



Columbia **Law School**

LAW, RIGHTS, AND RELIGION PROJECT

All Faiths & None

A GUIDE TO PROTECTING
RELIGIOUS LIBERTY FOR EVERYONE

October 2020

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Acknowledgements



For advice and assistance, we thank the **Auburn Senior Fellows, Susan Barnett, Melissa Rogers, Sirine Shebaya, and Maggie Siddiqi.** **Lilia Hadjiivanova** provided invaluable support with editing, outreach, and communications.

Design



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Preface

This year, the U.S. is confronting the legacy of its earliest injustices. We are reckoning together with how religion, especially Christianity, has inscribed patterns of power and domination into the very legal structure of this country.

Animated by our faiths and deep ethical convictions, people from every tradition and culture are looking afresh at how our social institutions, federal, state and local laws, and institutional policies have locked in a cruel, conflictual vision of community and country. We yearn for a different moral view, one expansive enough for all.

As a 202-year-old multi-faith justice organization, Auburn has seen people of faith and people of moral courage participate in every social change and solidarity movement in U.S. history—as congregational ministers and lay people, social service reformers and community organizers, theists and non-theists, advocates and activists.

It is our religious and moral traditions that inspire us to practice and promote ethics of care for others and stewardship of the resources we hold in common. We dream of and work for a world where each of us can thrive, where all are free to practice their religious, spiritual, and ethical traditions, and where every one of us can live, study, work, gather, and engage in public life without the threat or penalty of surveillance, marginalization, discrimination, or violence.

Robust religious liberty for all is fundamental to this vision. Preserving religious liberty includes maintaining distinctions between religious and civic authority, challenging governments when they attempt to constrain individual conscience or coerce minority populations, and challenging religious groups when they use faith as a bully stick. Permitting discrimination, stigmatization, or marginalization for one group or some groups creates vulnerabilities for all.

But our work is not primarily defensive. There is discrimination embedded in so many areas of civic life and law: employment, housing, education, criminalization and incarceration, disability accommodations, family rights, immigration, and national security. We must actively dismantle that discrimination even when advocates use narrow religious arguments to justify it.

We know that deeply held beliefs have real-world, measurable consequences. We are committed to evaluating those consequences against enabling standards of belonging, compassion, mutual responsibility, and solidarity, and we are motivated to build new, more expansive networks of law, policy, and community with people of all faiths and backgrounds.

Auburn stands proudly with the Law, Rights, and Religion Project (LRRP) at Columbia Law School and the cloud of witnesses endorsing the recommendations in this report. Together, we are called to expand public understanding of a religious liberty that truly supports freedom for all people, and together we are committed to building legal structures and community networks strong enough to scaffold a world where all belong.

Dr. Keisha E. McKenzie

Senior Vice President of Programs
Auburn

Introduction

Religious liberty rights have been immeasurably damaged over the past several years—often in the name of *protecting* religious liberty.

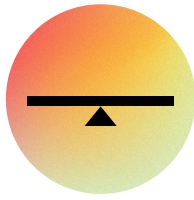
Government officials have embraced Islamophobic policies and rhetoric; shut the door on refugees fleeing religious persecution; elevated the religious rights of their political allies over the rights—religious and otherwise—of other communities; used religion as a tool of economic deregulation; and denigrated the beliefs of religious minorities, atheists, and religious progressives.

To achieve true freedom for those of all faiths and none, a complete overhaul of religious liberty policy, and a new understanding of what this right truly means, is necessary. This report offers guidance on how a future presidential administration could protect religious freedom—not merely for a favored few, but for everyone. While we discuss specific policy measures necessary to protect religious liberty, the report is organized around a set of overarching principles in order to provide more holistic guidance about the true meaning of religious freedom.¹

“ My tradition has taught me that religious liberty includes the right to practice our faith freely. It is also the liberty from state interference as we do the same. As this fundamental freedom has eroded for faith adherents the government disfavors, the Law Rights and Religion Project and Auburn Seminary bring clarity and truth to this troubling reality. I applaud their work.”

Rev. Kaji Douša

Senior Pastor
Park Avenue Christian Church



Religious Liberty Must Be Neutral

One of the most foundational rules of religious liberty—mandated by both the Free Exercise Clause and the Establishment Clause of the First Amendment—is that laws and policies must apply neutrally to people of all faiths.

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.”² 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.”³ Among other things, the neutrality rule prevents the government from singling out certain theological communities or beliefs for special persecution or special protection.

In order to ensure that people of all religious beliefs, or no religious belief, are treated with the neutrality that the Constitution demands, the incoming administration should:

A. END ISLAMOPHOBIC POLICIES & RHETORIC

The Muslim travel ban, promulgated in 2017, is a particularly egregious violation of the Constitutional mandate to treat all religious beliefs with neutrality. While five members of the Supreme Court refused to engage in a meaningful analysis of the Islamophobic animus motivating the ban when they upheld it in *Trump v. Hawaii*,⁴ this motive was unmistakable. That said, the Muslim travel ban was not the only or the first federal policy to have a non-neutral impact on American Muslims. Numerous U.S. laws and policies, especially in the areas of immigration, criminal justice, and counter-terrorism, intentionally or in practice target Muslims in ways that violate the neutrality requirement. The incoming administration should remedy this Constitutional failing by ensuring that no law or policy is used to harass people of faith, and in particular Muslims, on account of their religious identity.

RECOMMENDATIONS

- Withdraw the Muslim travel ban⁵ and work with Congress to ensure that future administrations cannot impose similar policies. End State Department “extreme vetting” measures, including the collection of visa applicants’ social media information, and other policies prompted by the travel ban and its subsequent revisions.⁶
- Work with government agencies and Congress to end or overhaul U.S. laws and policies that discriminate against and target Muslims, such as the PATRIOT Act (including the material support for terrorism statute); 2015 and 2017 changes to the visa waiver program; the Department of Homeland Security (DHS) Targeted Violence and Terrorism Prevention program; the DHS Controlled Application Review and Resolution Program; and the Federal Bureau of Investigation (FBI) No Fly List and Terrorist Watch List.⁷ Settle *Tanzin v. Tanvir*, a case challenging the FBI’s abuse of the No Fly list to punish three Muslim men for refusing to spy on their religious communities.⁸ Support legislation to prohibit racial and religious profiling.

- Review DHS, Department of Justice (DOJ), State Department, all members of the Joint Terrorism Task Force, and other agency guidelines, training manuals, and activities, and take measures to prohibit improper surveillance, ban religious discrimination, uncover and address implicit bias, and protect religious rights. For example: immigration agents should be prohibited from asking travelers intrusive questions about their religious beliefs and practices; federal agents should be required to respect the religious rights of federal criminal defendants and those in federal prisons and immigration detention centers; and department training materials should be updated to ensure that they are not encouraging implicit bias against people of certain religious backgrounds.
- Remove Islamophobic appointees including (ironically) the U.S. Agency for International Development’s Religious Freedom Adviser Mark Kevin Lloyd, who called Islam a “barbaric cult,” Secretary of State Mike Pompeo, who has ties to the anti-Muslim group ACT for America, and Department of Defense Under Secretary of Defense for Policy Anthony Tata, who has called Islam “the most oppressive violent religion.”⁹
- Publicly condemn Islamophobic policies instituted at the state and local levels, such as “anti-Sharia” legislation.

B. ELIMINATE RELIGIOUS EXEMPTIONS THAT FAVOR PARTICULAR BELIEFS

Many recent policies enacted in the name of “religious liberty” violate the neutrality principle by favoring particular religious beliefs, especially conservative Christian beliefs about sex, sexuality, marriage, reproduction, and the family, over others. Rather than protecting religious practices related to marriage or reproduction generally, these policies single out anti-LGBTQ or anti-abortion religious beliefs for exclusive and extraordinary protection. They therefore place the government’s seal of approval on a select set of religious beliefs. For example, a rule promulgated by the Department of Health and Human Services (HHS) in 2019 provides special protections to healthcare providers that refuse to perform abortions, sterilizations, and other healthcare services based on their religious beliefs.¹⁰ However, the rule offers no protection to those who *wish to provide such services* based on their religious beliefs, but are prohibited from doing so by their employers.

