

THE PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT
CENTER FOR GENDER AND SEXUALITY LAW
COLUMBIA LAW SCHOOL
435 WEST 116TH STREET
NEW YORK, NY 10027
TEL: 212.854.0167
[HTTP://TINYURL.COM/PUBLICRIGHTS](http://tinyurl.com/publicrights)



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From: Columbia Law School, [The Public Rights/Private Conscience Project \(PRPCP\)](#)

Contact: Liz Boylan | eboyla@law.columbia.edu | [212.854.0167](tel:212.854.0167)

Five Key Questions to Ask About the New Executive Order on Religious Liberty

In February, a draft of an Executive Order (EO) on religious liberty was leaked from the Trump Administration. This order would have had sweeping effects on the enforcement of federal law by all government agencies. In addition to harming LGBTQ communities, it would have had ramifications for unmarried pregnant and parenting women, patients seeking contraceptive care, religious minorities, cohabitating adults and others. President Trump is expected to sign an updated draft of the EO this week. The Public Rights/Private Conscience Project (PRPCP) has outlined five questions to ask when analyzing and reporting on the new order.

For more thorough analyses of religious exemptions, please visit our [website](#), which includes numerous publications on the legal and policy implications of [funding](#) organizations that discriminate based on religion, religious exemptions' effect on [women of color](#), and an analysis of the [First Amendment Defense Act](#). Additional analysis of the EO will also be posted to our website in the coming days.

1) Who does the EO apply to?

Religious exemptions are special rights that allow religious practitioners to violate laws that conflict with their sincerely-held beliefs. A religious exemption, like the forthcoming EO, can apply to houses of worship, religious organizations, and/or individuals. It's important to read the definition of "religious organization" carefully, however, as this term can often include large corporations that appear secular, like a hospital system or even a for-profit company. The term "person" is generally defined by federal law to include for-profit, publicly-traded companies like Walmart and ExxonMobil. Thus if the EO provides religious exemptions to all "persons," this would go beyond the Supreme Court's ruling in *Burwell v. Hobby Lobby*, which held that closely-held, for-profit companies are entitled to religious exemptions under the Religious Freedom Restoration Act (RFRA).

2) What religious beliefs are protected?

Recent proposed and enacted religious exemptions, including a leaked draft of the EO, have singled out for special protection particular conservative religious beliefs about sex, marriage, and reproduction. These include the belief that: 1) marriage is the union of one man and one woman; 2) sexual relations are properly reserved to such a marriage; 3) male and female refer to

an individual's sex as determined at birth; and 4) human life begins at conception. Providing government support for particular religious beliefs raises serious Establishment Clause and Equal Protection concerns, as highlighted by a recent [federal court opinion](#).

However other parts of the previously-leaked EO appear to apply far more broadly. For example, the requirement that federal agencies should “not promulgate regulations, take actions, or enact policies that substantially burden a person's or religious organization's religious exercise” could cover *any* religious belief.

3) Who is authorized to grant a religious exemption?

RFRA is a broad religious liberty law that prohibits the government from substantially burdening the exercise of religion unless doing so is the least restrictive means of furthering a compelling government interest. Typically, it is the *judiciary's* responsibility to interpret and apply RFRA through litigation between a private party and the government. The leaked EO, however, orders *federal agencies* to interpret (RFRA) preemptively in deciding whether or not to enforce federal laws.

For example, under the EO the Equal Employment Opportunity Commission could interpret RFRA to exempt employers with a religious opposition to hiring transgender workers from compliance with Title VII of the Civil Rights Act. It could then decline to bring suits on behalf of, or even provide right-to-sue letters to, transgender workers who are discriminated against because of their employer's religious beliefs. In such instances, it could be difficult to challenge an agency's overly-broad interpretation of RFRA.

4) Who is harmed?

It's clear that the proposed EO will harm many LGBTQ people. Less obvious, however, are the sweeping effects it is likely to have on many other groups. The leaked version of the EO specifically protects religious opposition to sex outside marriage; a provision that could sanction discrimination against unmarried pregnant and parenting women and cohabitating, unmarried adults more generally. The leaked EO would also gut the contraceptive coverage mandate of the Affordable Care Act, limiting coverage of necessary health care. Religious practitioners, and especially religious minorities, could also be harmed. The EO would allow discrimination against those who do not share their employer's religious beliefs. Further, it places government support behind particular religious beliefs that many religious observers do not share, such as the belief that a fertilized egg should be protected over the health of a pregnant person.

5) Are government contractors and employees included?

The leaked EO would provide broad religious exemptions to government contractors and employees, which poses particular Establishment Clause risks. It states that organizations do not “forfeit their religious freedom” when receiving government grants or contracts and orders agencies to provide religious exemptions to grantees. It also orders agencies to accommodate both federal employees and grantees who act upon the four particular religious beliefs outlined in question two, above. Thus the EO would allow faith-based organizations to place religious restrictions on the use of government funds, and to discriminate while carrying out government programs. It would also protect government employees who wish to act on their religious opposition to LGBTQ rights, extramarital sex, and reproductive health care.