



One Year Later: The Impact of President Trump's Executive Order Protecting Religious Liberty

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SUMMARY:

May 4th of this year marks the one-year anniversary of President Trump issuing his Executive Order Promoting Free Speech and Religious Liberty – an achievement that has had a tangible impact on the protection and priority of religious freedom throughout the executive branch over the past twelve months. In addition to policy changes at the U.S. Department of Agriculture (USDA) and the Department of Justice (DOJ), and better policy outcomes at the Department of Defense (DOD), its impact includes specific policy changes at the Department of Health and Human Services (HHS) which accomplished the following:

- Enabled at least 44 schools that provide an education for over 148,000 students to continue operating,¹ and
- Protected entities which are part of umbrella groups annually providing approximately 13.7 million people with health care and other social services.²

While more remains to be done, the executive order significantly advanced religious freedom and should be celebrated on its one-year anniversary. As we mark this occasion, let us look back and observe how the executive order led to increased religious freedom protections for all.

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What Did the Executive Order Say?

The executive order opens by stating that “[i]t shall be the policy of the executive branch to vigorously enforce Federal law’s robust protections for religious freedom,” for our “Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government.”³

Therefore, it continues, “[a]ll executive departments and agencies (agencies) shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech.” This includes protecting churches and other organizations from being targeted because they speak on “moral or political issues.”⁴

Additionally, it instructed the executive branch to consider how best “to address conscience-based objections” to the HHS contraceptive mandate.⁵

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Finally, “[i]n order to guide all agencies in complying with relevant Federal law, the Attorney General shall . . . issue guidance interpreting religious liberty protections in Federal law.”⁶

What Was Its Impact?

The executive order led to multiple federal executive branch agencies, including the USDA, DOJ, and HHS, to follow up with their own specific guidelines, standards, and regulations which further protect religious freedom. It also led to these and other federal agencies taking steps to protect religious freedom, including both case-specific actions and systemic changes.

Department of Agriculture Religious Freedom Protections

Mere days after President Trump signed the executive order last year, USDA Secretary Sonny Perdue issued a policy statement affirming a “commitment to safeguarding every American’s First Amendment rights, particularly the right to free speech *and* the right to free religious exercise.”⁷

The USDA’s Food Safety and Inspection Service (FSIS) then affirmed the protections in more detail by noting in a memorandum that “employees” and “supervisors” alike are “free to engage in speech about religion,” and “may also express their sincere religious views without fear of sanctions.”⁸ It continued, “[e]mployers in facilities that are inspected by USDA may wish to display religious icons, religious pamphlets, or faith-based messages in publicly available work areas or on public websites. Others may support employee religious organizations and openly express their own religious beliefs or practices in the workplace. USDA employees must act to avoid the limiting or chilling of protected speech.”⁹ The FSIS memo then included some examples of religious expression.¹⁰

Subsequently, the USDA clarified with more specificity that its policy protects religious expression on the topic of sexuality: “[o]pinions about same-sex marriage, gender identity, and sexual morality are all matters of public importance. Moreover, people often have different perspectives on these topics, which are sometimes informed by their religious beliefs, and feel the need to discuss them. USDA respects the First Amendment rights of USDA personnel, as well as non-USDA personnel working at facilities inspected by USDA, to share their varying viewpoints on these topics, whether through oral discussion, the display or distribution of literature, or other means.”¹¹

Impact: People like Donald Vander Boon are protected by the executive order

Donald Vander Boon is a man of faith and a small business owner in Michigan who runs a meat packing facility employing 45 people. During our nation’s same-sex marriage debate, he wanted to leave literature expressing pro-natural marriage views in his breakroom. But USDA officials, operating off an “anti-harassment” policy implemented by the Obama administration, threatened to remove USDA inspectors (which would shut down Mr. Vander Boon’s facility) unless he removed the literature from the breakroom table. Mr. Vander Boon only received relief after President Trump entered office and issued the executive order, which caused the USDA to issue several policy statements and subsequent clarifying guidance which clearly protects the religious freedom of Mr. Vander Boon and those in similar situations.¹²

Department of Justice Religious Liberty Guidance

Following the instruction in the executive order that the Attorney General “issue guidance interpreting religious liberty protections in Federal law,” the Department of Justice issued a memorandum containing

this guidance entitled “Federal Law Protections for Religious Liberty” on October 26, 2017. Working off of 20 enumerated principles, the Guidance explains the legal framework of religious liberty in detail and illuminates for other executive branch agencies how religious liberty is protected in federal law.¹³

In addition, following the issuance of the executive order, religious freedom was given more priority in the Department of Justice.

