Guttmacher Policy Review

GPR 2016 | Vol. 19

Learning from Experience: Where Religious Liberty Meets Reproductive Rights

By Adam Sonfield

The term "religious liberty" has, in recent years, become highly politicized and distorted. Social conservatives have pulled together many of their long-standing political demands—targeting reproductive health and LGBT rights, most prominently—into an overarching campaign couched in the language of religious liberty.

On the basis of the federal Religious Freedom Restoration Act (RFRA) and similar federal and state laws, they have argued in court, in legislatures and in the public square that laws meant to promote access to contraception or equal treatment of same-sex marriage, for example, are unlawfully restricting the rights of certain Americans to live according to their religious beliefs. In perhaps the highest profile example of this approach, conservatives have won another hearing in the U.S. Supreme Court this term on their claim that, in essence, any employer's assertion of religious liberty must trump their employees' right to contraceptive coverage under the Affordable Care Act (ACA).

These demands reflect an increasingly stark formulation of how and when people and institutions should be granted religious exemptions from their legal obligations—a formulation in which the concept of balancing competing rights, responsibilities and needs seems to have given way to religious liberty trumping all other concerns. Social conservatives are in effect using laws like RFRA to erode rights, programs and services that they wish to eliminate entirely but have been unable to do so directly through other means. Policymakers and advocates must guard against the abuse of these laws and to do so, they can look to the decades of experience with reproductive health–specific religious exemptions—exemptions that sometimes have well-defined limits and explicit protections for those who might otherwise be harmed.

HIGHLIGHTS

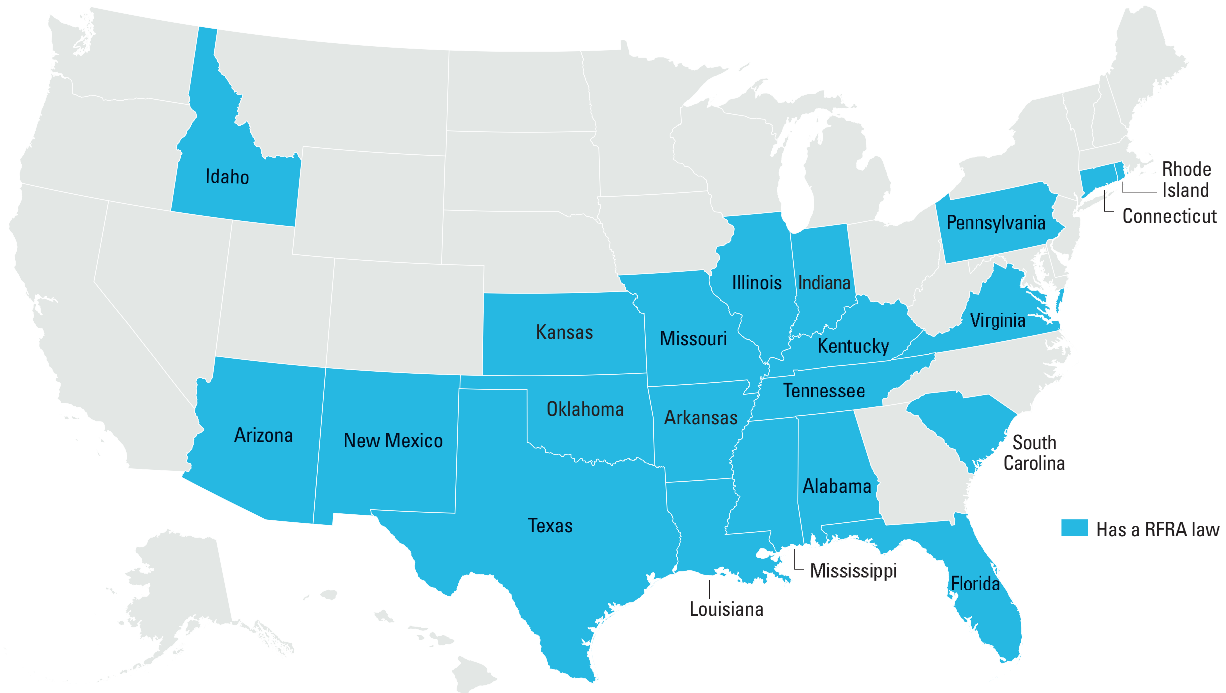
- *Social conservatives are rallying around protections for religious liberty as a way of undermining sexual and reproductive health and rights and LGBT rights.*
- *The long history of reproductive health–specific religious exemptions includes numerous examples of attempts to limit the scope of such exemptions and to mitigate potential harm.*
- *Broader protections against religious discrimination, such as the Religious Freedom Restoration Act, have traditionally relied on less-than-specific balancing tests—and policymakers should consider adding new protections, given how these laws are now being used and abused.*

