Islam and the need for a border wall," and that "when the president can redirect funds at will—even in the face of congressional opposition—nothing stands in the way of using such funds to surveil, harass, and sanction disfavored religious groups."

Finally, RFRA has been used to directly challenge the deportation of immigrants and help migrants to secure legal status. In *Rodriguez et al v. Sessions,* the U.S. citizen wife and daughter of undocumented Salvadorian immigrant Juan Rodriguez brought a claim arguing that his deportation violated their rights under RFRA. As Seventh Day Adventists, they argued that family unity is essential to their religious belief and practice, and that therefore deporting their husband and father to El Salvador would infringe on their religious exercise. The claim was dismissed when the government agreed to allow Mr. Rodriguez to remain in the country to pursue his asylum claim.

In Odei v. DHS, Ghanaian pastor Ernest Odei was prevented from entering the U.S. by border patrol agents at O'Hare Airport because he lacked a proper visa. Odei had planned to visit Spirit of Grace Outreach, a religious organization of which he was a founding member, speak at churches, perform missionary work, and meet with his academic advisors at the Christian university where he was a Ph.D. candidate. Following his return to Ghana, Odei and Spirit of Grace Outreach challenged the decision not to admit him on several grounds, including RFRA, arguing that denying

Juan Rodriguez Family.
Marie D. De Jesús/©Houston Chronicle

"Just as David defeated Goliath and had faith, so my father and my family will defeat our Goliath with the help of God."

~Kimberly Rodriguez, youngest daughter of Juan Rodriguez

Odei entry to the U.S. burdened both the pastor's and the organization's religious exercise. In September 2019, the Seventh Circuit rejected his claim, holding that a provision of the Immigration and Nationality Act barred courts from having the jurisdiction to review an order of removal, and that "[n]othing in the Religious Freedom Restoration Act overrides [this] jurisdictional bar."

While neither Rodriguez' nor Odei's RFRA claims were fully litigated, immigrants have won more limited RFRA claims brought within immigration proceedings. In 2005, Chukwuezue Henry Nworu, a Nigerian man who was married to a U.S. citizen, was exempted under RFRA from the requirement to submit to a blood test in order to become a legal permanent resident of the U.S. Nworu was a member of the Faith Tabernacle Congregation, which rejects medical interventions, including drawing blood. While an immigration judge initially claimed that he lacked the authority to interpret RFRA, the Board of Immigration Appeals and Attorney General reversed this decision, finding that requiring Nworu to take a blood test "was not the 'least restrictive means' of furthering [the government's] compelling interest as there exist other reasonably accurate methods of determining whether [Nworu] is suffering from a communicable disease."

Similarly, an Old Order Amish couple sued the federal government in 2018 for a RFRA exemption from the requirement that they submit photographs as part of the wife's application for permanent residency. The couple "believe that photographs of people are graven images prohibited by the Second Commandment." Despite the administration's alleged commitment to religious liberty, the Department of Homeland Security repeatedly refused to grant them an exemption from the requirement. The case eventually settled. In Sabra v. Pompeo, U.S. citizen Mohammed Sabra brought a RFRA and other claims against the State Department after it refused to recognize his daughter's citizenship and admit her into the U.S. for medical treatment, requesting additional evidence of paternity including photos of Sabra's wife during pregnancy—photos that "for religious reasons, the family is unwilling to provide as she is less than fully attired." This case is ongoing.

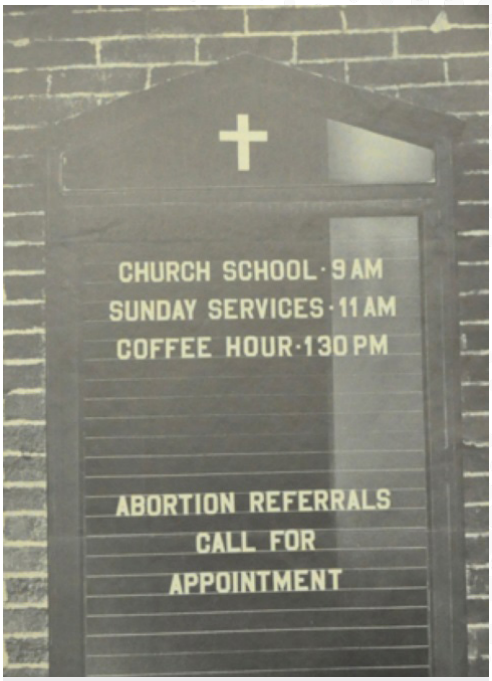
People of faith have sought to use RFRA and other exemption laws to protect both immigrants and those who are committed to providing them with spiritual and material assistance. This trend is likely to continue in the face of the federal government's ever-harsher immigration policies.

Reproductive Rights

Conversations around the intersection of religious liberty and reproductive rights typically equate people of faith with opposition to abortion and other reproductive healthcare. However, people of faith and religious denominations hold a wide and often quite nuanced range of views on bodily autonomy and the right to reproductive healthcare. Several religious denominations even hold that the right to make decisions about one's reproductive healthcare is an essential aspect of religious freedom.

For example, in a 2019 Statement on Reproductive Freedom, The Rabbinical Assembly, an international association of Conservative Jewish rabbis, stated that "Denying a woman and her family full access to the complete spectrum of reproductive healthcare, including contraception, abortion-inducing devices, and abortions, among others, on religious grounds, deprives women of their Constitutional right to religious freedom." Acknowledging the spectrum of views on abortion held by its members, the Evangelical Lutheran Church in America (ELCA) has stated that "[f]or some, the question of pregnancy and abortion is not a matter for governmental interference, but a matter of religious liberty and freedom of conscience protected by the First Amendment."

A number of large denominations, including the Presbyterian Church, Reform and Conservative Judaism, the United Church of Christ, and the Unitarian Universalist Association, support the right of individuals, based on their personal circumstances and beliefs, to make their own decisions regarding abortion in most or all circumstances. Other denominations, including the ELCA, United Methodist Church, and the Episcopal Church, have expressed some ambivalence about abortion, but nevertheless oppose absolute legal restrictions on the procedure. Perhaps unsurprisingly, given the large number of denominations supportive of reproductive rights, religious leaders, healthcare providers, and patients have all brought religious liberty claims as a means of protecting the right to obtain or provide reproductive healthcare.

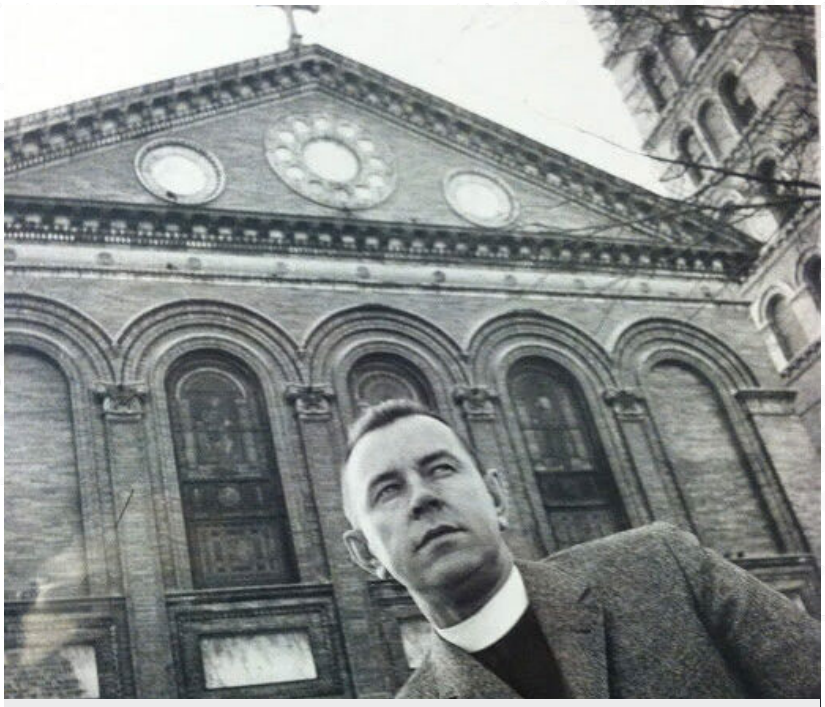


CCS Church Sign.
Courtesy of Susan Brownmiller

Prior to the legalization of abortion nationwide in 1973, a group of faith leaders established the Clergy Consultation Service (CCS), an underground network of ministers, rabbis, and

other faith leaders who helped tens (or by some estimates, hundreds) of thousands of people nationwide access safe abortion. Only three clergymembers ever faced formal legal charges for their activities, one of whom defended himself on the grounds that he had a constitutional right to provide such counseling—though this was based on the Free Speech rather than Free Exercise Clause. None of the clergy were ultimately convicted.

In addition to these defensive suits, CCS member Rev. Jesse Lyons brought an affirmative lawsuit, Lyons v. Lefkowitz, challenging New York State's prohibition on abortion. Rev. Lyons, a Methodist clergymember, argued that the ban "restricted his right to offer pastoral counseling that referred women to qualified physicians." The state legislature legalized abortion in New York before any of the multiple challenges to the law were decided, and New York's branch of CCS subsequently opened an abortion clinic.



Rev. Howard Moody.
Courtesy of Judson Memorial Church

"My understanding of free choice is that the right to choose is a God-given right with which persons are endowed…Freedom of choice is what makes us human and responsible. And for women, the preeminent freedom is the choice to control her reproductive process."

~Rev. Howard Moody, Co-founder of the Clergy Consultation Service

Religious Exemptions After Roe

The current makeup of the Supreme Court has renewed concerns that Roe v. Wade may be overturned in the coming years. If this comes to pass, religious liberty laws, including state RFRAs, could provide potential avenues for medical providers, activists, clergy, and patients to preserve abortion care.

Many healthcare providers have noted that their decision to offer abortion care is motivated by, not in spite of, their religious beliefs. And it is likely that in the event Roe is overturned, a new version of the Clergy Consultation Service will arise to assist patients in accessing abortion.

Thus, healthcare providers, faith leaders, and patients could use RFRA as a defense to potential criminal prosecution for performing, coordinating, or receiving an abortion. Such defenses may become more common even if Roe is not explicitly overturned, as increasingly severe restrictions on abortion may make it all but impossible to access the procedure legally in some states, leaving illegal abortion as the only or most affordable option.

In *Landreth v. Hopkins*, two CCS members in Florida similarly challenged a state law that prohibited advising on, advertising, or distributing printed material about abortion, arguing that it violated their rights to free speech and free exercise of religion. The suit was dismissed on procedural grounds.

After Roe but before RFRA, in the 1973 case *Watkins v. Mercy Medical Center,* Dr. Wilfred E. Watkins sued a Catholic hospital for denying his medical staff privileges after he refused to abide by the hospital's prohibition on sterilization and abortion. Dr. Watkins claimed that the denial violated his First Amendment Free Exercise rights. The Ninth Circuit ruled against him because the hospital was private and constitutional claims can only be brought against the government. (Now, however, RFRA might be used in similar circumstances in a circuit that has found RFRA to apply in suits between private parties.)

Since the passage of RFRA and state mini-RFRAs, people of faith have sought to use these laws to preserve access to reproductive healthcare. In fact, as mentioned in Section I, the ability to use the federal RFRA to protect abortion rights was contemplated even before the law was enacted: in the early 1990s, the U.S. Conference of Catholic Bishops opposed RFRA on the grounds that advocates of abortion rights were using religious freedom as a justification for—not against—a person's right to choose whether to terminate a pregnancy.

Most recently, the City of Baltimore brought a RFRA claim challenging a federal regulation promulgated by the Trump administration that prohibits doctors within the Title X program—a federal grant program that provides individuals with family planning and related services—from offering their patients information about or referrals to abortion services. Baltimore argued that this "Gag Rule" "violates rights of religious conscience recognized by [RFRA] by prohibiting physicians from counseling patients on comprehensive reproductive health services even when their religious exercise requires them to engage in such counseling."

Interestingly, the complaint alleges that the rule violates the religious rights of doctors who both support and oppose abortion rights. It explains that the rule burdens "health care providers whose religious beliefs require them to inform patients of their religious views against abortion as well as [those] whose religious beliefs require them to inform patients of information necessary for patients to make informed decisions about their health care in light of the importance certain faiths place on individual self-determination." The complaint also notes that the rule contains no exemption for "patients whose religious exercise would be substantially burdened by the inability of their physician to provide honest counseling."

In September 2019, Baltimore's RFRA complaints were dismissed without prejudice by a district court judge, who found that the city had "done little more than allege conclusory statements with no support to demonstrate any religious belief or how it has been substantially burdened." The court held that "[t]hese allegations are insufficient to state a plausible claim that the Final Rule violates the RFRA."

