



Testimony of Shirley J. Wilcher, M.A., J.D., CAAP
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Hearing on “Do No Harm: Examining the Misapplication of the Religious Freedom
Restoration Act”
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U.S. House of Representatives
Committee on Education and Labor

Good Morning, Mr. Chairman and Members of the Committee on Education and Labor. My name is Shirley J. Wilcher and on behalf of my association, the American Association for Access, Equity and Diversity (AAAED), I appreciate the invitation to testify about the potential application of the Religious Freedom Restoration Act (RFRA) in the employment context. We have been asked to opine on the particular implications of RFRA on the enforcement activities of the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP).

Introduction

In 2005, I joined the American Association for Affirmative Action, now titled the American Association for Access, Equity and Diversity (AAAED) as Executive Director. Founded in 1974, AAAED has four decades of leadership in providing professional training to members, enabling them to be more successful and productive in their careers. It also promotes understanding and advocacy of affirmative action and other equal opportunity and related compliance laws to enhance the tenets of access, inclusion and equality in employment, economic and educational opportunities. A 501(c)(6) membership organization, AAAED is the oldest operating association of professionals in the Equal Opportunity profession and is a leader in equal opportunity, affirmative action, Title IX and diversity training and advocacy for professionals in higher education, private industry and government.

Our members who are equal employment opportunity professionals, Diversity managers, consultants and lawyers, Federal EEO professionals and Title IX coordinators, are on the front line every day, receiving and investigating complaints of discrimination, overseeing the development of affirmative action programs, conducting diversity training and educating or counseling managers, faculty and students regarding policies related to equal employment opportunity, sexual harassment and equal education opportunity under Title IX.

We, at AAAED remain committed to preserving the laws enacted in the 1960s and beyond that were established to promote equal opportunity for those who have been historically disadvantaged based on race, religion, sex, national origin, disability, and more recently, sexual orientation and gender identity.

We endorse the recently House-passed Equality Act and urge its passage in the Senate. We also support this Committee's work to continue the legacy of Augustus Hawkins and other legendary members of this Committee who labored to secure employment opportunities for an increasingly diverse American workforce.

On a personal note, it is a pleasure to return to the committee where I worked as Associate Counsel for Civil Rights under Chairman Augustus F. Hawkins in the 1980s. Like today, it was a challenging time for those committed to the protection of individuals from discrimination based on race, religion, gender, national origin, disability and veterans' status and other bases. There were fundamental disagreements between those of us who worked for Members of Congress and those who were sworn to uphold and enforce the civil rights laws in the Federal civil rights agencies. Affirmative action law and policy were vigorously debated and agency officials, including Equal Employment Opportunity Commission Chairman Clarence Thomas, who now sits on the U.S. Supreme Court, regularly testified before this committee.

The 1980s were also a time when this committee conducted a robust oversight program, as it is attempting to do in these times. The Committee staff embarked on comprehensive reviews of the civil rights enforcement activities of the EEOC, the Department of Education's Office for Civil Rights (OCR) and the Office of Contract Compliance Programs, U.S. Department of Labor. At the OFCCP we visited a number of the agency's regional offices, met with staff and reviewed an impressive number of documents. Thanks to the cooperation of the agencies, we were able to do our jobs. While the outcome of our investigations resulted in three committee reports that contained robust criticisms of the policies in place at that time, I believe we were able to not only reverse some of the most harmful policies but most importantly, preserve the civil rights laws for those whom these laws were intended to protect.

In the 1990s, I was asked to serve as Deputy Assistant Secretary for Federal Contract Compliance, a position due in large part, to the oversight work that we were able to accomplish while working as staff of this Committee. I was the first and only African American female director of the OFCCP and served for nearly seven years.

The Office of Federal Contract Compliance Programs (OFCCP) and RFRA

The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order (E.O.) 11246, as amended, Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended. Collectively, these laws prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Contractors and subcontractors are also prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.¹ Contractors and subcontractors are required to take affirmative action to promote equal employment opportunity.

