

How Congress and the Trump Administration Can Advance Religious Freedom

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KEY TAKEAWAYS

The government should not turn social viewpoints, whether on life, marriage, or differences between the sexes, into ideological litmus tests for all Americans.

The Trump Administration has made strides in reversing previous abuses on conscience and religion. It should take further steps to build upon its strong record.

Congress should enact policies to protect religious freedom so that everyone—religious and secular individuals and organizations—can serve the common good.

Freedom of religion is our “First Freedom,” protected in the Constitution. But it has been eroded by the growth of the administrative state, misinterpretations of the Establishment Clause, and corporate and cultural activism that seeks to expand government power to coerce conformity to a new sexual orthodoxy.

The Obama Administration implemented policies that coerced both individuals and private entities (both for-profit and charitable) to conform to the government’s views on controversial issues like abortion and sexual orientation and gender identity (SOGI). The Obama Department of Health and Human Services (HHS) enforced the “contraceptive mandate” in the Affordable Care Act requiring that employers provide contraception, including abortifacients, under threat of massive financial penalties. This onerous burden caused multiple businesses and nonprofit

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organizations to file lawsuits to avoid violating their sincerely held religious beliefs about the beginnings of life. Ultimately, after years of costly litigation, the Supreme Court protected the religious freedom of the Hobby Lobby Corporation, a closely held for-profit organization, and the Little Sisters of the Poor, an order of Catholic nuns who serve the indigent elderly.¹

When the government forces religious actors to choose between following their beliefs or serving the public, it not only violates their freedoms, it deprives the public of valuable services and diversity among providers.

America's understanding of religious freedom benefits everyone: Jews, Christians, and Muslims; members of smaller communities like Buddhists, Hindus, and Sikhs; and agnostics and atheists. Our robust protections of religious freedom have created the infrastructure for healthy pluralism. We are free to disagree with both each other and with the state.

Congress and President Trump have the opportunity to strengthen this structure by removing ideological restrictions that the previous Administration placed on religious actors, thereby freeing everyone to participate in the public square and serve the common good.

Recommendations for Congress

With a new Democrat majority in the House of Representatives, the conversation has shifted from protecting religious freedom to attacking existing protections of religious freedom and passing new legislation that would limit religious freedom. In light of this, Congress should prioritize the following:

Oppose the Equality Act—in All Forms. This bill would punish disagreement on life, marriage, and sex differences by adding to the 1964 Civil Rights Act the term “sex” (in Title II on public accommodations) and redefining “sex” to mean sexual orientation and gender identity (SOGI) in multiple sections (Titles II, III [public facilities], IV [public education], VI [federal funding], VII [employment], and IX [education] and in the 1968 Fair Housing Act).²

In multiple states, these laws have been weaponized against those who believe that marriage is between a man and a woman or that sex is binary. Several wedding vendors, such as Masterpiece Cakeshop, have been sued for declining to create custom goods for same-sex weddings, although they serve all customers. The Equality Act would dramatically expand the definition of “public accommodations” to include houses of worship and online services.³ The expansive definition of public accommodations could lead to lawsuits demanding taxpayer funding for abortions through Medicaid, as

well as forcing health care workers and entities to participate in abortion.⁴ Under similar state laws, individuals who identify as transgender have sued hospitals that declined to perform surgeries (including hysterectomies) on healthy women because of their religious beliefs against sterilization.

In an unprecedented move for federal legislation, the Equality Act nullifies the applicability of the Religious Freedom Restoration Act (RFRA) to amended sections of the 1964 Civil Rights Act. The RFRA prohibits the federal government from substantially burdening a person's exercise of religion unless the government demonstrates that the application of the burden to the person is the least restrictive means of achieving a compelling governmental interest. In Alaska, a women's homeless shelter was sued for gender identity discrimination when it declined to admit a man who identifies as a woman into women's sleeping quarters.⁵

In addition to multiple problems the Equality Act would create for privacy, safety, and equality, it would be used as similar state laws have been to penalize people for acting on their sincere religious belief that people are created male and female and that male and female are created for each other.⁶ The Equality Act would treat such long-standing and widely held beliefs as the functional—and legal—equivalent of racist bigotry. This is not true, and our civil rights law should not say otherwise.⁷

