



RFRA FAQ

What is a RFRA?

RFRA stands for “Religious Freedom Restoration Act.” The original RFRA was a federal law signed by President Clinton in 1993.

Many state “RFRA” bills have been enacted over the ensuing decades that bear the same or a similar name, but as this FAQ explains, they are often quite different from the original federal law. All told, there are now 21 state RFRA’s.¹

Why did Congress pass the original federal RFRA?

The federal RFRA was passed in response to a Supreme Court decision in 1990 (*Employment Division v. Smith*)² that shifted the way that the Constitution’s First Amendment protected religious liberty rights. Up until *Smith*, most of the cases that came to the Supreme Court involved religious liberty rights claimed by members of religions that make up a minority of the United States population – Amish, Mennonites, Seventh Day Adventists, or Native Americans, for example. Their minority religious practices conflicted with generally applicable laws, such as mandatory high school enrollment,³ or work rules that assumed Sunday as the Sabbath.⁴ The general rule pre-*Smith* was that those seeking religious exemptions from otherwise generally applicable laws were permitted an accommodation if the plaintiff could show a big enough burden on his or her religious rights and the government couldn’t show a good enough reason for imposing the burden. But in *Smith* the Supreme Court changed the constitutional standard for a religious exemption claim: if a law is neutral and generally applicable (meaning the law was not passed to target a religion or is not being applied unfairly to target a religion), no exemption is constitutionally required.

The *Smith* decision was widely perceived as a radical revision of constitutional free exercise doctrine. Much of the outrage was tied to the concern that the *Smith* regime

¹ National Conference of State Legislatures, “State Religious Freedom Restoration Acts,” available at <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

² *Employment Division v. Smith*, 494 U.S. 872 (1990), available at <https://www.law.cornell.edu/supremecourt/text/494/872>.

³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972), available at <https://www.law.cornell.edu/supremecourt/text/406/205>.

⁴ *Sherbert v. Verner*, 374 U.S. 398 (1963), available at <https://www.law.cornell.edu/supremecourt/text/374/398>.



would not adequately protect minority religions. Majority religions have much less need of constitutional protection, because their religious concerns are often built into the “secular” state system – Christmas is a federal holiday and almost all businesses are closed on Christmas, for instance, compared to the holy days of other faiths that make up less of the American population. The plaintiffs in *Smith* itself were Native Americans working as drug addiction counselors who had been denied unemployment benefits when they were fired from their jobs for using peyote (a ritual practice connected to their religion). The Supreme Court found that they were not entitled to an exemption from rules prohibiting the smoking of peyote because the laws banning the use of peyote were general laws against controlled substances and were not passed or implemented unfairly against their religion.

A wide coalition of actors, both conservatives and liberals, was concerned that the *Smith* rule provided insufficient protections for religious liberty – particularly for the practices and beliefs of minority religions – and came together to pass the federal RFRA. It was supported by Senator Ted Kennedy and signed by then-President Bill Clinton. The federal RFRA explicitly sought to restore the pre-*Smith* rule: that a person’s sincerely held religious belief may not be substantially burdened unless the government can justify the law with a compelling state interest and a showing that the law is narrowly tailored to accomplish that interest.

While the federal RFRA was originally written to apply to federal and state laws/policies that burdened religion, the Supreme Court held in a case called *City of Boerne*⁵ that the federal RFRA applies only to federal, not state, laws or policies. There is also a law called the Federal Land Use and Institutionalized Persons Act, which applies the same federal RFRA standard to prisoners (in state or federal prison) and the land use cases.

What does the Federal RFRA Actually Say?

The Federal RFRA’s text is as follows:

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception



Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.⁶

In operation, this test requires that a person bringing a claim prove that a law imposes a substantial burden on the person’s religious exercise. Once the person proves that, the government must show that it has a compelling interest in applying the law to the person in question (in other words a really important reason for enforcing the law against the person), and that the law is narrowly tailored to that purpose (in other words, the law does the least possible amount of damage to the person’s rights while also accomplishing the important reason the government has for enforcing the law).

So what is the problem with RFRA today? Isn’t protecting minority religions a good thing?

Protecting minority religions – especially when their practices don’t harm third parties who don’t share their beliefs – is a worthy and valuable goal in a multicultural society. The problem is that the use of RFRA has drifted quite far from its intended targets. The federal RFRA is now being invoked not to protect minority religions from discrimination by the majority, but to enable members of majority religions (like the Christian owners of Hobby Lobby⁷), to impose their religious beliefs and strictures on other people who do not share them.

So the federal RFRA is really a cautionary tale, not an inspiration. Its implementation teaches us that we should proceed with caution when enacting these kinds of laws, as their application may drift substantially from the wrong they were intended to address.

On the state level, where many forms of RFRA are being discussed and enacted this legislative session, there is a particular need for deliberation – particularly since there’s nothing broken that these RFRA are fixing. There are no contemporary threats to religious freedom that justify the need to pass a RFRA bill immediately. We often hear that the “radical expansion” of the rights of LGBT people poses a threat to the religious liberty of those whose religion teaches that homosexuality is a sin. Even assuming that LGBT civil rights protections set up a conflict with religious liberty (which we are not

⁶ 42 U.S. Code § 2000bb–1.