The underlying philosophy of these civil rights-era laws is that federal funds should not be used to support discrimination; they should be used to promote equal employment opportunity.²

¹ OFCCP Directive 2018-03, dated August 10, 2018, (Accessed June 19, 2019)
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

² See, e.g., Executive Order 11246, Subpart B., section 2: Subpart B – Contractors' Agreements

Like Title VII of the Civil Rights Act of 1964, Section 202 of Executive Order 11246 provides an exemption for religious organizations, corporations, educational institutions and other entities who are contractors or subcontractors. Such entities are exempted from the requirement that they not discriminate in employment on the basis of a particular religion to perform work associated with the religious entity.³

The Religious Freedom Restoration Act of 1993 (RFRA), "Prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of

SEC. 202

"Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

During the performance of this contract, the contractor agrees as follows:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause." <https://www.dol.gov/ofccp/regs/statutes/eo11246.htm> (Accessed, June 21, 2019)

³ See Executive Order 11246, Sec. 204 (c): "Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order." See also: 41 C.F.R. § 60-1.5(a)(5), and part of the equal opportunity clause, see 48 C.F.R. §§ 22.807(b)(7), 52.222-26(b)(2).

See also, EEOC Questions and Answers: Religious Discrimination in the Workplace: *Religious Organization Exception*: Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. The exception applies only to those institutions whose "purpose and character are primarily religious." Factors to consider that would indicate whether an entity is religious include: whether its articles of incorporation state a religious purpose; whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether it is not-for-profit; and whether it affiliated with, or supported by, a church or other religious organization.

This exception is not limited to religious activities of the organization. However, it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.

Ministerial Exception: Courts have held that clergy members generally cannot bring claims under the federal employment discrimination laws, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act. This "ministerial exception" comes not from the text of the statutes, but from the First Amendment principle that governmental regulation of church administration, including the appointment of clergy, impedes the free exercise of religion and constitutes impermissible government entanglement with church authority. The exception applies only to employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction. Some courts have made an exception for harassment claims where they concluded that analysis of the case would not implicate these constitutional constraints.

https://www.eeoc.gov/policy/docs/qanda_religion.html (Accessed, June 19, 2019).

religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” The purpose of the law as stated was:

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.⁴

The legislation, introduced in 1990, was therefore intended to restore the “compelling state interest” test of the constitutionality of governmental restrictions on the free exercise of religion.⁵

On August 12, 2018, the OFCCP issued a directive (Directive 2018-03) on the Religious Freedom Restoration Act. An OFCCP directive is a document intended to provide guidance to OFCCP employees and contractors. The purpose of this directive was to “To incorporate recent developments in the law regarding religion-exercising organizations and individuals.”⁶ The directive recounts the recent legal developments involving religious organizations:

Recent court decisions have addressed the broad freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (government violates the Free Exercise clause when its decisions are based on hostility to religion or a religious viewpoint); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (government violates the Free Exercise clause when it conditions a generally available public benefit on an entity’s giving up its religious character, unless that condition withstands the strictest scrutiny); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations).⁷

The directive also reiterates the purpose of the Administration’s executive orders: to “protect religious exercise, not impede it.”⁸ OFCCP staff are directed to take these legal developments into account in their compliance activities. Staff are directed thusly:

⁴ Congress.Gov, H.R.1308 - Religious Freedom Restoration Act of 1993, (Accessed June 19, 2019), <https://www.congress.gov/bill/103rd-congress/house-bill/1308/text>

⁵ Religious Freedom Restoration Act of 1990, Hearing Before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, One-Hundred First Congress, Second Session, on HR 5377, Religious Freedom Restoration Act, September 27, 1990, (Accessed on June 19, 2019), <https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/05/hear-150-1990.pdf>.

⁶ U.S. Department of Labor, OFCCP, Directive 2018-03, August 10, 2018, (Accessed June 19, 2019), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html.

⁷ OFCCP Directive 2018-3.