Meanwhile, other proposed “compromises” that enact sweeping sexual orientation and gender identity policies with limited exemptions for religious institutions *do not* solve the underlying issue with these policies and *do* accelerate their harms. Proposed models such as “Fairness for All,” based in part on a legislative compromise in Utah, are inadequate to protect freedom for all.⁸

Exemptions for religious institutions leave religious individuals exposed to liability in the public square. They narrow the scope of religious freedom to “freedom of worship” to be practiced within the confines of a church or synagogue or a religious college—effectively erasing these beliefs from the public square. Enacting nationwide SOGI policies that only exempt religious institutions would decrease safety and privacy for women and girls in single-sex private spaces and subject them to gross unfairness in athletics. Exemptions for medical organizations controlled by religious institutions leave out secular medical providers and medical professionals employed by those providers who have conscience objections to transgender ideology and oppose hormonal and surgical interventions for patients with gender dysphoria, including children. Finally, exemptions for religious institutions from a transgender medical mandate fails to preserve body-affirming treatment options for parents of gender-dysphoric children.

All Americans should be able to live out their beliefs in every corner of the public square, not just the lucky few affiliated with an institution that qualifies for a religious exemption.

Oppose SOGI Language in Any Federal Bill that Treats Disagreement as Discrimination—Including in Appropriations. The House of Representatives added SOGI and abortion language to a number of appropriations bills, including for HHS (for foster care),⁹ Housing and Urban Development (HUD),¹⁰ Department of Homeland Security,¹¹ Department of State/U.S. Agency for International Development,¹² intelligence agencies, and Customs and Border Patrol. The newly introduced SOGI language would block the Trump Administration’s ability to carry out current regulatory priorities at HUD (new proposed rule for homeless shelters) and HHS (waiver for faith-based adoption agency).¹³ The Senate should strike this language from its versions of appropriations bills.

Other federal bills that would add SOGI to federal law include the Elder Pride Act/Inclusive Aging Act, which would add conditions to grants for organizations that serve the elderly based on whether grantees offer a full array of “sexual health services” or have a “formal relationship” with organizations that assist LGBT individuals.¹⁴ Attempts to create a SOGI ideology litmus test on serving the elderly should be opposed.¹⁵

Revise the Stronger Child Abuse Prevention and Treatment Act. H.B. 2480 added “sexual and gender minority youth” to abuse-prevention outreach requirements¹⁶ and references the Centers for Disease Control and Prevention’s definition, which includes the term “transgender.”¹⁷ The terms “transgender” and “gender minority” adopt one side of a political dispute over the proper treatment of gender dysphoria. These terms are *not* based on science or medicine but on ideology—and would be a roundabout way of enshrining SOGI ideology into law.

Oppose the Do No Harm Act (H.R. 1450). The bill would gut the Religious Freedom Restoration Act by limiting the scope of cases in which RFRA can protect Americans’ religious freedom.¹⁸ It does this by treating certain protected actions as “harm” and then removing them from RFRA’s reach.¹⁹ Supporters of the bill describe it as a response to the Supreme Court’s 2014 landmark decision in favor of Hobby Lobby Stores, which held that under the RFRA a closely held for-profit corporation could be exempt from the contraceptive mandate in the Affordable Health Care Act that violated their religious beliefs. Without the important balancing test RFRA provides, Americans everywhere would lose their first legal recourse to defend their First Amendment’s protection of religious exercise. The original RFRA should *not* be watered down.

Pass the Child Welfare Provider Inclusion Act. The Child Welfare Provider Inclusion Act (CWPIA)²⁰ would increase the supply of foster parents by allowing faith-based agencies to serve communities in a manner consistent with their religious beliefs.²¹ The CWPIA would prohibit federal government and state governments that receive federal funds from discriminating against foster care and adoption providers on the basis of their religious beliefs that every child deserves both a mom and a dad, or because they place children with co-religionists.

