



401 Ninth Street, NW, Suite 640
Washington, DC 20004
+1 619 646 2191
www.secularpolicyinstitute.net

25 August, 2016

House Judiciary Subcommittee on Constitution and Civil Justice
The Honorable Trent Franks, Chairperson
The Honorable Steve Cohen, Ranking Member

Dear Representatives Franks and Cohen:

When it passed, the Religious Freedom Restoration Act of 1993 (RFRA) was celebrated by groups traditionally opposed to each other on many social issues, including and especially the debate over church/state separation. 1993's RFRA has served to protect many good intentioned people from having their religious exercise substantially burdened by the State. That being said, 1993's RFRA has taken on a new character, that of a tool targeting certain marginalized groups in the name of "protecting religious conscience." Representatives Joseph Kennedy III (D-MA) and Bobby Scott (D-VA) have introduced an adjustment to the Federal RFRA seeking to balance its core principles of the freedom of conscience and religious exercise while protecting the rights of others; more specifically, traditionally marginalized groups (e.g, LGBT persons). The Do No Harm Act seeks: "To amend the Religious Freedom Restoration Act of 1993 to protect civil rights and otherwise prevent meaningful harm to third parties, and for other purposes." We the Secular Policy Institute, a secular government think tank and human rights advocacy organization, and our undersigned affiliates support the "Do No Harm Act" (H.R. 5272) and urge you to do the same.

The history of religious liberty in the United States has seen its share of redefinition. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" the second, "Free Exercise" clause has been the subject of an ongoing dialogue between the extent of personal freedom and social and legal responsibility. In *Reynolds v. U.S.* (1878) when polygynous (one man, multiple wives) marriage in the Church of Jesus Christ of Latter Day Saints was being challenged, U.S. Supreme Court Chief Justice Morrison Waite said that for a person to put their religious exercise before valid secular law was for that person to "make himself a law unto himself." The contours of Free Exercise evolved by distinguishing the insuperable freedom to believe vs. the non-exclusive freedom to act (*Cantwell v. CT* [1948]), that the government mustn't "substantially burden" the religious exercise of individuals (*Sherbert v. Verner* [1971], *Wisconsin v. Yoder* [1972]), that "not all burdens to religion were unconstitutional" when violating "fundamental public policy" (*Bob Jones*

University v. U.S. [1983]), and through the late Associate Justice Antonin Scalia citing Chief Justice Waite in his 1993 *Employment Division v. Smith* decision. Justice Scalia said that religious exercise must comport with neutral and generally applicable law.

This of course prompted Congress to issue the 1993 RFRA to re-implement the *Sherbert* and *Yoder* substantial burden tests. Since 1993 there have been two waves of RFRA's. The first being after the Court decided that RFRA 1993 only applied to the Federal government. Over the next two decades, 20 states adopted their own RFRA's (mirroring the original). That was until the *Hobby Lobby* and marriage equality cases. Since these landmark decisions we have seen RFRA's change from subtle channels of discrimination to outright tools of hostility toward the protected rights and liberties and marginalized individuals and communities. One of the most pernicious aspects of RFRA development, is that they have removed the government as the active party in discriminating against liberty itself. These laws have mutated, allowing individuals to discriminate against other individuals, shielding those discriminating from civil penalties placed otherwise upon everyone else. Laws relating to liberty no matter how well intentioned at their outset may need tinkering from time to time in order to make them work for the people they are intended to protect and to protect those people whose lives and liberties they were never directly intended to harm.

Though much of the adverse outputs of RFRA's are state-based, the Federal RFRA still has much influence and authority. The "Do No Harm Act," seeks to preserve the liberties of religious exercise while protecting the rights of others. This is done by amending the Federal RFRA to be in line with Justice Scalia's "neutral and generally applicable" ruling in the *Smith* Court. When implemented this would bolster the coverage of established civil rights law including the Civil Rights Act of 1964, Americans with Disabilities Act, the Family Medical Leave Act, the Violence Against Women Act, the Department of Housing and Urban Development's "Equal Access to Housing" rules. Most importantly this restricts the ability of individuals to "become a law unto themselves" in picking and choosing which laws they follow.

As the language of RFRA's have developed, they have expanded beyond individual persons and extended to corporations and institutions; they also have expanded beyond religion to include "deeply held moral convictions." RFRA's have also expanded to include virtually any type of belief as not requiring that said belief be central or compulsory to a larger system of belief or religion. This renders RFRA's essentially as vehicles for individuals and corporations to determine arbitrary the laws designed to protect others and allows them to claim availability to pick and choose which ones they follow under the cover of "religious liberty." This is truly a peculiar species of legislation which confers the right upon certain individuals to wantonly ignore laws critically important to protecting the liberties and civil rights of others. This is not merely an unestablished fear, RFRA's have been and are currently being used to discriminate in

housing, employment, healthcare, and also allows government officials to refuse to perform their sworn duties.

The Secular Policy Institute and our undersigned affiliates call on the Subcommittee on Constitution and Civil Justice to send the Do No Harm Act (H.R. 5272) to the House Floor and support its passage.

Yours Sincerely,

A handwritten signature in black ink, appearing to read "Jason Frye". The signature is fluid and cursive, with the first name "Jason" and last name "Frye" clearly distinguishable.

Jason Frye, CEO
Secular Policy Institute
401 Ninth St., NW, Suite 640
Washington, DC 20004
jason@secularpolicyinstitute.net
(619) 646-2191