⁸ *Ibid.* See also Office of the Assistant Secretary for Administration and Management, US Department of Labor’s statement on “The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance:” “Where a law enforced by DOL prohibits religious discrimination in employment by recipients of DOL financial assistance-2, such prohibition will be displaced by RFRA and thus will not apply to a recipient with respect to the employment of individuals of a particular religious belief to perform work connected with the carrying on by such recipient of its activities, provided that (i) such recipient can demonstrate that its religious exercise would be substantially burdened by application of the religious non-discrimination requirement to its employment practices

- They "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" and must "proceed in a manner neutral toward and tolerant of . . . religious beliefs." ³
- They cannot "condition the availability of [opportunities] upon a recipient's willingness to surrender his [or her] religiously impelled status."⁴
- "[A] federal regulation's restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act]."⁵
- They must permit "faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . [Federal] contracts."⁶
- They must respect the right of "religious people and institutions . . . to practice their faith without fear of discrimination or retaliation by the Federal Government."⁷⁹

OFCCP Compliance Activity

OFCCP conducts its compliance activities using two major functions: compliance evaluations and complaint investigations. The results of the agency's compliance activities between FY 2015 and 2019 are reported as follows:

Supply and Service Compliance Evaluations

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15 - FY18)
Scheduled*	551	785	735	1,048	2,036	1,151
Completed*	398	713	1,036	1,522	2,345	1,404
Completion Type						
Conciliation Agreement or Consent Decree	34 8.5%	115 16.1%	202 19.5%	275 18.1%	343 14.6%	234 17.1%
EO 11246 Violation	39 9.8%	127 17.8%	195 18.8%	258 17.0%	297 12.7%	219 16.6%
Section 503 Violation	14 3.5%	36 5.0%	71 6.9%	99 6.5%	173 7.4%	95 6.4%
Section 4212 Violation	17 4.3%	45 6.3%	96 9.3%	140 9.2%	236 10.1%	129 8.7%
Discrimination Violation	11	47	40	38	32	39

in the program or activity at issue, and (ii) DOL is unable to demonstrate that applying the non-discrimination provision to this recipient both would further a compelling government interest and would be the least restrictive means of furthering that interest. A determination whether a recipient of DOL financial assistance qualifies under RFRA for an exemption from a religious non-discrimination requirement in an authorizing statute or regulation will be made on a case by case basis upon request of the recipient."

<https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act/guidance> (Accessed June 19, 2019).

⁹ Ibid.

	2.8%	6.6%	3.9%	2.5%	1.4%	3.6%
Number of Workers in Facilities Reviewed	449,260	850,443	732,235	1,038,542	1,163,072	946,073

Note: The numbers do not add up to the Completed total and the percentages do not add to 100% because cases with no violations are not summarized and the completion types are not mutually exclusive.¹⁰

Complaints by Employment Practice

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15-FY18)
Received	766	1,418	686	588	670	841
Closed	706	1,320	720	691	769	875

Complaints by Employment Practice (continued)

	FT 2019 (Q2)	FY 2018	FY 2017	FY2016	FY2015	Average (FY15-FY18)
Hiring	27	55	64	55	113	72
	3.8%	4.2%	8.9%	8.0%	14.7%	8.9%
Job Assignment	17	43	42	54	125	66
	2.4%	3.3%	5.8%	7.8%	16.3%	8.3%
Promotion	14	19	24	43	90	44
	2.0%	1.4%	3.3%	6.2%	11.7%	5.7%
Demotion	5	6	7	15	35	16
	0.7%	0.5%	1.0%	2.2%	4.6%	2.0%
Segregated Facilities	0	3	1	2	14	5
	0.0%	0.2%	0.1%	0.3%	1.8%	0.6%
Termination	110	175	151	174	236	184
	15.6%	13.3%	21.0%	25.2%	30.7%	22.5%
Recall	0	1	8	3	11	6
	0.0%	0.1%	1.1%	0.4%	1.4%	0.8%
Layoff	5	9	13	14	62	25
	0.7%	0.7%	1.8%	2.0%	8.1%	3.1%
Wages	70	162	62	62	111	99
	9.9%	12.3%	8.6%	9.0%	14.4%	11.1%
Seniority	0	7	10	10	44	18
	0.0%	0.5%	1.4%	1.4%	5.7%	2.3%
Harassment	83	181	114	145	205	161