In the 115th Congress, the House Appropriations Committee passed the CWPIA as an amendment to the fiscal year 2019 Labor, Health and Human Services, and Education (LHHS) appropriations bill (the “Aderholdt Amendment”), but it did not ultimately become law.²² Meanwhile, in the 116th Congress, the House added SOGI language to the fiscal year 2020 Appropriations bills for LHHS that would invalidate the Trump Administration’s attempts to protect faith-based adoption with a waiver from a SOGI non-discrimination regulation enacted under the Obama Administration (discussed further below).²³

Regulatory action is *not* enough to provide permanent protection to every capable agency that wishes to serve children consistent with their religious beliefs. With more children entering foster care every day due to the drug crisis, Congress should not delay ensuring that all able agencies can recruit as many “forever families” as are needed to ensure no child is left on the waiting list.²⁴

Pass the First Amendment Defense Act. When the U.S. Supreme Court redefined marriage in the 2015 decision *Obergefell v. Hodges*, it pledged not to disparage Americans who hold the view that marriage is between one man and one woman and that, in the words of Justice Kennedy, is based upon “decent and honorable religious and philosophical premises” and held in “good faith by reasonable and sincere people” around the world.²⁵

The First Amendment Defense Act would prevent the federal government from discriminating against individuals and organizations for their beliefs about marriage through licensing, contracting, and accreditation (among others), and revocation of tax-exempt status.²⁶ This act is essential to protect private schools, charities, and businesses, as well as the students, clients, and customers whom they serve.

Pass Comprehensive Legislation to Protect Freedom to Disagree on Marriage and Sex Differences. Congress should enact comprehensive legislation to protect the freedom of all Americans to think, speak, and act according to their beliefs that marriage is between one man and one woman and that there are only two sexes.²⁷ The growing wave of punishments under

state and local SOGI laws and the Equality Act show it is time to enact legislative protection of:

- The right of medical professionals, insurance companies, and medical establishments to decline to provide treatment of gender dysphoria that violates their religious beliefs or consciences.
- Parents' rights to choose body-affirming treatments for gender dysphoria in minors.
- The rights of patients (both adults and minors) and counselors to hold private discussions about unwanted same-sex attraction or unwanted gender dysphoria without government censorship.
- The right to have private single-sex facilities in public accommodations, in educational institutions, and in any entity that receives public funds.
- The right to have single-sex athletic competitions at any educational institution that receives Title IX funds and to limit entry into sports based on biology—not gender identity.
- The right of employers to decline to provide insurance coverage for the treatment of gender dysphoria, including hormonal and surgical interventions, that violates their religious beliefs or consciences.
- The right to speak according to the belief that sex is binary and based on biology rather than self-perception, including in any organization that receives government funding.

Sexual orientation and gender identity policies like the Equality Act ultimately codify sexual ideology as government orthodoxy for everyone. As these policies multiply at the state and local level,²⁸ the federal government should enact policy to protect the freedom of all Americans to live according to their beliefs about marriages and differences between the sexes.

An effective solution to social and political conflicts over the definition of sex and the meaning of marriage will allow all Americans to live consistently with their beliefs. Congress should pass comprehensive legislation that will promote authentic pluralism by protecting freedom to disagree on these issues.

Strengthen Spiritual Fitness Resources for Veteran Suicide Prevention in the National Defense Authorization Act (NDAA). On average, 20 veteran suicides happen each day, despite more than 15 years of federal suicide-prevention programming.²⁹ Congress should recommend that the Department of Defense (DOD), in consultation with commanders, chaplains, and military medical professionals, develop a suicide-prevention program that incorporates, as an optional component, opportunities for religious practice in accordance with each member’s faith.³⁰

The Trump Administration’s Domestic and International Agendas

At the United Nations General Assembly in September 2019, President Trump stated that America’s “Founders understood that no right is more fundamental to a peaceful, prosperous, and virtuous society than the right to follow one’s religious convictions.”³¹ The Trump Administration has taken several significant steps to protect freedom of conscience and religion at home and abroad.³² This is consistent with the President’s public statements on numerous occasions emphasizing the importance of life and religious liberty.³³

Domestically, the Trump Administration has:

Issued an Executive Order on Religious Liberty. In 2017, the President issued Executive Order No. 13798 to “guide the executive branch in formulating and implementing policies with implications for the religious liberty...[in] compliance with the Constitution and with applicable statutes and Presidential Directives.”³⁴ The final executive order featured weaker religious liberty protections than had been incorporated in a previous draft, but it was nevertheless a step in the right direction.³⁵

