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Religious Liberty for a Select Few

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Religious Liberty for a Select Few

The Justice Department Is Promoting
Discrimination Across the Federal Government

By Sharita Gruberg, Frank J. Bewkes, Elizabeth Platt,
Katherine Franke, and Claire Markham April 2018



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Contents

- 1 Introduction and summary**

- 4 Jeff Sessions' religious liberty guidance is a solution in search of a problem**

- 5 The guidance misinterprets constitutional and statutory religious liberty protections**

- 9 The guidance's impact will be far-reaching and expensive**

- 18 Conclusion**

- 20 About the authors**

- 22 Endnotes**

Introduction and summary

In its first year, the Trump administration has systematically redefined and expanded the right to religious exemptions, creating broad carve-outs to a host of vital health, labor, and antidiscrimination protections. On May 4, 2017—the National Day of Prayer—during a ceremony outside the White House, President Donald Trump signed an executive order on “Promoting Free Speech and Religious Liberty.” At the time, the executive order was reported to be a “major triumph” for Vice President Mike Pence, who, as governor of Indiana, famously signed a religious exemption law that would have opened the door to anti-LGBTQ discrimination.¹ Among its other directives, the order instructed Attorney General Jeff Sessions to “issue guidance interpreting religious liberty protections in Federal law.”² The guidance on “Federal Law Protections for Religious Liberty,” which Sessions subsequently issued in October 2017, purports to clarify existing religious liberty protections.³ However, in practice, it expands those provisions to improperly elevate the right to religious exemptions above other legal and constitutional rights and to shield those who would seek to use federal dollars while denying necessary services to and discriminating against LGBTQ people, women, and religious minorities.

Federal agencies are already relying on Sessions’ guidance to broaden exemptions related to essential health services, including sexual and reproductive health care. In January 2018, the Department of Health and Human Services (HHS) announced the creation of a Conscience and Religious Freedom Division in the Office for Civil Rights as well as the publication of a proposed rule that would radically redefine and expand existing religious exemptions under the law. Among its other provisions, the rule would expand the right of health care providers to deny patients necessary care related to abortion and sterilization.⁴ In October 2017, HHS published a rule allowing virtually any employer that objects to contraception on moral or religious grounds to apply for an exemption to the Affordable Care Act’s mandate that employers provide contraceptive coverage in their health insurance plans.⁵ Both measures referenced Sessions’ October 2017 guidance as part of the department’s rationale for promulgating these rules.

Religious liberty is a foundational American value. Both the right to practice one's faith and the right to live free of a government-established religion are enshrined in the First Amendment to the Constitution. Both these rights are also very popular: Eighty-eight percent of Americans agree that religious liberty is a founding principle afforded to everyone in the United States, and almost two-thirds want to see that strong church-state separation is maintained.⁶

Throughout history, legislatures and the courts have worked to more clearly define and more robustly protect religious liberty for all Americans. While critical and widely embraced, the religious freedoms protected in the First Amendment are not unlimited. Much like all constitutionally protected rights, they must be balanced in an ongoing assessment of the needs and rights of a dynamic and pluralistic American landscape. For example, a common theme in First Amendment law has involved an understanding that religious liberty has a natural boundary where it causes harm to third parties.⁷

In 1993, communities of faith, civil rights advocates, and politicians along the ideological spectrum celebrated the passage of the bipartisan federal Religious Freedom Restoration Act (RFRA). RFRA prohibits the government from substantially burdening the exercise of religion unless doing so is the least restrictive means to further a compelling government interest. However, despite initial widespread support for RFRA, this strict test has since led to numerous attempts to go beyond RFRA's initial intent and use religious exemptions to override the rights of others.⁸

In the decades following RFRA's passage, conservatives have worked to use religious liberty claims to advance anti-equality political and legislative aims—particularly regarding issues of sex, marriage, and reproductive rights. This movement met with success in the 2014 Supreme Court decision in *Burwell v. Hobby Lobby*, which marked a dramatic change in the legal landscape of religious freedom.⁹ In its opinion, the court granted Hobby Lobby—a closely held, for-profit company—the same religious exemption available to faith-based nonprofits under the Affordable Care Act (ACA): the ability to opt out of providing employees comprehensive insurance coverage, including no-cost contraception under the ACA's contraception mandate. The court's decision upset the previously shared understanding of who is eligible for RFRA protections, what constitutes a substantial burden on religious exercise, and what constitutes the least restrictive means of furthering a compelling government interest.¹⁰