Even some longstanding policies inappropriately favor, or have been interpreted to favor, conservative religious beliefs about reproductive rights. For example, the text of the Church Amendment¹¹ prohibits healthcare entities from discriminating against providers because they performed *or* refused to perform a sterilization or abortion due to their religious beliefs or moral convictions. Courts have interpreted this measure, however, to generally protect an individual provider’s right to refuse services within the scope of their employment—but not a provider’s right to offer abortion or sterilization when this is prohibited by their employer. For example, in *Watkins v. Mercy Medical Center*, a doctor sued a Catholic hospital on religious liberty grounds for denying his staff privileges after he refused to abide by the hospital’s prohibition on sterilization and abortion.¹² In rejecting his claim, the court held that—unlike for anti-abortion providers—the Church Amendment protected a pro-choice doctor’s provision of abortion care only *outside the scope of employment*.¹³ The incoming administration must make a careful assessment of religious liberty policies to ensure that they do not amount to government favoritism towards, or endorsement of, particular theological beliefs.

RECOMMENDATIONS

- Eliminate religious exemption rules and policies that favor conservative religious beliefs about sex and sexuality,¹⁴ as well as administrative bodies charged with enforcing these rules.¹⁵ Work with Congress and agencies to ensure that religious exemptions, including the Church Amendment,¹⁶ protect all religious beliefs neutrally.

C. ACT NEUTRALLY IN PROMULGATING NEW RELIGIOUS EXEMPTIONS

As discussed throughout this report, numerous recently enacted religious exemptions are primarily intended to protect only politically conservative religious beliefs—namely opposition to reproductive and LGBTQ rights. In contrast, little effort has been made in recent years to accommodate religious beliefs that would be considered progressive. For instance, in response to public comments expressing concern that a proposed rule limiting immigration would harm immigrant religious workers and their employers, in 2019 U.S. Citizenship and Immigration Services (USCIS) declined to insert a religious exemption into the final rule.¹⁷ In explaining this denial, the agency claimed that “[the Religious Freedom Restoration Act] does not create a wholesale ‘exemption’ to a generally applicable regulation” but rather requires “a case-by-case determination.”¹⁸ This assertion conflicted with religious liberty guidelines issued by the Justice Department just two years earlier, which state that “[in] formulating rules, regulations, and policies, administrative agencies should...proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens.”¹⁹ The incoming administration should be careful to ensure that religious liberty policies are not enacted for the exclusive benefit of those who support the administration’s own political priorities.

RECOMMENDATIONS

- The administration should proceed with extreme caution in writing wholesale religious exemptions into administrative policy rather than making case-by-case determinations. However, to the extent that agencies *do* promulgate such wholesale exemptions, they should treat all religious beliefs with neutrality rather than favoring only those that comport with the administration’s political beliefs.

D. TREAT RELIGIOUS LITIGANTS NEUTRALLY

The DOJ has, over the past several years, failed to act with neutrality towards those who have made religious liberty claims in court. The agency has repeatedly submitted briefs and statements of interest in support of religious litigants with conservative views regarding sex and sexuality—even when these litigants were opposing the federal government.²⁰ In contrast, the DOJ and other agencies have aggressively surveilled and prosecuted more progressive people of faith, including: humanitarian aid workers who have provided assistance to migrants at the Southern border in accordance with their religious beliefs;²¹ a Christian pastor who ministers to undocumented people;²² a faith-affiliated nonprofit that is seeking to open a safe injection site for drug users;²³ and a group of Catholic laypeople who broke into and staged a protest at a U.S. nuclear facility.²⁴

Members of the DOJ have even cast aspersions on the religious faith of several of these litigants. For example, after being charged with several federal crimes, the Catholic nuclear war protestors mentioned above argued that the government was improperly punishing them for activities mandated by their faith. In response, the DOJ argued in a brief that this religious liberty claim “reflect[ed] an effort to propagandize and obtain secular public policy revisions tinged with post-hoc religious justification.”²⁵ Similarly, a DOJ brief opposing a religious nonprofit’s efforts to open a safe injection site argued that the founders’ “true motivation is socio-political or philosophical—not religious—and thus not protected by” religious liberty laws.²⁶ During a hearing, DOJ prosecutors attempted to cast doubt on the religious beliefs of a humanitarian aid worker who worked with migrants by soliciting testimony that he was not a member of a formal religious denomination such as Judaism, Islam, Mormonism, or the Bahá’í faith.²⁷ Such open biases towards those with particular religious beliefs violate the spirit of the Constitution’s neutrality requirement.

It is worth noting that the duty to treat religious litigants with neutrality does not bar the government from challenging the sincerity and religiosity of claimants during litigation. Government attorneys have long been hesitant to demand that religious litigants prove all the elements of religious liberty claims, including sincerity of belief. For example, the government did not challenge the sincerity or religiosity of the for-profit claimants in the 2014 case *Burwell v. Hobby Lobby*, despite relevant evidence suggesting that at least one of the claimants had recently violated its professed sincere objection to paying for birth control coverage in its employee health plan.²⁸ Such concessions to religious litigants are unnecessary—so long as the administration treats all claimants equally, it may demand that they prove in court all elements of religious claims made under the Constitution or the Religious Freedom Restoration Act (RFRA). The incoming administration should take steps to ensure that all litigants bringing religious liberty claims are treated neutrally.

RECOMMENDATIONS

- Disband or reform the DOJ's Religious Liberty Task Force.²⁹ Since its creation in 2018, the DOJ has withheld information about the Task Force's membership and activities, leading to widespread concerns about bias in its mission and makeup. The results of a Freedom of Information Act (FOIA) request about the Task Force were heavily redacted.³⁰ In order to ensure that the DOJ is protecting all people of faith neutrally rather than favoring particular denominations or ideologies, the Task Force should be either disbanded or made to adhere to transparency requirements.
- Promulgate measures, such as policy guidelines or trainings, to ensure that government attorneys treat the religious liberty interests of all litigants with neutrality. It is unacceptable for the government to accept without question the validity of certain religious beliefs—such as opposition to abortion and contraception—while rigorously challenging the sincerity and religiosity of more progressive faith actors.

“ At Sadhana, we understand why it’s so important for religious liberty to be strong, neutral, and pluralistic. Our communities have seen what can happen when it isn’t. So many Indians coming to the United States seeking asylum are from persecuted religious minority groups in India. Here, they are seen as undocumented immigrants and asylum seekers, but they are also persecuted religious groups and this nuance is often missed. We long for a world where people of all faiths and those of no faith at all can live in full human dignity.”

Sunita Viswanath

Co-founder

Sadhana: Coalition of Progressive Hindus



Religious Liberty Must Be Noncoercive

The purpose of religious liberty protections is to allow individuals to follow their own consciences, rather than being coerced to abide by the theological beliefs of government officials or their fellow citizens.

The most obvious violations of this noncoercion principle occur when government actors—such as teachers, judges, or administrators—engage in improper religious activities while acting as officials of the state. However, the noncoercion principle is also violated when the government permits private contractors to engage in religious coercion within government-funded programs. Finally, certain religious exemptions offered to private parties can also amount to religious coercion. This is the case when the government enacts religious exemptions that effectively conscript individuals into supporting religious beliefs or practices that they have not freely chosen. In other words, religious exemptions are coercive when they protect the religious liberty of *one party* by requiring *another party* to bear the cost of the exemption.