Issued the Department of Justice (DOJ) Memorandum on Religious Liberty and Set Up the Religious Liberty Task Force. Pursuant to Executive Order No. 13798, Attorney General Jeff Sessions issued 20 principles to guide federal agencies to act in accordance with the First Amendment, the RFRA, and other statutes and regulations.³⁶ The Religious Liberty Task Force implements these principles within the DOJ’s operations, legal arguments, and policies and regulations.³⁷

Filed *Amicus* Briefs with the Supreme Court. The DOJ intervened on behalf of religious liberty in critical SOGI cases in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and an Establishment Clause challenge in *The American Legion v. American Humanist Association*.³⁸

The DOJ also filed briefs in two cases concerning the interpretation of “sex discrimination” in Title VII of the Civil Rights Act, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission (EEOC)*,³⁹ and *Altitude Express v. Zarda*.⁴⁰ In the former case, the owner of Harris Funeral Homes, Tom Rost, is a Christian who believes that we are created male and female. He declined to allow a male employee who identifies as a female to adopt the female dress code and to use private facilities for females. The Court’s interpretation of Title VII could have a significant impact on employers, including religious ones, who believe that marriage is between a man and a woman or that sex is binary. The Department of Justice clarified that the EEOC overstepped its mandate by interpreting sex to mean SOGI and that federal legislation should be understood according to its “ordinary, contemporary, common meaning.”⁴¹

Furthermore, under President Trump, the Department of Health and Human Services has:

Created a New Conscience and Religious Freedom Division. The new division is dedicated to enforcing the numerous federal laws protecting freedom of conscience and religious freedom.⁴² As of April 2019, it had received 343 complaints (compared to the mere 10 complaints received over the course of eight years in the Obama Administration), and is an important step towards more consistent application of the law.⁴³

Issued a Rule to Provide Robust Enforcement of Federal Conscience Protections. The rule revises and strengthens a similar regulation from the George W. Bush Administration that was later rescinded under President Obama.⁴⁴ The Trump Administration’s rule will help ensure that health care providers, professionals, and other health care entities do not face coercion or discriminatory action if they decline to participate in certain activities, such as abortion, assisted suicide, or sterilization, because of moral or religious objections.

Rescinded the Health Care Gender Identity Mandate. In May 2019, the Trump Administration proposed a new rule to clarify that discrimination “on the basis of sex” under Section 1557 of the Affordable Care Act refers to biological sex only, not to a person’s subjective perception of his or her gender identity.⁴⁵ It was a needed corrective to the Obama Administration’s expansion of the term “sex” to mean to include gender identity.⁴⁶ Even though a federal judge blocked the regulation from going into effect through a nationwide preliminary injunction on the basis that the regulation had violated the Administrative Procedures Act and likely violated the RFRA, thereby preventing the rule from going into effect, the clarification provides predictability to both secular and religious medical professionals, hospitals, employers, and insurers.⁴⁷

Granted a Waiver for Faith-based Adoption to Miracle Hill. In January, HHS responded to a request from South Carolina for a waiver from an Obama-era regulation which added the categories of religion and SOGI to a non-discrimination provision in foster care funding.⁴⁸ The Obama-era changes exceeded the scope of the language in the original authorizing legislation which only prevented discrimination on the basis of “race, color, or national origin.”⁴⁹ The waiver from HHS allowed Miracle Hill Ministries to continue placing children with co-religionists.⁵⁰ It is the largest provider in South Carolina for children without special needs and recruits 15 percent of foster families in the state.⁵¹

Rescinded 45 C.F.R. §§ 75.300 (c) and (d) in Title IV-E of the Social Security Act—and Issued a New Rule. On November 1, HHS responded to requests from both child welfare providers, religious liberty advocates, and states by announcing it would rescind the Obama Administration’s problematic addition of “religion,” “sexual orientation,” and “gender identity” to the list of protected classes.⁵² In addition to creating problems for Miracle Hill Ministries, it had created problems for foster care agencies in other parts of the nation. In *Dumont v. Lyon*, the Attorney General of Michigan and the ACLU signed a settlement agreement to stop the state from working with faith-based agencies—citing the Obama regulation.⁵³