Finally, several cases brought by members of The Satanic Temple (TST) in Missouri have sought religious exemptions under that state's RFRA from state-mandated abortion requirements that conflict with their belief in bodily autonomy and respect for science. The law at issue required patients seeking an abortion to, among other things, undergo an ultrasound at least seventy-two hours before the procedure and certify receipt of a booklet that states "[t]he life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."

In Doe v. Greitens, plaintiff Mary Doe, a member of the Satanic Temple, brought a case in Missouri state court requesting an exemption from these mandates under the Missouri RFRA. Doe also argued that the law violated her Free Exercise rights under the First Amendment, as well as the Establishment Clause—which requires separation of church and state. As to the Establishment Clause argument, Doe argued that the law "unconstitutionally fosters an excessive government entanglement with religion" as "the sole purpose of the law is to indoctrinate pregnant women into the belief held by some, but not all, Christians that a separate and unique human being begins at conception."

After a trial, the Supreme Court of Missouri issued an opinion in February 2019 finding that the state law did not impose a substantial burden on Mary Doe's religious exercise in violation of the state RFRA, since the law did not "require a woman seeking an abortion to read the booklet containing the objected-to [statement] much less to agree with it."

The Court also found that the law did not contravene the Establishment Clause.

Despite this loss, Doe's case was successful on at least one front: during oral argument, Missouri's Solicitor General told the court that the challenged law did not in fact legally require patients to undergo an ultrasound as a prerequisite for receiving an abortion. Previously, "abortion clinics in Missouri had interpreted the law as requiring an ultrasound for the purposes of hearing a fetal heartbeat in order for an abortion to be performed." The Missouri Supreme Court relied on the Solicitor General's statement in finding that it "need not determine whether requiring Ms. Doe to have an ultrasound [or] to listen to the fetal heartbeat…would have constituted a restriction on her religious freedom, for the statute imposes no such requirements." This new interpretation of the state statute, which may not have been clearly adopted by the state absent Doe's lawsuit, will reduce one barrier to abortion care in Missouri.

A similar challenge to the Missouri law brought on Free Exercise and Establishment Clause grounds was initiated by a different Satanic Temple member, called Judy Doe, in federal court. In February 2019, a district court judge dismissed her claim, finding among other things that the statements "'[t]he life of each human being begins at conception' and that '[a]bortion will terminate the life of a separate, unique, living human being' are not facially religious," and therefore do not violate the Establishment Clause. The opinion has been appealed to the Eighth Circuit. TST has also threatened to challenge an Indiana law requiring the burial or cremation of fetal remains as a violation of its members' religious freedom.

LGBTQ Rights

As in the reproductive rights context, the public too often conflates "religious liberty" with opposition to LGBTQ rights and marriage equality, despite the fact that people of faith hold a wide variety of views about sex, sexuality, and marriage, and many people of faith identify as LGBTQ. Several commentators have noted the media's tendency to overlook LGBTQ people of faith, and one study of mainstream media articles about LGBTQ issues found that "[t]hree out of four of the messages with some religious identification were communicated by people affiliated with faith groups that have formal church policy, religious decrees or traditions opposing the rights of LGBT people." The study concluded that a "'gays versus religion' frame is present in the news" and that when media "use religious sources in news stories on LGBT issues, they tend to choose sources from more conservative Christian backgrounds – sources who voice negative messages about LGBT people and their rights. Conversely, pro-gay sources, or openly

LGBT people…are predominantly presented without any religious affiliation noted in the story."

Not every religious liberty litigant has opposed LGBTQ rights, however. Before the Supreme Court case Obergefell v. Hodges established a constitutional right to marry for same-sex couples, a group of interfaith clergy whose faith instructed that same-sex couples should be allowed to marry, and members of their congregations who wished to marry, filed a suit arguing that a North Carolina law that criminalized performing a same-sex marriage violated their religious beliefs and practices. This case, *General Synod of the United Church of Christ v. Reisinger*, was argued under the Free Exercise Clause, as the federal RFRA does not apply to state law and North Carolina has not passed a state RFRA. Obergefell was decided before the case could be fully litigated.

Nancy Petty.
Courtesy of Campaign for Southern Equality

"North Carolina's ban on marriage equality has placed a burden on my ability to minister to all of my congregants as equals. It violates my belief that all people are created equal and that God blesses all of our faithful relationships."

~Rev. Nancy Petty, United Church of Christ v. Reisinger claimant

In a recent law review article, "The Case of the Religious Gay Blood Donor," Professor Brian Soucek argues that RFRA could be used to challenge the U.S. Food and Drug Administration's prohibition on blood donations from sexually active men who have sex with men. Such a case could be initiated by a man who is religiously obligated to donate blood, but is prohibited from doing so. He posits that such a case "would either produce a major victory for gay rights or, as likely, would force courts to clarify and curtail some of the most controversial aspects of recent, mostly conservative, religious freedom efforts."

Interestingly, the inclusion of protections for LGBTQ-affirming faith practitioners helped to prevent the enactment of a broad religious exemption bill originally intended to benefit religious conservatives. The "First Amendment Defense Act" was first proposed in Congress in 2015, and its original text explicitly protected only the religious beliefs that marriage is "the union of one man and one woman," and that sex should only take place within such a marriage. Possibly out of concern that this could violate the Establishment Clause by advancing a particular religious belief about marriage, a later version of the bill added protections for the belief that marriage is "the union of one man and one woman, or two individuals as recognized under Federal law." In response to this change, some religious right groups pulled their support for the bill.

Economic Justice

Providing food and shelter to the poor has long been a way for many faith practitioners and religious institutions to act out their religious beliefs. In fact, almost every faith tradition has providing aid to the poor or needy as one of its central tenets. In the face of health, zoning, and other laws and policies that regulate such forms of charity, faith leaders and churches have relied extensively on religious liberty laws to defend their faith-based practices on behalf of people who are poor, hungry, and/or homeless. Several of these claims have succeeded under the Free Exercise Clause of the federal and state constitutions as well as federal and state RFRAs.

In 1983, prior to the passage of RFRA, a Lutheran church in Hoboken, New Jersey successfully relied on the federal Free Exercise Clause to prevent the municipality from shuttering the church's homeless shelter under its zoning laws. In ruling in the church's favor, a county judge held that "[i]n view of the centuries old church tradition of sanctuary for those in need of shelter and aid, St. John's and its parishioners in sheltering the homeless are engaging in the free exercise of religion." It then held that Hoboken could not use its zoning authority to prohibit that religious exercise.

In 1994, a federal district court found a Presbyterian church's food distribution program to be protected religious exercise, calling it "a form of worship akin to prayer" and noting that "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions." The court further held that a zoning board decision which would prevent the church from creating such a program at their new location substantially burdened its right to free exercise of religion in violation of the First Amendment and RFRA.

Other successful religious liberty claims brought by faith-based institutions in support of their efforts to feed the hungry or shelter the homeless include a Richmond, Virginia parish that won the right to run a "Meal Ministry" under RFRA; a New Orleans church that defended its soup kitchen from closure using religious liberty protections in the federal and Louisiana Constitutions; a Fort Lauderdale homelessness advocate who convinced a trial judge that the Florida RFRA required the city to provide him with an alternative site for his food distribution program; a New York City church that relied on the Free Exercise Clause to obtain a permanent injunction preventing the City from dispersing homeless persons sleeping on the Church's property; a Washington state church that forced the city of Woodinville to consider its permit request to host a tent city under the state constitution; ministries in Dallas that won exemptions from food safety regulations under the Texas RFRA to serve food to the homeless; Philadelphia churches that won an injunction under the Pennsylvania RFRA preventing the city from enforcing its ban on food distribution in public parks; and a woman in Texas—Joan Cheever—who used the threat of a state RFRA suit to pressure the city of San Antonio into allowing her to serve free food from a non-permitted vehicle called the "Chow Train."

Joan Cheever.
Photograph by/courtesy of David Martin Davies

"You are taught at an early age to take care of your neighbor and be a good Samaritan and help those in need."

~ Joan Cheever, Founder of The Chow Train in San Antonio

Not all claims have succeeded, however. In 2010, for example, the Eleventh Circuit found that a local regulation that placed limits on a religious organization's food distribution program did not violate the Florida RFRA. Specifically, it held that the regulation did not impose a burden on the organization's free exercise of religion, because it did "not forbid the Church and its members from engaging in their religious exercise; at most, the Ordinance imposes some inconvenience by requiring relocation outside the District." While the court acknowledged that moving a food distribution program outside the downtown park district "might result in some extra transit time for the Church's members," it determined that "needing to travel some extra distance is insufficient to establish a substantial burden."

While not universally successful, reliance on religious liberty laws to protect soup kitchens, homeless shelters, and similar programs have been one of the most effective uses of these laws outside of the Christian right context.

Religious Drug Use

From the ceremonial consumption of wine by Catholics and Jews to the use of peyote during Native American religious ceremonies, the use of psychoactive substances within spiritual practice is common to many faith traditions, notwithstanding laws that regulate or prohibit their ingestion. Yet despite the fact that RFRA was enacted in response to the Supreme Court's 1990 decision in *Employment Division v. Smith*—a case involving the religious use of an otherwise illegal substance—requests for RFRA exemptions from criminal drug laws have been almost universally unsuccessful.

The notable exception to this trend is *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, an early RFRA case in which the Supreme Court granted a religious exemption from the Controlled Substances Act to a church that engaged in ritual use of hoasca, a hallucinogenic tea. The Court held that exempting the small number of church members from the law criminalizing hoasca would not undermine the government's overall interest in preventing the sale of illegal drugs. Notably, the Court ruled that the government could not rely on a "slippery-slope" argument in denying a RFRA exemption. It explained, "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'"

Hoasca brewing.
Photograph by Apollo via flickr

"The communion with Hoasca creates an enhanced state of consciousness, capable of amplifying one's perception of his/her essentially spiritual nature, bringing about positive development in the moral and intellectual aspects of a human being."

~Statement of Centro Espírita Beneficente União do Vegetal

The Court's holding in O Centro, however, has not appeared to help other religious practitioners gain exemptions from criminal drug laws. Claimants ranging from Rastafarians to practitioners of Native American religions to new religious groups like the "First Church of Cannabis" have been denied RFRA exemptions from laws criminalizing the possession and distribution of marijuana on a variety of grounds. In a few cases, claimants were judged to be insincere, or motivated by money rather than religious faith. In other cases, judges found no substantial burden on a claimant's religious belief, arguing that marijuana use or distribution is not actually required by the claimant's religion (notably, in Hobby Lobby, the

Supreme Court deferred almost entirely to the plaintiff on the question of whether requiring contraception coverage in employee health plans imposed a substantial burden on the business's religious beliefs). Still other judges have ruled that, even if there is a substantial burden on the claimant's sincere exercise of religion, prosecuting even a single individual's personal marijuana use is narrowly tailored to advancing a compelling government interest. This determination is somewhat absurd in light of the holding of Gonzales v. O Centro Espírita, which found that exempting an entire religious group from the prohibition of a hallucinogenic drug (albeit a drug far less popular than marijuana) would not undermine any compelling government interest. These cases have all been decided by lower courts; should another RFRA claim involving drug use be taken up by the Supreme Court, it is not obvious how the Court would rule.

Harm Reduction Services

In addition to faith practitioners who use controlled substances, other people of faith feel called upon to minister and provide services to people who use drugs. In 2018, a group of people in Philadelphia, including the president of a seminary and a church evangelist, founded an organization called Safehouse whose mission "is to save lives by providing a range of overdose prevention services." The group has been engaged in efforts to open a safe injection site, where drug users would be able to bring in controlled substances purchased elsewhere to

Safehouse Boardroom.
Courtesy of Safehouse.

"At the core of our faith is the principle that preservation of human life overrides any other considerations. As witnesses to great losses of life in our community, we are compelled by our religious beliefs to take action to save lives."

~ Complaint for Declaratory Judgment, Part 5 Exhibit, Letter from Jose E. Benitez & Rhonda B. Goldfein to USA William M. McSwain, Nov. 26, 2018

use under the supervision of trained staff, who could provide them with medical assistance if necessary as well as referrals for drug treatment. The organization's website states that the "leaders and organizers of Safehouse are motivated by the Judeo-Christian beliefs ingrained in us from our religious schooling, our devout families and our practices of worship. At the core of our faith is the principle that preservation of human life overrides any other considerations."