In order to protect freedom of conscience for all Americans, the administration should:

A. ENSURE THAT BENEFICIARIES OF GOVERNMENT & GOVERNMENT-FUNDED SERVICES ARE PROTECTED FROM RELIGIOUS COERCION

Americans should not be subject to proselytizing or other forms of religious coercion at government institutions such as schools, courtrooms, and within the military. The same should be true at private institutions carrying out government-funded programs such as medical, mental health, food, shelter, and other services. To protect the constitutional guarantee that the state “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation,”³¹ the incoming administration should take steps to ensure that government-sponsored and -funded services remain open to and inclusive of persons of all faith traditions, including the nonreligious.

RECOMMENDATIONS

- End policies permitting coercive religious activities in public schools, including recently issued guidance that allows teachers to engage in religious activities with students, in violation of the Establishment Clause.³²
- Withdraw a new Department of Defense policy regarding religious practice in the military which has been criticized by the Military Religious Freedom Foundation,³³ and which could permit proselytizing by military superiors to subordinates.³⁴

- Restore recently eliminated policies that protected beneficiaries of government grants from religious coercion, and ensured their knowledge of and access to secular service providers.³⁵ Such policies force beneficiaries of government-funded programs to choose between receiving essential services—including access to homeless shelters, medical care, mental health and addictions counseling, food, and other services—and being subject to religious discrimination and unwanted proselytizing.

B. ELIMINATE COERCIVE RELIGIOUS EXEMPTIONS

Religious exemption disputes are often 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 one's religious freedom. The government should not force any person to give up their legal or constitutional rights, or change their behavior, in order to accommodate religious beliefs that they do not themselves hold. Such overly expansive religious exemptions violate rather than protect religious liberty.³⁶

Many recently adopted religious exemption policies do exactly this. For example, one exemption policy promulgated by HHS in 2019 appears to allow doctors to withhold medical information from their patients if they think the information might lead the patient to seek an abortion.³⁷ This eliminates patients' ability to make their own medical decisions, impacting not only their health but their personal religious and moral autonomy. The incoming administration should reject religious exemptions that push the significant economic, social, or legal costs of a religious belief onto those who do not hold that belief, and therefore coopt them into subsidizing another's faith-based beliefs and practices.

RECOMMENDATIONS

- Withdraw Executive Order 13798 "Promoting Free Speech and Religious Liberty,"³⁸ the Attorney General's guidance memoranda on religious liberty,³⁹ and the 2018 additions to the U.S. Justice Manual.⁴⁰ Together, these documents significantly misinterpret the current state of religious liberty law and demand that agencies promulgate religious exemptions not required under the Free Exercise Clause or RFRA.⁴¹ Moreover, they have been used to justify coercive religious exemptions that violate religious liberty.
- Eliminate religious exemption policies that place the burden of exemptions onto third parties, including:
 - + Numerous enacted and proposed policies—including some long-existing policies, like the 2007 Office of Legal Counsel "World Vision memo"⁴²—that permit religiously affiliated government contractors to violate federal employment antidiscrimination provisions that conflict with their religious beliefs.⁴³ These measures put workers in the position of choosing between their government-funded jobs and their religious beliefs. For example, an atheist mental health counselor could lose her legal right to employment discrimination protections as an employee of a federal contractor and be forced to affirm religious doctrine. While certain narrow exceptions may be warranted—for example, permitting a religious university that contracts with the federal government to discriminate on the basis of religion with regards to its theology professors—such exemptions are currently vastly overbroad and of dubious constitutionality.
 - + Numerous policies allowing healthcare providers, insurers, employers, and schools to deny access to reproductive health services to their patients, employees, and students.⁴⁴ These exemptions strip away legal rights from individuals in order to accommodate the religious beliefs of others, limiting those

individuals' ability to follow their own consciences when it comes to matters of reproductive decision-making. Further, they make people's health and lives subject to others' religious beliefs rather than best medical practice. For example, a Jewish woman whose faith requires that she seek abortion when doing so is necessary to protect her own health could be denied these services—or even information about and/or a referral for abortion—because of her medical providers' religious objection to abortion.

- + Policies that sanction, or appear to sanction, discrimination and denial of services to beneficiaries of government grants based on the religious beliefs of service providers.⁴⁵ For example, a same-sex couple could be turned away from a religiously affiliated, federally funded foster care agency that serves only Christian, different-sex couples.

C. PROTECT IMMIGRANTS FROM RELIGIOUS COERCION ABROAD

The U.S. has long prided itself on being a home for those fleeing religious persecution. Unfortunately, the country has often failed to live up to its purported ideals. Most recently, the federal government has set draconian limits on the ability of immigrants—including religious refugees and asylum-seekers—to pursue freedom of conscience in the U.S. In order to live up to the country's professed values, including its commitment to religious freedom, the incoming administration must greatly expand pathways for the resettlement of religious refugees and asylum-seekers.

RECOMMENDATIONS

- Greatly expand the cap on those admitted under the U.S. Refugee Admissions Program, rebuild the Office of Refugee Resettlement, and abide by the terms of the Convention Relating to the Status of Refugees. Withdraw Executive Order 13888, which grants states and localities the power to refuse refugee admissions.⁴⁶
- Withdraw recently adopted policies that drastically narrow eligibility for asylum,⁴⁷ promulgate policies ending the detention of asylum-seekers, expand work authorization and other rights and benefits to asylum-seekers, provide a right to appointed counsel for indigent asylum-seekers, including victims of religious persecution, and work with Congress to pass legislation establishing immigration courts that are independent of the DOJ.
- Propose legislation, exercise parole power,⁴⁸ or issue a regulation or executive order, to affirmatively grant asylum or other permanent immigrant status to all members of discrete religious groups known to be the victims of organized religious persecution in their countries of origin, such as Uighurs in China, Rohingya in Burma, and atheists in Saudi Arabia. Such measures have precedent in the Lautenberg and Specter Amendments, which made it easier for certain categories of refugees, including religious minorities from (respectively) the former Soviet Union and Iran, to gain status in the U.S.⁴⁹

“ This report is an important corrective to the equation of religious liberty with imposing a particular Christian interpretation of scripture on everyone in the U.S. This has had significant negative implications for religious communities, including Jews, whose practices differ from those of conservative Christians. A true commitment to religious liberty in the U.S. would honor the diverse religious traditions represented in this country, rather than attempt to impose a single interpretation of Christianity on everyone.”

Rabbi Jill Jacobs

Executive Director

T'ruah: The Rabbinic Call for Human Rights



Religious Liberty Must Be Nondiscriminatory

Laws prohibiting religious discrimination are indispensable to religious liberty and plurality.

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 people of faith from state-sanctioned marginalization and persecution. They have been a crucial factor in ensuring that people of all faiths are able to fully participate in civil society. Antidiscrimination laws are, of course, especially important to religious minorities, who experience discrimination and hate crimes at wildly disproportionate rates.⁵⁰

Some recent policies enacted in the name of “religious liberty” undermine the enforcement of civil rights laws, including those prohibiting religious discrimination. This is deeply troubling; if protections against religion-based discrimination may be ignored without consequence, adherents of minority religions will be chilled in exercising their faith. The protection of religious communities’ civil rights, including fair and equal access to housing, employment, education, and public accommodations, is essential to protecting their religious freedom. Any attempt to advance religious liberty by allowing religious discrimination will ultimately destroy the very right it seeks to protect.

