THIRD WAY

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How Can You Tell If A Religious Liberty Law Strikes the Right Balance?

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Religious liberty is a fundamental American value on which this nation was built. In fact, it is so crucial to our national identity that when the Supreme Court issued a ruling in 1990's *Employment Division v. Smith* * that many believed was not sufficiently protective of the freedom of religion, Congress passed the *Religious Freedom Restoration Act* (RFRA) with overwhelming bipartisan support. RFRA brought the law back in line with what it had been for decades before the 1990 Supreme Court decision—providing robust but not unlimited protections for religious exercise. It allows a person to claim an exemption from a federal law or regulation that applies to everyone else if 1) that person can demonstrate that the law or rule substantially burdens their religious practice and 2) the government can't prove an especially good reason why the religious believer should have to follow it—in particular, one that can't be accomplished through other means.

In the *Smith* case, the Supreme Court said that it was okay for the state of Oregon to deny unemployment benefits to two Native Americans who were fired from their jobs because they had ingested peyote as part of a longstanding religious ritual. Congress disagreed.

More than twenty years later, the reasoning behind this law and the protections it was intended to provide are just as necessary. RFRA and the principles behind it are relied upon by religious believers of all creeds to ensure that a generally-applicable law does not unintentionally cause them to violate their religious beliefs. Several states have followed this example and passed their own versions of RFRA to apply to their state laws. These kinds of laws preserve the ability of a Sikh soldier to wear a turban and beard while serving in the Armed Forces, despite the strict dress code service members otherwise must follow. They allow a Muslim woman to make the case that she should be able to wear her Niqab on the witness stand in federal court, even though witnesses are generally prohibited from obscuring their faces. And they

protect young school children—like a 5-year-old Native American boy in Texas with braids—who are punished for violating the dress code by wearing their hair as their faith requires. [1] Yet some state "super-RFRAs," like the one that recently caused an uproar in Indiana, and some courts' interpretations of federal RFRA, have gone well beyond the law's original intent and language. There are four questions that can help determine whether a religious freedom bill or decision varies from the careful balance intended by the broad coalition of folks who came together to pass the original federal RFRA: a balance that both protects religious liberty and respects the rights of all Americans.

1. Does it recognize the deeply-held religious beliefs of people—but not of corporations?

Under RFRA, federal law reads: "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." But last year's Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*, went well beyond this intent by ruling that "closely-held" corporations, like the Hobby Lobby chain of craft stores, can have religious beliefs and use RFRA. And unfortunately, some state super-RFRAs have explicitly gone *even further,* including the very contentious super-RFRA passed in Indiana earlier this year, by explicitly allowing any for-profit business to rely on RFRA to assert protection for its religious beliefs. [2] By contrast, others have struck a better balance, like Louisiana and Pennsylvania, who took additional steps to define "person" under the law so as to deny for-profit businesses any claim to religious liberty. [3]

If corporations and big businesses are allowed to make claims under state super-RFRAs or invited by courts to bring suits under federal RFRA, they can potentially be excused from all kinds of generally applicable laws—including non-

discrimination protections. A corporation could try to use a super-RFRA to refuse to serve gay and lesbian individuals or couples or even unwed mothers on the grounds that serving these customers would violate their religious beliefs. It is because of this possibility that the super-RFRA originally proposed in Indiana, and others like it, are often referred to as "turn away the gays" laws. Or a corporation could argue that it has a right to deny its employees their health coverage for countless services to which it may object. These examples go well beyond the original intent of RFRA, which was to protect a particular individual from being forced to violate their conscience unnecessarily—a rationale that simply does not apply to a big company.

2. Does it allow an individual to protect their own conscience against government action—but not to wield the law against the interests of another?