Since inauguration, the Trump administration has tried to build on the *Hobby Lobby* decision in order to distort religious liberty protections so that they advance only the rights of a narrow segment of the faith community—namely, conservative Christians—and create a license to discriminate against LGBTQ people, women,

religious minorities, and nonreligious people.¹¹ The administration's policies have established a pattern of protecting the religious liberty of only this small segment of Americans. The Muslim ban; abandonment of employment protections for LGBTQ workers; commitments to further expand religious exemptions for employers who object to their employees accessing no-cost contraception; and other discriminatory acts have all prioritized the rights of the older minority of white evangelical Christians who share a conservative view of sex and sexuality and a narrow, exclusive definition of marriage and family. Yet the administration has failed to acknowledge that many people of faith hold a wide variety of views regarding these issues.¹²

This report discusses how the Department of Justice's guidance opens the door to an extreme rewriting of the concept of religious liberty. The guidance—and the numerous agency rules, enforcement actions, and policies that it is influencing—will shift the balance of individual religious protections across the federal government toward a new framing that allows religious beliefs to be used as a weapon against minority groups.

Jeff Sessions' religious liberty guidance is a solution in search of a problem

The executive order directing Attorney General Sessions to promulgate guidance on religious exemptions was a troubling development. Throughout his career, Sessions has espoused a flawed interpretation of religious liberty that flouts the separation of church and state and favors specific conservative, evangelical Christian beliefs. For example, while he supports enacting special free exercise protections for those with anti-LGBTQ and anti-choice religious beliefs, Sessions has championed Islamophobic government policies and rhetoric.¹³ These concerns were borne out when Sessions issued religious liberty guidance that contained significant legal and constitutional problems.

While a few of these principles merely restate general and widely accepted principles of religious liberty law, others significantly expand upon or misinterpret Supreme Court precedent and statutory religious liberty protections. By elevating Sessions' beliefs on religious exemptions to the same level as established precedent, these provisions provide legal cover for individuals and government agencies to ignore a host of laws and policies; moreover, they are likely to create tangible harm in various marginalized communities.

Both the president's executive order and the attorney general's guidance are salient examples of a solution in search of a problem. Existing constitutional and statutory religious liberty protections for all are robust, comprehensive, and vigorously enforced—the fruits of which can be seen in the thriving, pluralistic religious communities in the United States. Attorney General Sessions has stated that religion in the United States is under attack; however, he offers no evidence for this proposition besides citing a law professor's blog post that encourages judges to “take aggressively liberal positions.”¹⁴ The First Amendment's guarantee of the free exercise of religion, the federal RFRA, and literally hundreds of federal regulatory measures provide more than adequate protection for the free exercise of religion in the United States.

Additionally, the Supreme Court maintains a docket that includes significant religious liberty cases each term and has not been hesitant to enforce constitutional and statutory free exercise rights when it finds that those rights have been abridged.¹⁵ The administration has not made the case that existing protections for religious liberty have weaknesses that merit stronger federal measures. The extremism of the president and attorney general’s embrace of religious exemptions—particularly given the strength of existing protections thereof—risk compromising establishment clause protections by directing agencies to pre-emptively provide exemptions to broadly applicable rules. As the Supreme Court noted in *Corporation of the Presiding Bishop v. Amos*, at some point, accommodation may devolve into “an unlawful fostering of religion.”¹⁶

The guidance misinterprets constitutional and statutory religious liberty protections

The guidelines issued by Jeff Sessions' Department of Justice (DOJ) contain significant exaggerations and misinterpretations of religious liberty under the Constitution and federal law. The guidance overstates the right to religious exemptions under the First Amendment and RFRA, demanding that agencies provide exemptions that are not required under current law and that may be prohibited by the establishment clause of the First Amendment. Several of the memo's most significant overstatements are outlined below:

- **The establishment clause:** The guidance repeatedly understates the limits on religious exemptions imposed by the establishment clause. For example, the guidance's broad statement that "individuals and organizations do not give up their religious-liberty protections by ... receiving government grants or contracts" misleadingly ignores establishment clause restrictions that prohibit faith-based organizations from placing religious restrictions on the use of government funds and even limit some optional religious activities within grant programs.¹⁷
- **RFRA and corporations:** The guidance states that RFRA protects the exercise of religion by " 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies,' 1 U.S.C. § 1, including for-profit, closely-held corporations like those involved in *Hobby Lobby*, 134 S. Ct. at 2768."¹⁸ The Supreme Court's holding in *Hobby Lobby*, however, was far narrower, finding only that the law applied to closely held corporations.
- **Religious employers:** The guidance overstates the existing religious exemption within Title VII of the Civil Rights Act of 1964, which permits religious employers to prefer coreligionists in hiring. The DOJ guidance states that such religious organizations are "entitled to employ only persons whose beliefs and conduct are consistent with the employers' religious precepts."¹⁹ While Title VII permits religious organizations to hire employees that share their religion, neither the statute nor subsequent case law allows

religious employers to require the conduct of employees to be consistent with the employer's religion in a way that violates Title VII's sex discrimination prohibition.²⁰ For example, religious employers are not permitted to fire someone for conduct that is inconsistent with their faith if it is otherwise protected under Title VII—such as only firing female employees for getting pregnant outside of marriage.

- **RFRA compelling interests:** The guidance states, “An asserted compelling interest in denying an accommodation [under RFRA] to a particular claimant is undermined by evidence that exemptions or accommodations have been granted for other interests.”²¹ This is an exaggeration of nonbinding language, or dicta, from the justices in *Hobby Lobby*, as the majority opinion assumed that the government had a compelling interest in the contraceptive mandate, and five justices explicitly held that the government's interest was compelling.²² In fact, the opinion stated that it was “unnecessary to adjudicate” the question of when and whether an existing exemption undermines an asserted compelling interest.²³
- **Requirement to create a new government program:** The guidance claims that the RFRA analysis “requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances ... creation of a new program.”²⁴ This, again, is taken from *Hobby Lobby* dicta that conflict with the opinion of not only the four dissenters in that case but with Supreme Court Justice Anthony Kennedy's concurrence, which stated:

*In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program ... The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government.*²⁵

- **Eligibility for government funding:** The DOJ guidance broadly states that “Government may not exclude religious organizations as such from secular aid programs, at least when the aid is not being used for explicitly religious activities such as worship or proselytization.”²⁶ The most recent case on this issue, however—*Trinity Lutheran Church v. Comer*—is ambiguous as to when the government can and cannot exclude religious organizations from funding. In a crucial but vague footnote, that opinion states, “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”²⁷

By expanding the types of companies that can bring RFRA claims, limiting what may be considered a “compelling interest,” stating that narrow tailoring may require the creation of a new government program, broadening the religious exemption of Title VII, and understating the limits of the establishment clause, the DOJ guidance attempts to dramatically expand the right to religious exemptions under federal law. At the same time, it pays little consideration to the impact that such exemptions will have on the enforcement of health, safety, labor, and anti-discrimination laws, or on the communities who depend on these laws. While RFRA and other exemptions already robustly protect religious observers, the guidance seeks to further elevate the right to exemptions above a host of other liberty and equality rights. Even more troubling, the agencies that will be issuing exemptions under the DOJ guidance are largely led by officials who have openly favored conservative religious views about sex and marriage over a larger concern for religious diversity and plurality.

The guidance's impact will be far-reaching and expensive

An analysis by the Center for American Progress identified at least 87 regulations, 16 agency guidance documents, and 55 federal programs and services that Attorney General Sessions' guidance could undermine.²⁸ Most of these regulations and guidance documents were created by the Obama administration in order to advance LGBTQ equality and ensure that federally funded programs do not discriminate. This research shows that the guidance will likely have far-reaching negative effects on people across the country, particularly because the DOJ will review a wide variety of proposed regulations—including those that implement civil rights laws—for compliance, and it will alert other agencies when they might be in conflict with the guidance.²⁹ Given Sessions' and the administration's record on LGBTQ rights, reproductive health, and religious minorities, this guidance, at best, may produce a severe chilling effect on promoting or enforcing protections for LGBTQ people, women, and minority communities. At worst, it could bring about new, explicit exemptions that expressly undermine civil rights.

