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The Religious Freedom Restoration Act, *Trinity Lutheran*, and Trumpism: Codifying Fiction with Administrative Gaslighting

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INTRODUCTION

For over a century, courts have weighed state actions that balance the restraints of the Establishment Clause with the obligations of the Free Exercise Clause of the First Amendment of the U.S. Constitution. The Establishment Clause prohibits the making of a law respecting the establishment of any religion, while the Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise of religion."[2] The space between these two strongholds of our democracy has been described by the United States Supreme Court as the "play within the joints."[3] As the Supreme Court explained in *Locke v. Davey*,[4] there are state actions that are "permitted by the Establishment Clause, but not required by the Free Exercise Clause."[5] A number of recent high profile cases before the Court have sought to further define the contours of this space, and determine the limitations of the Religious Freedom Restoration Act (RFRA). These cases, however, have provided little clarity for the government with respect to its implementation of federal policies and programs.[6] Despite the absence of clear guidance from the Court, the Trump administration has consistently pointed to *Trinity Lutheran Church of Columbia, Inc. v. Comer* and *Burwell v. Hobby Lobby Stores, Inc.* as mandates to protect and enable religious-based discrimination by federal grantees and contractors delivering federal services.[7] In doing so,

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[1] Visiting Assistant Professor, Willamette University College of Law. I would like to thank Sherwet Witherington for her thoughtful edits and contributions.
[2] U.S. CONST. amend I.
[3] Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970).
[4] 540 U.S. 712 (2004).
[5] *Id.* at 719.
[6] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).
[7] *See, e.g.*, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 (proposed on Aug. 15, 2019) (to be codified at 41 C.F.R. pt. 60) (adopting a regulation designed to strip workers of basic protections and empowering businesses and organizations receiving taxpayer dollars to discriminate against their employees with few safeguards from abuse); Health and Human Services Grants Regulation, 84 Fed. Reg. 63,831 (proposed on Nov. 19, 2019) (to be codified at 45 C.F.R. pt. 75) (proposing revisions to the federal Uniform Administrative Requirements for grant programs that strip explicit nondiscrimination provisions from the existing text); Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2,937 (proposed Jan. 17, 2020) (to be codified at 29 C.F.R. pt. 2) (allowing providers operating a voucher program to require a beneficiary to engage in religious activities); Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (proposed

the administration has dismissed the consensus of legal scholars and commentators regarding the limitations of these opinions.

Throughout Trump's first term in office, his administration has misapplied and misrepresented recent Supreme Court decisions and statutes to sanction the adoption of expansive religious exemptions for organizations receiving federal funding. Proponents of this routinized repeal of civil rights protections argue that the Trump administration is merely restoring the correct balance of religious liberties in the federal government.[8] However, the regulations and policies included in this campaign unconstitutionally broaden the already robust religious protections provided by statutes and the Court and have the effect of dismantling the civil rights infrastructure of the past fifty years. These actions reach beyond the expansive Bush-era faith-based regulations by removing beneficiary protection and prioritizing organizational and church access to taxpayer-funded grants.[9]

This Article addresses the Trump administration's consistent misinterpretation and misapplication of legal precedent to support unnecessary religious exemptions that exceed constitutional mandates and impair the rights of third parties to access federal services and programs. This Article specifically focuses on the Trump administration's application of RFRA,[10] *Trinity Lutheran*,[11] and *Hobby Lobby*[12] as egregious examples of the administration's efforts to gaslight the American public in order to elevate the rights of large religious organizations. Part I provides an overview of *Trinity Lutheran*[13] and the traditional understanding of the appropriate intersection of federal funding and free exercise. Part I also demonstrates how disparate Trump agencies use *Trinity Lutheran* as a mandate to dismantle civil rights protections and promote religious-based discrimination with federal funding. Part II discusses RFRA in the context of enforcement of general nondiscrimination and civil rights laws, *Hobby Lobby*,[14] and the rights that RFRA affords organizations doing business with the federal government. Part II also discusses the Trump administration's abuse of RFRA to sanction sweeping, unsupported government reforms

June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440, 460 and 45 C.F.R. pts. 86, 92, 147, 155, 156) (eliminating the explicit inclusion of discrimination on the basis of "gender identity" within the regulation's sex nondiscrimination protections); Department of Housing and Urban Development, Revised Requirements Under Community Planning and Development Housing Programs (Spring 2019), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53 (allowing shelters receiving taxpayer dollars to turn transgender people away entirely or provide unsafe housing); Press Release, Department of Justice Office of Public Affairs, Attorney General Sessions Issues Guidance on Federal Law Protections for Religious Liberty, (Oct. 6, 2017) (on file with Department of Justice), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty (implementing a sweeping directive to federal agencies regarding religious exemptions in part utilizing an overly broad interpretation of the Religious Freedom Restoration Act).

[8] Pete Madden, *Jeff Sessions Consulted Christian Right Legal Group on Religious Freedom Memo*, ABC NEWS, (October 6, 2017, 6:24 PM), https://abcnews.go.com/Politics/jeff-sessions-consulted-christian-legal-group-religious-freedom/story?id=50336322.