¹⁰ "OFCCP By the Numbers," <https://www.dol.gov/ofccp/BTN/index.html> (Accessed June 19, 2019)

	11.8%	13.7%	15.8%	21.0%	26.7%	19.3%
Job Benefits	8	14	18	24	58	29
	1.1%	1.1%	2.5%	3.5%	7.5%	3.6%
Training	0	9	13	11	47	20
	0.0%	0.7%	1.8%	1.6%	6.1%	2.5%
Retaliation	328	511	277	282	213	321
	46.5%	38.7%	38.5%	40.8%	27.7%	36.4%
Pregnancy	4	8	3	8	15	9
	0.6%	0.6%	0.4%	1.2%	2.0%	1.0%
Disabled	41	57	49	75	121	76
	5.8%	4.3%	6.8%	10.9%	15.7%	9.4%
Other*	67	158	156	127	196	159
	9.5%	12.0%	21.7%	18.4%	25.5%	19.4%

Note: The numbers by employment practice do not equal the total number of Closed because the Bases are not mutually exclusive.

*Other employment practice not listed above.

Complaints Investigated

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15 - FY18)
Investigated	51	114	104	147	114	120
Monetary Relief	\$29,221	\$744,792	\$97,006	\$203,933	\$516,777	\$390,627
Complainants with Monetary Relief	2	10	6	7	11	9
Monetary Relief Per Complainant	\$14,611	\$74,479	\$16,168	\$29,133	\$46,980	\$41,690

Complaints by Basis

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15 - FY18)
Received	766	1,418	686	588	670	841
Closed	706	1,320	720	691	769	875
Race	259	534	255	272	302	341
	36.7%	40.5%	35.4%	39.4%	39.3%	38.6%
Sex	109	274	161	147	190	193
	15.4%	20.8%	22.4%	21.3%	24.7%	22.3%
National Origin- Hispanic	42	84	58	41	33	54
	5.9%	6.4%	8.1%	5.9%	4.3%	6.2%
National Origin- Other	37	97	46	33	32	52
	5.2%	7.3%	6.4%	4.8%	4.2%	5.7%
Religion	32	93	34	28	25	45
	4.5%	7.0%	4.7%	4.1%	3.3%	4.8%
Color	57	118	41	39	27	56
	8.1%	8.9%	5.7%	5.6%	3.5%	5.9%

**Complaints by Basis
(continued)**

	FY 2019 (Q2)	FY 2018	FY 2017	FY 2016	FY 2015	Average (FY15 - FY18)
Sexual Orientation	27	65	14	5	3	22
	3.8%	4.9%	1.9%	0.7%	0.4%	2.0%
Gender Identity	12	20	9	11	3	11
	1.7%	1.5%	1.3%	1.6%	0.4%	1.2%
Disability	164	294	177	170	197	210
	23.2%	22.3%	24.6%	24.6%	25.6%	24.3%
Covered Veteran	89	132	124	124	125	126
	12.6%	10.0%	17.2%	17.9%	16.3%	15.4%

Note: The numbers by Basis do not equal the total number Closed because the Bases are not mutually exclusive.

A chart listing the findings of the relatively small number of complaint investigations shows that of the complaints alleging religious discrimination, most related to religious day observance. If our interpretation of the chart is correct, there were no “cause” findings in this group.¹¹

viol_religious_day_observance
N
N
N
N
N
N
N
N
N
N
N
N

A review of the completed complaint investigations between FY 2015 – FY 2018, there was only one where violation of religious day observance was identified. It is noted that the complainant filed under the Basis – National Origin – Hispanic and Color.

basis_national_origin_hispanic	basis_color	viol_demotion	viol_wages	viol_harassment	viol_religious_day_observance
Y	Y	Y	Y	Y	Y

¹¹ OFCCP Complaints as of 4/18/2019.

