



## ***Ad Hoc Committee for Religious Liberty***

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### **Why the Religious Freedom Restoration Act Works**

#### **Questions and Answers**

**In 1993, President Bill Clinton signed into law the federal Religious Freedom Restoration Act (RFRA). The bill passed both the United States House and Senate with nearly unanimous bipartisan support. RFRA provides a balancing test when the government attempts to restrict the free exercise of religion. Twenty states have legislatively adopted their own versions of RFRA, and another eleven states have RFRA-like protections provided by state court decisions. The federal RFRA and its state counterparts have worked well to provide appropriate protections for people of faith who seek to live out their faith in daily life. Answers to possible questions about RFRA follow.**

#### **1. Does RFRA provide a “license to discriminate” against gay people?**

No. RFRA provides a day in court for people with conscientious objections to general laws, allowing a more careful balancing of rights. It is not a “license” for anything, because important limiting principles and safeguards are built into it. And in situations involving actual “unjust discrimination” against anyone—whether based on same-sex attraction or otherwise—claims of religious freedom are virtually certain to fail. But RFRA allows those important distinctions to be made with temperance and care. Experience of the last twenty years with the federal RFRA, as well as similar (and even more protective) state laws, bears this out. Speculative and extreme hypotheticals to the contrary, which lack any basis in this long experience, do not support the false claim that RFRA is a “license to discriminate,” but instead underscore the need to expand the sober balancing RFRA facilitates.

#### **2. What are the safeguards built into RFRA?**

There are mainly two. First, a burden on religious exercise must be “substantial”—mere inconvenience or increased cost will not do. The classic case is when a matter of conscience is at stake. Many RFRA claims fail on this basis. Second, the burden is still permitted if the government can show that the burden represents the means “least restrictive” of religious exercise to serve a “compelling government interest.” These are highly fact-specific inquiries, and so broad statements about what the law will forbid or allow are simply misplaced. Sometimes the religious believer will win, and sometimes the

religious believer will lose, but RFRA provides a better framework to make sure all competing interests receive due consideration.

### **3. Why is any RFRA necessary at all?**

The U.S. Congress passed RFRA in 1993 in response to a decision by the U.S. Supreme Court (called *Employment Division v. Smith*) that made it more difficult for religious believers to challenge laws that affected their ability to live out their faith. The *Smith* case involved Native Americans who were fired from their jobs because they used peyote as part of their religion. People of all faiths and all political persuasions came together to ask Congress to pass a law that would, in effect, reverse the *Smith* decision. Americans simply wanted a return to the deference that the law had given to the free exercise of religion as guaranteed by the First Amendment of our Constitution, prior to the *Smith* decision. RFRA sailed through an otherwise divided Congress and was signed by President Clinton.

### **4. Since there is already a federal RFRA, why do states need their own?**

From 1993 to 1997, the federal RFRA applied to actions by both the federal government and state governmental entities. But in 1997, the U.S. Supreme Court decided that RFRA could not apply to state government actions. In response, many states passed their own versions of RFRA that would apply within their states. To date, about **twenty** states have passed such legislation. An additional **eleven** states have state court decisions interpreting their state constitutions to provide similar protection. Hence, at this point, the federal government, the District of Columbia, and **more than thirty** of the fifty states have provided, in one form or another, protections for religious freedom akin to RFRA.

### **5. Who really benefits from RFRA's?**

Members of minority faiths have been the primary beneficiaries of federal and state RFRA's. Recent examples include the following:

- In March 2015, the federal government returned eagle feathers it had previously seized from a Native American religious leader. The Native American had appealed the seizure of the feathers on RFRA grounds.
- In January 2015, the U.S. Supreme Court unanimously ruled in favor of a Muslim inmate in an Arkansas state prison who sought to wear a half-inch beard in accordance with his faith. (The case was decided under the Religious Land Use and Institutionalized Persons Act, a federal law that applies to prisoners but contains the same legal standard as RFRA.)

- In November 2014, the federal government settled a case under RFRA involving a Sikh employee who was told to go home from her job in a federal building because she carried a kirpan, “an emblem resembling a small knife with a blunt, curved blade” that reminds Sikhs of their commitment to justice.
- In June 2014, the U.S. Supreme Court decided that the federal government violated RFRA when it attempted to force family-owned businesses like Hobby Lobby to provide abortion-inducing drugs in their employee health plans. Hobby Lobby’s owners had faced the choice of violating their Christian faith or paying onerous fines.
- A Native American kindergartner was told that he would have to cut his hair in order to comply with his public school’s grooming policy. His parents applied for a religious exemption but were denied. The boy and his parents won their case in 2010, as the court found that the school district had violated Texas’s RFRA.

**6. Are you saying RFRA has no impact at all on current debates over “same-sex marriage” and laws prohibiting “sexual orientation” and “gender identity” discrimination?**

No. RFRA has a small—but valuable and important—impact on these areas, which has been exaggerated and distorted in recent political fights over state-level RFRA. In general, RFRA helps people of minority faiths who cannot secure specific legislative exemptions for themselves. As a result, most cases arising under RFRA look like the ones listed above. Sometimes, however, strongly held religious beliefs that are considered in the mainstream more broadly—such as the view that marriage is only the union of one man and one woman—have fallen into the minority in some local contexts. As a result, local laws are passed to penalize conduct based on those deeply-held beliefs with insufficient religious exemption, and sometimes none at all. Recent examples, particularly in the context of marriage, include the [florist in Washington State](#), the [photographer in New Mexico](#), and the [bakers in Colorado](#) and [Oregon](#). Their conscientious objections to state or local antidiscrimination laws do not amount to “unjust discrimination,” and in fact, rightly deserve the strong protection of the law. Without RFRA, they are unprotected, but with RFRA, they have a fair opportunity to make their case. Although they should win, there is no guarantee they will under RFRA; but at least they will have their day in court. Once again, this is not a “license to discriminate,” but instead a reasonable attempt to achieve fairness for all.