[9] *See generally, The Quiet Revolution: The President's Faith Based and Community Initiative: A Seven Year Progress Report*, THE WHITE HOUSE (Feb. 2008), https://georgewbush-whitehouse.archives.gov/government/fbci/The-Quiet-Revolution.pdf.

[10] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb4 (1993).

[11] 137 S. Ct. 2012 (2017).

[12] 573 U.S. 682 (2014).

[13] 137 S. Ct. 2012 (2017).

[14] 573 U.S. 682 (2014).

and regulations. Finally, in Part III, this Article concludes that given the faulty legal support of these cases, the regulations implemented under them fail to meet the requirements of the Administrative Procedures Act and are therefore legally specious. Courts should thus vacate these legally specious regulations when the regulations are challenged.

I. *TRINITY LUTHERAN V. COMER*: EQUAL ACCESS TO TIRE SCRAPS, NOT A CARTE BLANCHE TO DISCRIMINATE.

A. Playground Resurfacing and Free Exercise: States on Notice

In 2012, a preschool and childcare center operated by Trinity Lutheran Church in Columbia, Missouri, applied to receive a state grant to update its playground surface.[15] The Missouri Department of Natural Resources (DNR) offered grants to schools that reimbursed the cost of purchasing playground surfaces made from recycled tires.[16] These awards were made on a competitive basis.[17] The state enforced a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity," citing the Establishment Clause of the state Constitution.[18] As a result of this policy, Trinity Lutheran was determined ineligible and denied the grant.[19] The state declined to provide the grant to the church, citing concerns of violating the Establishment Clause of the state Constitution.[20] Trinity Lutheran challenged the DNR's denial, alleging violation of Article I, Section 7 of the Missouri Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment.[21] The District Court for the Western District of Missouri granted DNR's motion to dismiss for failure to state a claim, holding that excluding a religious institute from the grant program did not violate the Free Exercise Clause.[22] The court further found no evidence in Supreme Court precedent that suggested that the decision not to award a grant evinced hostility toward religion in violation of the neutrality toward religion mandated by the Establishment Clause.[23] The Court of Appeals for the Eighth Circuit affirmed the decision.[24]

In its 2017 decision, the Supreme Court reversed the Eighth Circuit's judgment, finding that Missouri had violated the church's Free Exercise rights by refusing to provide the grant solely because of the school's religious status.[25] The majority decision, drafted by Chief Justice Roberts, was joined by Justices Kennedy, Alito, Kagan, Thomas, and Gorsuch.[26] Justices Gorsuch and Thomas authored concurring opinions.[27] Justice

[15] Trinity Lutheran v. Comer, 137 S. Ct. at 2017.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 1137, 1140 (D. Mo. 2013).
[22] *Id*. at 1155, 1157.
[23] *Id*. at 1155.
[24] *Trinity Lutheran Church, Inc. v. Pauley*, 788 F.3d at 790.
[25] *Trinity Lutheran Church, Inc. v. Comer*, 137 S. Ct. at 2025.
[26] *Id*. at 2016.
[27] *Id*.

Sotomayor authored the dissent, joined by Justice Ginsburg.[28] The majority opinion relied heavily on the distinction between religious status and conduct to determine that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'"[29]

The *Trinity Lutheran* Court relied heavily on *McDaniel v. Paty*[30] to further define state action burdening free exercise.[31] *McDaniel* struck down a Tennessee law that disqualified ministers from serving as delegates to the State's constitutional convention.[32] The *McDaniel* Court found that requiring the complainant to step down from his status as a minister to be a delegate was a choice that unduly burdened his free exercise of religion.[33] In applying *McDaniel* to the state's decision in *Trinity Lutheran*, the Court held that like the restrictive statute at question in *McDaniel*, "the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."[34] In quoting *McDaniel*, the Court held that "[t]o condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties."[35] Here, the Court added the word "status" in brackets, which did not appear in the original text of the *McDaniel* decision.[36] This addition makes clear that the majority opinion solely focused on how state actions unduly burden free exercise based on an individual or entity's religious "status" as opposed to activities or conduct in which they engage.

The Court then distinguished the actions taken by Missouri in *Trinity Lutheran* from those of Washington state in *Locke.*[37] In *Locke,* a prospective seminary student challenged the state's restriction of scholarship funding toward his divinity degree.[38] The Washington state scholarship program provided high performing students with financial scholarships that could be used at religious and non-religious schools.[39] However, students were not allowed to use the scholarship towards a devotional theology degree—one "devotional in nature or designed to induce religious faith."[40] In this case, the Supreme Court found that this limitation did not unduly burden the student's free exercise of religion.[41] The *Trinity Lutheran* Court distinguished the two cases by stating,

> Washington's restriction on the use of its scholarship funds was different. According to the [*Locke*] Court, the State had 'merely chosen not to fund a distinct category of instruction.' Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he

[28] *Id.*
[29] *Id.* at 2019.
[30] 435 U.S. 618 (1978).
[31] *Trinity Lutheran Church*, 137 S. Ct. at 2019.
[32] *McDaniel*, 435 U.S. at 621.
[33] *Id.* at 629.
[34] *Trinity Lutheran Church*, 137 S. Ct. at 2021.
[35] *Id.*
[36] *Id.* at 2022.
[37] 540 U.S. 712 (2004).
[38] *Id.* at 718.
[39] *Id.* at 716.
[40] *Id.*
[41] *Id.* at 725.