In February 2019, the federal government filed a civil suit against Safehouse seeking a judicial declaration that its attempt to open a safe injection site violated the Controlled Substances Act (CSA). Safehouse's board members responded by arguing that the lawsuit violated their religious liberty under RFRA. They explained their "religious beliefs obligate them to take action to save lives in the current overdose crisis, and thus to establish and run Safehouse in accordance with these tenets." Specifically, they "believe that the provision of overdose prevention services effectuates their religious obligation to preserve life, provide shelter to our neighbors, and to do everything possible to care for the sick." By pressuring the board to cease its efforts to open a safe injection site, the government's suit, Safehouse argued, burdens their religious exercise and is not necessary to any compelling government interest. The Department of Justice has aggressively disputed Safehouse's claim, arguing that the founders' "true motivation is socio-political or philosophical—not religious—and thus not protected by RFRA." In October 2019, the district court ruled, without considering the organization's RFRA claim, that "there is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse." The government has promised to appeal.

Similarly, Jesse Harvey, a peer addiction recovery coach in Maine, founded the Church of Safe Injection in October 2018. The Church of Safe Injection is a non-denominational, interfaith religious organization whose mission, according to its website, is "to spread the gospel of harm reduction, to serve the least among us, and to support the well-being of marginalized communities." The church holds the "sincere religious belief that People Who Use Drugs (PWUD) should not die preventable deaths," and its members consider it their moral obligation to minister to and serve this population. To that end, church members act on their faith by distributing Naloxone (an overdose reversal medication), sterile needles, sterile water, rubber tourniquets, alcohol swabs, fentanyl testing strips, food, hand warmers, and other materials to people who use drugs, as a means of reducing overdose deaths and the transmission of HIV/AIDS and other illnesses. Harvey has stated publicly that the church will be applying for an exemption from federal drug statutes under RFRA so that it can open a safe injection site.

Jesse Harvey.
Photograph by/courtesy of Yoon S. Byun.

"If syringes had been around in Jesus' day, He would have supported safe injection, and He would have made sure that the people He hung out with had access to sterile supplies."

~ Jesse Harvey, Founder of the Church of Safe Injection

Government Surveillance, Profiling, & Discrimination

RFRA and the Free Exercise Clause have occasionally been deployed as a means of challenging government surveillance and profiling of Muslims. Rather than revolving around a specific religious practice, these claims share the common theme of using religious liberty arguments to challenge government laws, policies, and practices—particularly within the criminal justice, counter-terrorism, and immigration contexts—that target Muslims.

For example, *Tanvir v. Tanzin* involves a claim by several Muslim men who refused to become FBI informants because doing so would have contradicted their religious beliefs. In response to their refusal, the federal government retaliated against them by having their names placed on the government's "No Fly List"—a list created by the FBI's Terrorist Screening

Litigants Awais Sajjad, Jameel Al-gibhah, and Naveed Shinwari from Tanvir v. Tanzin .

Photograph by Ibraham Qatabi/ courtesy of the Center for Constitutional Rights.

Center that severely limits people's ability to leave or return to the U.S. The men argued that this constituted government punishment for acting on their religious beliefs, and therefore violated RFRA. In May 2018, the Second Circuit allowed the case to proceed, though this procedural decision has been appealed to the Supreme Court and no substantive RFRA decision has yet been made.

In *Hassan v. City of New York*, a group of Muslim people and organizations brought a lawsuit arguing that a secret police program that monitored Muslims in and around New York City violated their religious liberty under the First Amendment. The program included placement of cameras outside mosques and undercover officers that infiltrated—without any indication of criminal activity—Muslim houses of worship, student organizations, and businesses The plaintiffs argued that this intense surveillance violated their constitutional right to free exercise of religion by chilling their religious activity. They explained, for example, that mosques had noted a decline in attendance during the police program as "their congregants can no longer worship freely knowing that law-enforcement agents or informants are likely in their midst." Another organization stated it had "changed its religious and educational programming to avoid controversial topics likely to...attract additional NYPD attention." The parties eventually settled outside of court.

Other lawsuits in this vein, all of which have been unsuccessful, include religious liberty challenges to: the government's practice of extensively questioning Muslim Americans about their religious beliefs as they enter the country; government border stops of everyone who had attended an Islamic conference in Canada in 2004; and the detention of two Muslim men following trips to Saudi Arabia and Morocco. A Free Exercise Clause and RFRA challenge to an FBI surveillance program targeting Muslims in California is ongoing. In addition, following the enactment of President Trump's Executive Order barring immigration from certain Muslim-majority countries (the "travel ban" or "Muslim ban"), several people and groups brought lawsuits challenging the ban on a number of grounds, including RFRA. However, the Supreme

Court did not address these RFRA claims when it upheld the ban in Trump v. Hawaii in 2018.

Environmental Justice

While some sacred spaces take the form of a church, temple, or other building, natural structures such as rivers, mountains, or forests are also considered holy by some faith traditions. In particular, holy sites are an important part of many Native American religions. As these spaces have faced rapidly increasing public and private development, pollution, and other threats over the past several decades, faith communities have repeatedly sought to protect them through the use of religious liberty litigation.

In the 1988 case *Lyng v. Northwest Indian Cemetery Protective Association* three tribes in California—the Yurok, Karok, and Tolowa—challenged the federal government's plan to construct a road through the Six Rivers National Forest, a holy site essential to their religious practice. The Court held that while the government's action undoubtedly burdened the tribes' free exercise of religion, it did not constitute the type of burden prohibited by the Free Exercise Clause, because it did not place any legal demands or prohibitions on the tribes' own religious actions or activities. The Court stated that while the road "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," it would not coerce the tribes "into violating their religious beliefs; nor would [it] penalize religious activity."

Protest of the proposed G-O road through the Six Rivers National Forest .

Courtesy of Northcoast Environmental Center.

Despite the fact that Lyng and other pre-RFRA environmental Free Exercise claims were unsuccessful, Native American individuals and tribes and other religious practitioners have continued to use religious exemption claims in an effort to protect sacred or holy land, or fend off environmental degradation. The Supreme Court has yet to explicitly adopt the holding of Lyng—limiting a "substantial burden" to instances when the government coerces religious practitioners to change their own behavior—in the RFRA context, though several lower courts have done so, limiting tribes' ability

Criticism of Lyng

The reasoning of Lyng has been criticized by many scholars and advocates. For example, Michael McNally, author of several books on Native American religious practice, has argued that the court's reference to individual "spiritual fulfillment" was rooted in a lack of understanding and respect for the tribes' religious beliefs, and the "romanticized view that Native Americans, particularly when it comes to sacred land, are spiritual, not religious."

Similarly, Alex Tallchief Skibine, a law professor and member of the Osage Tribe, said the opinion "seem[ed] to equate Indians' religious exercises at sacred sites with Western yoga-like practices...portray[ing] Native religious activities at sacred sites as only about spiritual peace of mind." In fact, he explains, the "importance of sacred sites to Indian tribes and Native practitioners is less about individual spiritual development and more about the continuing existence of Indians as a tribal people."

In his dissent, Justice William J. Brennan decried the "cruelly surreal" result of the opinion, that "governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion."

to use RFRA to protect sacred sites.

For example, in Navajo Nation v. U.S. Forest Service, the Navajo Nation, Hopi Tribe, and numerous other tribes and nonprofit organizations brought a lawsuit arguing, among other things, that the Forest Service's decision to authorize the use of recycled wastewater to make artificial snow for a commercial ski resort located in a national park considered sacred by the tribes violated their rights under RFRA. The Ninth Circuit, relying on Lyng, disagreed, ruling that the Forest Service's actions did not impose a "substantial burden" on the tribes: "[l]ike the Indians in Lyng," the court explained, "the Plaintiffs here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment." It held that RFRA cannot be interpreted to require the government to change its own activities so as to advance or protect particular religious practices. In 2009, the Supreme Court declined to hear an appeal.

Religious freedom was also an integral part of the multiyear fight over the construction of the Dakota Access Pipeline (DAPL) in the Standing Rock Indian Reservation. In Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, Native American tribes filed a RFRA motion to stop the flow of oil through the pipeline, which ran under the bed of Lake Oahe. They argued that the presence of oil would render water in the lake unsuitable for use in religious practices, as some of the plaintiffs believed that the oil was "the fulfillment of a Lakota prophecy of a Black Snake that would be coiled in the Tribe's homeland and which would harm ... [and] devour the people." The D.C. District Court denied the claim, finding that the tribe had waited too long to bring it. The court additionally found that Lyng applied, and the tribes could not use RFRA to protect holy land. The plaintiff's appeal was dismissed by the circuit court in 2017.

DAPL.
Photograph by/courtesy of Robert Wilson.

"Clean, pure water is an essential part of the Lakota way of life that Creator has taught us. Clean, pure water is necessary for the rites and sacraments that comprise our religion."

~ Steven Vance, Cheyenne River Sioux Tribal Historic Preservation Officer

While many of the most significant religious liberty claims in the environmental justice context have been brought by Native American claimants, a few have been brought by Christian practitioners. In Adorers of the Blood of Christ v. Federal Energy Regulatory Commission, a group of Catholic nuns challenged a government agency's order granting a private company an easement to construct a natural gas pipeline through the nuns' property. The nuns explained that their "religious practice includes protecting and preserving creation, which they believe is a revelation of God." For example, their complaint noted that they "exercise their religious beliefs by, inter alia, caring for and protecting the land they own as well as actively educating and engaging on issues related to the environment, including the current and future impact on the Earth caused by global warming as

Adorers with cross.
Photograph by/courtesy of Dave Parry http://www.outsidetheimage.com.

"As religious women of the Catholic Church, our faith impels us to stand up when the principles we hold sacred are compromised on the very land that is ours…This is not a political statement but a spiritual stand as people of faith."

~ Sister Janet McCann, Adorers of the Blood of Christ (wearing a red scarf)

the result of the use of fossil fuels." Thus, forcing the Adorers to use their land to accommodate a fossil fuel pipeline "places a substantial burden on [their] exercise of religion" in violation of RFRA. The nuns lost on procedural grounds, and in 2019 the Supreme Court declined to hear their appeal.

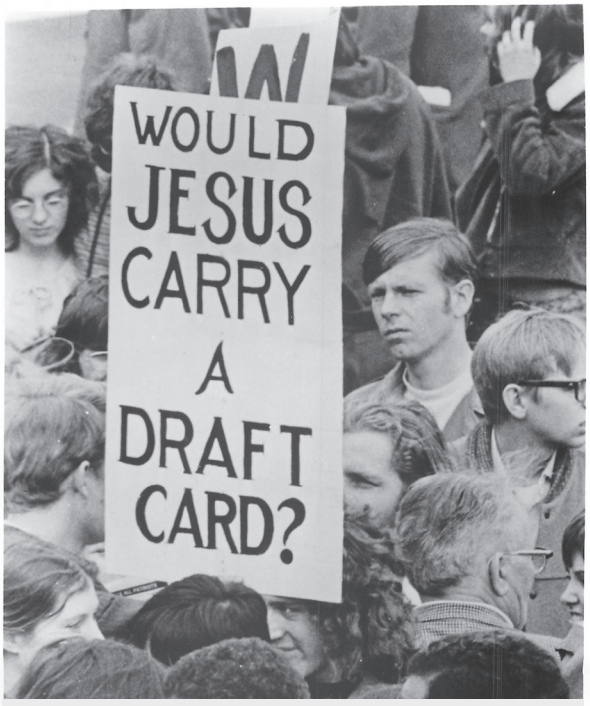
In Gelburd v. Christiansen, a Christian doctor filed a complaint against the U.S. Forest Service after he was prevented from providing medical assistance to a woman protesting the construction of a pipeline through a national forest in Virginia. The protester was occupying a small pod atop a pole in the forest, and the Forest Service was seeking to flush her out by cutting off her access to food, water, communication, and medical care. After hearing about the protester, Dr. Gelburd "attempted to reach her and conduct a medical examination of her to determine whether she…require[d] attention

and treatment," but was stopped by Forest Service employees. As he explained in his legal complaint, Dr. Gelburd's actions were motivated by his religious beliefs, which "compel him to use his knowledge and skills as a physician to assist persons in need of medical assistance, particularly the poor and disadvantaged." In preventing him from administering care, Dr. Gelburd argued that the government was burdening his religious exercise in violation of RFRA and the Free Exercise Clause. He withdrew the lawsuit after the woman ended her protest.

While rarely successful, religious liberty claims have consistently been used as a legal tool, both before and after the passage of RFRA, to challenge environmental destruction, including the destruction of holy sites.

Conscientious Objection and Anti-War Activism

Many religious practitioners, most prominently Quakers, have religious objections to participation in violence and war. As mentioned in the religious liberty timeline above, laws exempting conscientious objectors (those who oppose serving in the armed forces for religious or conscience-based reasons) from military service are some of the most longstanding religious exemption laws in the U.S. The current Selective Service requirements mandate that conscientious objectors who are drafted perform some alternative form of public service—unlike exemptions that permit religious objectors to disregard a law or policy entirely.