⁷ *Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014), available at <https://www.law.cornell.edu/supremecourt/text/13-354>.



willing to concede), the fact remains that most of the states in which the religious liberty alarm bell has been rung do not prohibit discrimination on the basis of sexual orientation. Put another way, in most of these states it is completely legal to discriminate against LGBT people, and as such no RFRA is needed to deny a lesbian or gay person a job, housing, or service at a business. Some of these laws are being written in an attempt to anticipate a potential ruling from the Supreme Court legalizing the marriage rights of same-sex couples nationally – but the laws are still overly broad and dangerous, and rushing them through could have unanticipated consequences. And in the meantime, these states have their own free exercise state constitutional protections, in addition to the federal constitution, so true religious liberty *is* already protected.

Are the state RFRA's the same as the federal RFRA?

The text of the state RFRA's vary dramatically. Some are identical to the federal RFRA – although for the reasons explained above this should not make us any more sanguine about the dangers they present. But many of them vary. The federal RFRA, for instance, requires a “substantial burden” on religious exercise to trigger its protections, but some of the state RFRA's only require “a burden,” or a concern about an imagined burden in the future without any requirement that the burden be serious in nature or that it be a real, rather than an imagined, harm.⁸ To take another important example, the federal RFRA only applies to disputes where government action burdens a person's religious liberty. While some of the state laws likewise are limited to cases involving the state government, some of them allow the state RFRA to be used as a defense in a dispute between private parties.⁹ This means that a business that does not want to serve LGBT individuals, for example, might be able to use RFRA as a defense if sued for discriminating against that person.

In sum, the state laws can vary dramatically from the federal RFRA in ways that could make them even more troublesome once they are on the books.

Who is covered by the federal and state RFRA's?

The answer varies by state. The federal RFRA applies to natural born persons (otherwise known as human beings) and, after *Hobby Lobby*, certain “closely-held” for-profit entities that are owned by a limited number of people who share the same religious views.

⁸ Ala.Const. Art. I, § 3.01; C.G.S.A. § 52-571b.

⁹ Indiana Senate Enrolled Act No. 101 (available at <http://iga.in.gov/legislative/2015/bills/senate/101#>); Miss. Code Ann. § 11-61-1 (2014).



Many state RFRA simply use the term “person” and don’t define what they mean by that term. Without litigation on the question it is not clear whether a state court would interpret them to apply only to natural-born persons or to any non-profit or for-profit entities. Indiana’s RFRA, however, explicitly applies to all for-profit businesses regardless of the size or homogeneity of their ownership, making it much broader in scope than most other state RFRA.¹⁰

Are the new state RFRA different from the older state RFRA?

That depends on the wording of the laws. Some of the older state RFRA, passed closer in time to the federal RFRA, also departed occasionally from the wording of the federal RFRA, which sometimes made them more restrictive and sometimes less so.

That being said, the new state RFRA are unique in beginning to explicitly extend religious liberty rights to disputes between private parties. They are often being written to protect one particular type of religious action, which is the refusal by businesses to serve LGBT customers or particularly to participate in LGBT marriages.

Do RFRA really matter?

YES. There has been a misinformation campaign by those supporting broad state RFRA to claim that RFRA won’t make much of a difference or don’t have much impact. This claim is questionable on its face – if RFRA won’t make a difference why is there such a push to support them? The answer is that they *do* matter, quite a lot. RFRA can allow real discrimination that has both material and dignitary harms to its victims. Imagine the costs of the real case of a lesbian waitress who is harassed by her boss about her sexuality constantly, which her boss claims is part of his protected religious liberty.¹¹ Or another real case, in which a doctor refused to treat the sick infant of a gay couple because he or she does not believe gay parents should raise children.¹² These are the kinds of actions that supporters of broad state RFRA believe should be protected.

It is important to bear in mind that almost all of these new RFRA are not limited to contexts that implicate LGBT rights. Rather, they grant rights that could be invoked in a

¹⁰ Indiana Senate Enrolled Act No. 101 (available at <http://iga.in.gov/legislative/2015/bills/senate/101#>).

¹¹ *Salemi v. Gloria’s Tribeca Inc.*, 982 N.Y.S.2d 458, 459-60 (2014), available at http://www.nycourts.gov/reporter/3dseries/2014/2014_01838.htm.

¹² “After ‘much prayer,’ doctor refuses to see 6-day-old baby because she has two moms,” DailyKos.com, (Feb. 19, 2015) available at <http://www.dailykos.com/story/2015/02/19/1365444/-After-much-prayer-doctor-refuses-to-see-6-day-old-baby-because-she-has-two-moms>.



wide range of contexts such as a refusal to include mental health care in a group health plan or a refusal to marry an interracial or interfaith couple.

Even when RFRA's are purportedly protecting everyone's rights, third parties can still be harmed. The much lauded "compromise" in *Hobby Lobby* for instance, that was supposedly going to ensure women receive seamless contraceptive coverage has yet to materialize almost a year after the decision. During that time the women impacted by the decision have not had access to the contraceptive coverage to which they are legally entitled, a harm that cannot be retroactively repaired.