Religious Liberty Claims

Religious liberty is one of the founding principles of the United States, and respect for individual religious rights is deeply ingrained in the legal system. Those protections begin with the First Amendment of the U.S. Constitution, which says the federal government may not prohibit the "free exercise" of religion. Over the decades, Congress and the states have defined and expanded this protection. A prime example is Title VII of the Civil Rights Act of 1964, which prohibits all but the smallest employers from discriminating based on religion and requires them to try to accommodate their employees' religious beliefs and practices.

RFRA IN THE STATES

As of the end of 2015, 21 states have enacted their own versions of the Religious Freedom Restoration Act (RFRA).



Source: National Conference of State Legislatures.

RFRA is another key protection for religious rights: It says that, with some exceptions, the federal government cannot substantially burden a person's exercise of religion. A nearly unanimous Congress enacted RFRA in 1993 in response to a controversial Supreme Court ruling that had made it more difficult for people to win claims of religious discrimination. Twenty-one states have their own versions of RFRA, which apply to state and local governments.[1]

Considering how RFRA is being used today, it seems impossible to believe that a vote in Congress would be nearly as unified. Ironically, abortion was a heated topic of debate as Congress considered RFRA, but primarily from a different perspective: Some of the major antiabortion groups, including the U.S. Conference of Catholic Bishops (USCCB) and the National Right to Life Committee, argued that RFRA could establish a religious right to abortion that could be used to undermine state abortion restrictions.[2] Similarly, USCCB worried that RFRA might be used by individuals or groups claiming that it would be a violation of their religious beliefs if a religious organization received public money—for instance, as part of delivering health care or social services under a government program. Amendments to head off these possibilities were proposed, but not adopted.

These arguments are rarely made today. Rather, USCCB, the Alliance Defending Freedom and other social conservative groups have turned these arguments around to their decided advantage. USCCB, for example, now relies on RFRA and other protections against religious discrimination to argue that they must be allowed to receive government funding even if they refuse to provide services, information and referrals required under the government program, such as access to contraception and abortion or appropriate interventions for LGBT individuals.

Objections to contraception and abortion have been the centerpiece of a long-brewing conflict between the federal government and USCCB over a federal program to help victims of trafficking (see "Absence of Balance: Sweeping Refusal

Policies in PEPFAR and the Proposed Trafficking Victims' Protection Act," Summer 2012). Similarly, USCCB and others have argued for reproductive health–related and LGBT-related exemptions to contracts for serving unaccompanied refugee minors. For example, not only have they objected to providing minors who have experienced sexual assault with access to emergency contraception and abortion care, they have argued that all of the government's attempts to accommodate their objections are unacceptable because even notifying the government that a minor is requesting these services would make them complicit.[3]

More prominently, social conservatives have pushed the boundaries of RFRA and religious liberty arguments to fight against insurance requirements related to reproductive health care. Dozens of employers have sued the Obama administration over the contraceptive coverage guarantee under the ACA, arguing that the administration has not gone far enough to exempt and accommodate employers with religious objections. The Supreme Court first addressed the issue in its 2014 decision in *Burwell v. Hobby Lobby Stores,* which effectively required the administration to extend its accommodation to certain for-profit companies.[4]

This term, the Court is hearing a series of seven cases (which will collectively be referred to as *Zubik v. Burwell*) contesting the accommodation itself, which allows employers with religious objections to absolve themselves from paying or arranging for contraceptive coverage, while requiring an insurance company to separately provide employees and dependents with that coverage at no additional cost. The plaintiffs argue that even filling out a form to tell their insurance company or the federal government that they have a religious objection is itself a violation of their religious rights by somehow making them complicit. Seven of the eight federal appellate courts that have ruled on such challenges have ruled in favor of the federal government.[5]

If the plaintiffs prevail, employers who assert religious objections would likely be empowered to deny hundreds of thousands of U.S. women their right under the ACA to contraceptive coverage. In fact, a 2015 study from the Kaiser Family Foundation estimated that 3% of nonprofits offering health insurance—and 10% of the largest such nonprofits—had taken up the accommodation.[6]