Impact: DOJ is now backing the religious freedom of people like baker Jack Phillips in court filings

The DOJ has weighed in with the Supreme Court in favor of religious freedom in multiple cases, including that of baker Jack Phillips, who faces adverse action by the State of Colorado for declining to create a custom same-sex wedding cake.¹⁴ The DOJ’s message to courts that it favors protecting the religious freedom of people in the position of Jack Phillips shows that the executive branch is prioritizing the First Amendment and religious liberty.

Department of Health and Human Services Contraception Mandate Exemption

Following the instruction that the federal government consider how best “to address conscience-based objections” to the HHS contraceptive mandate, on October 6, 2017, HHS issued rules which would protect religious organizations (such as the Little Sisters of the Poor) and other groups from having to compromise their faith or moral convictions or face millions of dollars in fines.¹⁵

Impact: Those with conscience objections to the HHS mandate are now much better off due to the executive order

A multitude of religious organizations, charities, schools, and other groups and individuals have been tied up in years of litigation against the Obama administration’s HHS contraceptive mandate that was issued following the passage of the Affordable Care Act. Despite the serious conscience concerns of these individuals and entities, the Obama administration refused to allow them to opt out of being forced to provide contraceptives and abortion-causing drugs and services against their beliefs.¹⁶ Only after President Trump issued the executive order, and HHS followed up by authorizing a meaningful exemption to the HHS contraception mandate, could these conscientious objectors rest a bit easier. While the exemption itself is still being challenged in court by activists who aren’t content to let the Little Sisters and others have their freedom, and the regulations authorizing the exemption are halted for now, those covered by the exemption and the people they serve can know HHS is working to ensure they are protected.

Many organizations are now covered by the exemption and will remain free to serve. At a minimum, this includes the 354 organizations and individuals affiliated with them who have challenged the mandate in court.¹⁷

Among these organizations are 44 schools that provide an education for over 148,000 students.¹⁸ These students would be in jeopardy of losing their educational opportunities if not for the Trump administration’s action to protect them.

Among these organizations are numerous public service organizations, part of umbrella groups helping to ensure that approximately 13.7 million people continue to receive health care and other social services. Catholic Charities USA – the umbrella group for the many local Catholic Charities which joined the HHS mandate litigation – served over 8.7 million people throughout the United States in 2014 alone.¹⁹ Additionally, nationwide, Catholic health care providers – many of whom became involved in this

litigation because they didn't want to compromise the tenets of their faith—serve one of every six hospital patients in the United States.²⁰ Recently, in a one-year period, they collectively admitted over 5 million patients, and employed over 600,000 people.²¹ Add these 5 million patients to the 8.7 million served by Catholic Charities, and that is the number aided by the executive order and subsequent HHS exemption even when considering only several large umbrella groups operating within a one-year timeframe.

If the new HHS rule had not been issued, these millions of people would be in greater jeopardy. While not all local religious providers and chapters joined the litigation against the mandate, all who want to exercise their beliefs would be put in greater jeopardy absent the new HHS rule. Moreover, because these numbers are drawn from only a few specific groups, they conservatively estimate the number of people who would be affected if other organizations—who would act on the freedom provided by the new HHS rule but have never expressed their view publicly—were to shut down.

Perhaps the most well-known conscientious objector involved in the HHS mandate litigation is the Little Sisters of the Poor, an international network that serves more than 13,000 elderly poor in 31 countries around the world (the first home opened in the United States in 1868, and now there are almost 30 homes in our country alone where the elderly and dying are cared for with love and dignity).²² Without the new HHS rule, these elderly individuals would be without the Little Sisters' care.