> proposed *to do* -- use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is -- a church.[42]

The Court further concluded that the religious conduct that the claimant in *Locke* sought to pursue with state funds must be distinguished from this case.[43] The Court stated that "Washington's restriction on the use of its funds was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy, an 'essentially religious endeavor,'" and held that "nothing of the sort can be said about a program to use recycled tires to resurface a playground."[44] This conclusion indicates that in cases involving programs that do involve "essentially religious endeavors"—including religious programming and ministry in the context of federal program service delivery—the *Locke* standard should apply.

B. The Federal Government's Administrative Misapplication of Trinity Lutheran

In the three years following the *Trinity Lutheran* decision, the Trump administration has routinely cited the Court's reprimand of the State of Missouri as cover for government-wide revisions to civil rights regulations and policies.[45] For example, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a directive in August 2018 and a proposed regulation in June 2019, revising the Office's rules binding federal contractors, in which it cited directly to the case.[46] OFCCP conducts audits, investigates complaints of employment discrimination, and reviews hiring data to ensure compliance with Executive Order 11246.[47] Since 1965, Executive Order 11246 has provided meaningful protections for employees of federal contractors and subcontractors from discrimination based on race, color, religion, and national origin.[48] Over the past five decades, protections have been added to include discrimination because of sex, sexual orientation, and gender identity.[49] These protections provide security to workers and equip them with meaningful administrative recourse.[50] Importantly, it also provides contractors with a clear set of expectations and standards regarding their treatment of employees.[51]

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[42] *Trinity Lutheran Church*, 137 S. Ct. at 2023.
[43] *Id*. at 2024.
[44] *Id*. at 2023.
[45] *Id*. at 2024 (including the narrowing language as Footnote 3 to the Court's finding that the Missouri rule amounts to "churches need not apply").
[46] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 *and*, 41,680-81 (proposed on Aug. 15, 2019) (to be codified at 41 C.F.R. pt. 60) ("This approach, which recognizes contractors' exercise of religion, is also consistent with Supreme Court decisions emphasizing that "condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." (citing *Trinity Lutheran v. Comer*, 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel*, 435 U.S. at 626 (plurality opinion)).
[47] *Locke*, 540 U.S. at 716.
[48] Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).
[49] Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014).
[50] Exec. Order No. 11246, 30 Fed. Reg. 12319 at § 209 (Sept. 24, 1965).
[51] *Id*. at § 202 (Sept. 24, 1965).

The proposed 2019 regulation (2019 Proposed Regulation) incorporated expansive religious exemptions from compliance with these nondiscrimination provisions.[52] As proposed, this regulation would empower a for-profit federal contractor to present religious belief as a defense to a claim or finding of employment discrimination.[53] This exemption would be available to any contractor that holds itself out to the public as carrying out a religious mission.[54] The 2019 Proposed Regulation states that this can include providing OFCCP with an unpublished, publicly unavailable response to a private inquiry regarding their religious status.[55] It does not require that the public—including the contractor's own workers—receive actual notification of exemption from nondiscrimination requirements.[56] The proposal also specifically allows taxpayer-funded businesses to consider tenets of their faith when making employment and benefit decisions.[57] Accordingly, organizations can pick and choose which tenets and standards are applied to particular individuals or groups. Businesses can also enforce tenets of their faith differently—even among impacted populations. For example, a religiously affiliated hospital could hire an openly LGBTQ doctor but refuse to provide spousal or transition-related health benefits based on religion.[58]

In the preamble to the 2019 Proposed Regulation, the Department of Labor cites the Supreme Court's decision in *Trinity Lutheran* as one of a series of cases in which the Court has "addressed the freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law."[59] The preamble further excuses this broad exemption by arguing that the exemption,

> . . . recognizes contractors' exercise of religion, [and] is also consistent with Supreme Court decisions emphasizing that 'condition[ing] the availability

[52] *See*, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677, 41,679, 41,682-85 (proposed on Aug. 15, 2019) (to be codified at 41 C.F.R. pt. 60) (defining "religion" as a term that is not limited to religious belief but also includes all aspects of religious observance and practice; defining "particular religion" to clarify that the religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor; defining "religious corporation, association, educational institution, or society" as one that: (1) is "organized for a religious purpose," meaning that it was conceived with a self-identified religious purpose, (2) holds itself "out to the public as carrying out a religious purpose", and (3) exercises "religion consistent with, and in furtherance of, a religious purpose"; defining "exercise of religion" as any sincere exercise of religion, whether or not compelled by, or central to, a system of religious belief"; defining "sincere" by "merely ask[ing] whether a sincerely held religious belief actually motivated the institution's actions"; and proposing to apply a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion).
[53] *See id.*
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id.* at 41,679 ("[This proposal] is also intended to make clear that religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases.").
[59] *Id. See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (noting that the government violates the Free Exercise Clause of the First Amendment when it conditions a generally available public benefit on an entity's giving up its religious character, unless that condition withstands the strictest scrutiny)."