Conservative individuals and groups have also sued over the ACA's provisions related to abortion coverage—provisions that were designed to segregate federal funds from any money used to cover or pay for abortion, but have never satisfied abortion opponents. And they have even challenged the District of Columbia's Reproductive Health Non-Discrimination Amendment Act of 2015, which prevents employers from discriminating against employees and their dependents for their use or intended use of contraception, abortion or fertility treatments, just as prior law had established protections related to pregnancy, childbirth and breastfeeding.[7] Supporters of the new law cite cases, for example, in which religiously affiliated schools have fired teachers for using in vitro fertilization or having a child outside of marriage. Opponents, however, have asserted that the law interferes with employers' ability to hire employees who share their values and have repeatedly pushed for Congress to overturn or undermine it.

The other major prong of conservatives' religious liberty campaign has been to push back against LGBT rights. As LGBT rights have advanced, opponents have argued that they are being forced to violate their religious beliefs by having to recognize or endorse LGBT rights and relationships. They assert that businesses should not have to

The litigation, legislation and public debate around the ACA's contraceptive coverage guarantee and LGBT rights have helped to highlight the extreme nature of social conservatives' demands.

provide flowers, food or venues for same-sex marriages; recognize same-sex marriages in offering employee benefits; or rent apartments to same-sex couples. Religiously affiliated organizations have argued that they should similarly be exempt from anti-discrimination laws protecting employees on the basis of sexual orientation. In the wake of the Supreme Court's 2015 decision in *Obergefell v. Hodges* legalizing same-sex marriage nationwide, these arguments have escalated, with social conservatives pushing for new state RFRA-like laws that would endorse these types of religious exemptions.

The litigation, legislation and public debate around the ACA's contraceptive coverage guarantee and LGBT rights have helped to highlight the extreme nature of social conservatives' demands. Conservatives assert that any burden on religious liberty is inherently unacceptable, regardless of the tradeoffs, the harm to others and how attenuated that burden might be. That absolutist stance has allowed them to convert religious liberty from a shield against government intrusion into a sword that can be used in the political process.

RFRA and other broad protections against religious discrimination may not be ideally designed to assess and temper such extreme claims. Under RFRA, the federal government may not "substantially burden a person's exercise of religion," except when it furthers a "compelling governmental interest" and is "the least restrictive means" of doing so. Even the most experienced lawyers may differ in their opinions about how this balancing test should apply in specific cases. Moreover, it is difficult for policymakers, advocates, the press and the public to understand the potential impact of seemingly small tweaks to states' own versions of RFRA, which makes it difficult to identify and address potential harm.

Mitigating the Harm

Drawing a line between shield and sword is familiar territory for reproductive health and rights experts. Over the past four decades, the federal and state governments have established dozens of religious exemptions, often known as refusal clauses or conscience clauses, which allow individuals and institutions to opt out of reproductive health–related activities that might otherwise be required by the government or by private entities, such as employers (see box, page 5). Some of these religious exemptions include provisions designed to appropriately balance religious liberty with other rights, responsibilities and needs—both by limiting the scope of the exemption and by taking active steps to protect those who might be harmed.

Limits in Scope

To begin with, most of these policies limit refusals to specific health care services, such as abortion, sterilization, contraception or in vitro fertilization. Further, they might specifically prohibit refusals in emergency situations or for particularly time-sensitive services, so as to prevent patients' health from being undermined. Similarly, they might allow refusals only for procedures and pharmaceuticals, and not for counseling, information or referrals, to help ensure that patients understand their options, provide informed consent to care and are not effectively abandoned by the health care system. These types of limits are in line with recommendations from professional medical associations such as the American College of Obstetricians and Gynecologists.[8,9] Only the most extreme laws—such as one enacted in Mississippi in 2004—explicitly apply to any type of service and to emergency care, counseling, information and referrals.[10]

Another way that policymakers have limited the scope of these policies is by explicitly prohibiting refusals that would discriminate against people based on broad characteristics, such as race, national origin, sex, sexual orientation, gender identity, age or marital status. Some health care providers and institutions might exhibit bias against and deny care for minors, unmarried women, LGBT individuals or others whose sexual activity they deem immoral. Despite this danger, few religious exemptions are explicitly limited in this manner. Mississippi's extreme law does have this single protection for some characteristics (including sexual orientation), but not all that might matter (including age, marital status and gender identity). In fact, some religious exemptions—for example, an Illinois law that rivals Mississippi's in its scope—explicitly supersede all other laws, which would include those that protect against discrimination.

