Religious Exemptions & Racial Justice:


Religious exemptions have been in the news almost constantly for the last two years. The media coverage usually sets up a standoff of rights: LGBT people and women on the one side, people of faith on the other. This framing of the meaning and scope of the recent call to protect religious liberty is misleading on several counts. First, it obscures the ways in which religious values are, rather than necessarily hostile to the rights of LGBT people and reproductive rights, an important source of commitment to those rights, and it surrenders the domain of religion to ideologically conservative voices. Second, to the extent that conservatives have dominated the call for renewed protections for religious liberty, their articulated concern is in conflict with the rights of LGBT people and same-sex marriage rights. But in doing so they disguise a broader agenda, one that aims at deregulating the economic sphere to such an extent as to necessarily involve undermining the national consensus that religion cannot be used as a justification for non-compliance with laws prohibiting race discrimination. Plausibly organized under the umbrella of religion, the calls for religious liberty legislation come from a coalition of actors whose larger political agenda seeks to dismantle the regulation of businesses more generally, and specifically when it comes to local, state and federal anti-discrimination laws. While backlash against LGBT and reproductive rights might be the legible target of today’s demand to protect religious liberty, the larger political project is one that seeks to reopen the legitimacy of measures that protect racial equality as well, including state public accommodation laws and the federal Voting Rights and Fair Housing Acts, just to name a few.

In this discussion paper our goals are three fold: First, to interrogate and formulate responses to the widely held view that religion is necessarily the enemy of gender and sexual rights. Second, to surface some of the ways that religious exemptions may be negatively impacting communities of color. Third, to brainstorm next steps for furthering work that draws attention to and ameliorates this damage. This discussion paper provides an overview of the ways in which we believe religious exemptions may threaten to have particular impact on communities of color, both directly and indirectly. The paper in no way endeavors to be a

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1 See e.g. Jakobsen and Pellegrini, Love the Sin: Sexual Regulation and the Limits of Religious Tolerance (Boston: Beacon Press, 20014).
complete accounting of such harms or a full elaboration of the questions involved; rather we intend it to establish a baseline of knowledge for attendees and provide a useful starting point for our conversation in person.

**Religious Exemption Overview**

A religious exemption - or religious accommodation\(^2\) - is when an individual or an entity secures a legal right to do something (for religious reasons) that the law would otherwise prohibit or to refrain from doing something (for religious reasons) that the law would otherwise require. Classic religious exemption cases from American history include Amish parents who do not want their children to have to attend high school even when there is a compulsory education law (so they want permission to refrain from doing something otherwise required),\(^3\) and Native American individuals who want to be able to practice traditional religious practices that involve the use of peyote without suffering negative, criminal consequences from the state (so they want permission to do something the law otherwise prohibits).\(^4\) In the United States there are several overlapping frameworks for religious exemptions, on both the state and federal levels. We treat each in turn.

**Federal:**

On the federal level, there are both constitutional and statutory guarantees for religious exemption rights.

First Amendment Guarantees:

The First Amendment to the U.S. Constitution’s protection for the Free Exercise of Religion provides some baseline protection for religious exemptions - the current constitutional standard is that if a law is religiously neutral on its face and is generally applicable, then a person has no right to an exemption from that law on the basis of their sincerely-held religious beliefs. In essence that means that if a law was not passed to target a particular religious group or

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\(^2\) To be precise an exemption is when an individual or entity is excused from an otherwise generally applicable legal requirement or prohibition, and an accommodation is when an alternative act or omission is allowed, but most people use the terms interchangeably, and we do so as well in this memo.


practice, or it is not being enforced to target a particular religious group or practice (even if it was passed without that purpose originally), there is no right to an exemption. This rule was established by the Supreme Court in 1990 in the Employment Division v. Smith\(^5\) case when it took a position on religious liberty rights quite different from the approach it had used for almost 40 years. The earlier standard, often referred to as the Sherbert v. Verner standard, required that government demonstrate a compelling government interest before denying unemployment compensation to someone who was fired because their job conflicted with their religion.

But, if a person can prove that the law was actually passed to target their religious practice, or is being unfairly enforced against their religious practice, then they may be eligible for an exemption; at that point the government must prove that it has a compelling state interest furthered by the law and that the law is narrowly tailored to achieve that compelling state interest. In practice this is a fairly difficult standard for plaintiffs seeking exemptions. Given the existence of the statutory standards discussed in the next paragraph, which are easier to satisfy, current religious exemption claims against the federal government are rarely - if ever - decided on constitutional grounds.