> of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.' *Trinity Lutheran*, 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. See *id*. (government burdens religious exercise when it so conditions ''a benefit or privilege,'' ''eligibility for office,'' ''a gratuitous benefit,'' or the ability ''to compete with secular organizations for a grant'' (quoted sources omitted)). Accord sec. 1, E.O. 13831 (the executive branch's policy is to allow ''faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . contracts . . . and other Federal funding opportunities'').[60]

This is a gross misapplication of the *Trinity* Court's intentionally narrow decision. The preamble obscures the narrow holding of the case and misleadingly suggests that it requires the federal government to grant broad religious exemptions to federal contractors.[61] The 2019 Proposed Regulation ignores the Court's limiting language, which protects organizations from discrimination solely on the basis of religious *status*, rather than *conduct*. The Court includes in a now widely-cited footnote, "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[62] The Department fails to include this footnote, which legal scholars have broadly accepted as having a limiting effect on the overall decision.[63]

The majority opinion could not have been clearer. The enforcement of a nondiscrimination provision does not meet the threshold standard for burdening Free Exercise as described by the *Trinity Lutheran* Court.[64] As a rule, the Establishment Clause does not prohibit the government from engaging in secular business with a religious organization; however, the Free Exercise Clause does not mandate the government fund religious activity or ignore religious-based actions that interfere with the operation of a state-funded activity.[65] As a basic contractual requirement, businesses are prohibited from discriminating on the basis of religion, sex, or other protected characteristics included in

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[60] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. at 41,680.

[61] *Trinity Lutheran Church*, 137 S. Ct. at 2024-25 (finding that "[t]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand," but using narrowing language to conclude that "[t]he State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far.").

[62] *Id.* at 2024 (including the narrowing language as Footnote 3 to the Court's finding that the Missouri rule amounts to "churches need not apply").

[63] *Special Feature: Symposium on the Court's Ruling in Trinity Lutheran Church of Columbia, Inc v. Comer*, SCOTUS BLOG (June 28, 2017), https://www.scotusblog.com/category/special-features/symposia-on-rulings-from-october-term-2016/symposium-on-the-courts-ruling-in-trinity-lutheran-church-of-columbia-inc-v-comer/.

[64] *Trinity Lutheran Church*, 137 S. Ct. at 2024-25.

[65] *Id.* at 2023 ("[A] State's antiestablishment [sic] interest in not using taxpayer funds to pay for the training of clergy [is one] of few areas in which a State's antiestablishment [sic] interests come more into play.").

Executive Order 11246. When a business is denied a federal contract because of discriminatory actions, they are not penalized because of their religious status, but because they fail to meet that basic contractual requirement. In sum, the federal government under Executive Order 11246 and its original regulations did not turn away contractors because of "who [they were]" but rather what they "do."[66] The Court's decision in *Trinity Lutheran* does not demand that the Department exempt contractors from compliance with Executive Order 11246.

Similarly, the Trump administration proposed sweeping changes to the federal government's charitable choice regulations in early 2020.[67] The existing regulations were adopted in 2015 to revise nine Bush-era regulations designed to increase the involvement of faith-based organizations in operating federally funded social service programs.[68] The existing charitable choice regulations (Existing Regulations) expanded on the basic beneficiary protections in the original charitable choice regulations and required faith-based organizations to provide beneficiaries with explicit notice regarding their rights to

[66] *Id.* (distinguishing *Locke* in concluding that "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry").

[67] Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 8215; Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2916; Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2938; Equal Participation of Faith-Based Organizations in Department of Justice's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2921; Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2929; Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2897; Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program 85 Fed. Reg. 3190; Equal Participation of Faith-Based Organizations in DHS's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2889.

[68] *The Quiet Revolution*, *supra* note 9, at 33-34 (This highlighted that Bush-era faith-based initiative conducted an audit of federal regulations and policies and determined that "[w]hile some limitations on religious organizations within a Federal program are constitutionally required and appropriate, the audit found that many Federal policies and practices went well beyond constitutional and legislative requirements, arising from an overriding misperception by Federal officials "that close collaboration with religious organizations was legally suspect . . . For example, the U.S. Department of Housing and Urban Development's regulations for the Community Development Block Grant (CDBG) program (which provides Federal funds to localities to support nongovernmental services), and for the HOME program (which gives funds to States and localities who often enlist community groups in efforts to provide affordable housing) prohibited funding "as a general rule" from going to "primarily religious" organizations for "any activities, including secular activities." Under the HOME program, a "primarily religious" organization could establish a "wholly secular entity" that could then take part in the program. In the CDBG program, a further regulation provided that a "primarily religious" organization could take part, if it agreed to a long list of restrictions, which included forfeiting its Title VII rights (a restriction not required by the authorizing statute). Similarly, the Department of Education's guidance for the Even Start Family Literacy Program prohibited "pervasively sectarian" organizations from receiving direct funds under the program and permitted such organizations to participate only as a subordinate to a "nonsectarian" partner organization. Even where a program's regulations or guidance documents did not specifically invoke the pervasively sectarian distinction, the audit found some Federal, State, and local program staff applied a similar, unwritten standard resulting in the exclusion of some faith-based organizations.").

be free from discrimination because of religion.[69] Freedom from discrimination includes the rights of beneficiaries to access services regardless of their religious belief, or refusal to hold a religious belief or to attend or participate in religious activities.[70] The Existing Regulations also require faith based organizations to inform beneficiaries about the process for filing a complaint.[71] Importantly, the Existing Regulations require organizations to make reasonable efforts to connect a prospective beneficiary with a secular or alternative faith-based provider, if that beneficiary objected to the religious character of the organization.[72]

