Why Shouldn’t States Just Adopt the Federal RFRA?

Because the federal RFRA is now being misused to justify discrimination.

Although both progressive and conservative organizations 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 freedom after the Supreme Court weakened constitutional protections for religious minorities.\(^1\) 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 supporters never intended. RFRA has been misused and misinterpreted so often that many of RFRA’s original supporters now oppose enactment of similar laws in the states. 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 RFRA Works:** In 2014, the Supreme Court decided *Burwell v. Hobby Lobby Stores,*\(^6\) holding that a large, for-profit corporation could use RFRA to deny its employees’ healthcare benefits that would otherwise be required by federal law. This decision alone is reason to oppose passage of a state law that is identical to the federal RFRA—it could lead to similar outcomes in the states. But the decision could have even more far-reaching repercussions: the Court interpreted RFRA so broadly that others are using the decision to argue the law can be used to justify discrimination and undermine access to healthcare. State RFRA that mirror the federal RFRA create similar risks.

- **State RFRA Are Now Justified With Anti-LGBT Rhetoric:** It is no coincidence that the introduction of state RFRA bills skyrocketed around the time the Supreme Court decided key cases recognizing the right of same-sex couples to marry. Today, many who support state RFRA intend for them to be used to trump nondiscrimination laws and protections for marriage. Indeed, most new state RFRA are accompanied by anti-LGBT rhetoric. Further proving their real intent, proponents of these laws refuse to accept amendments that would prevent the laws from being used to allow discrimination. “Religious liberty laws” are now synonymous with LGBT animus, which undermines real efforts to protect religious freedom.

- **The Federal RFRA Is Currently Being Used to Allow Discrimination:** In January 2019, the U.S. Department of Health and Human Services used the federal RFRA to allow Miracle Hill Ministries, a taxpayer-funded foster care agency in South Carolina, to escape federal nondiscrimination laws.\(^9\) Because of this misuse of RFRA, Miracle Hill can now refuse to work with potential parents and volunteers—like Beth Lesser, a Jewish mother, and Aimee Maddonna, a Catholic mother, who both tried to work with the agency—because they do not pass the agency’s religious litmus test.

Since 2007, the federal RFRA has been misused to permit federally funded organizations to discriminate in hiring on the basis of religion. The blanket exemption to federal hiring applies to all federal grants and contracts. Under this policy, a faith-based organization can take taxpayer funds to run a shelter for domestic-violence victims and then refuse to hire qualified employees to run that program because they are the “wrong" religion.\(^\text{xvi}\) 2017 Department of Justice Guidance,\(^7\) which endorses this misuse of RFRA, is so written so broadly it might be used to green light efforts to allow discrimination beyond hiring. For example, we have seen coordinated efforts to convince the federal government that RFRA allows taxpayer-funded organizations to take federal funds to perform government services and then refuse to provide any services to which they object.\(^\text{vii}\) We have also seen efforts to use RFRA to allow taxpayer-funded organizations to turn away certain patients and beneficiaries of government services.\(^\text{viii}\)

- **State Laws Like the Federal RFRA Are Being Used to Justify Discrimination:** Alliance Defending Freedom has filed cases across the country, including in Arizona and Wisconsin,\(^\text{ix}\) arguing that state RFRA and constitutional provisions identical to the federal RFRA allow business owners to use religion as a justification to discriminate against customers in violation of civil rights laws.
• **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; avoid ethics investigations; obstruct criminal investigations; shield religious organizations from bankruptcy and financial laws, in the process denying compensation to victims of sexual abuse; and thwart access to health clinics. In states whose RFRA mirror the federal RFRA, the statutes have been invoked to avoid licensing requirements and resist lawsuits over sexual abuse by clergy members. 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.

• **The Right-Left RFRA Coalition of the Early 1990s Dissolved Many Years Ago:** 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. These cases led many groups to reassess their support for RFRA. Indeed, after the Supreme Court held in 1997 that RFRA did not apply to the states, Congress attempted to pass a new bill that would have applied the RFRA standard to the states. The Religious Liberty Protection Act failed to pass because of concerns that the law would be used to justify discrimination. Today, many of the groups that supported RFRA in the 1990s are now pushing for it to be amended so it can no longer be misused to harm others.

• **RFRA Could Cause Unique Problems at the State Level:** Passing a RFRA could create potential religious exemptions in every single state law. Unlike the federal government, the states have sole authority to pass laws in areas such as family law, estate law, healthcare directives, 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.

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5. *Youngblood v. Fla. Dep't of Health*, No. 06-1152, 2007 WL 949 (S.D. Fla. 2007) (holding that requiring foster care agency to adhere to nondiscrimination law did not violate the state RFRA).
7. *Youngblood v. Fla. Dep't of Health*, No. 06-1152, 2007 WL 949 (S.D. Fla. 2007) (claiming that Wisc. Const. Art. 1, § 18 allowed the business to ignore a public accommodations law.)
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).
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).