



AMERICAN ATHEISTS

June 25, 2019

The Honorable Rep. Bobby Scott
Chair, House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

Re: SUPPORT for H.R. 1450, the “Do No Harm Act”

Dear Chairperson Scott and Members of the House Education and Labor Committee:

American Atheists, on behalf of its constituents nationwide, thanks you for holding a hearing on H.R. 1450, the Do No Harm Act. This important legislation clarifies that the Religious Freedom Restoration Act (RFRA) is meant to ensure that “religious freedom is only used as a shield to protect individuals from discrimination and not a sword to cut down the rights of others.”¹ American Atheists stresses that the First Amendment offers appropriate protection for religious freedom, and we advocate for a full repeal of RFRA because it grants unconstitutional preference to religious beliefs. However, we support the Do No Harm Act because it is an important step toward religious equality. We urge the Committee to swiftly pass this legislation to limit the negative impact of religious exemptions in federal law in areas such as civil rights and health care coverage.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. American Atheists believes that religious affiliation or beliefs should never justify special exemptions from the law, particularly if those exemptions burden third parties.

RFRA gives special treatment to religion above and beyond what the First Amendment requires or allows. It prohibits the federal government from “substantially burden[ing]” a person’s religious exercise without the most compelling justification.² While it was originally intended as

¹ Press Release, Education & Labor Committee, Scott, Kennedy, Harris Reintroduce Bill to Protect Individuals from Discrimination (Feb. 28, 2019), at: <https://edlabor.house.gov/media/press-releases/scott-kennedy-harris-reintroduce-bill-to-protect-individuals-from-discrimination->.

² Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

a shield to protect religious minorities and to ensure that religious freedom is protected, this law is now being used as a weapon. Even insignificant burdens on religious expression can trigger RFRA protection, and this law has been misapplied by the courts to justify the denial of health care coverage for employees, to allow for discrimination, and to undermine child abuse and labor laws. RFRA has provided religious individuals and groups justification to discriminate against atheists, religious minorities, LGBTQ people, and women.

In 2014, the Supreme Court ruled that a closely-held for-profit corporation was exempt from complying with the Affordable Care Act's contraception mandate based on the company's religious belief under RFRA.³ After the *Hobby Lobby* ruling, a Michigan federal court held that RFRA exempts employers from Title VII's non-discrimination requirements. In that case, the Judge sided with a Detroit-based funeral home that fired a transgender employee due to her gender identity.⁴ While the Sixth Circuit overturned this decision, it has been appealed to the United States Supreme Court.⁵

It is not only the judicial branch that has misused RFRA. In October 2017, Attorney General Jeff Sessions released guidelines on protecting religious freedom under federal law which present an extreme interpretation of RFRA and which act as a framework for interpretations by government agencies that will undermine vital constitutional protections.⁶ In fact, over the last year, numerous federal agency actions and regulations have made unconstitutional religious exemptions and pointed to RFRA as justification. For example:

1. The Department of Health and Human Services (HHS) permitted federally funded child welfare agencies in South Carolina to place their own religious beliefs over the best interests of the children in their care by discriminating against Jewish and same-sex couples who wish to adopt or foster a child.⁷ This exemption lays the groundwork for

³ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Ginsburg, J., dissenting) ("the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law. . . they judge incompatible with their sincerely held religious beliefs.").

⁴ *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.Supp.3d 594 (E.D. Mich. 2015).

⁵ *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (Mem.).

⁶ Memorandum from the Attorney General Jeff Sessions on Federal Law Protections for Religious Liberty (Oct. 6, 2017) at: https://www.justice.gov/opa/press-release/file/1001891/download?utm_medium=email&utm_source=govdelivery.

⁷ Letter from Steven Wagner, Principal Deputy Assistant Sec'y, Admin. for Children and Families, Dep't of Health and Human Serv.'s to Governor Henry McMaster, Governor of S.C. (Jan. 23 2019) (Re: Request for Deviation or Exception from HHS Regulation 45 CFR § 75.300(c)) at: <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>).

other states to request waivers for the same purpose: to allow institutions to discriminate based on their religious beliefs and still receive federal funding.

2. HHS issued regulations⁸ pertaining to “Protecting Statutory Conscience Rights in Health Care” that go far beyond the limited statutory religious exemptions created by federal law. By providing protection for religious conduct based on a specific set of beliefs, these regulations undermine the religious liberty of others, and they will threaten the safety, health, and well-being of millions of Americans by increasing discrimination and denials of care for vulnerable people across our nation.
3. HHS also issued regulations⁹ pertaining to Title X family planning programs¹⁰ which undermine religious freedom by giving preference to religious organizations in the distribution of federal funds. Moreover, these regulations unconstitutionally infringe upon the First Amendment freedom of speech by preventing medical providers from discussing abortion as an option or medically necessary procedure.
4. The Department of Labor issued a directive¹¹ to expand religious exemptions to nondiscrimination protections pertaining to federal contractors by allowing religious contractors to not only discriminate to prefer co-religionists in employment, but to discriminate on other protected bases due to religious belief. The agency is planning to issue a proposed rule on this matter.

Although the Supreme Court has made clear that the Establishment Clause requires the consideration of any impact an accommodation or religious exemption would have on third parties, RFRA fails to meet this standard. Specifically, the Constitution bars the government from crafting “affirmative” accommodations within its programs if the accommodations would harm any program beneficiaries.¹² The Constitution commands that “an accommodation must be measured so that it does not override other significant interests;”¹³ “impose unjustified burdens on other[s];”¹⁴ or have a “detrimental effect on any third party.”¹⁵ The fact is that

⁸ Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88).

⁹ Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59).

¹⁰ Population Research and Voluntary Family Planning Programs, Public Law 91-572.

¹¹ U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, Directive (DIR) 2018-03 (10 Aug. 2018).

¹² U.S. Const. Amend. I; *Cutter v. Wilkinson*, 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries” and must ensure that the accommodation is “measured so that it does not override other significant interests”) (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

¹³ *Cutter v. Wilkinson*, 544 U.S. at 722.

¹⁴ *Id.* at 726.

¹⁵ *Id.* at 720, 722; See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly*,

without the passage of the Do No Harm Act, RFRA is of dubious constitutionality because it mandates a sweeping religious exemption applicable to all federal law without any consideration of harm to third parties. Conversely, this legislation would help ensure that religious exemptions in federal laws do not harm the beneficiaries of federal programs, such as young people in foster care and women receiving family planning care.

American Atheists contends that religious equality cannot truly be achieved until RFRA is repealed. However, the Do No Harm Act has broad support from numerous LGBTQ, civil rights, health, and faith groups, and it is an important step in the direction of religious equality.¹⁶ We support the Do No Harm Act, and we urge you to swiftly pass this important bill. If you should have any questions regarding American Atheists' support for H.R. 1450, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,



Alison Gill, Esq.
Vice President, Legal and Policy
American Atheists

cc: All Members of the House Education and Labor Committee

Inc. v. Bullock, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”); *see also United States v. Lee*, 455 U.S. 252 (1982) (“the limits [followers of a particular sect] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”).

¹⁶ Press Release, Education & Labor Committee, *supra* note 1.