In order to protect people of faith from discrimination, the incoming administration should:

A. ELIMINATE POLICIES THAT PERMIT RELIGIOUS DISCRIMINATION

Despite rising levels of religious discrimination, several recently advanced policies (as well as some longstanding ones⁵¹) explicitly permit discrimination against religious minorities by narrowing the scope of civil rights laws. To cite just one example, the decision in 2019 to exempt federally funded foster care agencies from antidiscrimination regulations allows such agencies to reject foster parents based on religion. One such agency is currently being sued for turning away a Catholic foster parent, and it has refused to work with Jewish families.⁵² While a small group of religious practitioners may benefit from being allowed to violate antidiscrimination laws, the overall impact of such a regime is devastating to religious liberty and plurality more generally. The incoming administration should renew a commitment to rigorously protecting and enforcing civil rights laws, including measures prohibiting religious discrimination.

RECOMMENDATIONS:

- Eliminate existing and proposed religious exemptions that allow actors, including federal contractors, to discriminate against religious minorities far beyond what the ministerial exemption requires.⁵³ Such exemptions enable religious segregation and harm people of faith, particularly religious minorities.
- Rigorously enforce the Civil Rights Acts⁵⁴ and other laws and policies prohibiting religious discrimination.

“ This guidance memo on religious liberty should be welcomed and affirmed by all people of faith who desire, not an advantage for their own religious community, but a field of freedom and fairness for all.”

Brian D. McLaren

Author, Speaker & Activist



Religious Liberty Must Not Be Absolute

No constitutional right is absolute. Where important government interests, 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.

This includes instances where the over-accommodation of private religious belief veers into government promotion of religion, in violation of the Establishment Clause. Courts have not hesitated to deny exemptions to religious practitioners where they have found compelling government interests at stake.⁵⁵ Similarly, the executive branch should ensure that it is not improperly protecting free exercise of religion at the expense of other essential rights and interests.

In order to protect *all* fundamental rights, the new administration should:

A. REJECT THE NOTION OF RELIGIOUS LIBERTY AS THE “FIRST FREEDOM”

Some government officials have begun to adopt the concept of religious liberty as the first—and therefore the most important—constitutional right. This mistaken notion has even found its way into formal policies requiring agency employees to operate under the principle that “freedom of religion is a fundamental right of *paramount importance*.”⁵⁶ In fact, there is no hierarchy of civil rights, and the federal government has a responsibility to carefully consider how its actions will potentially burden *all*, not just religious rights. Further, agency guidance documents have sent a clear message to government actors that LGBTQ people’s right to nondiscrimination should be treated as subordinate to the religious rights of conservatives.⁵⁷ The incoming administration should make clear its duty to uphold all rights rather than positioning religious rights as “paramount.”

RECOMMENDATIONS

- Withdraw or reform all policies that promote an understanding of religious liberty as a “first freedom” or the most important fundamental right, and reject the use of the First Amendment as a means of restricting other constitutional rights.

B. ENSURE THAT RELIGIOUS LIBERTY PROTECTIONS ARE NOT WRITTEN IN ABSOLUTE TERMS

Some religious exemptions are written in absolute terms rather than as balancing tests.⁵⁸ While this may be appropriate in exceptionally narrow circumstances where exemptions have a minimal impact on others—such as uniform exemptions allowing federal employees to wear religious garb—such absolutism often threatens to undermine other fundamental rights and values. Before maintaining or promulgating any religious liberty measures, the incoming administration should carefully consider the existence of any competing individual and government interests.

RECOMMENDATIONS

- Eliminate religious liberty measures that do not adequately account for other fundamental rights, such as the right to equal protection.
- As stated previously, the administration should proceed cautiously in writing categorical religious exemptions into administrative policy. Exemptions should typically be made on a case-by-case basis, allowing individual consideration of all relevant interests. However, if the administration does promulgate any categorical exemptions, it should first carefully weigh all potential impacts on the legal and constitutional rights of others, as well as important government interests.

C. RESPECT THE ESTABLISHMENT CLAUSE

One essential limit to the right to individual free exercise of religion is the Establishment Clause, which maintains separation of church and state. Some recent policies intended to protect free exercise rights instead violate both the letter and the spirit of the Establishment Clause. The incoming administration must make a concerted effort to restore Establishment Clause protections, which are vital to ensuring complete religious liberty.

RECOMMENDATIONS

- Ensure that the government does not improperly fund religious belief. While the Supreme Court has placed limits on the government’s ability to withhold certain forms of funding from religious institutions,⁵⁹ the Establishment Clause continues to prohibit the government from directly funding religious activities.⁶⁰ Several administrative policies violate this mandate by providing government funds to organizations that place religious restrictions on the use of those funds.⁶¹ The incoming administration should withdraw these policies and enact regulations, policies, and—in partnership with Congress—legislation to ensure that no government funding is used to carry out religious practices, and that faith actors are not permitted to place religious restrictions on government funds.
- End the improper funding of religious schools.⁶² The Supreme Court has held that the government may (and, in some cases, must) provide certain forms of financial support to religious institutions, including schools, on an equal basis as secular institutions.⁶³ However, under no circumstances should the government incentivize the public to attend religious schools by providing them with inappropriate or excessive forms of financial support. Unfortunately, some recent policies appear to cross this line. For example, an analysis by Americans United for Separation of Church and State of federal COVID-19 recovery funding found that private schools—including religious schools—“have already received funding equivalent to nearly half of the funds allocated for public school districts, despite serving only one-tenth the number of students.”⁶⁴
- End policies that violate the Establishment Clause by permitting government entanglement in or promotion of religion, such as policies allowing coercive religious activities in public schools⁶⁵ or religious displays and symbols in federal facilities.⁶⁶

“

As a pastor, I fear that distortion of the First Amendment by the religious right—which is primarily an ethnonationalist rather than religious movement—has damaged our democracy and undermined our cherished values of human dignity and love of neighbor. Diverse coalitions of faith groups are working hard to defend these principles, and I’m hopeful that this report will help chart the path forward to reclaim the First Amendment and our constitutional rights.”

Rev. Jennifer Butler

CEO

Faith in Public Life



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 Supreme Court's early warning in the 1879 Free Exercise case *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."⁶⁷ This concern for democratic lawmaking was echoed again in *Employment Division 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."⁶⁸ Both decisions warn of the possibility that law will become ineffective if it cannot be applied to those who oppose it.

In order to prevent this outcome, the incoming administration should:

A. ELIMINATE ANTIDEMOCRATIC RELIGIOUS EXEMPTIONS

This report has already discussed many of the risks of overbroad and one-sided religious exemptions. Such exemptions become even more troubling when they amplify the rights of those who already hold positions of power over others, such as employers, landlords, business owners, university administrators, medical professionals, and social service providers. Rather than equally protecting the religious beliefs of all individuals, or—in the case of a direct conflict—protecting the religious rights of those with less social and political power, some religious exemptions do the opposite: prioritize the faith of individuals, and even for-profit corporations, that are already overrepresented in the democratic process. The incoming administration should ensure that religious liberty rights are not used as a means of undermining the democratic process by providing additional rights to powerful interest groups such as employers and landlords.

RECOMMENDATIONS

- Eliminate religious exemptions that require individuals to subsidize the religious beliefs of those in positions of power over them, as well as exemptions that permit religious discrimination in employment, housing, and the public marketplace.⁶⁹ An exception to this general rule would be religious exemptions required by the Free Exercise Clause of the First Amendment, which protects religious institutions' ability to discriminate in the hiring of ministers—though ministers should not be defined so broadly as to allow this exception to swallow the rule.
- Eliminate religious exemptions that serve to weaken democratically enacted restrictions on powerful institutions, such as religious exemptions that strip the right to collective bargaining away from workers at religious institutions.⁷⁰

B. PROTECT THE JOHNSON AMENDMENT

A number of policymakers have recently threatened to eliminate the Johnson Amendment,⁷¹ which prohibits certain nonprofits, including religious nonprofits, from engaging in partisan politics.⁷² In addition to protecting churches from government interference, this Amendment prevents politicians and political parties from using religious organizations as a means of injecting unregulated “dark money” into political campaigns. The incoming administration should make clear its intention to protect church-state separation by defending the Johnson Amendment.