Though a few judges have argued otherwise, the intention of the broad coalition of players who helped write and pass federal RFRA was that it could serve only as a defense for not following a law when the government itself is one of the parties in the courtroom. In other words, in order to invoke RFRA, you should be required to use it as a shield against the government—and not as a sword against someone else. However, some states have purposefully tried to go the other direction, including Indiana and Arkansas. The Indiana law explicitly says it may be asserted "regardless of whether the state or any other government entity is a party to the proceeding." [4] And under the initial version of the Arkansas RFRA passed by the state legislature, it could have been used not only as a defense but also to get an injunction against or damages and legal costs from the person suing the religious objector for not following state law. [5]

This scenario played out in a New Mexico case: *Elane Photography v. Willock*. A photographer violated the state's non-discrimination law when she refused to photograph the

commitment ceremony of a lesbian couple, who then sued her under that law. The photographer tried to use the state's RFRA as a defense, saying the non-discrimination law that prohibited her from refusing to serve someone based on their sexual orientation violated her religious beliefs, but the Court rejected that argument. It said the state was not a party to the case, and that New Mexico's RFRA, like the federal version was originally intended, cannot not be used as an excuse in a dispute among private parties to ignore the law that would result in hurting others. But had the photographer lived in a state with a super-RFRA, her company would have had a license to violate the state's non-discrimination law in any way the owner felt was justified by her religious beliefs.

3. Does it require a consideration of the burdens an accommodation would place on other people?

Unless the First Amendment requires that a religious believer be excused from following a law (and thus RFRA isn't needed), it is unconstitutional to shift the burden of adhering to a religion from someone who practices it to someone who doesn't. [6] In that way, the law ensures that one person is not able to use their religious beliefs or practices to try and control or harm others. Even when a person can demonstrate that a government action substantially burdens his or her religious practice and the government can't prove that the action furthers a compelling government interest in the least restrictive way possible, courts then must assess the effect accommodating the person's religious practice would have on third parties. In situations where allowing the religious believer to not comply with the law would have a serious negative impact on others, the Constitution does not permit the believer to use RFRA to get out of complying with the law and impose significant burdens on others. Achieving the original goal of RFRA, which was to bring the law back in line with the law prior to the 1990 *Smith* case, necessitates a continued consideration of the impact an accommodation will have on third parties, as a myopic look at only the

interests of the religious observer does not tell the whole story.

4. Does it protect religious exercise from a substantial burden—but not from any law that burdens any religious belief or behavior in any way, no matter how minuscule that burden?

Under the federal version of RFRA, a religious observer must show that a government action has imposed a "substantial burden" on their exercise of religion. But some states, including Arkansas in its initial version of the state RFRA, have lessened this test to only "a burden"—a much easier slight to claim. [7] There is a difference between a law that actually substantially burdens someone's religious exercise—making it impossible for them to practice an important right, like observing the Sabbath for example—and one that they just don't like. And while federal RFRA allows the government to require a person to follow the law if it can prove that doing so is "in furtherance of a compelling government interest," the original Arkansas legislation went further by requiring that the government interest be of the "highest magnitude." [8] This would have made it much more difficult for the state government to win the ability to enforce the law, and far more likely that a religious objector could refuse to follow laws that might be necessary for things like public safety or avoiding harm to others.

Conclusion

Today, 21 states have some version of a *Religious Freedom Restoration Act* (RFRA). [9] Some mirror federal RFRA and were intended to provide important protections for religious practice, but others have metastasized into super-RFRAs that upset the good intent behind RFRA to carefully balance protecting religious liberty and respecting the rights of all Americans. These four questions are crucial to ask when trying to tell the laws and proposed legislation apart, as well as make sense of cases decided. As originally intended, the

federal RFRA and many of the state RFRAs were deeply in sync with American values, designed to ensure a Jewish student could wear his yarmulke to public school despite a rule against head coverings or that a Seventh-day Adventist could request a change to his or her work schedule to observe a Saturday Sabbath. But some court decisions and state super-RFRAs go too far. Knowing where to draw the line and when to oppose the legislation or speak out about restoring RFRA's original intent is just as important—and just as American.

TOPICS

LGBT EQUALITY 84

END NOTES

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