DOJ guidance establishes a broad license to discriminate

The U.S. Constitution as well as federal, state, and local law contains numerous provisions to ensure that religious freedom thrives, providing a shield for individual beliefs and practices. The DOJ guidance, however, seems to interpret almost any government action to be a substantial burden on religious exercise—while minimizing any compelling government interest to the contrary—and allows religious liberty to be used as a sword to infringe on the rights of others. Examples from the recent past, such as *Hobby Lobby*, show that there have been efforts to reinterpret “religious exercise” beyond an individual's own actions—for instance, wearing religious garb or abstaining from work on Sabbath—to include any connection, however tenuous, with activities that the individual opposes, such as paying for insurance that might be used to obtain contraception. In other words, under the guidance, individuals and corporations will be able to point to almost any law or regulation and claim that it has burdened their religious freedom. This broad interpretation opens the door to exempt individuals and

corporations from following any law they do not like. For example, employers may try—as Harris Funeral Homes has—to demand that their transgender employees dress according to their sex assigned at birth, claiming that following Title VII’s protections against sex discrimination would be a substantial burden on their beliefs about gender;³⁰ that argument has already failed in the 6th U.S. Circuit Court of Appeals.³¹

The DOJ guidance unnecessarily emphasizes RFRA and asserts that many government interests, such as the prevention of discrimination, would not be found compelling enough to take precedence over religious beliefs “except in the narrowest circumstances.”³² This is a shocking statement by a government agency that is charged with the enforcement of federal civil rights laws. It creates a default in favor of religious exemptions, which will upset the careful balance that has been honed for centuries between religious freedom and other civil rights.

The guidance encourages federal agencies to give an unprecedented amount of deference to the religious beliefs of federal employees, contractors, and grantees. It also attempts to minimize third-party harm as a consideration when weighing religious objections against other protected rights, relying on a nonbinding footnote in *Hobby Lobby* while going beyond the Supreme Court’s actual holding. The Supreme Court has repeatedly held that religious freedom should not be interpreted to allow for the infliction of harm on others.³³ It has invalidated religious exemptions that would have imposed “significant burdens” on third parties, noting that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”³⁴ While the *Hobby Lobby* footnote argues that some religious exemptions that harm third parties may be permissible, the court was careful to note that it believed the impact of an accommodation on women employed by Hobby Lobby would be “precisely zero.”³⁵ The guidance from the Department of Justice elevates a footnote in *Hobby Lobby* rather than the actual ruling, permitting harm to third parties in favor of individual religious practices.

The guidance puts vulnerable populations at risk

These expansive interpretations will likely lead to major regulatory changes, as agencies bring themselves into compliance and create broad exemptions that enable noncompliance with anti-discrimination and other laws. For example, by allowing individuals and companies to ignore nondiscrimination protections because of a religious objection to equal treatment for certain populations, the guidance would essentially gut these protections and render them largely ineffective, shifting the balance in favor of those who object to them on religious grounds.

Of particular concern is the impact that the guidance may have on contractors and grantees. The guidance document states that “government contracts, grants, and other programs” are entitled to religious “protections.”³⁶ With hundreds of billions of dollars going to contractors and grantees every year, expanding religious exemptions for these organizations could have far-reaching effects on the employees who work for federal contractors, the communities served by federal grantees, and the taxpayers who fund these programs. More than half of the U.S. population still lives in a state with no employment nondiscrimination laws covering sexual orientation and gender identity.³⁷ Calculations using USASpending.gov’s searchable database indicate that, in fiscal year 2016, approximately \$615 billion in federal contracts, grants, loans, and other financial assistance was allocated to the 30 states without comprehensive LGBT nondiscrimination protections on the books—places where LGBTQ people are especially vulnerable to discrimination.³⁸ Despite existing protections, employees working for federal contractors in those states may now be even more vulnerable. Thanks to an executive order signed by former President Barack Obama, all federal contractors and subcontractors with contracts over \$10,000 are barred from discriminating on the basis of sexual orientation and gender identity.³⁹ The contractor executive order, which was signed in 2014, was the single largest expansion of LGBTQ workplace protections in U.S. history.⁴⁰ Federal contractors employ nearly 30 million individuals—or about one-fifth of all U.S. civilian employees—who, with the implementation of the DOJ guidance, may be vulnerable to discrimination.⁴¹