Up until the Smith decision when the Supreme Court narrowed the way in which religious exemptions claims would be treated under the First Amendment’s Free Exercise clause, almost all of the cases decided by the Court involved minority religionists’ requests for an accommodation of their non-majoritarian religious practices (Amish, Seventh Day Adventists, Native Americans, etc.)

In 1993, after public outcry against the Supreme Court's articulation of the constitutional free exercise standard in Smith, Congress passed the federal Religious Freedom Restoration Act\(^6\) (“federal RFRA”), which provides a more accommodating standard for the person seeking an exemption. Under the federal RFRA, which only applies to the federal government, a person need show only that a law imposes a "substantial burden" on their sincerely-held religious belief. This triggers a version of strict scrutiny, in which the government must show that it has a compelling interest in enforcing the law in question against the person seeking the exemption, and that the law is narrowly tailored to achieve that compelling state interest. Prior to Hobby

\(^5\) In Employment Division v. Smith the Supreme Court held that a state could deny unemployment benefits to a person fired for violating a state prohibition on the use of peyote, even though the use of the drug was part of a religious ritual. 494 U.S. 872 (1990).

Lobby v. Burwell,\(^7\) which was decided in June 2014, there had been limited use of the federal RFRA and even less public knowledge about it, but the Hobby Lobby decision reinvigorated RFRA both as a legal tool and as a subject of media interest.

In addition to RFRA, there is a companion law called the Religious Land Use and Institutionalized Persons Act (RLUIPA),\(^8\) which applies the RFRA standard to certain land use cases and to cases that prisoners bring challenging the conditions of their confinement as burdening their sincerely held religious beliefs.

**State:**

Like the federal government, many states have both state constitutional free exercise provisions and state statutory religious exemption laws. Some state constitutional provisions are identical to the federal standard and some vary: Some of them are construed more broadly than the current federal standard (the rest are deemed coextensive, or the state supreme court has never addressed the question).

In addition to state constitutional protections, 21 states have their own state versions of the federal RFRA. The text of the state RFRAs vary dramatically. Some are identical to the federal RFRA – but many are not. The federal RFRA, for instance, requires a "substantial burden" on a sincerely held religious belief to trigger its protections, but some of the state RFRAs only require "a burden," or “a likely burden,” that is, a concern about an imagined burden in the future without any requirement that the burden be serious in nature or that it be a real, rather than a supposed, harm.\(^9\) To take another important example, the federal RFRA only applies to disputes between a private party and the federal government. While some of the state laws likewise are limited to cases involving the state government, some of them allow the state RFRA to be used as a defense in a dispute between private parties.\(^10\) This means that a business in a state that has an LGBT non-discrimination law but that does not want to serve LGBT individuals, for example, might be able to use RFRA as a defense if sued for discriminating against that person, by arguing that although the law prohibits their business from discriminating

\(^8\) 42 U.S.C. § 2000cc.
\(^9\) Ala.Const. Art. I, § 3.01; C.G.S.A. § 52-571b.
against LGBT people, the law shouldn’t apply to them because their religion instructs that homosexuality is a sin.

**The False Dichotomy Between Religion and Rights**

Among the most nefarious maneuvers made by the advocates of broad protections for religious liberty is the wedge they have placed between “religion” on the one hand, and “sexual and reproductive rights” on the other. In important respects the advocates for state RFRAs have made a persuasive case that people of faith, or religion more generally, are being discriminated against, and that the recent successes of the LGBT rights movement, or more correctly the marriage equality movement, have resulted in the minoritization and persecution of people who hold “religious values.”"11 New laws must be passed, the argument goes, in order to “restore” religious liberty that is supposedly now under threat.

This rhetorical strategy, of course, obscures, if not denies, the important role that religion and religious values have played in building and defending a culture of civil rights in the U.S. and elsewhere. So too, it overdetermines “religion” as a particularly narrow set of values that necessarily stand in opposition to the rights of LGBT, women, and reproductive rights. More progressive voices in communities of faith have worked hard, yet still struggle, to shape a broader and more inclusive notion of what counts as religious values. This effort has been particularly fraught within communities of color, which are seen as heirs of the civil rights struggles of the 1960s but also as especially opposed to marriage equality.