Would Jesus Carry a Draft Card
Courtesy of Religion News Service.

Not all people of faith are covered by existing conscientious objector laws, however. In 1971, the Supreme Court held that those who had religious objections to serving in the Vietnam War—but not all wars—were not entitled to an exemption from military service under the Military Selective Service Act. Further, the Court held that the Free Exercise Clause did not mandate that such objectors be exempted from service. In rejecting a constitutional exemption for those opposed specifically to the Vietnam War, the Court held that there existed "governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars." In

particular, the Court pointed to "the Government's interest in procuring the manpower necessary for military purposes."

Two other important cases of the Vietnam era were more favorable to religious objectors. In United States v. Seeger and Welsh v. United States, the Supreme Court ruled that persons with non-traditional religious beliefs—including those who did not even describe their beliefs as "religious"—could be entitled to a religious exemption under the Selective Service Act. The court noted that this construction of the Act "embraces the ever-broadening understanding of the modern religious community."

Some conscientious objectors are opposed not only to fighting wars, but to paying taxes that will be used to support the military. Those who object to paying for wars, however, have not succeeded in gaining religious exemptions under the Free Exercise Clause or RFRA. Pacifists who have argued that their religious beliefs permit them to withhold or divert all or part of their tax payments have consistently lost in court. In Adams v. C.I.R., for example, a devout Quaker stated that she "sincerely believes that participation in war is contrary to God's will, and hence, that the payment of taxes to fund the military is against the will of God." She therefore "declared herself exempt from taxation, so no federal income tax would be withheld from her pay." The Third Circuit denied her claim, holding that granting an exemption would be impossible because of the "practical need of the government for uniform administration of taxation, given particularly difficult problems with administration should exceptions on religious grounds be carved out by the courts."

Finally, some religious practitioners' anti-war beliefs require them to do far more than refrain from fighting in, or financially supporting, wars. Some people of faith—members of the historic "Peace Churches" (including Quakers and Mennonites), as well as Catholics, Jews, and many other religious practitioners—have been motivated by their beliefs to engage in anti-war protest and organizing. While there was some anti-war activity during WWI and WWII, the Vietnam War was a particularly active time for such religiously motivated protest.

In the late 1960s and early 70s, those opposed to the Vietnam War, including many priests, reverends, brothers, nuns, and other people of faith, participated in dozens of draft board raids in which participants entered government offices and destroyed Selective Service records. In 1968, for instance, a group of nine Catholics, including six current or former priests, brothers, or nuns, seized several hundred draft records from a Selective Service office in Catonsville, Maryland and burned them with homemade napalm. After burning the records they held hands

Milwaukee 14.
Courtesy of Jim Forest.

"It seemed to me one of the tragedies of history that Christians, since the age of Constantine, had rarely put their obedience to Christ ahead of their obedience to the state."

~Jim Forest, member of the Milwaukee 14 (fourth from left)

and recited the Lord's Prayer. Two of the nine were, at the time, on bail after having been arrested the previous year for entering a draft board office in Baltimore, distributing bibles, and pouring blood on draft records.

Other draft board raid participants during this period included the "Milwaukee Fourteen" (including six Catholic clergymembers and a minister of the Church of Scientology), who held a religious service and recited from the Gospels of John and Luke while burning draft records; the "D.C. Nine" (including five priests and two nuns), who broke into and poured blood on office files at the Dow Chemical Company, a weapons manufacturer; the "Camden 28" (including four Catholic priests,

a Lutheran minister, and 23 Catholic laypeople); the "Chicago 15" (including two priests); the "New York Eight" (including three priests); and the "Boston Eight" (including two priests and a nun).

A number of these raids resulted in high-profile trials. While the draft board raiders do not appear to have raised a legal defense explicitly based on the Free Exercise Clause, they defended their actions in several cases by explaining that they had acted out of sincere religious conviction, and in accordance with God's higher law. This argument was soundly and repeatedly rejected. The trial judge in the D.C. Nine case, for example, "emphatically denied the existence of a 'legal defense' based on 'sincere religious motives' or a belief that action was justified by 'some higher law.'" An opinion in the Catonsville Nine trial, while it admitted that the sincerity of the protestors was "beyond question," explained that "the exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law." The opinion in a Baltimore draft raid case quoted a 1943 religious liberty case brought by a draft refuser: "[o]ne is criminally responsible who does an act which is prohibited by a valid criminal statute, though the one who does this act may do it under a deep and sincere religious belief that the doing of the act was not only his right but also his duty." It further explained that "[n]o civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief."

Another wave of religious anti-war protests began in the 1980s, with the birth of the Plowshares movement, a Christian pacifist movement that takes its name from the vision expressed in the Book of Isaiah: "Nations shall beat their swords into plowshares and their spears into pruning hooks; one nation shall not raise the sword against another, nor shall they train for war again." The Plowshares movement advocates active resistance to war and originated with a 1980 protest in which eight Christians, including several priests and a nun, entered a General Electric facility, hammered on missile components, and poured blood on security documents. For the past four decades, its members have engaged in nonviolent, often symbolic forms of protest at military and weapon manufacturing facilities. While typically relying on secular legal defenses, on occasion Plowshares members have harnessed their religious beliefs as a defense to prosecution—albeit with little success.

For example, three Plowshares members who were prosecuted in 2013 for a protest at a nuclear facility in Tennessee argued in federal court that they "must be able to present evidence on their religious, moral, and political beliefs because that evidence is needed to" demonstrate that they did not act with an illegal intent to harm the U.S. The court held that their religious motives were "irrelevant."

More pointedly, in 2018, a group of seven Catholic Plowshares members broke into and staged a protest at a U.S. nuclear submarine naval base in Georgia. Using spray paint and containers of their own blood, they "symbolically disarmed the building and its surroundings." As they later explained, the protesters considered this to be a "prophetic action to raise the consciousness of society about the immorality" of nuclear weapons. The action was motivated by their religious commitment "to practice peaceful activism to carry forth the prophet Isaiah's command to 'beat swords into plowshares' in its effort to promote peace and prevent nuclear war." Many of those arrested were affiliated with the Catholic Worker movement—a decentralized religious group, unaffiliated with the official Catholic Church, whose members seek to "serve the poor, and resist war and social injustice."

Kings Bay Plowshares outside courthouse.
Courtesy of Kings Bay Plowshares.

"The idolatry of these nuclear weapons and the government which protectstheir massive destructive power, leave me no choice, I must follow my conscience and my faith."

~ Elizabeth McAlister, Plowshares protester

The "Kings Bay Plowshares Seven," as they came to be known, were arrested and charged with conspiracy, trespass, destruction of property, and "depredation" of property. In response, they sought to have the charges dismissed under RFRA. Among other defenses, the Seven argued that their protest was a form of sincere religious exercise, and that prosecuting them was not necessary to achieve any compelling government interest.

In August 2019, the District Court judge held that the charges against the Seven should not be dismissed. The judge found the defendants to be both religious and sincere —despite the federal government's claim that their protest "reflect[ed] an effort to propagandize and obtain secular public policy revisions tinged with post-hoc religious justification." While the judge found that there was a substantial burden on the protestors' religious exercise, she held that application of the criminal laws to the defendants was the least restrictive means of furthering the government's "compelling interests in the safety of those on Kings Bay Naval Submarine Base, the security of the assets housed there, and the smooth operation of the base." In October 2019, the protesters were found guilty of all charges.

Capital Punishment

People of faith from a range of different traditions oppose capital punishment on religious grounds. This has led some to engage in protest against the practice or to refuse to participate in death penalty trials as a judge, juror, or witness. In 2017, for example, Wendell Griffen, an Arkansas State Judge as well as an ordained Baptist minister, participated in an anti-death

"Premeditated and deliberate killing of defenseless persons—including defenseless persons who have been convicted of murder—is not morally justifiable."

~Judge Wendell Griffen

Wendell Griffen in court.
Photograph by/courtesy of Brandon Markin.

penalty rally and prayer vigil on Good Friday outside of the Governor's mansion.[1] In response, the Arkansas Supreme Court and its judges barred him from presiding over death penalty cases. Judge Griffen then brought a complaint against the Court, arguing that the bar violated the Arkansas RFRA and chilled his religious exercise in violation of the Free Exercise Clause of the First Amendment. [2] [3]

Religious Exemptions & Government Employees

The reasoning of the Eighth Circuit's decision against Judge Griffen—that the state has a compelling interest in ensuring that certain state actors are perceived as impartial—could prove useful to advocacy groups fighting religious exemption requests brought by anti-LGBTQ government employees such as Kim Davis, the Kentucky county clerk who refused to issue marriage licenses to same-sex couples in the wake of Obergefell v. Hodges.

On the other hand, it seems intuitively unfair and disingenuous to prevent judges who oppose the death penalty for religious reasons, but not those who support the death penalty for religious reasons, from hearing capital cases. Moreover, as Judge Griffen himself has noted, there are many other instances in which judges who hold particular religious beliefs are permitted to hear cases that pose a risk of bias, or the appearance of bias—such as judges with a history of anti-choice religious activism who are nevertheless permitted to hear disputes involving abortion.

The Eighth Circuit found against Judge Griffen, and upheld the bar on his participation in death penalty cases. Addressing the Free Exercise claim, it held that the order "does not prohibit Judge Griffen's free exercise of religion… Rather, the order reflects neutral principles applicable to all judges who exhibit potential for bias."[4] Regarding the state RFRA claim, the court held that even if the order did burden the judge's exercise of religion, "Arkansas has compelling interests in the impartiality of the judiciary and in public perception of an impartial judiciary" and Judge Griffen "does not allege any less restrictive means of furthering this compelling interest."[5] In September 2019, the Arkansas Supreme Court refused to restore Judge Griffen's ability to hear capital cases.[6]

Another recent case that made the news involved Greta Lindecrantz, a Mennonite woman who was held in contempt of court and imprisoned after she refused to testify in a Colorado death penalty case because of her religious opposition to capital punishment.[7] Lindecrantz, who had worked as an investigator on the defense team of the man facing the death penalty, agreed to testify only after the criminal defense attorneys in the case "said her stance was adversely affecting [the defendant's] legal position."[8]

Atheists' Rights & Church-State Separation

Finally, religious liberty laws have been used by people of faith, Humanists, and atheists[9] to fight for the rights of nonbelievers and for church-state separation. While traditionally the

Establishment Clause has been the vehicle for such challenges, litigants have increasingly turned to Free Exercise and religious exemption-based claims.

For example, some groups—in particular The Satanic Temple (TST)—have openly attempted to use religious freedom demands by their members as a kind of poison pill to limit the scope of government religious activities and exemptions. TST has relied on a "nuclear option for church/state separation"[10] one commentator has deemed "Lucien's Law" after TST co-founder Lucien Greaves. The "Law" states that "governments will either (1) close open forums when The Satanic Temple asks to speak, or (2) censor The Satanic Temple, thereby opening itself to legal liability."[11]

In some circumstances this tactic has proven quite effective. When the state of Oklahoma placed a statute of the Ten Commandments outside of its state capitol, TST announced its intention to donate a statue to "complement" it: a representation of Baphomet, a goat-headed deity that has been adopted by occult and satanic groups.[12] The Oklahoma Supreme Court later held that the Ten Commandments statute violated the Oklahoma Constitution. Similarly, TST has requested to give Satanic invocations before state legislatures that open meetings with prayer,[13] started "After School Satan" clubs in public schools that permit religious afterschool programs, and distributed Satanic coloring books in public schools that allow the distribution of religious literature.[14]

Statute of Baphomet in front of the Arkansas state capitol building for the Satanic Temple's Rally for the First Amendment in 2018.
Courtesy of Magnolia Pictures.