The Trump Administration also pledged that recipients of federal funds could continue to follow their own beliefs on marriage. Some agencies described their views on marriage as an essential component of their shared values with families, birth mothers, and children. Without the new regulatory reform, faith-based adoption agencies would have remained vulnerable. Forty Democrats in Congress called on HHS to revoke the waiver to Miracle Hill (mentioned above) and to refrain from granting such waivers in the future.⁵⁴

Proposed a HUD Rule to Protect Privacy and Safety in Homeless Shelters. The Obama Administration implemented a SOGI provision in federal housing called the “Equal Access Rule.” It then created an additional rule based on the Equal Access Rule that granted individuals access to sex-specific shelters for the homeless on the basis of *self-determined* gender identity.⁵⁵ Lawsuits arose in both religious and secular women’s homeless shelters over whether men who self-identify as women can demand access. The Trump HUD proposed a new rule that would allow shelter providers to offer single-sex or sex-segregated facilities, empowering them to protect the well-being of all guests.⁵⁶

Rescinded the Obama Administration’s Gender Identity Mandate in Schools. The Trump Department of Justice and Department of Education (DOE) officially rescinded Obama-era guidance that instructed schools

to treat “sex” as “gender identity” for the purposes of Title IX—forcing them to give access to sex-specific facilities and activities to members of the opposite sex.⁵⁷ A federal judge issued a nationwide injunction that brought this gender identity mandate to a halt, which the Obama Administration then appealed. The Trump Administration withdrew the motion, stating that “in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.”⁵⁸

Proposed a New Rule for Religious Organizations that Partner with the Department of Labor. The new rule ensures that religious entities that partner with the Department of Labor can take into account not only religious belief but “all aspects of religious observance and practice” (per the definition of religion in Title VII of the Civil Rights Act) in their employment decisions.⁵⁹ Religious organizations were reluctant to participate as federal contractors because President Obama issued Executive Order No. 13672, which expanded President Lyndon Johnson’s Executive Order No. 11246 to cover SOGI. The Obama Administration gave contractors guidance that suggested it would narrow existing religious exemptions.⁶⁰

Clarified the U.S. Department of Veterans Affairs Public Religious Displays. The VA clarified that religious symbols, as well as spiritual and pastoral care, are welcome at its facilities.⁶¹ Millions of service members from different religious backgrounds have relied upon their faith and gained encouragement from religious literature, symbols, and displays. No member of the military should have to hide his or her faith when putting on a uniform, nor should our public square be devoid of religious symbols.

Internationally, the Trump Administration has advanced religious liberty by:

Responding to the Islamic State of Iraq and al-Sham (ISIS)’ Genocide. Vice President Mike Pence has spearheaded two initiatives in this regard: (1) the Genocide Recovery and Persecution Response Program, which gave more than \$340 million in aid to religious and ethnic minority communities persecuted by ISIS in Iraq and elsewhere in the region; and (2) the International Religious Freedom Fund, which received nearly \$5 million in pledges and helped more than 1,800 victims of persecution.⁶²

Using the Department of State to Promote International Religious Freedom. Secretary of State Mike Pompeo elevated the office of Ambassador-at-Large for International Religious Freedom to report directly to the Secretary, fulfilling the requirements of the Frank R. Wolf International Religious Freedom Act of 2016.⁶³ Secretary Pompeo and Ambassador-at-Large for International Religious Freedom Sam Brownback hosted two Ministerial Summits to Advance International Religious Freedom, with over 900

representatives from governments, faith communities, and advocacy groups from more than 100 countries. These fora built consensus around combatting apostasy laws, protecting places of worship, and the use of technology regarding religious freedom—as well as focusing on specific countries, including Burma, China, and Iran.⁶⁴ At the United Nations General Assembly (UNGA) in September, President Trump announced an initiative to engage business leaders in protecting religious freedom in the workplace and a \$25 million fund to protect houses of worship and religious artifacts.⁶⁵

Further Opportunities for the Trump Administration

More can and should be done to protect religious freedom at home and abroad. There are unrelenting attacks against the freedom of all Americans to live according to their beliefs in every corner of the public square. Abroad, more than 80 percent of the world's population lives under serious restrictions on their religious freedom. The Trump Administration can build upon the strong record of its first three years with the following initiatives.