Unfortunately, some LGBT advocates and groups have, perhaps unwittingly, collaborated in this narrow framing of religious values, taking for granted the notion that “religion” is always a foe of gay rights, or failing to appreciate the ways in which faith-based communities have a rich history of social justice organizing and can be an invaluable partner in working to resist overly broad interpretations of religious “freedom.” This has had the effect of creating an additional wedge between those who are working to protect gay rights and communities/leaders/individuals of faith.

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In Georgia a coalition of actors recently worked together to defeat a particularly broad RFRA, drawing into the campaign many African American ministers such as Dr. Kenneth Samuel, the Pastor for the World Church in Stone Mountain, who insisted that “People of faith already have religious protections. The freedom we have in place does not give any of us the right to harm others. This proposed legislation will do harm to others in the name of religion.”12 A coalition of faith leaders, many of whom were people of color, penned a letter opposing the Georgia RFRA.13 The success of this partnership in Georgia in defeating a false dichotomy between religious values and sexual/LGBT rights is worth learning from and building upon in other contexts where the two are seen in ineluctable opposition.

Direct Impacts on Racial Justice:

The first way in which the religious exemption laws described above may impact communities of color is that there is a real and present danger that religious exemptions could be used to excuse compliance with civil rights laws that prohibit discrimination on the basis of race and other grounds. When advocates defend the need for the new RFRA or more limited bills that focus specifically on allowing businesses not to participate in LGBT weddings, they often state, as did Louisiana Governor Bobby Jindal in a recent New York Times op-ed,14 that these laws are needed to protect business owners from being forced to participate in same-sex marriages when doing so would offend their religious beliefs. Yet, few of the new statutes/executive orders being introduced in or passed by state legislatures is limited to the context of same-sex marriage or even LGBT rights (Louisiana’s bill focuses specifically on objections to marriage equality). These laws usually grant a broad right to be exempt from

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compliance with any state law if the law burdens a person’s religious beliefs. (See the attached scenarios where these new RFRA rights might be invoked.)

In fact, we have already seen efforts to use state RFRAs as a “license to discriminate” on the basis of race. In recent months internet chat rooms and Twitter threads have seen a rise in questions such as: “can a caterer refuse to cater an interracial marriage?” or “shouldn’t a business owner be allowed to pick their customers based on their conscience?” Keith Bardwell, a Louisiana justice of the peace, was forced to resign his office after he refused to marry an interracial couple. He, like the proponents of the current exemptions, argued that the couple could find another justice of the peace to marry them, one whose conscience was not burdened by the immorality of interracial marriage. When state officials advised him that could not continue to discriminate while holding public office, he commented: “I found out I can’t be a justice of the peace and have a conscience.”

In *Hobby Lobby*, the most recent Supreme Court articulation of the RFRA standard, the majority opinion, written by Justice Alito, went out of its way to “distinguish” the Affordable Care Act from laws guaranteeing freedom from race discrimination. According to the Court, there was no need to fear that RFRA could be used to get out of compliance with laws prohibiting discrimination based on race because, “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”

That sounds reassuring, but it's so vague and broad as to be almost meaningless. In legal terms, this was "dicta" - meaning it was language in the opinion that was not actually required for the court's ultimate decision, and as such, it has no binding force. The Supreme Court cannot decide issues that are not in front of it, so simply saying that prohibitions on racial discrimination are "precisely tailored" provides no protection for a race discrimination law if one actually comes


16 Bardwell is not alone in refusing to marry interracial couples. See also: David Greenberg, “White Weddings: The incredible staying power of the laws against interracial marriage,” *Slate*, June 17, 2008; Michael Biesecker, “GOP leader: NC officials can refuse to marry gays,” *The News and Observer online* (Raleigh, North Carolina), October 21, 2014 (“In 1977, AP reported that two Forsyth County magistrates refused to marry a black man and a white woman, nearly 10 years after the U.S. Supreme Court declared state bans on interracial marriage unconstitutional.”).


before the court being challenged by a plaintiff seeking a religious accommodation. And in fact, the way that the federal and state RFRAs are written, they could quite clearly be used to challenge prohibitions on race discrimination if a plaintiff is willing to claim that their free exercise of religion requires that they be allowed to discriminate on the basis of race. Whether or not the claims would win is impossible to predict, but there is simply no clear or obvious bar to using a RFRA to challenge race discrimination laws.