In addition, atheists and others have brought claims arguing that government acts that embrace or promote religious precepts violate their religious beliefs (or lack thereof). In New Doe Child #1 v. Congress of United States, a group of atheist, Humanist, and Jewish claimants argued that laws requiring the inscription of the national motto "In God We Trust" on currency violated their RFRA rights. They argued that the inclusion of this religious message on government-issued money "cause[d] them to bear, affirm, and proselytize an objectionable message in a way that, for the Atheist and Humanist Plaintiffs, violates their core religious beliefs, and, for the Jewish Plaintiff, renders him complicit in the sins of superfluously printing God's name and destroying God's printed name."[15] The Sixth Circuit found no substantial burden on their beliefs, as the plaintiffs were not legally required to use cash and RFRA "does not require the Government to permit Plaintiffs to use their preferred means of payment."[16]

In *Barker v. Conroy*, Evangelical-preacher-turned-atheist-activist Dan Barker sued the U.S. House of Representatives after he was denied the opportunity to be a guest chaplain and deliver a secular invocation to legislators in lieu of an opening prayer.[17] He claimed that, in addition to violating the Establishment Clause, the government was infringing on his rights under RFRA by forcing him to choose between receipt of a government benefit—serving as the guest chaplain—and following his religious beliefs by giving secular remarks.[18] For context, the Supreme Court had previously held that legislative prayer programs, if neutral, do not violate the Establishment Clause.[19] The District Court of D.C. rejected Barker's claim in part because it found that "the opportunity to serve as a guest chaplain is not the type of benefit covered by RFRA."[20] While the case was appealed, the D.C. Circuit Court ruled only on Barker's Establishment Clause, not his RFRA claim.[21]

Dan Barker.
Photograph by Sam via flickr

"I cannot invoke a spirit or supernatural agency before this esteemed body. But I can invoke the 'spirit'… of Thomas Jefferson, [a] nonChristian deist, who stated that our Constitution 'erects a wall of separation between church and state.'"

" ~Dan Barker's proposed secular invocation to Congress

* * *

The cases outlined above represent a wide sampling of the religious liberty claims that have—or could be—brought outside of the "culture war" context. There are countless additional religious liberty claims that could be used to gain exemptions in the public health, criminal justice, voting rights, economic justice, gun control, animal welfare, and other areas. Examples might include:

An oncologist requests an exemption under the federal RFRA from the Controlled Substances Act. She argues that the Act prevents her from acting on her religious obligation to sell or administer marijuana to patients who would benefit from the drug.

An employee of the federal government who is responsible for enrolling people in public benefit programs is fired for enrolling all applicants that she believes need financial assistance into the programs, regardless of whether or not they are eligible under the law. She brings a RFRA claim, arguing that she was acting on her religious belief that denying benefits to people in need is immoral.

An Immigration and Customs Enforcement agent affirmatively sues the Department of Homeland Security seeking an exemption from any job duties that would require his participation in separating families, which would violate his religious beliefs.

A resident of public housing requests an exemption under a state RFRA from a state rule barring persons with felony convictions from public housing. He argues that this rule coerces him into violating his religious obligation to care for family members in need, including those with felony convictions.

A person with a felony conviction requests an exemption under a state RFRA from a state law barring persons with felony convictions from voting. She argues that this rule prevents her from fulfilling her religious obligation to vote.

A professor at a public university is disciplined for prohibiting her students from carrying firearms into her classroom or office, despite a state "campus carry" law allowing guns on public university campuses. The professor brings a state RFRA claim, arguing that teaching in a classroom with guns would violate her religious beliefs.

An animal rights activist requests an exemption under a state RFRA from a state "ag-gag" bill, which limits the ability of whistleblowers to expose health, safety, and animal rights violations in the agriculture industry. The objector argues that this rule prevents him from fulfilling his religious obligation to expose animal abuse.

The religious exemption claims that might be brought by people of faith engaged in humanitarian and progressive social movements are nearly endless. As is evident from the examples discussed above, however, religious liberty claims brought by those who engage in social justice work as a form of religious exercise have only rarely succeeded. In contrast, the Christian right has made enormous gains in securing religious exemptions in recent years before the courts, in state legislatures, and especially within the current federal administration.

Endnotes

1 In re Kemp, 894 F.3d 900 (8th Cir. 2018), cert denied, 139 S. Ct. 1176 (2019).

2 Alan Blinder and Richard Pérez-Peña, Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court, N.Y. Times (Sept. 1, 2015), https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html.

3 For example, while Judge Ho of the 5th Circuit has a history of volunteering for the anti-abortion group the First Liberty Institute, he nevertheless participated in a recent case involving a fetal burial rule in Texas. See Mark Joseph Stern, Trump-Appointed Judge Bemoans the "Moral Tragedy" of Abortion, Accuses Lower Court of Anti-Christian Bias, Slate (July 16, 2018), https://slate.com/news-and-politics/2018/07/judge-james-ho-attacks-abortion-rights-while-accusing-a-lower-court-of-anti-christian-bias.html. See also, THV11, Judge Griffen Speaks on Religious Liberty, Being Barred from Execution Cases, Youtube (June 9, 2017), https://www.youtube.com/watch?v=fhvk74cu2pM ("There have been Christians who have been judges who have said that abortion is a sin but they weren't sanctioned and they weren't told to get off cases involving abortion.").

4 Id. at 907 (internal citations omitted).

5 Id. at 908.

6 Max Brantley, Supreme Court Again Rebuffs Judge Griffen on Hearing Capital Cases, Ark. Times (Sept. 19, 2019), https://arktimes.com/arkansas-blog/2019/09/19/supreme-court-again-rebuffs-judge-griffen-on-hearing-capital-cases.

7 Noel Phillips, Mennonite Investigator to be Released from Jail, Scheduled to Testify Wednesday in Colorado Death Penalty Case, Denver Post (Mar. 12, 2018), https://www.denverpost.com/2018/03/12/mennonite-investigator-greta-lindecrantz-agreed-testify-remains-jailed/.

8 Id.

9 This report capitalizes "Humanist" to denote those who are affiliated with the organized Humanist movement. See Harvey Lebrun, Humanist with a Capital H, Amer. Humanist Soc'y (last visited Oct. 1, 2019), https://americanhumanist.org/what-is-humanism/humanism-capital-h/. In contrast, it does not capitalize "atheist," as it denotes those who do not believe in any god(s) but are not affiliated with any formal group or movement.

10 Hemant Mehta, After Satanists Plan to Give Away Coloring Books, School Board May Change Rules to Block Them, Friendly Atheist (Nov. 14, 2014), https://friendlyatheist.patheos.com/2014/11/14/after-satanists-plan-to-give-away-coloring-books-school-board-considers-banning-religious-distributions-altogether/.

11 Andrew Seidel, What I Learned from Fighting Back Against Public School Bible Distributions, Friendly Atheist (May 5, 2015), https://friendlyatheist.patheos.com/2015/05/05/what-i-learned-from-fighting-back-against-public-school-bible-distributions/.

12 Abby Ohlheiser, The Satanic Temple's Giant Statue of a Goat-headed God Is Looking for a Home, Wash. Post (July 1, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/01/the-satanic-temples-giant-statue-of-a-goat-headed-god-is-looking-for-a-home/?utm_term=.fa86ebb30a9d. See also, Complaint, Satanic Temple v. City of Belle Plaine, Minnesota, No. 0:19-cv-01122-WMW-LIB (D. Minn. Apr. 25, 2019) (challenging a city's withdrawal of a permit to display a Satanic Temple monument on government property.).

13 Complaint, Satanic Temple et al. v. Scottsdale, City of et al, Docket No. 2:18-cv-00621 (D. Ariz. Feb 26, 2018).

14 Educatin' With Satan, https://afterschoolsatan.com/ (last visited Nov. 6, 2018).

15 Doe v. Cong. of the United States, 891 F.3d 578, 583 (6th Cir. 2018), rehearing en banc denied, (Aug. 8, 2018). See also Newdow v. Peterson, 753 F.3d 105 (2d Cir. 2014); Newdow v. Lefevre, 598 F.3d 638 (9th Cir. 2010); Mayle v. United States, 891 F.3d 680 (7th Cir. 2018); Doe v. United States, 901 F.3d 1015 (8th Cir. 2018), cert. denied, 139 S. Ct. 2699 (2019). See also Freedom From Religion Foundation v. Hanover School Dist., 626 F.3d 1 (1st Cir. 2010) cert. denied, 564 U.S. 1004 (2011) (Free Exercise Clause challenge to voluntary recitation of the Pledge of Allegiance in public schools).

16 Cong. of the United States, 891 F.3d at 591.

17 Barker v. Conroy, 282 F.Supp.3d 346 (D.D.C. 2017). See also Heap v. Carter, 112 F.Supp.3d 402 (E.D. Va. 2015); Newdow v. Bush, 355 F.Supp.2d 265 (D.D.C. 2005).

18 Barker v. Conroy, 282 F.Supp.3d at 365.

19 See Town of Greece v. Galloway, 572 U.S. 565, 134 S. Ct. 1811 (2014).

20 Barker v. Conroy, 282 F.Supp.3d at 365.

21 Barker v. Conroy, 921 F.3d 1118 (D.C. Cir. 2019).

III The Christian Right and the Redefinition of "Religious Liberty"

As the prior section demonstrates, no single group or ideology has had a monopoly on religious faith, or religious liberty litigation. Nevertheless, the Christian right has been enormously successful at conflating popular understandings of "religious liberty" with particular conservative religious views around sex, sexuality, marriage, and reproduction. Through strategic legislative, administrative, and litigation campaigns—as well as aggressive media coverage—the religious right has come to dominate the ways in which we talk about, and enshrine into law, religious liberty protections. This dominance has pushed other important religious liberty developments, such as the increasing criminal prosecution of faith practitioners discussed above, out of the spotlight.

When courts, the media, and politicians give prominent attention to the religious liberty claims made by socially conservative actors, while comparatively ignoring claims made by socially progressive actors, the effect is to reinforce the notion that socially conservative religious traditions are more deserving of constitutional and statutory religious freedom protections. Indeed, this dynamic can create and/or reinforce a belief that conservatives are legitimately religious while progressives' beliefs are—as the Department of Justice argued in the Safehouse case—merely "socio-political" rather than religious.[1]

Perhaps the most troubling aspect of this phenomenon, however, is that many of the religious exemption proposals advanced by the right do not actually protect "religious liberty" at all, but rather advance the cause of conservative Christian hegemony. They do so in at least three ways:

First, by providing enormously broad and absolute legal protections for particular conservative religious beliefs—protections that are designed to override every other relevant secular and religious right with which they may conflict—the exemptions improperly put the government's stamp of approval on certain religious beliefs.

Second, by requiring third parties to bear the costs of religious exemptions for those with conservative religious beliefs about sex and sexuality—beliefs that these third parties do not themselves hold—many exemptions actually infringe on the religious liberty rights of more people than they protect.

Third, many of the proposed religious exemptions would erode antidiscrimination laws that protect people of faith, and especially religious minorities, from bias and persecution on account of their faith.

This section will provide a brief overview of the legislative, administrative, and judicial activism undertaken by the Christian right in the name of "religious liberty." It will also touch upon the ways in which these efforts actually undermine religious liberty.

Legislative Efforts

Over the past several years, conservative policymakers have introduced and passed dozens of religious exemption laws that are billed as protecting "religious freedom" in general, but in reality only benefit those with anti-LGBTQ or anti-choice religious beliefs. Since 2015, exemption laws that protect those opposed to LGBTQ rights have been passed in Indiana,[2] Florida[3], Tennessee[4], Kansas[5], Kentucky[6], Alabama[7], South Dakota[8], Texas,[9] and Oklahoma.[10] In the most recent 2018-2019 legislative session, several states passed bills aimed at allowing student clubs at public universities to restrict their membership based on religion, sexual orientation, or gender identity.[11] Many of these proposed and enacted state bills are outlined in "Project Blitz," a detailed legislative playbook authored by the Congressional Prayer Caucus and other groups that contains model bills on a range of issues, including the insertion of religious symbols and classes into schools, bills that would "define public policies of the state in favor of biblical values concerning marriage and sexuality," and religious exemptions from antidiscrimination and other laws.[12]

Examples of proposed and enacted laws advanced by the Christian right include:

- Mississippi's H.B. 1523, passed in 2016, creates a sweeping exemption from compliance with state law if the law conflicts with one of three specific religious beliefs: that "(a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."[13] This exemption is absolute. In other words, the State must grant exemptions to persons who hold those three religious beliefs, rather than weighing the possible benefits and costs of a requested exemption, and then deciding whether to grant it.

- If passed, the federal First Amendment Defense Act, or FADA,[14] would limit enforcement of a wide range of health, labor, and antidiscrimination protections to

the extent that they conflict with religious opposition to sex between unmarried parties or LGBTQ identities.[15] Again, this exemption would be absolute, regardless of any harm it imposes on others.

- The federal government and nearly every state have enacted laws that allow doctors, insurers, and hospitals to refuse to provide abortion and other reproductive healthcare based on religious or moral objections to these services, regardless of the religious beliefs of their patients.[16] These laws almost never protect the religious beliefs of medical providers who support reproductive rights.[17] While hospitals may not infringe on the beliefs of anti-choice providers, they may require those who feel morally obliged to provide comprehensive care—like Dr. Wilfred E. Watkins, who unsuccessfully challenged his employer's prohibition on sterilization and abortion in 1973—to violate their consciences. In addition, the exemptions do not always have clear exceptions for medical emergencies.