The Existing Regulations also specifically define "direct" and "indirect" funding and create different levels of discrimination protections for each. Direct funding includes grant awards that are issued to an organization to provide a service on behalf of the government.[73] Organizations receiving direct funding are prohibited from discriminating because of: religion, religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.[74] However, religious organizations receiving indirect funding are not required to modify their programs or activities to accommodate a beneficiary who may object to the religious character of their program.[75] Indirect services are paid through a voucher, certificate, or another similar form of government-funded payment, this can include vouchers for child care or education, mental health services, or other similar programs[76] Under the Existing Regulations, this carve-out for indirectly funded organizations was balanced by the requirement that, to be considered "indirect," the individual beneficiary must have access to a secular option.[77]

The Trump administration published proposals in 2020 that would remove the notice and referral requirements incorporated in the Existing Regulations.[78] The 2020 preambles argue that requiring a religious organization to provide notice of rights when a secular organization is not required to do so is religious discrimination.[79] The 2020 proposed

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[69] Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19,355, 19,362 (Apr. 4, 2016).
[70] *See, e.g., id.*
[71] *See, e.g., id.*
[72] *Id.*
[73] *What is the Difference Between Indirect Funding and Direct Funding?*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (Aug. 11, 2014), https://www.hhs.gov/answers/grants-and-contracts/what-is-the-difference-between-indirect-direct-funding/index.html ("Indirect funding is funding that an organization receives as the result of the genuine and independent private choice of a beneficiary through a voucher, certificate, coupon, or other similar mechanism. Direct funding is funding that is provided to an organization directly by a governmental entity or intermediate organization that has the same duties as a government entity.").
[74] *See supra* note 68, and accompanying text.
[75] *Id.*
[76] Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. at 19,426.
[77] *Id.*
[78] Numerous agencies, including the Justice Department, Health and Human Services, Labor, and Housing and Urban Development, issued regulations to promote religious exemptions in accordance with the White House Faith and Opportunity Initiative, Executive Order 13831. Executive Order 13831, 85 FR 2921 (DOJ), 85 FR 2974 (HHS), 85 FR 2929 (Labor), 85 FR 8215 (HUD), 85 FR 2938 (Veterans Affairs), 85 FR 2889 (DHS), 85 FR 2897 (USDA), 85 FR 3190 (Education), 85 FR 2916 (USAID).
[79] *Id.*

charitable choice regulations (2020 Proposed Regulations) would remove the existence of a secular option requirement for funding to be considered "indirect." However, the 2020 Proposed Regulations retain the lower nondiscrimination standard that relieves these organizations from the obligation to modify or accommodate a beneficiary that objects to the religious character of their organization.[80] The 2020 Proposed Regulations would also add language stating the program "may require attendance at all activities that are fundamental to the program," including religious activities.[81] In practice, this will mean that a beneficiary may be presented with only religiously-based service options in order to use their voucher and may then be compelled to engage in religious practices or activities by the organization.

The 2020 Proposed Regulations also assert that the existing requirement of a referral to a secular organization is an undue burden.[82] In support of removing the referral requirement, the regulation cites directly to *Trinity Lutheran.*[83] The use of *Trinity Lutheran* to sanction religiously-based discriminatory actions is a similarly unfaithful application of the standard set by the Court. Under the 2020 Proposed Regulations, federal agencies must not only evaluate grant requests from faith-based organizations alongside secular organizations (regardless of the organization's religious status), but also hold these organizations to a different and lesser standard regarding service delivery. The latter mandate directly conflicts with the language of the *Trinity Lutheran* majority opinion.

II. UNDERSTANDING NONDISCRIMINATION PROVISIONS AND REQUEST FOR RELIGIOUS-BASED EXEMPTIONS

A. RFRA and Hobby Lobby v. Burwell

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) in the wake of the Supreme Court decision *Employment Division, Department of Human Resources of Oregon v. Smith.*[84] In this case, Justice Scalia held that the Free Exercise Clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote.[85] Therefore, the State could deny claimants' unemployment compensation for work-related misconduct based on use of the drug without violating the Constitution.[86]

The *Smith* decision ignited a swift response from diverse civil rights, religious, and service groups including the ACLU, the Baptist Joint Committee, the Anti-Defamation League, and the Human Rights Campaign. RFRA was designed to safeguard the rights of vulnerable religious minorities like those targeted in *Smith.* RFRA prohibits the federal government from "substantially burden[ing]" a person's free exercise of religion unless it is the least restrictive means by which to achieve a compelling government interest.[87] The RFRA balancing test was intended to create a uniform standard for analyzing free exercise

[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] 494 U.S. 872 (1990).
[85] *Id.*
[86] *Id.* at 890.
[87] *See* 42 U.S.C. § 2000bb–1.

claims. Over the past two decades, however, organizations and businesses seeking exemptions from laws of general applicability weaponized RFRA.[88]