In its preamble to the Final Rule related to Discrimination Because of Sex, OFCCP specifically declined to issue a blanket rule on exemptions under RFRA but chose to review contractors' exemption requests on a case-by-case basis:

On the subject of RFRA, the religious organization commenter asks OFCCP to clarify in the final rule that RFRA forbids application of this paragraph, as well as proposed paragraphs 60-20.7(a)(3) (regarding adverse treatment based on failure to conform to sex-role expectations by being in a relationship with a person of the same sex) and 60-20.7(b) (regarding adverse treatment based on gender identity or transgender status), to contractors with religious objections to those provisions.[91]

OFCCP declines to implement a blanket exemption from these provisions because claims under RFRA are inherently individualized and fact specific. There is no formal process for invoking RFRA specifically as a basis for an exemption from E.O. 11246. Insofar as the application of any requirement under this part would violate RFRA, such application shall not be required.

If a contractor seeks an exemption to E.O. 11246 pursuant to RFRA, OFCCP will consider that request based on the facts of the particular case. OFCCP will do so in consultation with the Solicitor of Labor and the Department of Justice, as necessary. OFCCP will apply all relevant case law to the facts of a given case in considering any invocation of RFRA as a basis for an exemption.¹²

This preamble also restates that the OFCCP follows the "ministerial exemption" handed down by the Supreme Court, regarding the hiring of an organization's ministers or clergy and reiterated the program's regulations, which permit religiously-affiliated contractors to favor individuals of a particular religion in employment decisions.

One way of measuring the effects of the RFRA policy followed by OFCCP is to ascertain if the bases for the complaints filed alleging discrimination on the basis of sexual orientation or gender identity reflect actions by religious organizations seeking exemption from the anti-discrimination provisions of the Executive Order. One could also inquire whether any religious exemptions have been submitted to the OFCCP and/or the Solicitor of Labor since the directive was implemented. We have not seen any records on the agency's website regarding either inquiry.

Concerns Regarding to Potential Effect of RFRA

While there are few data to date given the available compliance review and complaint information and in light of the recent issuance of Directive 2018-03, we are concerned that a deleterious outcome is possible if the directive is interpreted liberally and supersedes the nondiscrimination provisions of Executive Order 11246 and other laws enforced by OFCCP. We extend that concern to other civil rights agencies as well including the Equal Employment Opportunity Commission.

First, given the litigation that has led to the OFCCP's directive, the most vulnerable population affected by the enforcement of this policy will be the LGBTQ community. *The EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, case, while not an OFCCP matter, is an excellent example of how the RFRA may be invoked

¹² Federal Register, Discrimination Based on Sex, a Rule by the Federal Contract Compliance Office, June 15, 2016, <https://www.federalregister.gov/documents/2016/06/15/2016-13806/discrimination-on-the-basis-of-sex> (Accessed, June 21, 2019).

to justify the termination of a transgender employee.¹³ The LGBTQ community is not alone however. Using the cover of religious beliefs or practices, employers may also seek exceptions to the hiring of applicants of other faiths, national origins, and virtually all bases now covered by the civil rights laws including sex, race, and disability. The question is, how broadly or narrowly will the OFCCP (and other agencies) interpret this directive and RFRA itself? This is a cause for Committee oversight both now, as the OFCCP Directive is relatively new, and in the years to come.

As the Committee is well-aware, there is reason to be concerned that actions occurring in non-employment areas may well become an issue in the employment context. Earlier this year, the Department of Health and Human Services granted to South Carolina an exemption to the nondiscrimination requirements in federally-funded child welfare programs. Families who were not of the religion of the program managers were not allowed to participate in a foster care and adoption program.¹⁴ The basis for the exemption for this flagrantly discriminatory policy was reportedly the Religious Freedom Restoration Act.

The October 6, 2017 policy memorandum issued by the Attorney General on “Federal Law Protections for Religious Liberty” is rife with potential to trammel the civil rights protections enforced by equal employment agencies such as the OFCCP. The final provision of this expansive memorandum specifically covers federal contractors:

Agencies Engaged in Contracting and Distribution of Grants

Agencies also must not discriminate against religious organizations in their contracting or grant-making activities. Religious organizations should be given the opportunity to compete for government grants or contracts and participate in government programs on an equal basis with nonreligious organizations. Absent unusual circumstances, agencies should not condition receipt of a government contract or grant on the effective relinquishment of a religious organization's Section 702 exemption for religious hiring practices, or any other constitutional or statutory protection for religious organizations. In particular, agencies should not attempt through conditions on grants or contracts to meddle in the internal governance affairs of religious organizations or to limit those organization' otherwise protected activities.¹⁵

One has to ask why this memorandum was necessary when there already exist provisions for religious freedom in hiring and religious accommodations in both Title VII and Executive Order 11246? If the South Carolina exemption, and the *Hobby Lobby and R.G. & G.R Harris Funeral Homes, Inc.* cases are instructive, there is enough potential for discrimination in the name of religious liberty to extinguish the civil rights protections that minorities and women have enjoyed since the 1960s.