Reproductive Health–Related Exemptions

The United States has a long tradition of religious exemptions that intersect with sexual and reproductive health and rights. Some of these policies are essentially preemptive—designed to protect individuals and institutions against potential obligations that might be imposed by government officials or private entities. In other cases, federal and state policymakers have inserted exemptions into policies that impose otherwise explicit obligations on individuals and institutions.

Preemptive refusal clauses: *In the wake of the U.S. Supreme Court's 1973 decision in* Roe v. Wade *that legalized abortion nationwide, Congress enacted a provision sponsored by Sen. Frank Church (D-ID) that prevents the government from, as a condition of certain funds, requiring health care personnel or institutions to perform or assist in abortion or sterilization procedures against their moral or religious convictions. It also prevents institutions receiving certain federal funds from penalizing personnel because of their participation, nonparticipation or beliefs about abortion or sterilization.*

State legislatures took a similar tack in the wake of Roe v. Wade. *Today, almost every state in the country has laws allowing some health care providers to refuse to provide abortion services.[14] Some of those states also extend these refusal rights to sterilization or to contraception more broadly, with eight states specifically allowing public employees to refuse to provide contraceptive services or information. In fact, five states have broad-based exemptions that, for at least some entities, encompass any health care service to which the entity objects.*

In 1996, Congress extended refusal rights to the field of medical training, allowing medical institutions and personnel to refuse to provide or refer for abortion training and allowing medical students to refuse to be trained in the procedure. In 2004, Congress enacted a more sweeping provision, named after Rep. Dave Weldon (R-FL), which forbids federal, state and local governments from requiring health care personnel or institutions to perform, provide, refer for or pay for an abortion. The extension of these rights to health insurance and to referrals was particularly notable, as was the provision's imposition on the authority of state and local governments. Similar language was included in the ACA in 2010, in regard to health plans offered on the law's new marketplaces.

Contraceptive coverage exemptions: *When the Obama administration implemented the ACA's contraceptive coverage guarantee, it also established an exemption for houses of worship that object to sponsoring a health plan that includes such coverage. Further, the administration set up an "accommodation" for nonprofit employers with religious objections—allowing them to step away from contraceptive coverage, while still ensuring that their employees receive that coverage. Both the exemption and the accommodation have been the*

Continued on next page

Policymakers have also limited the job categories and institutions that are granted religious exemptions. Some policies limit exemptions to specific types of health care professionals or to people directly involved in providing the services, rather than extending them to people only indirectly involved (such as employees doing clerical or janitorial work). And when granting exemptions to institutions, policymakers often limit them based on characteristics such as whether the institution is nonprofit or whether it is run by or affiliated with a house of worship. One example of a law that violates these principles is Utah's 2011 refusal law, which broadly defines "health care provider" to include anyone who is even "associated" with a health care facility and does not limit the range of institutions eligible for the exemption.

Active Protections

Some religious exemptions also include provisions designed to mitigate potential harm from whatever refusals are allowed under the law. One common-sense tactic is to require prior notice of any objections to whoever might be affected.[11]

Reproductive Health–Related Exemptions *continued*

subject of dozens of high-profile lawsuits that have now twice reached the Supreme Court.

These steps echoed exemptions to earlier federal and state contraceptive coverage requirements: In 1998, Congress required contraceptive coverage for health plans participating in the Federal Employees Health Benefits Program, but included an exemption for plans objecting on religious grounds. In addition, 20 of the 28 states with their own contraceptive coverage requirements include exemptions for certain employers—or occasionally, insurers—that have objections.[15] Those exemptions vary widely in terms of which types of employers may claim the exemption.

Additional religious exemptions: *Policymakers have inserted religious exemptions into many other requirements and programs. For example, when Congress in 1997 revamped the statute governing managed care plans' participation in the Medicaid system, it included a provision ensuring that plans could not block providers from discussing treatment options that the plan itself did not cover. However, Congress included an exception to that rule that allows a plan to refuse to cover counseling and referral services to which it has a religious or moral objection.*

Similarly, under the President's Emergency Plan for AIDS Relief (PEPFAR), the U.S. government's effort to prevent and treat HIV and AIDS worldwide, no organization may be required to "endorse, utilize, make a referral to, become integrated with, or otherwise participate in" a program or activity to which it has a religious or moral objection.[16] The law also requires U.S. officials awarding grants to ignore the limits on services that result from religious objections. These provisions allow organizations opposed to condoms—such as the network of Catholic relief agencies—to nevertheless compete for comprehensive prevention grants. The PEPFAR exemption is broader than what is enforced for the U.S. international and domestic family planning programs, both of which allow organizations to receive grant money to provide a limited suite of services (such as natural family planning only), but still require them to provide information and referral for a broad range of methods.

