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Institutional Religious Freedom Includes Freedom in Serving Others

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This Cornerstone Forum series, in which this article is the fourth, is published under RFI's Freedom of Religious Institutions in Society (FORIS) Project. FORIS is a three-year initiative funded by the John Templeton Foundation to clarify the meaning and scope of institutional religious freedom, examine how it is faring globally, and explore why it is worthy of public concern. This series aims to address the second project focus — i.e., examining how institutional religious freedom is faring globally — through articles that delve into political, legal, and social conditions affecting religious institutions in a particular country.

Today's most vexing problems about freedom of religious institutions in the United States concern religious nonprofits that provide social or educational services to others. Such problems, like many others, are currently superseded by the overwhelming health and economic effects of COVID-19. But the issues will return. And the services religious nonprofits provide will be important in responding to and recovering from the pandemic.

Nonprofits pose complex religious freedom questions because they often straddle the perceived boundary between public and private. Decisions by houses of worship and decisions about clergy get very strong protection because they are regarded as private, involving ministry to the faithful, not the general public. Conversely, some religious organizations serve the public with no conflicts between their own norms and those required by law.

Some organizations, however, employ or serve people outside their faith but also encounter religious freedom issues because their tenets clash with general laws on immigration, nondiscrimination, or other matters. Consider progressive groups that provide sanctuary or aid to undocumented immigrants, or Catholic adoption or foster agencies that decline to certify same-sex households for child placement, or religious colleges that assign student rooms by biological sex at birth. I call such organizations "partly acculturated"—they provide services of secular value to the broader culture, but some of their religious norms clash with dominant cultural values reflected in law. Some critics oppose protecting religious organizations in such situations. They argue that when an organization hires or serves people outside its faith, it must be subject to most or all rules the government sets. The Obama Administration's 2011 contraception-insurance mandate initially reflected this outlook. Its exemption for objecting organizations covered only congregations. All faith-based schools and organizations offering social services fell under the coverage mandate

because they serve non-adherents. (The exemption was later expanded.) Catholic foster-care and adoption agencies have been excluded from programs in Michigan and Philadelphia; the latter case is now before the U.S. Supreme Court.

I've argued previously that partly acculturated activities deserve significant protection. Religious freedom includes ***freedom in serving others***. The law should not force organizations to be either wholly unacculturated—serving only their own members—or wholly acculturated—subject to all regulations no matter how serious the clash with their beliefs.

I make this argument because service to the general society, motivated by distinctive religious norms, is a central, familiar aspect of "exercis[ing] religion" under the First Amendment. Precisely because of their commitment to sometimes unpopular norms, partly acculturated groups may offer distinctive vigor in serving others—whether progressives assisting stigmatized migrants or Catholic agencies placing special-needs children.

The proper scope of religious freedom in serving others presents challenges, because effects on non-adherents of course matter. Certainly, in today's pandemic, even-handed public-health rules limiting assemblies are justified. But the ongoing issues about nondiscrimination affect organizations' employees or clients. There we can rely on two limits: (1) reasonable notice to those persons concerning the organization's religious identity, and (2) alternative providers of the services or opportunities in question. For example, manifestly religious colleges do not need to be penalized for adhering to their tenets when prospective students have many other educational choices.
Three bills, discussed below in more detail, have been introduced in Congress addressing issues concerning sexual orientation and gender-identity (SOGI) discrimination versus traditionalist organizations' religious freedom. Unsurprisingly in our polarized times, two of the bills protect one side and not the other, dismissing the claims of either religious traditionalists or LGBT persons and reinforcing polarization. But a third proposal makes a serious, if imperfect, effort to protect both sides.

The Equality Act

The Equality Act (EA), which was approved by the House but stalled in the Senate, comprehensively prohibits SOGI discrimination in employment, education, federally funded activities, and commercial businesses serving the public. The EA commendably protects LGBT people's equality. But it shows no respect for traditionalists' religious freedom.

The prohibition on employment discrimination imposes liability on religious organizations that believe an employee's transgender or same-sex activity cannot model the organization's faith. It provides no defenses, and preexisting ones are uncertain. Current law permits religious organizations to prefer "individuals of a particular religion" in employment, which courts have held includes preferring individuals who adhere to religiously based standards of conduct. But LGBT-rights proponents argue that this exemption applies only to claims of religious discrimination, not separate claims of SOGI discrimination. On that point, current law is uncertain.

Religious organizations might also argue they can require adherence to a conduct standard because it is a "bona fide occupational qualification" (BFOQ). But the U.S. Supreme Court says the BFOQ defense is "extremely narrow," applicable only when the characteristic involved affects the

employer's "central mission." One can imagine a court unsympathetic to traditionalist sexual ethics saying that an employee who violates them can still perform the job.