- Alabama's S.B. 185, passed in 2017, extended the state's religious refusal law to cover "[a]ny individual who may be asked to participate in any way in a health care service."[18] It defines "health care service" somewhat confusingly as "[p]atient medical care, treatment or procedure that is limited to abortion, human cloning, human embryonic stem cell research, and sterilization, and is related to: Testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered or provided by health care providers." In 2019, Indiana similarly expanded its religious refusal law to cover additional medical providers, including pharmacists.[19]

Administrative Efforts

The Christian right has encouraged administrative agencies—especially at the federal level—to promulgate rules, policies, and guidance that offer special legal protections for those with conservative religious ideologies. Many of these rules protect only conservative religious beliefs, often at the expense of the rights (religious and otherwise) of others, including women, LGBTQ people, and religious minorities. To give just a brief overview, the Trump administration has thus far:

- Issued an Executive Order instructing the Attorney General to issue policy guidelines on religious liberty,[20] as well as subsequent guidelines suggesting that RFRA should be interpreted to exempt religious objectors from antidiscrimination laws and policies.[21] The administration then created a "Religious Liberty Task Force" to implement the guidance;[22]

- Withdrew regulations that protected the beneficiaries of government grants from unwanted religious coercion and proselytizing;[23]

- Expanded the circumstances under which federal contractors can claim a religious exemption from antidiscrimination requirements, undermining civil rights protections for workers—especially religious minorities;[24]

- Announced its intent to cease enforcing a bar on contracting with religious organizations to provide federally funded educational services to private schools;[25]

- Proposed a rule that would allow religiously-affiliated homeless shelters to turn away transgender people;[26]

- Issued rules allowing employers and universities to cut off access to birth control coverage for their employees and students—regardless of their own religious beliefs—if allowing this coverage would violate the religious or moral beliefs of the employer/university;[27]

- Issued a rule expanding the ability of healthcare providers, insurers, and employers with religious objections to sexual and reproductive healthcare to deny access to such care to patients and employees;[28]

- Issued a rule which encourages medical providers that place religious restrictions on the provision of reproductive healthcare to nevertheless participate in the Title X national family planning program;[29]

- Proposed a rule inserting broad religious exemptions into a nondiscrimination provision of the Affordable Care Act;[30]

- Issued a directive allowing religious displays and symbols in Veterans Affairs facilities, and;[31]

- Granted a request from South Carolina Governor Henry McMaster to allow foster care agencies in the state to violate antidiscrimination laws while remaining eligible for federal funding.[32]

- In contrast, the administration has not made any efforts to accommodate religious beliefs that run contrary to its political priorities. For instance, in response to public comments expressing concern that a proposed "public charge" rule—which would allow the government to withhold legal permanent resident status from immigrants who use public programs like food stamps and Medicaid—would harm religious workers, the U.S. Citizenship and Immigration Services (USCIS) declined to insert a religious exemption into the final rule.[33] In explaining its denial, the agency claimed that "RFRA does not create a wholesale 'exemption' to a generally applicable regulation" but rather requires "a case-by-case determination."[34]

  Notably, this assertion explicitly conflicts with the administration's own religious liberty guidelines discussed above, which state that "[i]n formulating rules, regulations, and policies, administrative agencies should…proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens," and that the decision to "consider requests for accommodations on a case-by-case basis rather than in the rule itself" requires the agency to "provide a reasoned basis for that approach."[35] It is also worth mentioning that since publishing the rule, but before its effective date, the Administrative Appeals Office of USCIS has denied at least two RFRA claims made by immigrants seeking to be classified as religious workers.[36]

- The administration also threatened to withdraw federal grant funding from two university Middle East studies programs because, according to the administration, they place "a considerable emphasis…on the understanding the positive aspects of Islam, while

there is an absolute absence of any similar focus on the positive aspects of Christianity, Judaism or any other religion."[37]

Judicial Efforts

Finally, lawsuits involving anti-LGBTQ and anti-choice religious exemption claims have proliferated over the past several years. The growth in these cases has been, in large measure, the result of the growth of well-funded conservative religious liberty groups such as the Alliance Defending Freedom, Liberty Counsel, and the Becket Fund, who have brought the majority of these cases. In addition to Burwell v. Hobby Lobby[38] and Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission[39] discussed in the religious liberty timeline, there have been dozens of additional claims filed by conservative religious adherents seeking exemptions from health, antidiscrimination, and related laws and policies.[40] In September 2019, the Supreme Court of Arizona became the first high court to grant a religious exemption from sexual orientation antidiscrimination law to a for-profit company. The ruling, Brush & Nib Studio v. City of Phoenix, was predicated on the state constitution's free speech provision and state RFRA. The court ruled that a local civil right ordinance could not be applied to require a small stationary and printing business to "create custom wedding invitations celebrating same-sex wedding ceremonies in violation of their sincerely held religious beliefs."[41] Many other cases are still being litigated.

Over the past two years, the U.S. Department of Justice has also filed a large number of friend-of-the-court briefs in federal lawsuits involving religious liberty issues—largely in support of conservative Christian claimants, including a bakery that refused to serve a same-sex couple and an anti-abortion clinic that objected to certain state health regulations.[42]

As is evident from the examples discussed above, many of the "religious liberty" policies embraced by the Christian right 1) provide broad and absolute protections only for a narrow set of conservative religious beliefs and fail to protect those with alternative religious views; 2) require LGBTQ people, women, and others to forgo their own rights (for example, to equal employment opportunities or healthcare access) in order to accommodate the religious beliefs of others, and/or; 3) would permit discrimination against religious minorities. Such religious exemptions do not enhance, but instead undermine religious liberty. Rather than protecting

a particular set of religious believers at the expense of others, religious freedom has been traditionally understood by the framers of the Constitution and by the courts to mean religious freedom for everyone. This means, in contemporary terms, including the non-religious, religious minorities, LGBTQ people of faith, and those with progressive religious beliefs.

Endnotes

1 Motion for Judgment on the Pleadings at 29-30, *United States of America v. Safehouse,* No. 2:19-cv-00519 (E.D. Pa. June 11, 2019).

2 S.B. 101, 119th Gen. Assemb., Reg. Sess., (Ind. 2015).

3 H.B. 43/S.B. 110, 2016 Leg., Reg. Sess. (Fla. 2016).

4 S.B. 1556/ H.B. 1840, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016).

5 S.B. 175, 86th Leg., Reg. Sess. (Kan. 2016).

6 S.B. 17, 2017 Leg., Reg. Sess. (Ky. 2017).

7 H.B. 24, 2017 Leg., Reg. Sess. (Ala. 2017).

8 S.B. 149, 92th Gen. Assemb., Reg. Sess. (S.D. 2017).

9 H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

10 S.B. 1140, 56th Leg., 2nd Sess. (Okla. 2018). In 2019, an Idaho lawmaker even introduced a resolution that would condemn what she considers to be "Christian persecution," citing as evidence of such persecution the enforcement of civil rights laws on anti-LGBTQ Christians. *See* Ruth Brown, *Legislator Wants to End What She Calls Christian 'Persecution,' Cites Non-Idaho Examples*, Idaho Statesman (Mar. 15, 2019), https://www.idahostatesman.com/news/politics-government/state-politics/article227854124.html.

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12 Congressional Prayer Caucus Foundation, National Legal Foundation, and Wallbuilders, *Report and Analysis on Religious Freedom Measures Impacting Prayer and Faith in America* (2018-2019), CPCF (2018), https://www.au.org/sites/default/files/2019-01/Project%20Blitz%20Playbook%202018-19.pdf.

13 Miss. Code Ann. § 11-62-1 *et. seq.* (2016). This law was found unconstitutional by a federal District Court judge, but that opinion was overturned on procedural grounds. Barber v. Bryant, 193 F.Supp.3d 677 (S.D. Miss. 2016), *overturned by* 860 F.3d 345 (5th Cir. 2017). These bills are designed to affirmatively condone religiously-motivated denials of goods, services, and benefits to LGBTQ+ people as well as anyone who has had sex outside of a different-sex marriage, such as unmarried pregnant and parenting people or cohabitating unmarried couples. See *Unmarried and Unprotected: How Religious Liberty Bills Harm Pregnant People, Families, and Communities of Color*, Public Rights/Private Conscience Project (2017), https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/unmarried_unprotected_-_prpcp.pdf.

14 First Amendment Defense Act, S. 2525, 115th Cong. (2018).

15 *First Amendment Defense Act of 2016L Hearing on H.R. 2802 before the H. Committee on Oversight and Government Reform, 114th Cong.* (July 12, 2016) (statement of Katherine Franke, Sulzbacher Professor of Law, Gender, and Sexuality Studies, Columbia Law School), *available at* http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_fada_testimony.pdf.

16 *Refusing to Provide Health Services,* Guttmacher Inst. (May 1, 2019), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services. While the scope of these exemptions is not always clear, some medical providers, including Catholic hospitals, have refused to provide essential medical care even when a patient's life is at risk. Julia Kaye, Brigitte Amiri, Louise Melling, and Jennifer Dalven, *Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women's Health and Lives*, A.C.L.U. (May 2016), https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied.

17 One notable exception to this is the Church Amendment, passed in 1973, which prohibits certain healthcare entities from discriminating against healthcare personnel because they "performed or assisted in the performance of a lawful sterilization procedure or abortion" or because they refuse to perform these services. 42 U.S.C. § 300a–7.

18 S.B. 185, 2017 Leg. Sess., (Ala. 2017) (emphasis added).

19 S.E.A. 201, 121st Gen. Assemb., Reg. Sess. (Ind. 2019).

20 Exec. Order No. 13798, 82 C.F.R. § 21675, (2017).

21 Memorandum from U.S. Attorney General Jeff Sessions to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty*, *supra* note XX. For example, they state that "The government may be able to meet that standard [that a law be necessary to further a compelling government interest] with respect to race discrimination…but may not be able to with respect to other forms of discrimination." *Id.* at 13a.

22 Jeff Sessions, Attorney General, Remarks at the Department of Justice's Religious Liberty Summit (July 30, 2018), *available at*
https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit.

23 Exec. Order No. 13831, 83 C.F.R. 20715 (2018); Melissa Rogers, *President Trump Just Unveiled a New White House 'Faith' Office. It Actually Weakens Religious Freedom*, Wash. Post (May 14, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/05/14/president-trump-just-unveiled-a-new-white-house-faith-office-it-actually-weakens-religious-freedom/?utm_term=.43996900803f. It's worth noting that the White House has long awarded significant grants—such as contracts to provide care to unaccompanied minors—to faith based organizations that refuse to

provide sexual and reproductive health care to beneficiaries. This practice was unsuccessfully challenged in 2018 as a violation of the Establishment Clause. *See ACLU v. Azar*, 2018 WL 4945321 at *1 (N.D. Cal. Oct. 11, 2018) (holding that "A reasonable person would not view the government, which facilitated access to abortion by transferring unaccompanied minors who want abortions to shelters where they can obtain them, to be endorsing the Conference's anti-abortion views.").

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Torres v. Carter, No. 5:19-cv-327 (E.D.N.C. July 31, 2019) (Title VII religious discrimination charge brought by state employee fired for refusing to train a female colleague because spending time alone with a woman violated his Christian beliefs); *Indiana Family Inst. v. City of Carmel*, No. 29D01-1512-MI-010207 (Hamilton Sup. Ct. Dec. 11, 2015) (challenge to legislative "fix" to Indiana's RFRA, which prohibited discrimination); *Klein v. Or. Bureau of Labor & Indus.*, 289 Or. App. 507, 410 P.3d 1051 (2017) (bakery sought an exemption under the Free Exercise Clause from state antidiscrimination law after refusing to make a wedding cake for a same-sex couple); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) *appeal docketed,* No. 19-333 (U.S. Sept. 12, 2019) (florist shop sought an exemption under the Free Exercise Clause from state antidiscrimination law after refusing to make wedding flower arrangements for a same-sex couple); *Cervelli v. Aloha Bed & Breakfast*, 142 Haw. 177 (Ct. App. 2018), *cert denied*, 139 S. Ct. 1319 (2019) (bed and breakfast sought an exemption under the Free Exercise Clause from state antidiscrimination law after refusing a hotel room to a same-sex couple); *Telescope Media Grp. v. Lucero*, 2019 WL 3979621 (8th Cir. 2019) (wedding videography company opposed to providing services to same-sex couples sought pre-enforcement exemption under the Free Exercise Clause from state antidiscrimination law); *303 Creative Ltd. Liab. Co. v. Elenis*, 2017 WL 4331065 (D. Colo. Sep. 1, 2017), *appeal dismissed*, 746 Fed. App'x. 709 (10th Cir. 2018) (wedding website design company opposed to providing services to same-sex couples sought pre-enforcement exemption under the Free Exercise Clause from state antidiscrimination law); *Fulton v. City of Phila.*, 922 F.3d 140 (3rd Cir. 2019) *appeal docketed,* No. 19-123 (U.S. Jul. 25, 2019) (foster care agency opposed to working with same-sex couples seeks exemption from city antidiscrimination ordinance under Free Exercise Clause and Pennsylvania Religious Freedom Act); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert denied*, 136 S.Ct. 2433 (2016) (Free Exercise Clause challenge to state rules requiring pharmacies to deliver all proscribed medication, including contraception, regardless of religious belief); *Caring Families Pregnancy Services v. City of Hartford*, No. 3:19-cv-00584 (D. Conn. Apr. 18, 2019) (federal and state constitutional challenge to a local ordinance requiring pregnancy centers to disclose whether or not they have licensed medical providers on site).