In addition to potentially permitting employee discrimination by federal contractors, the DOJ guidance may allow providers to lock LGBTQ people out of many federally funded programs and services. Billions of taxpayer dollars fund organizations that provide critical services like health care, shelter, and assistance for victims of violence. Table 1 provides examples of programs that have sex-, sexual orientation- and gender identity-inclusive nondiscrimination rules in order to ensure grantees do not deny services to LGBTQ people. The DOJ guidance could permit a contractor or grantee to assert a religious belief in order to refuse services under these programs without risking the loss of federal funding. For example, LGBTQ survivors of interpersonal violence could be turned away from federally funded domestic violence shelters; health clinics around the world that are funded by the U.S. Agency for International Development could refuse to treat LGBTQ people; a landlord who receives federal funding could refuse to rent an apartment to a same-sex couple or a transgender person. And beyond service refusals, the guidance could be relied upon by federal agencies to sanction mistreatment of, for example, LGBTQ youth in residential programs; for instance, one residential placement facility in Michigan forced LGBTQ teens to wear orange jumpsuits in order to “warn” the other residents of their identity.⁴²

In another example, under the guise of mental health care, faith-based organizations contracting with HHS could force any unaccompanied LGBTQ immigrant children in their care into conversion therapy.

The programs listed in Table 1 are just a few examples of the more than 50 taxpayer-funded programs and services CAP identified that could be permitted to refuse service to LGBTQ people and women under the DOJ guidance.

TABLE 1
Examples of programs with sex-, sexual orientation-, and gender identity-inclusive nondiscrimination rules

Attorney General Sessions' guidance jeopardizes access to these programs for women and LGBTQ people

Agency/Department	Program	Annual budget (FY 2017)
U.S. Agency for International Development and State	Global health programs	\$8.8 B
U.S. Department of Housing and Urban Development	Homeless assistance grants	\$2.4 B
	Community Development Block Grant	\$3 B
	Section 8 contracts	\$10.3 B
U.S. Department of Health and Human Services	Shelters for unaccompanied immigrant children	\$1.4 B
	Community health centers	\$5 B
	Ryan White HIV/AIDS Program	\$2.3 B
	Runaway and homeless youth programs	\$119 M
	Title X Family Planning program	\$286 M
U.S. Department of Justice	Violence Against Women Act grant programs	\$482 M
U.S. Department of Veterans Affairs	Homeless veterans' programs (including Supportive Services for Veterans Families)	\$1.6 B

Sources: U.S. Agency for International Development and State, Congressional Budget Justification: Department of State, Foreign Operations, and Related Programs (U.S. Department of State, 2018), available at https://www.usaid.gov/sites/default/files/documents/1868/FY_2019_CBJ.pdf; U.S. Department of Housing and Urban Development, FY 2019 Congressional Justifications, available at <https://www.hud.gov/sites/dfiles/CFO/documents/FY%202019%20Congressional%20Justifications%20-%20Combined%20PDF%20-%20Updated.pdf>; U.S. Department of Health and Human Services, "HHS FY 2018 Budget in Brief - ACF - Discretionary," available at <https://www.hhs.gov/about/budget/fy2018/budget-in-brief/acf/discretionary/index.html> (last accessed March 2018); U.S. Department of Health and Human Services, "HHS FY 2018 Budget in Brief - HRSA," available at <https://www.hhs.gov/about/budget/fy2018/budget-in-brief/hrsa/index.html> (last accessed March 2018); U.S. Department of Health and Human Services, Putting America's Health First: FY 2019 President's Budget for HHS (2018), available at <https://www.hhs.gov/sites/default/files/fy-2019-budget-in-brief.pdf>; U.S. Department of Health and Human Services, "Title X Family Planning: Funding History," available at <https://www.hhs.gov/opa/title-x-family-planning/about-title-x-grants/funding-history/index.html> (last accessed March 2018); Office on Violence Against Women, FY 2019 Budget Request at a Glance (U.S. Department of Justice), available at <https://www.justice.gov/jmd/page/file/1033176/download>; U.S. Department of Veterans Affairs, Budget In Brief 2019, available at <https://www.va.gov/budget/docs/summary/fy2019VAbudgetInBrief.pdf>.