Although courts have not interpreted RFRA to exempt individuals from compliance with these laws, *Hobby Lobby*[89] provided an unprecedented re-interpretation of the statute in 2014. In *Hobby Lobby*, the Supreme Court held that the Department of Health and Human Service's enforcement of the Affordable Care Act's contraceptive mandate violated RFRA.[90] The *Hobby Lobby* Court held that requiring employers to cover access to contraception on a group health insurance plan not only burdened the sincerely held religious beliefs of the business, but was also not the least restrictive means to ensure contraceptive coverage for workers.[91] The Court also determined that the term "person" under RFRA includes for-profit businesses.[92]

Although the impact of this decision on access to contraception and reproductive care is inarguably profound, the RFRA analysis as written and employed by the Court is not directly transferable to analyzing the constitutionality of nondiscrimination provisions. The Court's reliance on the "least restrictive means" prong isolates the decision's usefulness in other contexts. In *Hobby Lobby*, the Court determined that alternative, less restrictive governmental actions were available to further the compelling interest of providing healthcare.[93] Nondiscrimination provisions are the least restrictive means to ending discrimination, which is a well-established compelling interest.[94] The government cannot end discrimination if it allows discrimination to occur, or if some parties are exempt from complying with generally applicable laws. Justice Alito limited the reach of this decision to the specific facts at hand, dismissing Justice Ginsburg's dissent, which raised the concern that the decision could be used to excuse discrimination in hiring that is "cloaked as religious practice to escape legal sanction."[95] Justice Alito concluded that "[the Court's] decision . . . provides no such shield. The Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[96]

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[88] *See, e.g.*, EEOC v. Harris Funeral Homes, Inc., 884 F.3d 560, 591 (6th Cir. 2018) (finding that the respondent's construction of the compelling self-interest test, wherein the EEOC complained that terminating an employee because of her proposed gender nonconforming behavior and the funeral home instead focused on its defense that it merely wished to enforce an appropriate workplace uniform, was off-base).

[89] 573 U.S. 682 (2014).

[90] *Id*. at 683.

[91] *Id*. at 685, 686.

[92] *Id*. at 684.

[93] *Id*.

[94] Robin S. Maril & Sarah Warbelow, *Finding an End to Federally Sanctioned Discrimination: A Call to Rescind the 2007 OLC World Vision Memo*, 24 AM. U. J. GENDER SOC. POL'Y & L. 445, 463 (2016) ("The government has a longstanding and well-established interest in eradicating invidious discrimination. Evidence of this interest has been bolstered over the past decade by recent federal marriage equality decisions both at the Supreme Court and multiple federal district and circuit level courts. The adoption of state-level nondiscrimination laws across the nation in states traditionally reticent to extend protections to LGBT people, including Utah and Nevada, illustrate not only the growing acceptance of LGBT people, but a shared belief in the government's role to prohibit discrimination against individuals on the basis of sexual orientation and gender identity by private businesses and landlords.").

[95] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (Ginsburg, J. dissenting)

[96] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 733 (2014).

Lower courts have directly ruled on the application of RFRA as a means to gain exemption from civil rights provisions. The Sixth Circuit held in *EEOC v. Harris Funeral Homes*[97] that RFRA could not be used as a defense to otherwise unlawful discrimination.[98] In this case, after successfully working at a Michigan funeral home for nearly six years, Aimee Stephens informed her employer that she would be undergoing a gender transition, and would begin wearing the women's uniform to work.[99] She was fired within days.[100] The funeral home argued that Title VII should not apply to their business, because requiring the funeral home to continue to employ Stephens while she presented as a woman would constitute an unjustified substantial burden on the owner's sincerely held religious belief under RFRA.[101] The Sixth Circuit disagreed.[102] It found that to counter a claim under RFRA, the government need only prove that the action in question is the least restrictive means for accomplishing a compelling government interest.[103] The Sixth Circuit cited two lower federal courts holding that Title VII serves as the least restrictive means for ending employment discrimination—a well-established compelling government interest.[104] The Court further relied on the decisions of state courts that held that nondiscrimination provisions not only survive strict scrutiny, but also allow for fewer religious based exemptions than other generally applicable laws.[105]

The Sixth Circuit also held that requiring an employer to recognize a worker's gender identity did not substantially burden the employer's rights under RFRA.[106] Specifically, the Court held that, "as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it. . . . simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA."[107] The Court distinguished "tolerating" Stephens's gender identity from "supporting" it and noted that eight other circuits have confirmed this approach to applying RFRA.[108]

B. Systematic Manipulation of RFRA and Hobby Lobby

Immediately upon taking office, the Trump administration began implementing a systematic rescission and redesign of civil rights and programmatic regulations based on a distorted manipulation of RFRA and interpretation of case law. These government-wide efforts were centralized through the Department of Justice. Under former Attorney General Jeff Sessions, DOJ published a memorandum implementing sweeping directives across

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[97] 884 F.3d 560 (6th Cir. 2018).
[98] *Id*. at 567.
[99] *Id*. at 568.
[100] *Id*.
[101] *Id*. at 567.
[102] *Id*.
[103] *Id*. at 583.
[104] *Id*. at 595 ("We also find meaningful Congress's decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, '"[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist."').
[105] *Id*. at 596.
[106] *Id*.
[107] *Id*. at 588.
[108] *See id*.; *see also* Mich. Catholic Conf. & Catholic Family Servs. v. Burwell, 807 F.3d 738 (6th Cir. 2015), *vacated sub nom.* Mich. Catholic Conf. v. Burwell, 136 S. Ct. 2450 (2016).

federal agencies regarding religious exemptions and the interpretation of RFRA to evaluate existing regulations for potential intersections with religious rights. This guidance also urged Departments to engage in rulemaking to amend any policies to explicitly allow religious organizations and individuals to discriminate.[109] As a result of this memo, agencies as disparate as the Departments of Housing and Urban Development,[110] Agriculture,[111] and Labor[112] engaged in misguided and unnecessary rulemaking, citing RFRA and the *Hobby Lobby* opinion as mandates for reforms.