Domestically, the Trump Administration should:

Veto the Equality Act and Any Bill Including SOGI Language. Given the widespread, dangerous implications of any federal sexual orientation and gender identity policy, the President should veto the Equality Act—and any bill that includes SOGI language. The law should leave people free to act consistent with the belief that we are created male and female and that male and female are created for each other.⁶⁶ All too often, SOGI policies have been used to punish people who hold these views, despite the Supreme Court's pledge in *Obergefell v. Hodges* not to disparage traditional beliefs about marriage.⁶⁷

Rescind the Equal Access Rule. Homeless shelters are not the only organizations affected by the Equal Access Rule. The 2012 rule, which added SOGI to the Code of Federal Regulations, applies to all HUD-insured and HUD-assisted housing, including housing for families and care facilities for the elderly and disabled.⁶⁸ Given the widespread implications of the Equal Access Rule, HUD should rescind this problematic rule and issue new regulations that reiterate sex discrimination is based on biology, not gender self-identification.⁶⁹

Issue New Guidance on Preferred Pronouns. Although the Trump Administration addressed the Obama Administration's gender identity mandate, it retained the previous policy on preferred pronouns.⁷⁰ In June 2017, the DOE issued a memo stating that it may investigate complaints of “refusing to use a transgender student's preferred name or pronouns.”⁷¹

All students deserve to learn in an environment that is free from bullying and harassment. But that does not mean that the government should treat the viewpoint that sex is binary as bullying. Nor should the federal government compel the speech of teachers or administrators in the presence of students. A public school teacher in Virginia was fired for not using a student's preferred pronoun.⁷² The DOE should issue new guidance clarifying that all teachers, students, and administrators remain free to speak consistent with their beliefs.

Issue Guidance to Clarify the Meaning of "Sex" in Title IX. The DOE should issue clarification that Title IX refers to biological sex, not self-professed gender identity. Although the Obama-era "Dear Colleague" letter was rescinded, problems continue to arise at the state and local levels. In Decatur, Georgia, a 5-year-old female student was sexually assaulted by a male classmate who identifies as gender-fluid in the girls' restroom at school.⁷³ The school adopted a gender-identity bathroom policy without notification to parents who may have objections for either religious or secular reasons.

Strengthen Spiritual Fitness Resources in Suicide Prevention. The DOD can act independently to strengthen spiritual fitness resources for members of the military in order to reduce suicides.⁷⁴

Internationally, the Trump Administration should:

Appoint a Special Adviser on International Religious Freedom to the National Security Council. Section 301 of the International Religious Freedom Act states that there should be a Special Adviser to the President on International Religious Freedom whose position should be comparable to that of a director within the Executive Office of the President.⁷⁵

Appoint an Ambassador to the United Nations Economic and Social Council (ECOSOC). The Trump Administration should work with the Senate to appoint an ambassador to strengthen the ability of the United States to promote the new religious liberty initiatives that President Trump announced at the UNGA. This is a critical time to explain the United States' concerns about the U.N. Secretary General's misguided "hate speech" initiative that threatens to undermine the freedoms of expression and thought, conscience, and religion protected in the Universal Declaration of Human Rights.⁷⁶

The Organization of Islamic Cooperation (OIC) has long-targeted the U.N. for efforts to introduce restrictions on speech that "offend" religious sensibilities. The U.S. opposed the OIC's "Defamation of Religions" resolution under the Bush Administration, but the Obama Administration adopted a compromise.⁷⁷ The Trump Administration should strongly critique efforts to empower supra-national or national actors to censor speech.

Conclusion

All Americans benefit when Congress and the executive branch protect religious freedom because this freedom provides the essential national infrastructure for authentic pluralism and civil discourse. When the government adopts a position whether on marriage or abortion or any other matter, that position should not become a state orthodoxy or an ideological litmus test.

In order for Americans to be able to live according to their consciences, we must be able to disagree on matters of profound importance—like life, marriage, and sex differences. For the benefit of all Americans, the 116th Congress and the Trump Administration should continue removing barriers to the freedom of religious groups and individuals to participate in the public square.

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