Also among the challengers is Samaritan Ministries, a health care cost-sharing group with 229,000 members that share more than \$25 million in health care monthly.²³ Without the new HHS rule, all these people would face the possibility of their organization being forced to shut down or violate its beliefs.

In addition, ministries involved in the litigation like Insight for Living, Dr. James Dobson's Family Talk, and the evangelistic outreach Reaching Souls International are now able to continue to operate freely due to the Trump administration's HHS mandate exemption. This ensures that many will continue to benefit from their ministries.

Many of these conscientiously objecting organizations have taken the position that they would pay the millions of dollars in fines (and ultimately go bankrupt) that the Obama administration's approach to the HHS mandate would demand, rather than violate their consciences. Thus, we can conclude that the Trump administration's HHS contraceptive mandate exemption is helping religious groups, who collectively care for millions, remain operating and able to serve.

While not all have final relief in the HHS mandate litigation yet, this is primarily because anti-faith advocates insist on trying to halt the new HHS exemption in the courts. Even so, though the regulation authorizing the exemption is temporarily blocked from operation, these individuals and organizations are in a better position now than they were under the Obama administration.

Department of Health and Human Services Expands Office for Civil Rights

Earlier this year, HHS announced the creation of a Conscience and Religious Freedom Division within the Office for Civil Rights (OCR), following the executive order issued last year. This new division expands on the Office of Civil Rights at HHS to further investigate and handle complaints of discrimination against people due to their religious beliefs in a variety of contexts, including their religious or moral beliefs regarding abortion and other health care services. Announcing the new conscience division, Acting HHS Secretary Eric Hargan said, "The Founding Fathers knew that a nation

that respects conscience rights is more diverse and more free, and OCR's new division will help make that vision a reality."²⁴

In 2008, the Bush administration had implemented a regulation to enforce existing pro-life and related conscience protection laws contained in the Church Amendments,²⁵ the Coats/Snowe Amendment,²⁶ and the Weldon Amendment,²⁷ but in 2010, the Obama administration rescinded this regulation, leaving in place the Office of Civil Rights to take complaints. Yet the Obama administration delayed processing such complaints,²⁸ and even issued a memo severely limiting the conscience protections that apply to them.²⁹ All of this makes the Trump administration's new proposed regulation, which will enforce existing federal conscience laws prohibiting government discrimination against people because of their beliefs about abortion and related services,³⁰ all the more necessary.

This new proposed regulation not only enforces those laws which the Bush administration's regulation did, it expands the protections to enforce 25 statutes which generally bar discrimination by the federal government, federally funded state and local governments, and in some cases federally funded entities. The new HHS Conscience and Religious Freedom Division will implement this proposed regulation when finalized.

Impact: Those bringing claims of discrimination due to their religious or moral convictions will now have the same protections as those claiming other types of discrimination

HHS will now investigate and handle complaints of discrimination against people due to their religious beliefs or moral convictions on par with other types of discrimination. This policy change will result in people experiencing such discrimination being able to avail themselves of the same sources of relief as those claiming other types of discrimination.

Department of Defense

Impact: Colonel Leland Bohannon's religious freedom was further protected due to the executive order

Air Force Colonel Leland Bohannon was disciplined last year after declining to sign a certificate of appreciation for the same-sex spouse of an airman under his command (though he ensured it was still signed – and by a higher-ranking officer). Air Force administrative authorities found Bohannon in violation of regulations prohibiting sexual orientation discrimination, and rejected his religious freedom arguments. Yet the Air Force Review Boards Agency, operating under the Secretary of the Air Force, reversed this finding and ruled in favor of Colonel Bohannon, concluding that he had the right to not be forced to violate his conscience regarding same-sex marriage.³¹

In ruling for Bohannon, the Agency cited President Trump's executive order, and relied heavily on the subsequent DOJ Guidance, which properly describes the framework and requirements of the Religious Freedom Restoration Act (RFRA) in situations like this.³² The Agency properly followed RFRA, which requires an examination of whether the objective desired by the person asking that religious freedom be overridden can still be obtained while the religious beliefs are also honored. Generally, if both can be accomplished, this is the required outcome. So it was in this case, where placing someone else's signature on the certificate allowed the objective of a signed certificate to be met, while simultaneously allowing Colonel Bohannon's religious beliefs to be honored by not forcing him to be the one who signed it.