So it's possible - and more than that, it's a very real practical possibility. We should not forget that historically, religion and free exercise were used as reasons that objectors should not have to comply with the Civil Rights Act of 1964. As late as 1983, Bob Jones University took a case to the Supreme Court arguing that it should not have to comply with race non-discrimination requirements for educational institutions in order to maintain its tax-exempt status.19

Religious exemption supporters like the Becket Fund are pursuing a broad libertarian agenda that seeks to undermine all government regulation of the market. One novel strategy in this approach being pioneered by the Becket Fund is undermining state civil rights commissions - which are often the easiest way for a victim of discrimination to bring a claim for redress under state or local law. In one case, a business that had refused to work with an LGBT couple on their wedding for religious reasons responded to a complaint that the couple filed with the Iowa Civil Rights Commission by filing a suit in state court to block the administrative process.20 This kind of tactic, where a business does a “run around” the civil rights commission, is designed to undermine the authority of these commissions to adjudicate claims of discrimination – whether it be sexual orientation, race, religion or other forms of prohibited discrimination. This tactic increases the costs of litigation to plaintiffs and creates delays in resolution - all of which are particularly burdensome to low-income plaintiffs. Even more, if successful, these cases seek to diminish the power of administrative agencies to address and remedy discrimination. These agencies are an incredibly important public resource for low-income people and people of color to turn to in their efforts to address individual and systemic forms of bias. Given that these agencies are mandated to accept complaints of discrimination and are then required to investigate and prosecute those complaints, they provide an important form of justice to classes of people

who cannot afford private counsel. The Beckett Fund and other groups’ efforts to undermine the power and authority of these agencies in the name of religious liberty is part of a broader effort to underfund, understaff, and limit the jurisdiction of administrative agencies charged with enforcing local civil rights laws. If this type of strategy becomes widespread and is successful, it will create precedent that would apply to any kinds of discrimination claims that state civil rights commissions normally handle – including but not limited to race discrimination.

**Indirect Impacts on Racial Justice**

In addition to the potential for religious exemptions to directly undermine prohibitions on race discrimination, there are ways in which religious exemptions may have disproportionate impact on communities of color even when the exemptions are not to allow direct discrimination on the basis of race. In this section we treat two areas of potential concern: the impact of religious exemptions in healthcare provision, and the impact of religious exemptions in employment and employment benefits.

Religious exemptions in healthcare have a disproportionate impact on women in their reproducively fertile years, and a particularly disproportionate impact on low-income women, who are disproportionately likely to be women of color. Women of color are three times more likely to be poor than white men, and 1 in 4 black women live in poverty - the rates are even higher for black women who are married heads of households with children.\(^{21}\) Low-income women and women of color are particularly vulnerable to harm from religious objections because of their limited access to healthcare resources and their dependence on partially or fully subsidized health care, which is often delivered by religiously-affiliated hospitals or clinics that have religious objections to providing reproductive health care. This problem may be particularly acute for rural women of color, who are often concentrated in states with more conservative religious (more specifically, conservative Christian) cultures. In rural communities religious

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health care exemptions can be particularly burdensome because of a lack of other health care alternatives within a reasonable area, particularly for emergency reproductive health care.\textsuperscript{22}

Religious objections or exemptions in the health care sector can affect any aspect of reproductive health care. Objection to participating in providing abortion services is specifically covered by many federal and state laws, and some states have specific laws that cover reproductive health care refusals more broadly. These existing laws have established a baseline that treats reproductive healthcare differently from other forms of healthcare and legitimizes the refusal to provide reproductive health care services.