41 *Brush & Nib Studio, LC v. City of Phx.*, 2019 WL 4400328 at *1 (Sep. 16, 2019).

42 Adiel Kaplan, David Mora, Maya Miller and Andrew R. Calderon, *Trump Admin Files More Briefs in Religious Liberty Cases Than Obama, Bush*, NBC News (Feb. 24, 2019), https://www.nbcnews.com/politics/justice-department/trump-admin-files-more-briefs-religious-liberty-cases-obama-bush-n974531; Arika Herron, *Justice Department Supports Indianapolis Archdiocese in Firing of Gay Cathedral Teacher*, Indianapolis Star (Sept. 27, 2019), https://www.indystar.com/story/news/education/2019/09/27/justice-department-backs-indianapolis-archdiocese-gay-teacher-firing/3788768002/.

IV Charting a Path Forward: Protecting Religious Liberty for Everyone

The Satanic Temple Supports Religious Liberty. Courtesy of The Satanic Temple.

When and how religious practitioners should be exempted from secular laws and policies is undoubtedly a complicated question. How do we protect religious liberty for everyone—from the conservative Christian to the Satanist—while also protecting other fundamental rights and values? When are exemptions necessary to preserve a diverse and pluralistic society, and when do they become so overbroad or widespread that they threaten others' rights—or the democratic process itself? While there may not be a single test that applies to every situation, courts have, over time, developed a number of rules and guidelines that are helpful in assessing which religious exemptions advance our constitutional commitments to liberty and equality, and which threaten them. This section outlines the fundamental values that are necessary to protecting religious freedom, not for some but for all.

Religious Liberty Must Be Neutral

One of the most foundational rules of religious liberty law is that it must apply neutrally to people of all faiths—from Jack Phillips, the owner of Masterpiece Cakeshop, to Scott Warren, the No More Deaths volunteer. Neutral application of religious liberty protections is mandated by both religion clauses of the First Amendment—as the Supreme Court has repeatedly held: "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion."[1] Justice Elena Kagan has called this "the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian."[2]

Among other things, the neutrality rule prevents the government from singling out certain theological communities or beliefs for special persecution or special protection. This principle was reaffirmed most recently in the Supreme Court's decision in Masterpiece Cakeshop. Written by Justice Anthony Kennedy, the opinion repeatedly stressed the government's duty to be respectful of all religious beliefs, and noted that the First Amendment "bars even 'subtle departures from neutrality' on matters of religion."[3] Unfortunately, it must be acknowledged that the Court quickly abandoned this commitment to religious neutrality in its opinion in Trump v. Hawaii, the Muslim travel ban case, wherein the Court refused to acknowledge the very clear evidence that the ban was motivated by animus against Muslims.[4]

Many exemption laws and policies advanced by the Christian right fail the religion clauses' neutrality requirement. Rather than protecting religious practices related to marriage or reproduction generally, they instead single out anti-LGBTQ or anti-choice religious beliefs for exclusive, extraordinary protection from the enforcement of any other civil law or policy,

regardless of the consequences. They therefore put the government in the position of taking a theological stance on what religious beliefs entitle one to stand above the law. As a group of religion law scholars wrote about Mississippi's H.B. 1523, for example, the anti-LGBTQ bill:

"[D]id not address the subjects of marriage, sexuality, and gender, and attempt evenhandedly to accommodate religious beliefs and practices. Rather, it singled out only specific religious viewpoints on these subjects as worthy of legal sanctuary. Those with different religious views on the very same questions receive no protection… Mississippians who hold the Enumerated Beliefs receive extraordinary legal benefits, while those with a different viewpoint on the exact same questions of faith receive nothing."[5]

Similarly, most religious exemption laws and policies related to healthcare that are embraced by the right provide extraordinarily broad protections to those opposed to abortion, sterilization, or other reproductive care but fail to protect the many healthcare providers whose religious faith motivates them to provide comprehensive sexual and reproductive healthcare. As discussed in Section II, people of faith who support the right to reproductive healthcare access—including Dr. Wilfred E. Watkins, "Mary" and "Judy Doe," and members of the Clergy Consultations Service—have also had little success in court.

Even if some religious adherents may benefit from a proposed exemption, religious exemption laws and policies that clearly prefer one religious belief over others actually violate religious liberty principles. The government may not weigh in on highly contested theological disputes by singling out certain views for special and absolute protection, essentially placing the government's seal of approval on a select set of religious beliefs.

Just as the legislative and executive branches must respect the neutrality rule in promulgating religious exemptions, applying religious exemption laws neutrally is a daunting but essential task for the judiciary and anyone charged with enforcing such laws. The RFRA test in particular contains many nuanced components: courts are tasked with determining whether a particular claimant is sincere; whether their articulated beliefs are "religious" in nature; whether these beliefs are being substantially burdened; and whether the burden is nevertheless necessary to advance a compelling government interest. The complexity of the RFRA test provides many opportunities for conscious or unconscious bias—for example, assuming the sincerity of incarcerated plaintiffs to be more suspect than those outside prison; treating established faiths as more obviously "religious" than newer or smaller ones; or determining that creating an exemption for a doctor opposed to performing abortions is more practical or

necessary than one for a doctor who wants to provide abortions.

In one notable example, the plaintiffs challenging the contraceptive mandate of the ACA were universally accepted as being motivated by their sincere religious rather than political beliefs—despite the fact some plaintiffs had in fact included coverage for contraceptives in their insurance plans prior to the ACA's enactment, and only removed this coverage after being contacted by law firms seeking to bring a lawsuit.[6] Even attorneys representing the government in those cases declined to challenge the companies' religiosity or sincerity.

In contrast, DOJ attorneys have argued that the Kings Bay Plowshares protestors' RFRA claim "reflect[ed] an effort to propagandize and obtain secular public policy revisions tinged with post-hoc religious justification."[7] The DOJ has also rigorously challenged the religious beliefs of the board members of Safehouse and humanitarian aid workers like Scott Warren. As one commentator has noted, "[w]hen you pay close attention to the litigation strategy pursued by the federal government's lawyers, what you see is that this administration is not committed to an overarching principle of religious liberty—or even rights for Christians, in general…but rather only for those who share the administration's political perspective."[8]

Judges have not generally accepted the government's recent attempts to label progressive people of faith as irreligious or insincere. However, in one opinion, a magistrate judge belittled several of the No More Deaths volunteers' RFRA arguments as a "modified Antigone defense,"[9] prompting scholars of law and religion to publicly comment:

"the defense raised in this case, unlike in Sophocles' play Antigone, does not stage a tragic conflict between written positive law and unwritten, abstract morality. The law appealed to by the defendants is not outside of or above the laws of the state. Instead, the defendants ask the court to interpret a written, legislatively created right to religious liberty. The magistrate judge's failure to offer a careful analysis of their RFRA defense reflects a mistake of law, passing under cover of a clever parry to Greek tragedy, that should be corrected on appeal."[10]

Moreover, many media stories about the volunteers' cases have framed their activities as primarily political in nature, frequently ignoring their deep-seated spiritual commitments and even failing to mention their RFRA defense.[11]

In order to preserve religious freedom, it is critical that courts rise above this challenge and neutrally apply religious exemption laws to all faith practitioners—regardless of whether their

beliefs may be deemed common or unusual, conservative or progressive. Of course, this does not mean that all religious exemptions should succeed or fail together. Exemptions that would harm others or reduce overall religious liberty and plurality should be treated with caution. Similarly, exemption claims that would threaten a larger government program or undertaking—such as tax collection—will be granted far less frequently than those that can be easily accommodated. However, courts must be conscious of the risk of bias when performing the RFRA test, and make a concerted effort to apply religious exemption laws with the neutrality that the Constitution's religion clauses, and a national commitment to religious plurality, require.

Religious Liberty Must Be Non-coercive

The purpose of religious liberty protections are, of course, to allow individuals to follow their own consciences in determining which religious tenets, practices, and communities to embrace. Thus, religious exemptions may not have the effect of conscripting others into supporting religious beliefs or practices that they have not freely chosen. Another way to understand this principle is that religious exemptions reach their constitutional limit when they protect the religious liberty of one party by requiring another party to bear the cost of protecting those rights. The government cannot force a person to give up any legal or constitutional right, or change their behavior, in order to accommodate religious beliefs that they do not themselves hold.[12] In Hobby Lobby, for instance, the Supreme Court emphasized that "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief."[13] This absence of third party costs for the accommodation of religion is crucial to protecting everyone's religious freedom, not just those seeking a religious exemption.

Many of the exemptions proposed and enacted by the religious right require a third party—someone other than the religious objector—to bear the cost of the exemption. For example, an exemption allowing doctors to withhold medical information from their patients if they think this might lead them to seek an abortion eliminates patients' ability to make their own medical decisions, impacting not only their health but their personal religious and moral autonomy. A newly proposed federal rule that would exempt government contractors from antidiscrimination policies, allowing them to condition employment on "acceptance of or adherence to religious tenets as understood by the employer,"[14] would put a large chunk of the labor force at risk of losing their job if they do not adopt the faith-based practices of their employers.

The First Amendment Defense Act would "accommodate" the religious beliefs of individuals and companies opposed to marriage equality by eliminating many health, labor,

and antidiscrimination provisions that protect workers. For instance, while employers who deny health insurance coverage to their employees' dependents would normally be subject to tax penalties, FADA would prevent the government from punishing employers who withhold coverage to the children of same-sex parents because of their religious beliefs. How would losing health insurance for one's child burden a worker's religious rights? It is obvious that losing this legal benefit imposes a significant economic hardship. The fact that the worker is losing the benefit because of an identity characteristic—her sexual orientation—imposes an additional dignitary harm. However, when the government eliminates someone's legal rights in order to accommodate someone else's theological beliefs, this also imposes a religious harm. It essentially requires the worker to subsidize religious beliefs that violate her own conscience.

Too often, religious exemption disputes are framed as pitting one person's right to religious liberty against another's right to secular equality. This is an important concern, but it obscures the fact that losing rights or benefits to accommodate another person's religious beliefs is also an assault on their religious freedom.

Policymakers and judges should reject religious exemptions that push the economic, social, or legal costs of a religious belief onto those who do not hold that belief. Any exemption that requires people to subsidize religious beliefs they do not share—or even, in some cases, beliefs they do share—diminishes religious liberty for everyone.

Religious Liberty Must Be Nondiscriminatory

Laws prohibiting religious discrimination are indispensable to religious liberty and plurality, and any attempt to narrow the scope of such laws should be rejected. For over 50 years, the overwhelming public consensus has held that access to employment, housing, education, and public accommodations should not be restricted on account of certain identity characteristics, including religion. Civil rights laws banning religious discrimination have reduced religious segregation and protected religious minorities from state-sanctioned marginalization and persecution. Now, efforts to carve out religion-based exemptions from antidiscrimination law threaten to challenge this consensus.