Employment discrimination: *Although not specifically about reproductive health care, Title VII of the Civil Rights Act has been cited repeatedly in relation to these issues. Under Title VII, an employer must "reasonably accommodate" its employees' religious practices, unless that creates an "undue hardship on the conduct of the employer's business." In the case of health care, "undue hardship" has been interpreted by the courts and the federal government as including effects that undermine patients' health and access to care. The federal agency that enforces Title VII has used several examples related to pharmacists who object to dispensing contraceptives in explaining how to accommodate an employee without harming patients.[17]*

For example, a Louisiana law from 2009 requires providers to give written notice of their objections to current and potential patients and employers, to help ensure that refusal will not compromise patient access to health care. As another example, federal Medicaid law requires that current and prospective enrollees be notified about any services that a Medicaid managed care plan refuses to cover, and be given information about how to access that care anyway—with coverage instead coming directly from the state.

The state acting as a back-up source of coverage is one example of another type of protection: obligations on other parties to ensure that refusals do not unduly interfere with coverage or care.[11] For example, some state policies require that pharmacies that have an employee with religious objections always have a pharmacist available on-site who will fill a prescription or at least refer a customer to another nearby pharmacy.[12] Under the federal contraceptive coverage guarantee's religious accommodation, a health insurance company is required to

provide coverage separately and directly to enrollees as a back-up for when an employer has a religious objection.

Legislation in Illinois—approved by the Senate and pending in the House—would amend the state's current extreme law in multiple ways to limit potential damage to patients' health and health care. It requires health care facilities to adopt written protocols for ensuring that religious objections do not prevent patients' timely access to care, including requirements to provide patients with information on their medical condition, prognosis and all legal medical options; to ensure that there are other options on-site or by referral in the event of a refusal; and to transfer patients and their medical records without delay, upon their request.

Restoring (Some) Reason

Given the increasingly political and contentious ways in which RFRA and similar laws are now being applied, and recognizing that such laws are likely here to stay, advocates should encourage policymakers to at least incorporate more explicit guidance and fail-safes in their laws and regulations. An Indiana version of RFRA enacted in 2015 provides a useful example: After the law was signed in March, it triggered widespread criticism in the state and across the country as a threat to LGBT rights.[13] Many national corporations weighed in to say that it did not reflect their values, and numerous groups announced boycotts of the state. In response, the state quickly amended the law to include nondiscrimination protections, and it now specifies that it cannot be used to deny services, facilities, goods, employment or housing on the basis of a wide range of personal characteristics, specifically including sex, sexual orientation and gender identity.

However, some critics of the Indiana law say that the changes did not go far enough. Notably, the new nondiscrimination protection does not apply to houses of worship or to other nonprofit religious organizations, such affiliated schools. In addition, the changes did nothing to head off the law's use in undermining access to reproductive health information and services.

While the U.S. Supreme Court is weighing another potentially major challenge to RFRA in the context of the contraceptive coverage case, advocates expect numerous states in 2016 and beyond to consider adopting or expanding their own versions of RFRA and other measures purporting to protect religious liberty. The impact of these actions and the Supreme Court's expected ruling in mid-2016 is likely to reverberate throughout the congressional and presidential election season.

In this context, advocates and policymakers interested in preserving access to reproductive health care and protecting reproductive rights will need to be vigilant in preventing the potential abuse of these laws. In doing so, they can draw on the wealth of examples from the reproductive health field about how to limit the scope of a religious exemption and otherwise mitigate the potential harm. And there may be other ways to adapt RFRA and similar laws—perhaps by providing more precise definitions for the key terms used in their balancing tests and by adding new factors to be weighed, such as the potential for a religious objection to harm others. None of these or similar strategies will do anything to truly advance reproductive rights, but they are necessary to prevent the access to reproductive health care and reproductive rights that still exists from becoming an empty promise. ■

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Guttmacher Policy Review

From the Guttmacher Institute's policy analysts

Editorial Office: Washington, DC
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ISSN: 2163-0860 (online)
http:/www.guttmacher.org/archive/GPR.jsp
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