The recent prosecution of Purvi Patel in Indiana provides a salient example of the way in which religion and criminal law can collaborate to disproportionately target women of color and immigrant women, addressing their reproductive health needs as matters that deserve criminal rather than medical attention. Purvi Patel was arrested in July 2013 after she went to the emergency room at St. Joseph Regional Hospital in Mishawaka, Indiana, bleeding heavily after a miscarriage. Rather than medically treat her presenting condition, the hospital doctor reported her to local law enforcement, on the ground that her miscarriage amounted to “feticide” and criminal neglect of a child. St. Joseph Regional Hospital, a Catholic hospital, had the only emergency room in her community, and Ms. Patel was treated by a pro-life physician and member of the American Association of Pro-Life Obstetricians and Gynecologists, who reported her to the police rather than treat her.\textsuperscript{23}

The case of Tamesha Means is another sobering example. Tamesha's water broke when she was 18 weeks pregnant and she was rushed to Mercy Health Partners, a Catholic Hospital. Tamesha was in excruciating pain and termination of her pregnancy was the safest option to prevent sepsis, but because of the Catholic directives for care, the hospital sent her home twice without informing of her options. She presented a third time with a serious infection and the hospital was still prepared to send her home again; it was only because she went into labor and


began to deliver that the hospital finally treated her. The ACLU is representing Tamesha in a suit against the hospital, but it is easy to imagine there are many more women who suffered similar - or worse - fates and did not have the luck or resources to access legal representation.

These kinds of scenarios are tragically common. As of the latest comprehensive figures compiled by MergerWatch and the ACLU, 1 of 9 hospital beds in the country was in a Catholic Hospital, and 10 of the largest 25 health-care networks were Catholic. While Catholic healthcare is not the only site of religious objections to reproductive health care, Catholic health care directives make it an unusually dispersed but uniform problem. As Merger Watch has noted, “Low-income women are disproportionately affected by these religious health care restrictions because they tend to be more dependent on hospitals and hospital outpatient clinics for their health care.”

State RFRAs have the potential to drastically broaden the scope of allowable reproductive health refusals, going far beyond the provision of abortion services to objections to having any role in treating patients who have had abortions (even simply supervising their recovery, or dispensing medication). Moreover, they may allow exemptions to state laws that require provision of a standard range of reproductive health care, including contraception, family planning counseling, emergency contraception, treatment of ectopic pregnancies, or miscarriage management. Recently an uproar has erupted over the refusal by religious social service providers to provide the full range of reproductive health care to migrant minors, almost all people of color, despite receiving government contracts to care for them.

A similar spectrum of refusals and discrimination is experienced by LGBT people, disproportionately LGBT people of color, who access or are required to participate in a wide range of services through private agencies contracted to provide social services with public funding. Publicly funded services for drug treatment, homelessness, job training, criminal diversion, transition out of trafficking or sex work, and a wide range of other programs are often

provided by private, faith-based, organizations whose religious mission entails condemnation of homosexuality as a sin. These agencies, by virtue of their religion-based charter, are potentially exempt from laws that prohibit discrimination on the basis of sexual orientation or gender identity.

Another site of disproportionate impact for communities of color is employment. Religious exemptions in conditions and benefits of employment have a newly heightened profile after the *Hobby Lobby* case, and can take several forms. Such exemptions may, like *Hobby Lobby*, involve objections to providing various forms of insurance coverage, whether for particular types of services like contraception, abortion, or artificial reproductive technology, or for particular groups of people, like domestic partners or civil union partners in states that do not have marriage equality. To the extent that communities of color are disproportionately low-income and therefore dependent on the provision of health insurance benefits in order to access certain kinds of healthcare (whether through an employer or individual health care purchased under the Affordable Care Act), these exemptions have a disproportionate impact on their health and wellbeing.

**Conclusion**

Recent calls to enhance the protection of religious liberty rights have gained traction due to the success of a strategy that portrays religion and people of faith as persecuted or subject to discrimination. This strategy misleadingly overdetermines religious values as necessarily opposed to LGBT and reproductive rights. There are important lessons to be learned both from the success of this rhetorical framing of religion, and from the organizing that has effectively deployed clergy and other people of faith to give truth to this lie.

What is more, religious exemptions currently have a disproportionate impact on communities of color, particularly on women of color and on LGBT individuals of color who are more likely to be low-income and to depend on access to subsidized healthcare, insurance benefits, and low-cost state administrative processes for civil rights violation remedies. The

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expansion of religious exemptions – and the libertarian agenda they often serve – also has the potential to undermine core civil rights guarantees of racial equality. Religious exemption doctrine has no intrinsic or internal limitations that would protect civil rights laws from claims for religious exemptions. In that sense, those working to resist religious exemptions on the policy and legislative level have work in common with those fighting for racial justice, equality, and access to services.