Antidiscrimination laws are, of course, especially important to religious minorities, including Muslims, Sikhs, Jews, and atheists. Both the Federal Bureau of Investigation and the Department of Justice consistently report a disproportionately high number of discriminatory incidents, including hate crimes, against Muslims and Jews.[15] In the wake of the September 11th attacks

in 2001, the Equal Employment Opportunity Commission (EEOC) witnessed a 250% increase in the number of religious discrimination charges involving Muslims.16 While this number has gone down somewhat since then, religious minorities continue to bring claims of discrimination at wildly disproportionate rates as compared with people from majority religious traditions. Despite making up only one percent of the population, over 25% of the EEOC charges of religious workplace discrimination in 2015 related to Muslims.17 The number of assaults against Muslims in recent years has actually surpassed the modern peak of 2001.18 Nonprofit organizations that track religious discrimination have also noted a recent rise in anti-Semitic incidents against Jews.19

A 2016 report issued by the DOJ noted that in recent years, "[c]ommunities reported an uptick in attacks and threats against mosques, gurdwaras, and other houses of worship, as well as acts of bullying, harassment, and violence against children and adults who are—or are perceived to be—Muslim."20 Muslims themselves report high levels of discrimination: nearly half of U.S. Muslims report having experienced at least one incident of discrimination in the past year, and half say it has become harder to be Muslim in the U.S. in recent years.21 In recognition of the disproportionate rates of discrimination faced by religious minorities, the EEOC's strategic enforcement plan for the years 2017-2021 listed discrimination against Muslims and Sikhs as an emerging priority issue.22

Despite rising levels of religious discrimination, many exemptions advocated by the Christian right explicitly permit discrimination against religious minorities by narrowing the scope of civil rights laws. For example, Texas's H.B. 3859 allows religious foster care agencies to refuse to place children in non-Christian families, regardless of any state or local laws that prohibit such discrimination. Similarly, the Trump Administration's decision to exempt Miracle Hill Ministries and other federally funded foster care agencies from antidiscrimination regulations allows such agencies to reject foster parents based on religion: Miracle Hill is currently being sued for turning away a Catholic foster parent, and it has refused to work with Jewish families.[23] In Masterpiece Cakeshop, the attorney for the bakery explicitly argued before the Supreme Court that the Free Exercise Clause should be interpreted to allow for-profit businesses to violate laws prohibiting religious discrimination—not just discrimination based on sexual orientation. In other words, not only should bakeries be allowed to deny wedding cakes to same-sex couples, they should also be allowed to deny them to Muslims, Jews, interfaith couples, or atheists.

While a small group of religious practitioners may benefit from being allowed to violate antidiscrimination laws, the overall impact of such a regime would be devastating to religious

liberty and plurality more generally. Laws prohibiting religious discrimination have been a crucial factor in ensuring that people of all faiths are able to fully participate in civil society. If protections against religion-based discrimination may be ignored without consequence, adherents of minority religions will be chilled in exercising their faith for fear of experiencing bias in public accommodations, employment, housing, and in other sectors of public and private life.

Just as antidiscrimination laws protect religious liberty, religious liberty laws can shield people of faith—especially religious minorities—from discrimination. For example, Iknoor Singh successfully used RFRA to challenge a university Reserve Officer Training Corps program's claim that allowing him to maintain his long hair, beard, and turban, as required by his Sikh faith, would "have an adverse impact on unit cohesion and morale because uniformity is central to the development of a bonded and effective fighting force."[24] Of course, such "uniformity" is modeled on Christian, rather than Sikh, norms of dress and grooming. Thus, at least for religious minorities, religious liberty and equality rights are mutually-enforcing values, each dependent on the other.

RFRA was originally understood to be a civil rights law, promulgated in order to reduce unintentional discrimination against religious minorities. Using exemptions in order to expand religious discrimination turns the purpose of such laws on their head. In order to protect religious liberty, we must protect religious communities' civil rights, including their fair and equal access to housing, employment, education, and public accommodations. Any attempt to advance religious liberty by allowing religious discrimination will ultimately destroy the very right it seeks to protect.

Religious Liberty Cannot Be Absolute

No constitutional right is absolute. Where the government has important policy considerations, or the legal or constitutional rights of others are at risk, limits on the individual right to free exercise, free speech, and even liberty are permissible, and sometimes required.

Some religious exemption laws embraced by the Christian right are written in absolute terms, leaving no room for consideration of the impact the exemption would have on others. The First Amendment Defense Act, for example, would place an absolute barrier on the enforcement of an enormous range of laws and policies on certain religious objectors, regardless of the consequences this would have on larger considerations of civil rights, labor, health, and tax policy. Such an unconditional exemption stands in stark contrast not only with RFRA, which requires

consideration of important government interests, but with Supreme Court precedent. In Cutter v. Wilkinson, the Court upheld RLUIPA in part because it was clear that the law would not require the adoption of religious exemptions that "become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution."[25]

Courts have not hesitated to deny religious exemptions to religious minorities as well as members of humanitarian and social justice movements where they have found compelling government interests at stake—from the early sanctuary movement volunteers to Rastafarians seeking to use marijuana for religious practice to Catholic nuclear war protestors. They should similarly ensure that they take careful account of competing individual and government interests in assessing claims brought by conservative Christians seeking exemptions from health, labor, and antidiscrimination laws.

This report posits that conflicts between religious exercise and other rights—specifically equality rights—are often misunderstood and over-emphasized in the current dialogue regarding religious liberty. Nevertheless, when religious liberty rights do conflict with other legal or constitutional rights, courts and legislatures must make every effort to thoughtfully balance the competing interests, without awarding absolute and unconditional deference to any one constitutional value.

Religious Liberty Must Be Democratic

Pushed to their limit, religious exemptions have the potential to undermine democratic governance in serious ways. There is some truth to the Court's early warning in U.S. v. Reynolds that allowing unrestricted religious exemptions "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[26] This concern for democratic lawmaking was echoed again in Employment Decision v. Smith in 1990. In his majority opinion rejecting the right to religious exemptions under the Constitution, Justice Scalia wrote that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[27] Both decisions warn of the possibility that law will become ineffective if it cannot be applied to those who oppose it.

This concern for maintaining a functioning democracy may appear overblown when it comes to religious exemptions that require only modest accommodations, or apply to a small minority

group. Permitting Sikhs in the military to wear a turban, or a small sect to use hoasca, will have little larger impact on the government's ability to pass and enforce laws. Typically, such exemptions are necessary because in promulgating the underlying law or rule, policymakers did not take into consideration the religious beliefs or practices of the community requesting an exemption. Allowing exemptions in the context of small or disfavored religious communities may therefore mirror other constitutional doctrines that seek to correct for democratic failure, such as the constitutional suspicion that is required when the state acts in a disfavored way toward discrete and insular minorities that do not have the power to avail themselves of the political processes that would otherwise protect their interests.[28]

However, increasingly, religious exemption litigation is being brought on behalf of extremely large faith groups—such as conservative Evangelical and Catholic Christians—and in contexts in which the groups' religious beliefs were already extensively considered and debated, and an exemption was ultimately rejected in favor of other government priorities. In these contexts, we would not conclude that the democratic process has somehow failed these communities, rather the democratic process produced a result with which they do not agree. The ordinary, democracy-respecting response to such a moment is to return to democratic institutions and seek a change in the law, rather than claim that the law does not, or should not, apply to them.

For example, in the case of Hobby Lobby's RFRA challenge to the contraceptive mandate of the ACA, the federal government had already engaged in extensive negotiations among religious, health, and other advocates, and had decided to adopt a religious accommodation to the mandate that applied to religious nonprofits, but not to for-profit corporations.[29] In successfully gaining a religious exemption through litigation after being denied an exemption by the executive administration, the for-profit claimants were able to essentially override the careful compromise that had been negotiated through the regular democratic process. Religious objectors are, of course, free to challenge such compromises if they believe them to be in violation of the Constitution or federal law. Nevertheless, it is worth considering as part of the debate over the scope of religious exemption law how such challenges may be used to give even large and politically-powerful religious constituencies a second opportunity to win policy battles that they have lost at the legislative or administrative levels.

In hearing RFRA and other exemption claims, judges should be cognizant of the scale of the exemptions that are requested, and whether they might have a larger impact on the ability of policymakers to make and enforce law.

Religious Liberty Must Be Pluralistic

The majority of the rules outlined above are targeted primarily at those in government charged with promulgating, enforcing, and applying religious liberty laws. However, these are not the only actors responsible for the increasingly lopsided understanding of "religious liberty" in the U.S. Advocates, journalists, and others have played an essential role in shaping the way we discuss and protect religious liberty. Too often, this has meant focusing public attention on "religious liberty" rights as defined by those with a select set of conservative religious beliefs about sex, sexuality, and marriage.

To remedy this, advocates of religious liberty for all must cease conflating "religious liberty" with the Christian right, even if unintentionally. Legal measures that would in fact threaten the religious liberty of certain faith communities, or of non-practitioners, should not be referred to as efforts to advance "religious liberty." Indeed, such laws must be understood as an attack on religious neutrality and equality.

Specifically, it is critical that writers and advocates as well as policymakers reject a "religion vs. LGBTQ/reproductive rights" framework for understanding and describing religious liberty claims. For many people—like members of the Clergy Consultation Service who provided abortion referrals prior to Roe, and the clergymembers in United Church of Christ v. Reisinger who sought a religious right to perform same-sex wedding ceremonies—religious freedom is not in conflict with reproductive justice and LGBTQ equality. Positioning the protection of religion and other fundamental rights as a zero-sum conflict erases the experiences of many faith communities, including LGBTQ people of faith. Exemptions that protect anti-choice or anti-LGBTQ religious views may offer protections to certain religious believers, but they do not protect all—or even most—people's right to religious liberty.

As part of this commitment to respecting all religious beliefs, atheists and the nonreligious must be included among those in need of religious liberty protection. A large and growing percentage of the U.S population identifies as unaffiliated with any religious group, though a slight majority (55%) of this population—often called the "nones"—still describe themselves as religious or spiritual.[30] Despite this trend towards non-affiliation, nonreligious people and atheists continue to face widespread prejudice in the United States.[31] This bias towards atheists can have material consequences; studies have found that atheists are vulnerable to discrimination in a range of settings, including when seeking employment and running for office.[32] In fact, while

unenforceable, there are still laws or constitutional provisions on the books in eight states barring atheists from holding public office.[33]

Those who think, speak, and write about religious liberty must take care to present a pluralistic view of religion and religious freedom, rather than essentializing "religious liberty" as an issue for conservative Christians. Moreover, they should acknowledge that religious liberty rights must apply to the nonreligious, or they are meaningless.

Conclusion

Religious liberty means many things to many people. To some, like Samantha Elauf—who lost a job opportunity because of her headscarf—it means the ability to practice one's religion openly without fear of discrimination or persecution. To others, like atheist activist Dan Barker, it means the right to access government institutions, such as public schools and courthouses, that are free from religious prayer or symbols. To others still, like Scott Warren—who continues to face significant prison time for providing food and shelter to migrants—it means the right to act out their faith, even if doing so may conflict with criminal or civil statutes. And finally, to some, religious liberty means no less than the ability to enshrine their own personal beliefs into U.S. law, and impose these beliefs on others.

Legislators and courts cannot protect every individual's own private understanding of religious liberty. While free exercise of religion is a fundamental right, it is not an unlimited one. Like the right to free speech, it must sometimes yield to larger governmental or public concerns—including rights of others to follow their own consciences. While no one would argue that the United States' religious liberty doctrine has been a model of consistency and clarity, there have been a few longstanding guiding principles that have served us well: the responsibility to treat all religious communities and beliefs—including a lack of religious belief—with neutrality; the refusal to require that people subsidize religious beliefs they do not hold; and a commitment to nondiscrimination and religious plurality.

Unfortunately, both advocates and government actors are now attempting to rewrite the meaning of religious liberty in a way that favors only a subset of religious believers. While people of faith have been called by their religious beliefs to feed the hungry, welcome the stranger, serve those who use drugs, protect our environment, symbolically disarm weapons of war, celebrate same-sex commitments, and protect the right to abortion, these acts have been purposefully overlooked in favor of a theory of "religious liberty" centered on opposition to sexual liberty

and equality rights. This is an affront to the values that made the free exercise of religion and church-state separation two of the foundations of our constitutional democracy.

This report is not intended to offer an opinion on how each of the religious liberty cases discussed therein should be decided. Rather, it is intended to shine a spotlight on the ways in which conversations about religious liberty in the U.S. have focused almost exclusively on one religious community, to the detriment of other faith groups. By providing a reminder of the vast diversity of religious beliefs and believers that must be protected equally under the law, we hope to reclaim a deeper understanding of religious liberty and preserve this fundamental constitutional right for people of all faiths and none.

Endnotes

1 *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (internal citations omitted). *See also*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226, (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of noreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.").

2 *Town of Greece*, 572 U.S. at 616 (2014) (Kagan, J., dissenting).

3 *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (2018). In addition, while many religion law experts and people of faith would dispute the idea that the presence of a 40-foot cross on government property displays neutrality towards religion, the Court's recent decision upholding such a monument relied on the neutrality principle. *American Legion*, 139 S. Ct. at 2090 (2019) ("For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."). *See also*, *id*. at 2094 (Kagan, J., concurring) ("Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands.").

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10 Brief for Professors of Religious Liberty as Amici Curiae in Support of Neither Party on Defendants' Motion to Dismiss Under the Religious Liberty Restoration Act at 6, *United States of America v. Hoffman*, No. 4:19-CR-00693-RM (D. Ariz. Apr. 22, 2019).

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