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Five Key Questions to Ask About the New Executive Order on Religious Liberty

In February, a draft of an Executive Order (EO) on religious liberty was leaked from the Trump Administration. This order would have had sweeping effects on the enforcement of federal law by all government agencies. In addition to harming LGBTQ communities, it would have had ramifications for unmarried pregnant and parenting women, patients seeking contraceptive care, religious minorities, cohabitating adults and others. President Trump is expected to sign an updated draft of the EO this week. The Public Rights/Private Conscience Project (PRPCP) has outlined five questions to ask when analyzing and reporting on the new order.

For more thorough analyses of religious exemptions, please visit our website, which includes numerous publications on the legal and policy implications of funding organizations that discriminate based on religion, religious exemptions’ effect on women of color, and an analysis of the First Amendment Defense Act. Additional analysis of the EO will also be posted to our website in the coming days.

1) Who does the EO apply to?
Religious exemptions are special rights that allow religious practitioners to violate laws that conflict with their sincerely-held beliefs. A religious exemption, like the forthcoming EO, can apply to houses of worship, religious organizations, and/or individuals. It’s important to read the definition of “religious organization” carefully, however, as this term can often include large corporations that appear secular, like a hospital system or even a for-profit company. The term “person” is generally defined by federal law to include for-profit, publicly-traded companies like Walmart and ExxonMobil. Thus if the EO provides religious exemptions to all “persons,” this would go beyond the Supreme Court’s ruling in Burwell v. Hobby Lobby, which held that closely-held, for-profit companies are entitled to religious exemptions under the Religious Freedom Restoration Act (RFRA).

2) What religious beliefs are protected?
Recent proposed and enacted religious exemptions, including a leaked draft of the EO, have singled out for special protection particular conservative religious beliefs about sex, marriage, and reproduction. These include the belief that: 1) marriage is the union of one man and one woman; 2) sexual relations are properly reserved to such a marriage; 3) male and female refer to
an individual’s sex as determined at birth; and 4) human life begins at conception. Providing
government support for particular religious beliefs raises serious Establishment Clause and Equal
Protection concerns, as highlighted by a recent federal court opinion.

However other parts of the previously-leaked EO appear to apply far more broadly. For example,
the requirement that federal agencies should “not promulgate regulations, take actions, or enact
policies that substantially burden a person’s or religious organization’s religious exercise” could
cover any religious belief.

3) Who is authorized to grant a religious exemption?
RFRA is a broad religious liberty law that prohibits the government from substantially burdening
the exercise of religion unless doing so is the least restrictive means of furthering a compelling
government interest. Typically, it is the judiciary’s responsibility to interpret and apply RFRA
through litigation between a private party and the government. The leaked EO, however, orders
federal agencies to interpret (RFRA) preemptively in deciding whether or not to enforce federal
laws.

For example, under the EO the Equal Employment Opportunity Commission could interpret
RFRA to exempt employers with a religious opposition to hiring transgender workers from
compliance with Title VII of the Civil Rights Act. It could then decline to bring suits on behalf
of, or even provide right-to-sue letters to, transgender workers who are discriminated against
because of their employer’s religious beliefs. In such instances, it could be difficult to challenge
an agency’s overly-broad interpretation of RFRA.

4) Who is harmed?
It’s clear that the proposed EO will harm many LGBTQ people. Less obvious, however, are the
sweeping effects it is likely to have on many other groups. The leaked version of the EO
specifically protects religious opposition to sex outside marriage; a provision that could sanction
discrimination against unmarried pregnant and parenting women and cohabitating, unmarried
adults more generally. The leaked EO would also gut the contraceptive coverage mandate of the
Affordable Care Act, limiting coverage of necessary health care. Religious practitioners, and
especially religious minorities, could also be harmed. The EO would allow discrimination
against those who do not share their employer’s religious beliefs. Further, it places government
support behind particular religious beliefs that many religious observers do not share, such as the
belief that a fertilized egg should be protected over the health of a pregnant person.

5) Are government contractors and employees included?
The leaked EO would provide broad religious exemptions to government contractors and
employees, which poses particular Establishment Clause risks. It states that organizations do not
“forfeit their religious freedom” when receiving government grants or contracts and orders
agencies to provide religious exemptions to grantees. It also orders agencies to accommodate
both federal employees and grantees who act upon the four particular religious beliefs outlined in
question two, above. Thus the EO would allow faith-based organizations to place religious
restrictions on the use of government funds, and to discriminate while carrying out government
programs. It would also protect government employees who wish to act on their religious
opposition to LGBTQ rights, extramarital sex, and reproductive health care.