



WHY SHOULDN'T STATES JUST ADOPT THE FEDERAL RFRA?

Because RFRA is now being misused to justify discrimination and deny healthcare.

Although both progressives and conservatives supported RFRA when it was enacted in 1993, much has changed in the ensuing two decades. In the 1990s, the broad coalition supporting RFRA saw it as a way to protect religious liberty after the Supreme Court weakened constitutional protections in *Employment Division v. Smith*.¹ Since then, RFRA has been exploited to justify discrimination and other harms to third parties, and courts have interpreted the law in ways that its sponsors never intended. RFRA has been misused and misinterpreted so often that many of RFRA's original supporters now oppose enactment of these laws in the states. **And because RFRA means something different today than it did in 1993, states should not adopt laws like the federal RFRA.**

COURTS HAVE CHANGED THE WAY THAT RFRA WORKS:

In 2014, the Supreme Court decided *Burwell v. Hobby Lobby Stores*,² holding that a large, for-profit corporation could use RFRA to deny its employees insurance coverage for contraception. This decision alone is reason to oppose passage of a state law that is identical to the federal RFRA—we don't want similar outcomes in the states. But the decision could have even more far reaching repercussions: the Court interpreted RFRA so broadly that others may try to use the law to undermine access to healthcare, justify discrimination, and threaten public safety. State RFRA's will create similar risks.

THE FEDERAL RFRA IS BEING INVOKED TO JUSTIFY DISCRIMINATION IN HIRING:

In 2007, the Bush Administration issued a legal memorandum³ that claims that RFRA allows faith-based organizations to ignore federal laws prohibiting hiring discrimination by recipients of federal grants. This memo remains federal policy today and applies to multiple grant programs. According to this policy, RFRA allows, for example, a faith-based organization to take taxpayer funds to run a shelter for domestic-violence victims and then refuse to hire qualified employees to run that program based on their religion.⁴ Some are attempting to extend the memo's reach even further: immediately after President Obama signed an executive order⁵ prohibiting federal contractors from discriminating against LGBT employees, some cited this memo to argue that RFRA exempts religious groups from this non-discrimination protection. States should not adopt a statute that could lead to similar justifications for discrimination.

THERE ARE EFFORTS UNDERWAY TO USE RFRA TO JUSTIFY OTHER FORMS OF DISCRIMINATION:

More and more entities are trying to use RFRA to trump laws prohibiting discrimination and protecting public health. These arguments have not yet succeeded, but the decision in *Hobby Lobby* has increased the likelihood that a court will accept them or that a government official will adopt them as public policy.

REFUSAL TO SERVE CERTAIN PATIENTS:

The Ethics & Religious Liberty Commission of the Southern Baptist Convention joined with the Bishops, National Association of Evangelicals, and others to argue that RFRA entitles them to an exemption from the provision of the Affordable Care Act that prohibits sex discrimination—a provision that protects women and LGBT patients—in the provision of healthcare programs and activities.⁶

REFUSAL TO PROVIDE GOVERNMENT-FUNDED HEALTHCARE SERVICES:

The U.S. Conference of Catholic Bishops, the National Association of Evangelicals, and others have argued that RFRA allows them to take federal grants to perform government services and then refuse to provide any services under that grant to which they object.⁷ Specifically, they have argued that they have the right to take taxpayer money to serve unaccompanied immigrant minors—many of whom have been sexually abused—but refuse to offer these young women information about, referrals for, or access to necessary reproductive healthcare. If accepted, moreover, this argument could be used to withhold virtually any type of healthcare.

THERE HAVE BEEN OTHER EFFORTS TO USE THE FEDERAL RFRA TO HARM OTHERS:

Attempts to use RFRA to harm others extend beyond discrimination and the denial of healthcare. We have seen efforts to use RFRA to refuse counseling to patients in same-sex relationships;⁸ avoid ethics investigations;⁹ obstruct criminal investigations;¹⁰ shield religious organizations from bankruptcy and financial laws, in the process denying compensation to victims of sexual abuse;¹¹ and thwart access to health clinics.¹² In states whose RFRA mirror the federal RFRA, the statutes have been invoked to avoid licensing requirements¹³ and resist lawsuits over sexual abuse by clergy members.¹⁴ Most of these attempts were unsuccessful, but most were also decided before the Supreme Court decision in *Hobby Lobby*, which could tip the scales in favor of those misusing RFRA.