On November 19, 2019, Health and Human Services (HHS) published a proposed rule revising the regulations adopting the federal Uniform Administrative Requirements for grant programs.[113] The Trump administration proposed a revision to this regulation that stripped the explicit nondiscrimination provision, as well as a provision referencing the decisions in *U.S. v. Windsor*[114] and *Obergefell v. Hodges*[115]—the Supreme Court cases recognizing federal marriage equality.[116]

Originally adopted in December 2016, the regulations implementing the Uniform Administrative Requirements for grant programs prohibited discrimination in all HHS grant programs.[117] The preamble indicated that HHS designed the nondiscrimination provision to align grant programs with the beneficiary protections in the HHS acquisition regulations found at 45 C.F.R. 352.237–74.[118] The 2016 regulation specifically prohibited discrimination by HHS grantees on the basis of age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation.[119]

The 2016 HHS grant regulation provided essential security for individuals served by HHS-funded programs that did not have an independent regulatory or statutory nondiscrimination provision. In the absence of this protection, LGBTQ people, women, and religious minorities will face an increased risk of discrimination or denial of taxpayer-funded services without recourse, including foster care and adoption programs, Head Start,

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[109] Press Release, Department of Justice Office of Public Affairs, Attorney General Sessions Issues Guidance on
Federal Law Protections for Religious Liberty (Oct. 6, 2017) (on file with Department of Justice), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty (implementing a sweeping directive to federal agencies regarding religious exemptions in part utilizing an overly broad interpretation of the Religious Freedom Restoration Act).

[110] Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811 (proposed July 24, 2020) (to be codified 24 C.F.R. pt. 5).

[111] Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2,897 (proposed Jan. 17, 2020) (to be codified 7 C.F.R. pt. 16).

[112] *Guidance Regarding Federal Grants and Executive Order 13798*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act.

[113] Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation, 84 Fed. Reg. 63,831 (proposed November 19, 2019) (to be codified 45 C.F.R. pt. 75).

[114] 570 U.S. 744 (2013).

[115] 576 U.S. 644 (2015).

[116] *See generally*, Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation, 84 Fed. Reg. 63,831.

[117] Health and Human Services Grants Regulation, 81 Fed. Reg. 89,393 (proposed Dec. 12, 2016) (to be codified at 45 C.F.R. pt. 75).

[118] *Id*.

[119] *Id*.

senior supportive services, maternal health programs, and substance abuse recovery programs.[120]

In the notice of proposed rulemaking, HHS expressed concerns that the existing 2016 regulation was unconstitutional and violated RFRA.[121] However, in the recent case of *Fulton v. City of Philadelphia*, the Third Circuit rejected a claim for exemptions under Pennsylvania's Religious Freedom Protection Act, which is analogous to the relevant provisions of this regulation.[122] In *Fulton*, a religiously affiliated foster care agency challenged the enforcement of a city-wide requirement that foster care agencies not discriminate on the basis of sexual orientation.[123] The agency argued that its religious convictions prevented it from certifying same-sex married couples as foster parents.[124] The court found it "unlikely" that the nondiscrimination requirement imposed a "substantial burden" on the agency under Pennsylvania law.[125] "[E]ven if" there were a substantial burden, however, the court held that the agency was "not likely to prevail on its RFRA claim because the City's actions are the least restrictive means of furthering a compelling government interest."[126] As the court explained, "[i]t is black-letter law that 'eradicating discrimination' is a compelling interest."[127] Therefore, "the mere existence of [plaintiff's] discriminatory policy is enough to offend the City's compelling interest in anti-discrimination."[128]

The 2016 HHS nondiscrimination rule targets the same forms of invidious discrimination at issue in *Fulton*. As the Third Circuit determined in *Fulton*, the rule as currently written advances a "compelling governmental interest" in prohibiting discrimination.[129] Further, the Third Circuit held that prohibiting such discrimination is the least restrictive means sufficient to further this interest.[130] The Trump administration's elimination of the enumerated protections within this regulation grants a blanket license to entities receiving federal funds to discriminate without regard to the facts of any particular case. Indeed, grantees could discriminate against LGBTQ individuals even if the motivation for such discrimination were not religious at all.