The guidance has already been used by government grantees to expand religious exemptions around the provision of reproductive health services. Currently, government entities receiving federal funds are prohibited from requiring health care personnel to perform or assist in abortions or sterilizations or to provide referrals for abortions. HHS proposed a rule on January 26, 2018, which references the guidance in order to broaden these exemptions and significantly change the religious refusal landscape as it pertains to reproductive health services.⁴³ The proposed rule could allow hospital personnel to refuse to perform any reproductive health or other service by claiming that it conflicts with a religious belief. Back when emergency contraception was only available with a prescription, there were reports of emergency room doctors refusing to prescribe it to victims of rape if they believed that it was against their religion.⁴⁴ Even though a prescription is no longer necessary, there are reports of hospitals refusing to provide emergency contraception to rape survivors.⁴⁵ Hospitals and pharmacists nationwide could be allowed to refuse to provide emergency contraception or other forms of contraception on the basis of religious beliefs, expanding upon current state guidance that generally grounds such refusals in medical or professional opinion.⁴⁶ Furthermore, health care institutions would have to accommodate personnel who, due to religious beliefs, refused to perform key reproductive health services and functions, even if there was substantial evidence that doing so would result in harm to a third party, thereby opening up the possibility of significant litigation against these institutions. As the HHS's proposed rule demonstrates, the DOJ guidance opens the door to widespread denial of care on religious grounds, with the potential to severely impact the reproductive health care of women as well as that of LGBTQ individuals generally.

Thousands of DOJ attorneys may selectively enforce religious liberty

As noted in the introduction, in addition to Sessions' 20 "Principles of Religious Liberty," the attorney general also issued a memo declaring that the policy of the Justice Department is to further the "Principles of Religious Liberty" in all of its current and future cases—including its decisions of which cases to pursue.⁴⁷ This applies to all DOJ litigating divisions: for example, its civil rights office as well as all 93 U.S. attorney's offices, who enforce federal laws across the country. In January 2018, the DOJ amended its U.S. Attorneys' Manual to instruct U.S. attorney's offices on implementing the "Principles of Religious Liberty."⁴⁸ Each office was directed to assign an individual to coordinate religious liberty litigation and to implement the manual's religious liberty instructions. These new duties would include informing the office of the associate attorney general of any suits against the government that raise significant questions concerning religious liberty and that require the office's permission to uphold laws that may impinge on an individual's religious liberty.

Sessions' memo, coupled with the instructions to U.S. attorney's offices, reveals his intent to actively ensure that his overreaching interpretation of religious liberty becomes enshrined in law. In other words, the memo essentially requires all DOJ attorneys to further the legal goals of far-right litigation groups like Alliance Defending Freedom (ADF). The extent to which this could undermine LGBTQ rights, reproductive rights, and civil rights more broadly cannot be overstated. Nationwide, the Department of Justice has over 10,000 lawyers who now are all being drafted to advance an overly broad view of religious liberty whenever possible.⁴⁹ Rather than defending LGBTQ people and women who have been discriminated against, these attorneys have been directed to advance the ability of entities that, because of their religious views, are causing harm to third parties. President Trump's attempts to ban immigrants from Muslim-majority nations indicate that the administration is not interested in protecting religious freedom generally. Rather, it is apparent that the DOJ will privilege certain religious views—especially those in opposition to LGBTQ and reproductive rights—in the application of this guidance.