RECOMMENDATIONS:

- Ensure that politicians and political parties do not use churches and other religious nonprofits to circumvent campaign finance restrictions by protecting and enforcing the Johnson Amendment.

“ My faith teaches me that all people are created equal before God and all life is inextricably interwoven. My country teaches us that religious liberty is one of its core values, and we should be able to count on the government that serves us to protect each person’s dignity and humanity. As a multi-faith justice organization, Auburn stands on the moral principles that we belong to one another, that our faiths should spur us to promote trust, compassion, and hope, and that the beliefs we hold so dearly should unite us rather than divide us. The recommendations in this report will help to create a country and a world in which we all belong.”

Rev. Dr. Katharine Rhodes Henderson

President
Auburn



Religious Liberty Must Be Pluralistic

Far too many journalists, activists, scholars, and even government officials in recent years have confined the meaning of “religious liberty” to refer exclusively to a select set of conservative Christian beliefs about sex, sexuality, and marriage.

At the same time, the rights of religious minorities and atheists have often been ignored. In order to protect religious liberty for all, the incoming administration must not conflate “religious liberty” with conservative Christianity, even unintentionally. Specifically, it is critical that the administration protect the rights—and highlight the voices and experiences—of religious minorities in all of its religious liberty efforts. Further, the administration should reject a “religion vs. LGBTQ/reproductive rights” framework for understanding and describing religious liberty issues. For many people, 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.

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. While a large and growing percentage of the U.S. population identifies as unaffiliated with any religious group,⁷³ nonreligious people and atheists continue to face widespread prejudice in the U.S.⁷⁴ 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.⁷⁵ In fact, while unenforceable, there are still laws or constitutional provisions on the books in eight states barring atheists from holding public office.⁷⁶

In fighting ardently for religious liberty, the incoming administration 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, it should acknowledge that religious liberty rights must apply to the nonreligious, or they are meaningless.

To protect religious pluralism, the administration should:

A. PROTECT RELIGIOUS MINORITIES & ATHEISTS

While every effort has been made over the past several years to accommodate the beliefs of conservative Christians, the rights of other religious communities, and the nonreligious, have too often been needlessly trampled. The administration should make a firm commitment to protecting the rights of religious minorities, whose faith-based beliefs and practices are typically overlooked in the legislative process. It should also make clear that atheists, Humanists, and other nonreligious persons are just as entitled to religious freedom—and freedom *from* religion — as people of faith.

RECOMMENDATIONS

- Rigorously protect the rights of religious minorities. For one, the administration must undertake a concerted effort to protect land sacred to Native American religious communities, and take measures to mitigate damage already inflicted on religious sites—including Lake Oahe and other sites sacred to the Lakota Sioux people, which were desecrated by the construction of the Dakota Access Pipeline,⁷⁷ and Organ Pipe Cactus National Monument, which contains ground sacred to the Tohono O’odham Nation and other indigenous groups, and which has already been damaged and continues to be threatened by the construction of a wall at the southern border.⁷⁸
- Protect the rights of atheists and the nonreligious. Several actions by federal government bodies—including the 2018 rejection of a secular Humanist’s application to become a Navy chaplain⁷⁹ and the House of Representatives’ 2016 refusal to allow an atheist to give a secular invocation at the opening of a legislative session⁸⁰—indicate that some government actors believe the nonreligious are not entitled to equal expression of their beliefs. The incoming administration should make clear that this is false by safeguarding the ability of non-theists to openly express their values on an equal basis as religious practitioners.

B. REJECT CHRISTIAN NATIONALISM

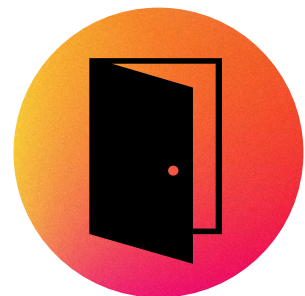
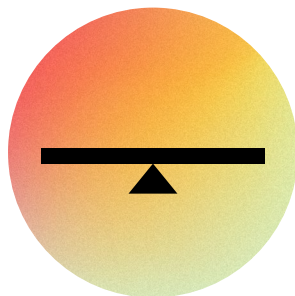
In a deeply troubling turn for religious liberty, some current members of the executive branch have embraced Christian Nationalist rhetoric. From President Trump’s guarantee on the campaign trail that “Christianity will have power” under his presidency,⁸¹ to Attorney General William Barr’s speech at Notre Dame University promoting “natural law—a real, transcendent moral order which flows from God’s eternal law” and decrying “militant secularists,”⁸² to Mike Pompeo prominently featuring his thoughts on “Being a Christian Leader” on the State Department’s website,⁸³ some members of the administration have seemingly abandoned the commitment to religious diversity in favor of overt language favoring Christianity. The incoming administration should make clear that such language is unacceptable, anti-democratic, and unconstitutional.

RECOMMENDATIONS

- Ensure that all committees, events, policies, and other government efforts intended to advance religious liberty do so with an emphasis on religious diversity and pluralism, including nonbelief.

Conclusion

As we have described in this report, a robust and inclusive religious liberty will be neutral, noncoercive, nondiscriminatory, balanced against other rights, democratic, and pluralistic.



We have offered several specific recommendations for how federal leaders might apply those six characteristics to their development and administration of policy. If followed, these recommendations will ensure that religious liberty is an enabling force rather than a repressive one; that it expands this nation's lived experience with healthy, pluralistic communities rather than stoking conflict and limiting liberties to those with power.

Religious liberty should protect and preserve the rights of all people to participate in public life and access common goods. And at all levels of public life, policy-making, and governance, we hope for leaders of moral courage, including those of faith, who will continue to make it so.