¹³ R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, 884 F.3d 560 (6th Cir. 2018). The case is on appeal to the Supreme Court. See the Sixth Circuit decision in this case at: <http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0045p-06.pdf> (RFRA would not limit the EEOC's authority to enforce anti-discrimination laws under Title VII)

¹⁴ Ian Thompson, ACLU, “In an Era of Religious Refusals, the Do No Harm Act Is an Essential Safeguard,” February 28, 2019, <https://www.aclu.org/blog/religious-liberty/using-religion-discriminate/era-religious-refusals-do-no-harm-act-essential>

¹⁵ Office of the Attorney General, Federal Law Protections for Religious Liberty, October 6, 2017, https://www.justice.gov/opa/press-release/file/1001891/download?utm_medium=email&utm_source=govdelivery (Accessed, June 19, 2019).

It is axiomatic that this nation was founded on the principle of religious liberty. It is also a fact that the principle of the separation of church and state undergirds the foundation upon which this nation stands. Moreover, religious freedom as a justification for discrimination is a centuries-old rationale, used to defend slavery, the denial of women's suffrage, Jim Crow laws, and segregation.¹⁶ Tisa Wenger of the *Washington Post* wrote:

“In short, religious freedom should not be granted this much power. If a bakery or an adoption agency can deny their services to same-sex couples on religious freedom grounds, then what prevents other businesses and organizations who may sincerely profess Christian white supremacy from refusing to serve African Americans or Jews, as they have done before?”¹⁷

Federal agencies responsible for enforcing equal employment laws should not have to defend such laws against professed encroachments based on a religious pretext. As we wrote in response to the Department of Education's Notice of Proposed Rulemaking on Title IX Sexual Harassment and Assault Regulations, “Taking a sword to a problem that requires at best a pen is not the approach we would endorse.”¹⁸

The Religious Freedom Restoration Act must be enforced as it was intended and not used as a rationale to extirpate decades of progress in an increasingly diverse America.

Thank you for the opportunity to speak about this important matter.

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www.aaaed.org

¹⁶ See Zaid Jilani, “How Religious ‘Liberty’ Has Been Used to Justify Racism, Sexism and Slavery Throughout History,” AlterNet, April 6, 2018, <https://www.alternet.org/2015/04/how-religious-liberty-has-been-used-justify-racism-sexism-and-slavery-throughout-history/> (Accessed June 19, 2019); Henry Brinton, “In Civil War, the Bible became a weapon,” USA Today, February 27, 2011, https://usatoday30.usatoday.com/news/opinion/forum/2011-02-28-column28_ST_N.htm (Accessed June 19, 2019); Larry R. Morrison, “The Religious Defense of American Slavery Before 1830,” Kings College, <http://www.kingscollege.net/gbrodie/The%20religious%20justification%20of%20slavery%20before%201830.pdf>: “Much like their proslavery predecessors, 20th-century segregationists argued that the civil rights movement was trying to impose an alien, anti-Christian, even communistic ideology that would destroy the Christian racial order of the South,”

¹⁷ Tisa Wenger, “Discriminating in the name of religion? Segregationists and slaveholders did it, too,” Washington Post, December 5, 2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/12/05/discriminating-in-the-name-of-religion-segregationists-and-slaveholders-did-it-too/?noredirect=on&utm_term=.647ceb1d31c2 (Accessed June 19, 2019).

¹⁸ AAAED comments regarding the Notice of Proposed Rulemaking published by the U.S. Department of Education on November 29, 2018, January 30, 2019, p.8.