While Colonel Bohannon was helped by the Agency's application of the executive order, DOD still needs to make clear through policy changes that the religious freedom of others in his position will be protected.

What Else Should the Trump Administration Do to Protect Religious Liberty?

Many policies of the Obama administration demanding affirmation of categories such as sexual orientation and gender identity remain in place, and hang as a cloud over religious freedom insofar as they could be used to force people to violate their sincerely held religious beliefs on these matters. These policies and regulations should be repealed or amended with clarifications that protect religious freedom. They include DOD regulations allowing for hormone treatment for transgendered individuals,³³ HHS regulations requiring federally-regulated health care organizations and providers to provide gender transition services,³⁴ Department of Housing and Urban Development (HUD) regulations prohibiting discrimination based on sexual orientation and gender identity,³⁵ Department of Labor (DOL) regulations prohibiting discrimination on the basis of gender identity,³⁶ and General Services Administration (GSA) regulations prohibiting discrimination on the basis of gender identity.³⁷ These are only some of the regulations and policies which should be addressed to ensure greater protection of religious freedom in the executive branch.

Conclusion

In addition to expressly protecting and prioritizing religious freedom, President Trump's Executive Order Promoting Free Speech and Religious Liberty has had a tangible impact on the way the issue has been dealt with in multiple federal agencies over the past year. While we must continue to strive to protect religious freedom, the executive order significantly advanced religious freedom and should be celebrated on its one-year anniversary.

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¹ These figures were compiled using the number of schools listed as plaintiffs challenging the HHS mandate in court, see "HHS Case Database," Becket, accessed April 27, 2018, https://www.becketlaw.org/research-central/hhs-info-central/hhs-case%20database/?fwp_database_profit=718922d7c06d05c1e7c4894ca554492d, and computing their total enrollment. It is therefore a conservative estimate, as there are schools which did not challenge the mandate.

² This figure is the sum of the 8.7 million people served by Catholic Charities USA – the umbrella group for the many local Catholic Charities which joined the HHS mandate litigation – in 2014 alone (see "2014 Catholic Charities Annual Survey – Summary," Catholic Charities USA, https://files.catholiccharitiesusa.org/files/publications/2014-Annual-Survey_Summary.pdf?mtime=20150828143835), and the 5 million patients admitted by Catholic health care providers – many of whom joined the HHS mandate litigation – during a one year period. See "Catholic Health Care in the United States," Catholic Health Association, January 2016, https://www.chausa.org/docs/default-source/general-files/cha_mini_profile2016.pdf?sfvrsn=0.

³ "Presidential Executive Order Promoting Free Speech and Religious Liberty," The White House, May 4, 2017, accessed April 27, 2018, <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-free-speech-religious-liberty/>, Section 1.

⁴ *Ibid.*, Section 2.

⁵ *Ibid.*, Section 3.

⁶ *Ibid.*, Section 4.