Endnotes

- ¹ These principles, and some of the text explaining them, are drawn from the *Whose Faith Matters?* report issued by the Law, Rights, and Religion Project. See Elizabeth Reiner Platt, Katherine Franke, Kira Shepherd & Lilia Hadjiivanova, *Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right*, THE LAW, RIGHTS, AND RELIGION PROJECT (2019), <https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Images/Whose%20Faith%20Matters%20Full%20Report%2012.12.19.pdf>.
- ² *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 no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.”).
- ³ *Town of Greece v. Galloway*, 572 U.S. 565, 616 (2014) (Kagan, J., dissenting).
- ⁴ *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 239 (2018).
- ⁵ Presidential Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 24, 2017).
- ⁶ For detailed information about “extreme vetting” policies, see Harsha Panduranga, Faiza Patel, & Michael W. Price, *Extreme Vetting and the Muslim Ban*, THE BRENNAN CENTER (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_extreme_vetting_full_10.2.0.pdf.
- ⁷ For information about these and other policies impacting American Muslims, see *We Won't Be Banned: Fighting the 2017 Muslim Bans*, CAIR CALIFORNIA (2018), https://ca.cair.com/wp-content/uploads/2018/03/Muslim_Ban_Final1.pdf; *Losing Liberty: The State of Freedom 10 Years After the PATRIOT Act*, MUSLIM ADVOCATES (2011), https://muslimadvocates.org/wp-content/uploads/2019/06/Losing_Liberty_The_State_of_Freedom_10_Years_After_the_PATRIOT_Act.pdf.
- ⁸ Brief for Respondents, *Tanzin v. Tanvir*, No. 19-71 (Feb. 5, 2020).
- ⁹ *Secretary of State Nominee Mike Pompeo's Disturbing Civil Rights Record*, MUSLIM ADVOCATES (2018), <https://muslimadvocates.org/files/Mike-Pompeo-Fact-Sheet-4.5.18.pdf>; Guthrie Graves-Fitzsimmons, Maggie Siddiqi, & Samantha Behar, *How the Trump Administration Has Harmed Faith Communities*, CENTER FOR AMERICAN PROGRESS (2020), <https://www.americanprogress.org/issues/religion/reports/2020/09/21/490625/trump-administration-harmed-faith-communities/>.
- ¹⁰ See, e.g., *Protecting Statutory Conscience Rights in Health Care*; Delegations of Authority, 45 C.F.R. § 88 (2019). For an explanation of why this rule favors certain religious beliefs in violation of the Establishment Clause, see Comment, Law, Rights, and Religion Project (formerly the Public Rights/Private Conscience Project) (Mar. 27, 2018), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Policy%20Analyses/Policy_HHSRule_3.27.18.pdf.
- ¹¹ 42 U.S.C. § 300a-7(c)(1).
- ¹² *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho 1973), *aff'd*, *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975).
- ¹³ *Id.* The court stated that while the doctor “is free to believe that sterilization services should be provided for the public and to perform them anywhere he is able,” he “cannot force [a facility] to allow him to perform them in its hospital.” *Id.* at 803.
- ¹⁴ See, e.g., 45 C.F.R. § 88, *supra* note 10; Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811 (proposed July 24, 2020) (to be codified at 24 C.F.R. pts. 5, 567) (while this is not a religious exemption, it eliminates antidiscrimination protections for LGBTQ people seeking government-funded housing and shelter programs in the name of protecting “religious liberty”); Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020) (to be codified at 42 C.F.R. pts. 438, 440, 460; 45 pts. 86, 92, 147, 155, 156) (changing the definition of “sex” in antidiscrimination provisions of the ACA to comport with conservative religious beliefs about sex, gender identity, and abortion).
- ¹⁵ Press Release, U.S. Dep’t of Health & Human Serv., HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.
- ¹⁶ 42 U.S. Code § 300a-7 *et. seq.*
- ¹⁷ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 at 41331-32 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).
- ¹⁸ *Id.* at 41332. The Religious Freedom Restoration Act, passed in 1993, provides a broad right to exemptions from federal laws and policies that burden one’s religious practice. 42 U.S.C. § 2000bb *et. seq.*
- ¹⁹ Memorandum from U.S. Attorney General Jeff Sessions to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty*, (October 6, 2017), available at <https://www.justice.gov/opa/press-release/file/1001891/download>. It is also worth mentioning that since publishing the rule, but before its effective date, the Administrative Appeals Office of USCIS denied at least two RFRA claims made by immigrants seeking to be classified as religious workers. Matter of T-R-C-C-O-G-V-H, ID# 3933126 (AAO Sept. 19, 2019); Matter of T-B-C-O-T-U-S-/C-P-T, ID# 4194528 (AAO Sept. 25, 2019).
- ²⁰ See, e.g., Brief for the Federal Respondent Supporting Reversal, *R.G. & G.R. Harris Funeral Home v. EEOC*, 590 U.S. ___, 140 S. Ct. 1731 (2020) (No. 18-107) available at <https://www.justice.gov/sites/default/files/briefs/2019/08/19/18-107bsunitedstates.pdf>; Brief for the Department of Justice as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___, 138 S. Ct. 1719 (2018) (No. 16-111) available at https://www.justice.gov/sites/default/files/briefs/2017/09/08/16-111tsacunitedstates_0.pdf; United States’ Statement of Interest in Support of Plaintiffs’ Motion for a Preliminary Injunction, *Chelsey Nelson Photography v. Louisville-Jefferson County*, No. 3:19-cv-00851-JRW (D. Ky. 2020) available at <https://www.justice.gov/opa/press-release/file/1252601/download>.
- ²¹ *United States v. Warren*, No. 4:18-cr-00223-RCC-BPV (D. Ariz. 2018); *United States v. Deighan*, No. 4:17-mj-00340-N/A-BGM (D. Ariz. 2017); *United States v. Hoffman*, No. 4:17-mj-00339-N/A-BGM (D. Ariz. 2017).
- ²² Complaint, *Dousa v. United States Dep’t of Homeland Sec.*, No. 3:19-CV-10255-LAB-KSC, 2019 WL 2994633 (S.D. Cal. July 8, 2019).
- ²³ *United States v. Safehouse*, No. 2:19-cv-00519 (E.D. Pa. 2019).
- ²⁴ *United States v. Kelly*, No. 2:18-cr-22 (S.D. Ga. 2019).