III. THESE REGULATIONS ARE NOT LEGALLY SUPPORTED AND VIOLATE THE ADMINISTRATIVE PROCEDURES ACT.

The Trump administration's persistent reliance on a novel and judicially contradicted interpretation of RFRA to support expansive regulatory changes is a thinly veiled attempt

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[120] Human Rights Campaign public comment in response to Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation, 84 Fed. Reg. 63831.
[121] Health and Human Services Grants Regulation, 81 Fed. Reg. 89,393.
[122] 922 F.3d 140 (3d Cir. 2019), cert. granted, 140 S. Ct. 1104 (2020) (mem.).
[123] 922 F.3d at 146.
[124] *Id*. at 148.
[125] *Id*. at 163.
[126] *Id*.
[127] *Id*. (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)). "And mandating compliance is the least restrictive means of pursuing that interest." *Id.*
[128] *Id*. at 164.
[129] *Id.*
[130] *Cf. Hobby Lobby*, 573 U.S. at 733 (noting that "prohibitions on racial discrimination are precisely tailored to achieve" the Government's "compelling interest in providing an equal opportunity to participate in the workforce without regard to race").

to mislead the general public and to gaslight administrative lawyers, advocates, and regulated entities. In each of the administrative actions taken under the guise of RFRA and *Trinity Lutheran*, the federal government has failed to provide grantees, beneficiaries, and the public with the legally required justification for these far-reaching changes. In all the proposed regulations discussed above, the government provides mere sentences to explain revisions that will impact millions of people. Although courts traditionally defer to the agencies when interpreting the Administrative Procedure Act (APA), the Trump administration's reliance on an interpretation of RFRA that contradicts federal court decisions interpreting the statute forfeits this nearly automatic deference.

This seemingly purposeful misinterpretation violates Section 706 of the Administrative Procedure Act, which provides that an agency action is unlawful if it is found to be, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[131] In *Encino Motorcars, LLC* v. *Navarro,*[132] the Supreme Court provided that to meet this standard, "an agency must give adequate reasons for its decisions. The agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[133] The Court has also made clear that the "arbitrary and capricious" review includes a review of the authority and legal reasoning employed by the agency.[134]

The Supreme Court has held that an agency action that conflicts with a previous judicial interpretation of an unambiguous statute violates the APA regardless of the level of deference to which the action is originally entitled.[135] However, the Court has held that an agency can dismiss judicial precedent and demand deference when the statute in question is ambiguous or where Congress has provided room for agency discretion.[136] An agency is entitled to choose among different interpretations of the statute. However, here, there is no alternative interpretation of RFRA by the courts.

The Sixth Circuit decision in *EEOC v. Harris Funeral Home*[137] and the Third Circuit decision in *Fulton v. Philadelphia*[138] provide clear, consistent precedent that the executive branch should follow—enforcement of generally applicable nondiscrimination provisions does not violate RFRA and the statute does not mandate exemptions from compliance.[139] Further, the statute as it pertains to exemptions and enforcement of such provisions is not ambiguous. The unambiguous nature of the statute paired with this cross-circuit agreement leaves no interpretative "gaps" for the administration to fill by regulation. The administration's application of RFRA as a mandate for reversing nondiscrimination

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[131] 5 U.S.C. § 706 (2020).
[132] 136 S. Ct. 2117 (2016).
[133] *Id*. at 2125 (quoting Motor Vehicles Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)).
[134] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V)).
[135] Maislin Indus., Inc., v. Primary Steel, Inc., 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").
[136] *See* Chevron v. National Resource Defense Council, 467 U.S. 837 (1984).
[137] 884 F.3d 560 (6th Cir. 2018).
[138] 922 F.3d 140 (3d Cir. 2019).
[139] *See supra* Part II.

provisions and granting broad exemptions to religious employers and organizations conflicts with judicial precedent.

The administration's application of *Trinity Lutheran* is similarly misleading. Although the Court in *Trinity Lutheran* held in favor of Trinity Lutheran Church under the Free Exercise Clause, it also acknowledged that its decision was far from a mandate.[140] Further, it concretely established the distinction between discrimination on the basis of mere status and government decisions based on an organization's actions or conduct.[141] The Trinity Lutheran decision clearly provides religious organizations and churches with a "level playing field," with access to federal grants and programs, initially codified by the Bush-era faith-based regulations. The Justices, however, included explicit limiting language that their decision does not engage with state decisions in response to religious conduct. It is far from the mandate that the Trump administration has claimed.[142]

The Trump administration's re-interpretation of RFRA, *Hobby Lobby*, and *Trinity Lutheran* to mandate religious exemptions is unlawful and interferes with the "province and duty" of Congress to design statutes and of the judiciary to interpret them.[143] Therefore, the Trump administration's reliance on a misinterpretation of legal authority as "data" is "arbitrary and capricious" and a clear violation of the APA.

CONCLUSION

Since taking office in January 2017, the Trump administration has engaged in an aggressive, unconstitutional, and legally specious campaign to systematically rescind administrative civil rights protections and import broad religious exemptions across the federal register. Citing a troubling combination of recent and foundational cases, the administration has coordinated a near-acrobatic legal analysis across federal rulemaking that has ushered in an unprecedented disregard for the constitutional rights of beneficiaries of federal programs. The administration's manipulation of Supreme Court decisions as mandates for these reforms is a direct violation of the APA, calling into question their legitimacy and legal enforceability.

[140] *Trinity Lutheran Church*, 137 S. Ct. at 2024.
[141] *Id*.
[142] *Id*. at 2029 n.2 (Sotomayor, J., dissenting).
[143] Marbury v. Madison, 5 U.S. 137, 177 (1803).