Political appointees will ensure that the guidance is widely implemented

The DOJ guidance instructs federal agencies to implement broad religious exemptions in all of their rulemaking and enforcement actions. Many of the agency staff tasked with providing these exemptions have long advocated for the use of exemptions as a tool to restrict access to reproductive health care and limit LGBTQ rights. At the same time, these advocates have denounced church-state separation and, in some cases, supported anti-Muslim discrimination. Thus, there is a serious danger that implementation of the DOJ guidance will result in lopsided protections that shelter conservative religious beliefs about sex, marriage, and reproduction while failing to similarly protect progressive faith communities or religious minorities.⁵⁰

From drafting regulations and guidance with broad religious exemptions to reinterpreting existing rules to reallocating federal funds to faith-based service providers, President Trump's appointees will ensure that the guidance is implemented across the federal government. While there are political appointees at many federal agencies who will likely use this guidance to further anti-LGBTQ agendas, the Department of Health and Human Services currently hosts one of the largest concentrations of known anti-LGBTQ advocates. It is now home to many former employees of anti-LGBTQ and anti-reproductive rights organizations—individuals who have spent their careers undermining federal protections for LGBTQ rights and access to reproductive health services.

Many HHS appointees have a track record of anti-LGBTQ actions

The director of the Office of Refugee Resettlement, Scott Lloyd, was recently in the news for refusing to comply with a judicial order for a 17-year-old in federal custody to receive the abortion she requested, directing the shelter to take her to a crisis pregnancy center instead.⁵¹ Prior to joining HHS, for years, he worked opposing access to contraception and abortion as the public policy attorney for the Knights of Columbus—a Catholic fraternal organization that has consistently opposed LGBTQ equality and reproductive rights.⁵² Another Knights of Columbus alumna, Maggie Wynne, was a former director of the House of Representatives Pro-Life Caucus and now serves as a policy counselor at HHS.⁵³ HHS recently consolidated all decision-making authority over Title X family planning assistance grants from a group of policy makers to Valerie Huber, the former CEO of Ascend, an organization that promotes abstinence-only sex education and that supports crisis pregnancy centers. Women’s health advocates caution that Huber will redirect funding away from providers like Planned Parenthood and toward largely faith-based crisis pregnancy centers.⁵⁴ Charmaine Yoest, former president of Americans United for Life and a senior fellow at American Values—a far-right organization that supports “traditional family values”—was, until recently, the assistant secretary of public affairs at HHS.⁵⁵ The head of HHS’s Center for Faith-based and Neighborhood Partnerships, Shannon Royce, was previously chief of staff for Family Research Council, the political affiliate of James Dobson’s Focus on the Family, an organization that shapes the religious right’s policy agenda.⁵⁶ In her current role, Royce leads the department’s efforts to partner with faith-based and community organizations.

Steven Wagner is the acting assistant secretary for the Administration for Children and Families, which oversees the Office on Trafficking in Persons; the Administration on Children, Youth and Families; and the Office of Refugee Resettlement.⁵⁷ In 2011, he wrote a column for *National Review* criticizing the Obama administration for not awarding the U.S. Conference of Catholic Bishops a grant in response to their refusal to provide family planning services to trafficking survivors. Wagner referred to the provision of contraception to victims of human trafficking as “tantamount to aiding and abetting the crime of exploitation.”⁵⁸

Alliance Defending Freedom frequently sues the federal government in order to undermine nondiscrimination laws and reproductive rights, working against what it refers to as the “myth of the so-called ‘separation of church and state.’”⁵⁹ Due to the organization’s focus on spreading defamatory information about LGBTQ people as a class and its support for the criminalization of LGBTQ people in other countries, it has been classified by the Southern Poverty Law Center as a hate group.⁶⁰ For years,

Matt Bowman litigated religious exemption cases for ADF and was also “a key member of the Life Litigation Project to protect the sanctity of human life.”⁶¹ He was one of the attorneys representing Conestoga Wood Specialties in its suit against HHS over the contraceptive mandate.⁶² He is now a legal adviser at HHS, interpreting whether the department’s policies are in line with the religious exemptions law.⁶³