- ²⁵ Order and Magistrate Judge's Report and Recommendation at 46, 48 *United States v. Kelly*, No. 2:18-cr-00022-LGW-BWC (S.D. Ga. Apr. 26, 2019); Petitioner's Response to the Court's Aug. 15, 2018 Order Directing Supplemental Briefing at 10, *United States v. McAlister*, No. 2:18-cr-00022-LGW-RSB (S.D. Ga. Sept. 5, 2018).
- ²⁶ Motion for Judgment on the Pleadings at 24, *United States v. Safehouse*, No. 2:19-cv-00519 (E.D. Pa. June 11, 2019).
- ²⁷ Transcript of Proceeding, Motion Hearings at 52-54, *United States v. Warren*, No. CR-18-223-TUC-RCC (D. Ariz. May 11, 2018).
- ²⁸ See Kara Loewentheil & Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, in *RELIGIOUS EXEMPTIONS 247* (Kevin Vallier & Michael Weber eds., 2018).
- ²⁹ Memorandum from U.S. Attorney General Jeff Sessions to All Component Heads and United States Attorneys, *Religious Liberty Task Force* (July 30, 2018), available at <https://www.justice.gov/opa/speech/file/1083876/download>.
- ³⁰ Results of Freedom of Information Act request by Jason Leopold to the Department of Justice (June 2020), https://www.justice.gov/oip/foia-library/foia-processed/general_topics/religious_liberty_task_force_06_15_20/download.
- ³¹ *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15 (1947).
- ³² Updated Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools, 85 Fed. Reg. 3257 (Jan. 21, 2020) (to be codified at 34 C.F.R. pt. undef.). For analysis of this guidance, see AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *Praying for Common Sense: The Truth About Religion in Public Schools* (Jan. 18, 2020), <https://www.au.org/sites/default/files/2020-01/Praying%20for%20Common%20Sense%20-%20The%20Truth%20About%20Religion%20in%20Public%20Schools%201.18.20.pdf>.
- ³³ Diana Stancy Correll, *Pentagon Unveils New Religious Liberty Policies After Pressure from Conservative Lawmakers*, NAVY TIMES (Sept. 19, 2020), <https://www.navytimes.com/news/your-military/2020/09/18/pentagon-unveils-new-religious-liberty-policies-after-pressure-from-conservative-lawmakers/>.
- ³⁴ U.S. DEP'T OF DEF. Instruction § 1300.17: Religious Liberty in the Military Services (effective Sept. 1, 2020) available at <https://s3.amazonaws.com/static.militarytimes.com/assets/pdfs/1600441007.pdf>.
- ³⁵ Exec. Order No. 13,831, 83 Fed. Reg. 20715 (May 3, 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/>. See also *infra* note 45 and accompanying text.
- ³⁶ Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 29 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 343 (2014).
- ³⁷ 45 C.F.R. § 88, *supra* note 10. The rule protects healthcare professionals that refuse to provide referrals for abortion services—but defines “referrals” extremely broadly as “the provision of information...where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving” an abortion or other service covered by the rule) (emphasis added).
- ³⁸ Exec. Order No. 13,798, 82 Fed. Reg. 21675 (May 4, 2017).
- ³⁹ Memorandum from U.S. Attorney General Jeff Sessions to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty* *supra* note 19; Memorandum from U.S. Attorney General Jeff Sessions to All Component Heads and United States Attorneys, *Implementation of Memorandum on Federal Law Protections for Religious Liberty* (October 6, 2017), available at https://www.justice.gov/opa/press-release/file/1001886/download?utm_medium=email&utm_source=govdelivery.
- ⁴⁰ U.S. Dep't of Justice Manual 1-§ 15.000 *et. seq.* (2018) available at <https://www.justice.gov/jm/1-15000-respect-religious-liberty-0>.
- ⁴¹ For a deeper analysis of these documents, see Elizabeth Platt, Katherine Franke, Sharita Gruberg, Frank J. Bewkes, & Claire Markham, *Religious Liberty for the Select Few*, LAW, RIGHTS, AND RELIGION PROJECT & CENTER FOR AMERICAN PROGRESS (Apr. 3, 2018), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Policy%20Analyses/Policy_RelLibSelectFew_4.1.18.pdf.
- ⁴² Memorandum Opinion for the General Counsel Office of Justice Programs, *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007), <https://www.justice.gov/file/451561/download> (hereinafter “World Vision Memo”). For an explanation of why this memo violates the Establishment Clause, see LAW, RIGHTS, AND RELIGION PROJECT (formerly the Public Rights/Private Conscience Project), *Law Professors' Analysis of a Need for Legal Guidance and Policy-Making on Religious Exemptions Raised by Federal Contractors* (May 10, 2016), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/olc_memo_analysis_final.pdf.
- ⁴³ See, e.g., Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41677 (proposed Aug. 15, 2019) (to be codified at 41 C.F.R. pt. 60). For an analysis of this proposed rule, see Comment, Law, Rights, and Religion Project (formerly the Public Rights/Private Conscience Project) (Sept. 16, 2019), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Policy%20Analyses/Policy_OFCCP%20Comment%209.16.19.pdf. See also U.S. DEP'T OF LABOR, Office of Federal Contract Compliance Programs, Directive (DIR) 2018-03 (Aug. 10, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html; Memorandum from U.S. Acting Director of the Office of Management and Budget to Heads of Executive Departments and Agencies, *Guidance Regarding Federal Grants and Executive Order 13798* (Jan. 16, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/01/M-20-09.pdf>; Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2897 (proposed Jan. 17, 2020) (to be codified at 7 C.F.R. pt. 16); Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190 (proposed Jan. 17, 2020) (to be codified at 2 C.F.R. pt. 3,474; 34 C.F.R. 75 pts. 76,106, 606,607, 608, 609); Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974 (proposed Jan. 17, 2020) (to be codified at 45 C.F.R. pts. 87, 1,050); Equal Participation of Faith-Based Organizations in DHS's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2889 (proposed Jan. 17, 2020) (to be codified at 6 C.F.R. pt. 19); Equal Participation of Faith-Based Organizations in Department of Justice's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2921 (proposed Jan. 17, 2020) (to be codified at 28 C.F.R. pt. 39); Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2929 (proposed Jan. 17, 2020) (to be codified at 29 C.F.R. 2); Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2,916 (proposed Jan. 17, 2020) (to be codified at 22 C.F.R. pt. 205); Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2938 (proposed Jan. 17, 2020) (to be codified at 38 pts. 50, 61, 62); Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 8215 (proposed Feb. 13, 2020) (to be codified at 24 C.F.R. pts. 5, 92, 578); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106); DEP'T OF LABOR, *Guidance Regarding Federal Grants and Executive Order 13798* (2020), <https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act>; DEP'T OF EDUC., *Guidance Regarding Department of Education Grants and Executive Order 13798* (2020), <https://oese.ed.gov/files/2020/08/Guidance-Regarding-Department-of-Education-Grants-and-Executive-Order-13798.pdf>.
- ⁴⁴ 42 U.S. Code § 300a-7 *et. seq.*; Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57536 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2,590, 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2,590, 45 C.F.R. pt. 147). For more on why these rules violate the Establishment Clause, see Comment, Law, Rights, and Religion Project (formerly the Public Rights/Private

- Conscience Project) (Sept. 20, 2016), <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>. See also 45 C.F.R. § 88, *supra* note 10; 85 Fed. Reg. 37160, *supra* note 14; Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (March 4, 2019) (codified at 42 C.F.R. pt. 59).
- ⁴⁵ See *supra* notes 35 and 43; Melissa Rogers, *Trump Administration's Religious Freedom Claims Require a Closer Look*, CANOPY FORUM (Apr. 24, 2020), <https://canopyforum.org/2020/04/24/trump-administrations-religious-freedom-claims-require-a-closer-look/>. See also Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation, 84 Fed. Reg. 63831 (proposed Nov. 19, 2019) (to be codified at 45 C.F.R. 75); 84 Fed. Reg. 7714, *supra* note 44; Letter from Steven Wagner, Principal Deputy Assistant Secretary, HHS Administration for Children and Families, to South Carolina Governor Henry McMaster (Jan. 23, 2019), available at <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>. 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.”).
- ⁴⁶ Exec. Order 13,888, 84 Fed. Reg. 52355 (Oct. 1, 2019).
- ⁴⁷ For a detailed list of recent efforts to drastically curtail asylum, see *A Timeline of The Trump Administration's Efforts To End Asylum*, NATIONAL IMMIGRANT JUSTICE CENTER (last visited Sept. 27, 2020), <https://immigrantjustice.org/issues/asylum-seekers-refugees>.
- ⁴⁸ Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).
- ⁴⁹ CONGRESSIONAL RESEARCH SERVICE, *Refugee Admissions and Resettlement Policy* 6-7 (Dec. 18, 2018), <https://fas.org/sgp/crs/misc/RL31269.pdf>.
- ⁵⁰ Despite making up only one percent of the population, over 25% of the EEOC charges of religious workplace discrimination in 2015 related to Muslims. EQUAL EMP’T OPPORTUNITY COMM’N, *Charges Filed on the Basis of Religion - Muslim or National Origin - Middle Eastern FY 1995-FY 2015* (last visited Mar. 11, 2019), https://www.eeoc.gov/eeoc/statistics/enforcement/religion_muslim_origin_middle_eastern.cfm. The number of assaults against Muslims in recent years has actually surpassed the modern peak of 2001. Katayoun Kishi, *Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RESEARCH CTR. (Nov. 15, 2017), <http://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>. Nonprofit organizations that track religious discrimination have also noted a recent rise in anti-Semitic incidents against Jews. Laurie Goodstein, *‘There Is Still So Much Evil’: Growing Anti-Semitism Stuns American Jews*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/anti-semitism-attacks.html>. 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.” DEP’T OF JUST., *Combating Religious Discrimination Today: Final Report* 7 (July 2016), <https://www.justice.gov/crt/file/877936/download>. 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. Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RESEARCH CTR. (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/>.
- ⁵¹ World Vision Memo, *supra* note 42.
- ⁵² Complaint, *Maddonna v. United States Department of Health and Human Services*, No. 6:19-CV-00448 (D.S.C. Feb. 15, 2019); Akela Lacy, *South Carolina is Lobbying to Allow Discrimination Against Jewish Parents*, INTERCEPT (Oct. 19, 2018), <https://theintercept.com/2018/10/19/south-carolina-foster-parent-discrimination-hill-ministries/>.
- ⁵³ See *supra* notes 35, 42, 43, and 45.
- ⁵⁴ 42 U.S.C. § 1981 *et. seq.*
- ⁵⁵ See, e.g., *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); *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986) (denying a religious liberty defense to members of the sanctuary movement of the 1980s); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1988) (same).
- ⁵⁶ Memorandum from U.S. Attorney General Jeff Sessions to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty*, *supra* note 19 (emphasis added). See also U.S. Dep’t of Justice Manual *supra* note 40 at § 1-15.300 (“The freedom of religion is a fundamental right of paramount importance”); Remarks by Attorney General Jeff Sessions at the Department of Justice’s Religious Liberty Summit (July 30, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit> (“Freedom of religious is indeed our ‘first freedom’—being the first listed right of our First Amendment.”).
- ⁵⁷ Memorandum from U.S. Attorney General Jeff Sessions to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty*, *supra* note 19 at 13a (stating that while the government “may” be able to demonstrate sufficient interest in prohibiting race discrimination to override a religious organization’s right to free association, it “may not be able to with respect to other forms of discrimination.”). See also Katie Benner, *Justice Dept. Religious Freedom Training Spurs Concern Among Lawyers*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/13/us/politics/justice-department-religious-freedom.html>.
- ⁵⁸ See, e.g. First Amendment Defense Act, S. 2525, 115th Cong. (2018). For an analysis of this proposed bill, see *First Amendment Defense Act of 2016 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 https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Testimony/Testimony_Franke_FADA.pdf.
- ⁵⁹ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, 137 S. Ct. 2012 (2017); *Espinoza v. Montana Department of Revenue*, 591 U.S. ___, 140 S. Ct. 2246 (2020).
- ⁶⁰ *Espinoza*, 140 S. Ct. at 2254 (“Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools”); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
- ⁶¹ See generally *supra* notes 35, 42, 43, and 45, and accompanying text. See also DEP’T OF JUSTICE, *Guidance Regarding Department of Justice Grants and Executive Order 13798* (2020), <https://www.justice.gov/file/1298191/download> (“individuals and organizations do not give up religious liberty protections by providing government-funded social services.”). See also U.S. SMALL BUS. ADMIN., *Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL)* (Apr. 3, 2020), <https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf> (“faith-based organizations are eligible to receive SBA loans regardless of whether they provide secular social services.”). Relatedly, the administration has created special and more favorable rules for religious institutions seeking federal assistance during the COVID crisis. See Micah Schwartzman, *The Separation of Church and State Is Breaking Down Under Trump*, THE ATLANTIC (June 29, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498/>.
- ⁶² Title I-Improving the Academic Achievement of the Disadvantaged and General Provisions; Technical Amendments, 84 Fed. Reg. 31660 (July 2, 2019) (to be codified at 34 C.F.R. pts. 200, 299); Student Assistance General Provisions, The Secretary’s Recognition of Accrediting Agencies, The Secretary’s Recognition Procedures for State Agencies, 84 Fed. Reg. 58834 (Nov. 1, 2019) (to be codified at 34 C.F.R. pts. 600, 602, 603, 654, 668, 674).