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- ⁷ “Policy Statement on First Amendment,” U.S. Department of Agriculture, May 8, 2017, <https://www.usda.gov/sites/default/files/documents/5817-Policy-Statement.pdf>.
- ⁸ “Memorandum for all FSIS District Managers,” U.S. Department of Agriculture, Food Safety and Inspection Service, https://adfllegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/resources/media-resources/letters/adf-letter-to-president-trump-regarding-west-michigan-beef-company/guidance-memo---usda.pdf?sfvrsn=3a351739_2.
- ⁹ Ibid.
- ¹⁰ Ibid.
- ¹¹ “First Amendment and Religious Beliefs: Questions and Answers,” U.S. Department of Agriculture, November 6, 2017, accessed April 27, 2018, <https://www.fsis.usda.gov/wps/portal/informational/aboutfsis/civil-rights/policy-statements/first-amendment-q-and-a/first-amendment-and-religious-beliefs>.
- ¹² Alliance Defending Freedom, “USDA beefs up protections for free speech, religious freedom,” press release, November 6, 2017, <https://www.adfllegal.org/detailspages/press-release-details/usda-beefs-up-protections-for-free-speech-religious-freedom>.
- ¹³ “Federal Law Protections for Religious Liberty,” U.S. Department of Justice, Memorandum, October 26, 2017, <https://www.federalregister.gov/documents/2017/10/26/2017-23269/federal-law-protections-for-religious-liberty>.
- ¹⁴ Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111, <http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-tsac-USA.pdf>.
- ¹⁵ Department of Health and Human Services, Interim Final Rule, *Religious Exemptions and Accommodations for Coverage of Certain Preventative Services*, October 6, 2017, <https://s3.amazonaws.com/becketnewsite/2017-21851.pdf>.
- ¹⁶ “HHS Case Database,” Becket, accessed April 27, 2018, https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/?fwp_database_profit=718922d7c06d05c1e7c4894ca554492d. At the same time, the Obama administration had exempted a number of big businesses, the military, and even New York City. See “HHS Mandate Information Central,” Becket, accessed April 27, 2018, <https://www.becketlaw.org/research-central/hhs-info-central/>.
- ¹⁷ This figure consists of the total number of all non-profit plaintiffs challenging the HHS mandate in court. See “HHS Case Database,” Becket, accessed April 27, 2018, https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/?fwp_database_profit=718922d7c06d05c1e7c4894ca554492d. It is therefore a conservative estimate, as there are entities which did not challenge the mandate.
- ¹⁸ These figures were compiled using the number of schools listed as plaintiffs challenging the HHS mandate in court, see “HHS Case Database,” Becket, accessed April 27, 2018, https://www.becketlaw.org/research-central/hhs-info-central/hhs-case%20database/?fwp_database_profit=718922d7c06d05c1e7c4894ca554492d, and computing their total enrollment. It is therefore a conservative estimate, as there are schools which did not challenge the mandate.
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- ²¹ Ibid.
- ²² “A Vocation to Serve the Poor,” Little Sisters of the Poor, accessed April 27, 2018, <http://thelittlesistersofthepoor.com/who-are-the-little-sisters-of-the-poor-1#a-vocation-to-serve-the-poor>.
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- ²⁵ Church Amendments, 42 U.S.C. § 300a-7.
- ²⁶ Coats/Snowe Amendment, 42 U.S.C. §238n.
- ²⁷ Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat 3034.

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- ²⁸ Richard M. Doerflinger, "A Pledge Betrayed: The Obama Administration Nullifies Conscience Rights," *Public Discourse*, July 6, 2016, accessed May 1, 2018, <http://www.thepublicdiscourse.com/2016/07/17295/>.
- ²⁹ Letter from Jocelyn Samuels, Office of Civil Rights, Department of Health and Human Services, June 21, 2016, <http://www.adfmedia.org/files/CDMHCIInvestigationClosureLetter.pdf>.
- ³⁰ "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," Department of Health and Human Services, Proposed Rule, January 26, 2018, <https://www.federalregister.gov/documents/2018/01/26/2018-01226/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>.
- ³¹ *Bohannon v. Wilson*, Agency Docket No. MO-2017-00003, Other Docket No. FC-17-001, Final Agency Decision, Air Force Review Boards Agency, Office of the Assistant Secretary, Department of the Air Force, March 27, 2018, <https://firstliberty.org/wp-content/uploads/2018/04/Col-Bohannon-Final-Appeal-Decision.pdf>.
- ³² *Ibid.*, 10.
- ³³ "TRICARE; Mental Health and Substance Use Disorder Treatment," U.S. Department of Defense, Memorandum, February 1, 2016, <https://www.federalregister.gov/documents/2016/02/01/2016-01703/tricare-mental-health-and-substance-use-disorder-treatment>.
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