In his role as director of the HHS Office of Civil Rights, Roger Severino is also charged with interpreting whether or not the department and organizations receiving federal money are in compliance with the law.⁶⁴ Prior to joining HHS, Severino directed the DeVos Center for Religion and Civil Society at The Heritage Foundation. In that role, he referred to efforts to protect transgender people from discrimination as an “abuse of power” and claimed that the LGBT-inclusive nondiscrimination protections in Section 1557 of the Affordable Care Act were illegal.⁶⁵

Appointees in other agencies are also likely to share the Trump administration’s narrow views on religious liberty

While HHS houses some of the most troubling appointees, it is not the only agency where personnel can dictate policy. At the Justice Department, John Gore, the acting assistant attorney general for the Civil Rights Division, previously defended the University of North Carolina school system after the Obama administration sued it over HB2, the state’s anti-trans bathroom bill, and defended voting restrictions that targeted minority voters.⁶⁶ Under the direction of Secretary of Education Betsy DeVos, the Department of Education has already rolled back protections for transgender students.⁶⁷ The DeVos family’s foundation has given money to many anti-LGBTQ organizations, including Focus on the Family, Family Research Council, and the National Organization for Marriage.⁶⁸ Even the Department of State is putting in place personnel whose views of religious liberty prioritize conservative Christian adherents. Pam Pryor, the Trump campaign’s leader of “faith and Christian outreach,” currently holds one of the highest political appointments at the department.⁶⁹ Meanwhile, Gov. Sam Brownback (R-KS) has been tapped to serve as the State Department’s ambassador at large for international religious freedom.⁷⁰ As governor, Brownback rescinded nondiscrimination protections for LGBTQ state employees; issued an executive order prohibiting the Kansas state government from taking action against religious organizations that refuse to provide social services or charitable services to same-sex couples; and signed legislation allowing university groups to exclude LGBTQ students while still receiving university funds.⁷¹

The Trump administration has built up its agency staff with appointees who have track records that—similar to Sessions’—are full of troubling attacks on LGBTQ equality, reproductive rights, and the rights of religious minorities. As a result, the implementation of selective religious liberty interpretations will find many champions and few critics in these key officials. Given their backgrounds, it is clear what values these officials are bringing to the administration. And with his guidance, Sessions has attempted to empower them and give those values legal cover, at the expense of others’ rights to liberty and equality.

Conclusion

Not only has the guidance already resulted in regulations that vastly expand religious exemptions, but individuals are also using it to argue for exemptions from federal law. ADF submitted the guidance in support of its arguments in a Title VII anti-transgender discrimination case. The organization claimed that the guidance supported its position that the Religious Freedom Restoration Act provides an exemption from Title VII and therefore allowed employers to discriminate based on religious beliefs. Specifically, ADF claimed that forcing an employer to allow a transgender employee to dress according to her gender identity at work would burden the employer's religious liberty and that the government's interest in enforcing Title VII was insufficient to override this burden. The 6th U.S. Circuit Court of Appeals was unconvinced, stating that:

“As a matter of law, bare compliance with Title VII—without actually assisting or facilitating [the employee]’s transition efforts—does not amount to an endorsement of [the employee]’s views ... requiring the Funeral Home to refrain from firing an employee with different religious views from [the employer] does not, as a matter of law, mean that [the employer] is endorsing or supporting those views ... the fact that [the employer] sincerely believes that he is being compelled to make such an endorsement does not make it so.”⁷²

Despite the 6th Circuit's strong rebuke of the overly broad construction of RFRA, the Trump administration continues to implement across the federal government its overreaching interpretation of religious exemption law. Under the Department of Justice's guidance, almost any government interference can be considered a substantial burden on the free exercise of religion. At the same time, the guidance makes it more difficult for the government to assert a compelling interest for why a religious exemption should be denied. Furthermore, regulations interpreting the guidance have failed to acknowledge the wide array of religious perspectives on issues of sex, sexuality, marriage, and family.

This guidance is a deliberate attempt to undermine the legal equality and dignity of LGBTQ people, which illustrates the urgent need for a comprehensive nondiscrimination law—at the federal level—that is inclusive of sexual orientation and gender identity. Implementation of the guidance by political appointees across the federal government could result in the violation of the rights of LGBTQ people, women, and religious minorities. Moreover, these individuals may receive unfair treatment as well as outright exclusion from a wide variety of critical federal programs.

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