- ⁶³ See *supra* note 59.
- ⁶⁴ Samantha Sokol, Maggie Garrett, & Elise Helgesen Aguilar, *The Paycheck Protection Program Has Provided Billions in Federal Funds to Private and Religious Schools*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (2020), <https://www.au.org/sites/default/files/2020-07/PPP%20COVID%20Relief%20Money%20for%20Private%20Schools%207.29.20.pdf>.
- ⁶⁵ 85 Fed. Reg. 3257, *supra* note 32.
- ⁶⁶ DEP'T VETERANS AFF., *VA Overhauls Religious and Spiritual Symbol Policies to Protect Religious Liberty* (July 3, 2019), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5279>.
- ⁶⁷ *Reynolds v. U.S.*, 98 U.S. 145, 167 (1878).
- ⁶⁸ *Employment Div., Dep't. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).
- ⁶⁹ *Supra* notes 35, 42-45 and accompanying text.
- ⁷⁰ Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUMBIA L. REV. 1453 (2015); Colleen Flaherty, *No NLRB Jurisdiction at Religious Colleges*, INSIDE HIGHER ED (June 11, 2020), <https://www.insidehighered.com/news/2020/06/11/no-nlr-b-jurisdiction-religious-colleges>; Amy Littlefield, *Union-Busting in the Name of God*, THE NATION (Mar. 31, 2020), <https://www.thenation.com/article/society/religious-universities-unions-labor/>.
- ⁷¹ I.R.C. § 501(c)(3) (2015).
- ⁷² Exec. Order No. 13,798, *supra* note 38; Salvador Rizzo, *President Trump's Shifting Claim that 'We Got Rid' of the Johnson Amendment*, WASH. POST (May 9, 2019), <https://www.washingtonpost.com/politics/2019/05/09/president-trumps-shifting-claim-that-we-got-rid-johnson-amendment/>.
- ⁷³ Penny Edgell et al., *Atheists and Other Cultural Outsiders: Moral Boundaries and the Non-Religious in the United States*, 95 SOC. FORCES 607, 611 (Dec. 2016). Many “nones” report believing in God. For research on religious identification in the U.S., see U.S. Public Becoming Less Religious: Modest Drop in Overall Rates of Belief and Practice, but Religiously Affiliated Americans Are as Observant as Before, PEW RESEARCH CTR. (Nov. 3, 2015), <https://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/>; Religious Landscape Study, PEW RESEARCH CTR. (last visited March 21, 2019), <https://www.pewforum.org/religious-landscape-study/>.
- ⁷⁴ Edgell et al., *supra* note 73; Will M. Gervais et al., *Global Evidence of Extreme Intuitive Moral Prejudice Against Atheists*, 1 NAT. HUM. BEHAV. 0151 (2017).
- ⁷⁵ Michael Wallace et al., *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, 1 SOC. CURRENTS 189 (2014); Bradley R.E. Wright et al., *Religious Affiliation and Hiring Discrimination in New England: A Field Experiment*, 34 RESEARCH IN SOC. STRATIFICATION & MOBILITY 111 (2013); Andrew S. Franks & Kyle C. Scherr, *A Sociofunctional Approach to Prejudice at the Polls: Are Atheists More Politically Disadvantaged than Gays and Blacks?*, 44 J. APPLIED SOC. PSYCHOL. 671 (2014).
- ⁷⁶ 2018 *State of the Secular States: A Review of State Law and Policy Affecting the Separation of Religion and Government*, AMER. ATHEISTS 30 (2018), <https://www.atheists.org/wp-content/uploads/2018/10/2018-State-of-the-Secular-States.pdf>; Laurie Goodstein, *In Seven States, Atheists Push to End Largely Forgotten Ban*, N.Y. TIMES (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/us/in-seven-states-atheists-push-to-end-largely-forgotten-ban-.html>.
- ⁷⁷ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77 (D.D.C. 2017).
- ⁷⁸ Paulina Firozi, *Sacred Native American Burial Sites Are Being Blown Up for Trump's Border Wall*, LAWMAKER SAYS, WASH. POST (Feb. 9, 2020). See also *Complaint*, *La Posta Band of Diegueno Mission Indians of the La Posta Reservation v. Trump*, No. 3:20-cv-01552 (S.D. Cal. Filed Aug 11, 2020).
- ⁷⁹ Mark D. Faram, *No 'Atheist' Chaplains, Lawmakers Tell Navy*, NAVY TIMES (Mar. 26, 2018), <https://www.navytimes.com/news/your-navy/2018/03/26/no-atheistchaplains-lawmakers-tell-navy/>.
- ⁸⁰ *Barker v. Conroy*, 921 F.3d 1118 (D.C. Cir. 2019).
- ⁸¹ Donald Trump, Republican Candidate for U.S. President, Speech at a Campaign Rally at Dordt College, Sioux Center, Iowa (Jan. 23, 2016); Lorraine Caballero, *Donald Trump Promises 'Power' for Christianity If He Becomes U.S. President*, CHRISTIAN POST (Jan. 25, 2016), <https://www.christianpost.com/news/donald-trump-promises-power-for-christianity-if-he-becomes-u-s-president-155767/>.
- ⁸² William P. Barr, U.S. Attorney General, Speech to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame, South Bend, Indiana, (Oct. 11, 2019) available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics>.
- ⁸³ Mike Pompeo, U.S. Secretary of State, Speech Before the American Association of Christian Counselors, Gaylord Opryland Hotel, Nashville, Tennessee (Oct 11, 2019), <https://www.state.gov/being-a-christian-leader/>.