Religious Freedom Restoration Act Overview

Supportive Talking Points

WHY STATES NEED STATE RFRAs

Due to the passage of the federal Religious Freedom Restoration Act in 1993, the Federal Government provides the highest level of protection for the free exercise of religion, recognizing this First Amendment freedom as a fundamental human right of the first order. RFRA restored the highest level of judicial review for free exercise claims that arise in federal courts, a standard known as "strict scrutiny." This same level of protection, which was once the standard throughout the United States, is no longer available for persons living in many States because their legislatures have not passed similar legislation at the state level. State RFRA legislation is intended to correct the inequalities of religious liberty protections so that all citizens have the same protections for the peaceful free exercise of religion as they enjoy under federal law. Individual States and their political subdivisions should not be guilty of restricting a person's free exercise rights more than the Federal Government is allowed to do. **THE ISSUE:**

- In almost half the States in the United States, there is currently no state legislation that requires the courts to provide the same deference to free exercise claims that is currently provided under federal law.
- Laws, policies, and regulations "neutral" toward religion have the potential to burden religious exercise as surely as laws purposely intended to regulate or control religious exercise.
- Protecting the free exercise of religion from government intrusion is a federal interest of the first order. Federal law requires that federal courts use strict scrutiny, the highest level of judicial review, in order to ensure the adequate protection of free exercise claims. State courts should do no less.

THE PROBLEM:

- Prior to 1990, the courts used the compelling interest/strict scrutiny test to resolve free exercise claims. However, in Employment Division v. Smith, 494 U.S. 872 (1990), the United States Supreme Court held that a federal law that was neutral on its face only had to be rational to be upheld (the lowest level of judicial review), even though it burdened the free exercise of religion.
- Congress understood this threat to religious liberty created by the Smith case and passed the Religious Freedom Restoration Act of 1993 (RFRA) to restore strict scrutiny (the highest level of judicial review), striking sensible balances between religious liberty and competing prior governmental interests.
- In City of Boerne v. Flores, 521 U.S. 507 (1997), the Court held that RFRA only applied to actions of the Federal Government and could not be constitutionally applied to state and local governmental actions.
- Since that time, approximately 22 states have passed legislation requiring their courts to use the same standard as set out for Federal Government action in RFRA, and at least 10 other States have had RFRA-type protections applied through state court decisions.
- The need for more States to pass RFRA has taken on increased urgency recently. Often relying on the decision in Obergefell, some executive and judicial entities have elevated anti-discrimination statutes, including sexual orientation, to override the greater constitutional rights of citizens guaranteed in the First Amendment, including the freedoms of speech, religion, and assembly. The U.S. Commission on Civil Rights, in its 2016 majority report, "Peaceful CoExistence: Reconciling Nondiscrimination Principles with Civil Liberties," recommends exactly that type of second class status for religious liberty.

THE SOLUTION: LEGISLATION THAT MAKES STATE AND FEDERAL LAW STANDARDS CONSISTENT

- Passing RFRA at the state level would ensure that state courts would use the federal law standard of compelling interest/strict scrutiny for religious free exercise claims. This means that the test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) would be applied consistently with respect to state and local governmental actions, ensuring its application in all cases in which free exercise of religion is substantially burdened. This means that any time state or local governmental actions substantially burden the free exercise of religion, the government must justify such actions with a compelling interest and must use the least restrictive practical means to accomplish its legitimate constitutional objective.
- State RFRAs do not protect bad faith or insincere representations of a burden on free exercise.
- Legal clarity avoids unnecessary litigation. Litigation involving the free exercise of religion is often among the hardest fought, as fundamental principles are at stake. States have a compelling interest to avoid such litigation and to protect religious liberty.
- State RFRAs clarify that a person whose religious exercise is substantially burdened by government can make a claim or mount a defense against the government's action and receive a declaration as to the legality of the government's action in a timely way, whether or not damages are requested.
- State RFRAs enhance government's transparency and accountability because it requires government officials to justify their unwillingness to accommodate citizens' religious exercise.
- Passing RFRA at the state level honors American pluralism and helps limit the coercive power of government. With RFRA, state bureaucracies are less likely to try to force citizens to do what their faith forbids or to prevent them from doing what their faith requires. By passing RFRA, a State recommits itself to the foundational principle that American citizens have the God-given right to live peaceably and undisturbed in accord with their religious beliefs.
- State RFRAs ensure healthy religious diversity in the State and reduces conflict along religious lines. Conflict becomes unnecessary when everyone's religious liberty is protected.
- A growing body of international research shows a positive relationship between religious freedom and economic freedom. One recent study shows the connection between religious freedom and ten of the twelve pillars of global competitiveness measured by the World Economic Forum's Global Competitiveness Index. Countries that protect religious freedom, in general, experience higher income, higher levels of education for women, better health outcomes, less armed conflict, less corruption, less harmful regulation, and other personal liberties (such as freedom of the press, freedom of speech, economic liberty, and freedom of travel) are more secure. (See Brian J. Grim, Greg Clark, and Robert Edward Snyder, "Is Religious Freedom Good for Business?: A Conceptual and Empirical Analysis," 10 Interdisciplinary J. of Research on Religion, article 4, 2014, ISSN 1556-3723.)

EXAMPLES OF WHY THIS IS IMPORTANT:

- Home-based churches and Bible study groups that face eviction on unequal terms with large gatherings (like parties) could mount a free exercise claim under this legislation.
- Church ministries that help ex-prisoners or that feed the homeless have been confronted with local government bans on their activities. Under this legislation, these ministries would have a better defense for their religious liberty.

- Medical professionals with religious objections would have a defense against providing drugs or services that would facilitate abortions. For example, in Vermont, after the passage of an assisted suicide law, the Vermont Board of Medical Practice and Office of Professional Regulation interpreted the law to require doctors to counsel their patients about the assisted suicide option. Doctors who lodged objections due to their convictions of conscience or their Hippocratic oaths were still expected to follow the board's interpretation of the law. Vermont All. for Ethical Healthcare, Inc. v. Hoser, No. 5:16-CV-205, 2017 WL 1284815 (D. Vt. Apr. 5, 2017), appeal dismissed sub nom. Vermont All. for Ethical Healthcare, Inc. v. van de Ven, No. 17-1481, 2017 WL 3429397 (2d Cir. May 22, 2017). See, http://www.adflegal.org/detailspages/case-details/vermont-alliance-for-ethical-healthcare-v.-hoser.
- The federal RFRA allowed Hobby Lobby, a privately held company whose owners are opposed to abortion on the basis of sincere religious belief, to prevail in its free exercise claim against the Affordable Care Act's mandate that the company fund abortifacients for its employees. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
- Without a similar act, Washington State has basically compelled a family-owned drug store to shut down because it refuses to sell abortifacients. This pharmacy was targeted by Planned Parenthood for its refusal to carry Plan B abortifacients or to refer customers to pharmacies that did. Under political pressure, the Pharmacy Commission of Washington State issued regulations that essentially prohibited pharmacies from refusing to follow their religious beliefs in these ways. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), cert. denied, 136 S. Ct. 2433 (2016). See, https://www.adflegal.org/detailspages/case-details/stormans-v.-wiesman.

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