The EA also subjects organizations receiving federal funds to SOGI nondiscrimination rules in all their operations. This covers virtually all private colleges, for example, because their students receive federal grants or loans. It would not matter that Title IX, which prohibits sex discrimination in federally supported higher education, contains an exemption for religious organizations. The EA creates new liability under a separate section, Title VI, which has no exemptions; and the EA creates none.
Indeed, the EA strips religious organizations of protection they previously had. It removes the Religious Freedom Restoration Act, an important source of protection, as a defense against any nondiscrimination claims.

First Amendment Defense Act
Religious traditionalists also have a proposal that gives the other side no protection. The *First Amendment Defense Act (FADA)* would forbid the federal government to "take any discriminatory action" against anyone who acts "in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, [or that] sexual relations outside marriage are improper." The forbidden actions include penalties or withdrawal of tax exemptions or other benefits.

FADA broadly shields traditionalist organizations. Because it has no limit based on "compelling" interests in nondiscrimination, very large for-profit corporations would have protection if they're closely held (although not if publicly traded)—even though large companies' policies could significantly affect LGBT persons. More importantly, the bill does nothing to protect LGBT persons.

Fairness for All
In contrast, a recently introduced third bill—*"Fairness for All" (FFA)*—would couple prohibitions on SOGI discrimination with meaningful exemptions for religious organizations and individuals. It is not perfect, and it faces serious political opposition. But this bill reflects a serious effort to protect both sides.

As to rules concerning employment, FFA would exempt not only congregations but also educational institutions as well as other tax-exempt religious nonprofits if the latter "emplo[y] only individuals of the employer's religion." That quoted limitation may seem to raise the problem described above: it withholds any protection from organizations that employ or serve people outside their faith. But the limitation may not be severe. As already noted, a similar existing exemption—for preferring "individuals of a particular religion"—has been read to allow employers to define their "religion" to include not only affiliation with the group but adherence to its conduct standards. The question was whether that exemption applied only to religious-discrimination suits. FFA clearly creates a parallel exemption for SOGI-discrimination suits.

In prohibiting discrimination in federally funded programs, FFA adds safeguards for participating religious organizations. They may have religious displays in areas where programs occur and may conduct internal governance according to religious criteria. Schools and daycares may "enforce … written religious standards" in admissions, curriculum, student retention, and residences. Providers

of marriage/family education may include religious content in a funded activity if they make "reasonable efforts" to refer objecting beneficiaries to alternative providers.

For adoption and foster providers, FFA protects religious freedom differently: it does not exempt religiously motivated conduct but excludes certain conduct from liability whatever its motivation. Under FFA, prospective parents would receive a certificate that they could use to pay a child-placement provider. The provider may decline upfront to accept a child or family, but only if it refers them to a willing provider nearby and the relevant state has policies to increase the number of qualified providers. Once the provider has accepted a parent or child, it may not discriminate afterward based on race, sex, SOGI, or other characteristics.

This arrangement gives full protection to neither side, but meaningful protection to both. The traditionalist organization has to make decisions upfront and provide referrals, but within those constraints it can avoid violating its beliefs. Parents and children would be subject to refusal—but with referrals. A careful religious exemption might balance the interests better, but some people see exemption as symbolically validating the religious objector's view. I disagree with that objection; but changing the basic rule instead may be a pragmatic step to avoid it.

Constitutional Protection

SOGI nondiscrimination might become federal law without statutory religious freedom protections if the Equality Act passes—or if the U.S. Supreme Court rules in pending cases that SOGI discrimination is already illegal as a form of discrimination "because of sex." Traditionalist religious organizations then would have to fall back heavily on constitutional protections.

That brings up another of the Court's pending cases, which involves Philadelphia's policy of excluding foster-care agencies that decline to provide explicit certification of same-sex households for placement of children. A major issue in that case is whether the Court should overturn its 1990 ruling (*Employment Division v. Smith*) that the Free Exercise Clause gives no protection against laws that are "neutral and generally applicable." Those are the very laws that can seriously burden a religious organization that serves others in society based on its distinctive norms.

If the Court reinstated some protection for religious organizations against generally applicable laws—meaningful, although not absolute, protection—the fact that multiple other foster-care agencies are typically available and happy to certify same-sex households would be relevant. So, too, would be the fact that Catholic agencies, like many others, occupy a distinctive niche in a diverse overall group of providers. Protection based on those facts would point the way toward balancing LGBT rights and institutional religious freedom.

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