IN THE 1990S, CONGRESS REJECTED A SECOND RFRA LAW BECAUSE IT LACKED NON-DISCRIMINATION PROTECTIONS:

In the early 1990s, some landlords refused to rent apartments to unmarried couples on religious grounds and brought lawsuits, in some cases under RFRA, to obtain exemptions from laws prohibiting housing discrimination.¹⁵ These cases led many groups to reassess their support for RFRA. Indeed, after the Supreme Court held in 1997 that RFRA could not apply to the states, Congress attempted to pass a new bill, the Religious Liberty Protection Act, that would have applied the RFRA standard to the states, but it failed to pass because of concerns that the law would be used to justify discrimination.

STATE RFRAS ARE JUSTIFIED USING ANTI-LGBT RHETORIC:

Today, many who support state RFRAs intend for them to be used to trump non-discrimination laws and laws that ensure access to healthcare. Most new state RFRAs are accompanied by anti-LGBT rhetoric. And proponents of these laws refuse to accept amendments that would prevent the laws from allowing discrimination.

RFRAS COULD CAUSE UNIQUE PROBLEMS AT THE STATE LEVEL:

Unlike the federal government, the states have sole authority to pass laws in areas such as family law and professional licensing—areas where religious exemptions could be particularly troubling. The states also have the primary authority to pass criminal laws, another area where granting religious exemptions may be especially dangerous.

[1] *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

[2] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

[3] Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juv. Just. & Delinquency Prevention Act, Op. O.L.C. 2007 WL 5633562 at *1, available at <http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision.pdf>.

[4] *Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013*, U.S. Dep't of Just. (Apr. 9, 2014), available at <http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>.

[5] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), as amended by Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (2014); Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969), as amended by Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (2014).

[6] United States Conference of Catholic Bishops (USCCB), Comments to OFCCP on Discrimination on the Basis of Sex (Mar. 30, 2015), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Discrimination-Basis-of-Sex-March-2015.pdf>.

[7] United States Conference of Catholic Bishops (USCCB), Comments on Interim Final Rule on Unaccompanied Children, 7 (Feb. 20, 2015), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/02-20-15-comments-UM.pdf>.

[8] *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012) (arguing that offering counseling to individuals in a same-sex relationship burdened a counselor's religious exercise).

[9] *Doe v. La. Psychiatric Med. Ass'n*, No. 96-30232, 1996 WL 670414 (5th Cir. Oct. 28, 1996) (using federal RFRA to challenge an ethics investigation by the Louisiana Psychiatric Medical Association).

[10] *In re Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (claiming that RFRA prohibits government from compelling grand jury witness to testify against rabbi); *United States v. Town of Colo. City*, No. 3:12-CV-8123-HRH, 2014 WL 5465104 (D. Ariz. Oct. 28, 2014) (arguing that RFRA prohibited U.S. Department of Justice from compelling witness testimony in civil-rights lawsuit against city); *Perez v. Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572 (D. Utah Sept. 11, 2014) (holding that RFRA prohibited court from compelling witness testimony in child-labor case).

[11] *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015) (arguing that RFRA should shield Archdiocese from bankruptcy laws that would make more funds available to pay victims of sexual abuse).

[12] *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (challenging Freedom of Access to Clinic Entrances Act under RFRA); *Am. Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995) (same); *United States v. Weslin*, 964 F. Supp. 83 (W.D. Pa. 1997) (same) *Planned Parenthood Ass'n of Se. Pa., Inc. v. Walton*, 949 F. Supp. 29 (E.D. Pa. 1996) (same).

[13] *Youngblood v. Fla. Dep't of Health*, No. 06-11523, 2007 WL 914239 (11th Cir. Mar. 28, 2007) (claiming health inspection of school operated by church violated Florida RFRA); *McGlade v. State*, 982 So. 2d 736 (Fla. Dist. Ct. App. 2008) (claiming that law requiring midwifery license burdened religious exercise).

[14] *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHDX07CV125036425S, 2013 WL 3871430 (Conn. Super. Ct. July 8, 2013) (arguing that Connecticut RFRA precludes claims against Church for negligent supervision and retention of alleged abuser); *Givens v. St. Adalbert Church*, No. HHDCV126032459S, 2013 WL 4420776 (Conn. Super. Ct. July 25, 2013) (same); *Noll v. Hartford Roman Catholic Diocesan Corp.*, No. HHDX04CV024034702S, 2008 WL 4853361 (Conn. Super. Ct. Oct. 20, 2008) (same).

[15] *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), (holding that the First Amendment allowed landlord to ignore housing non-discrimination provision), vacated on other grounds, 220 F.3d 1134 (9th Cir. 2000) (en banc); see also *Smith v. Fair Emp't & Housing Comm'n*, 913 P.2d 909 (Cal. 1996) (arguing same under RFRA); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (rejecting landlord's claim on both First Amendment and RFRA grounds); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (ruling that state constitutional provision allowed the discrimination).

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