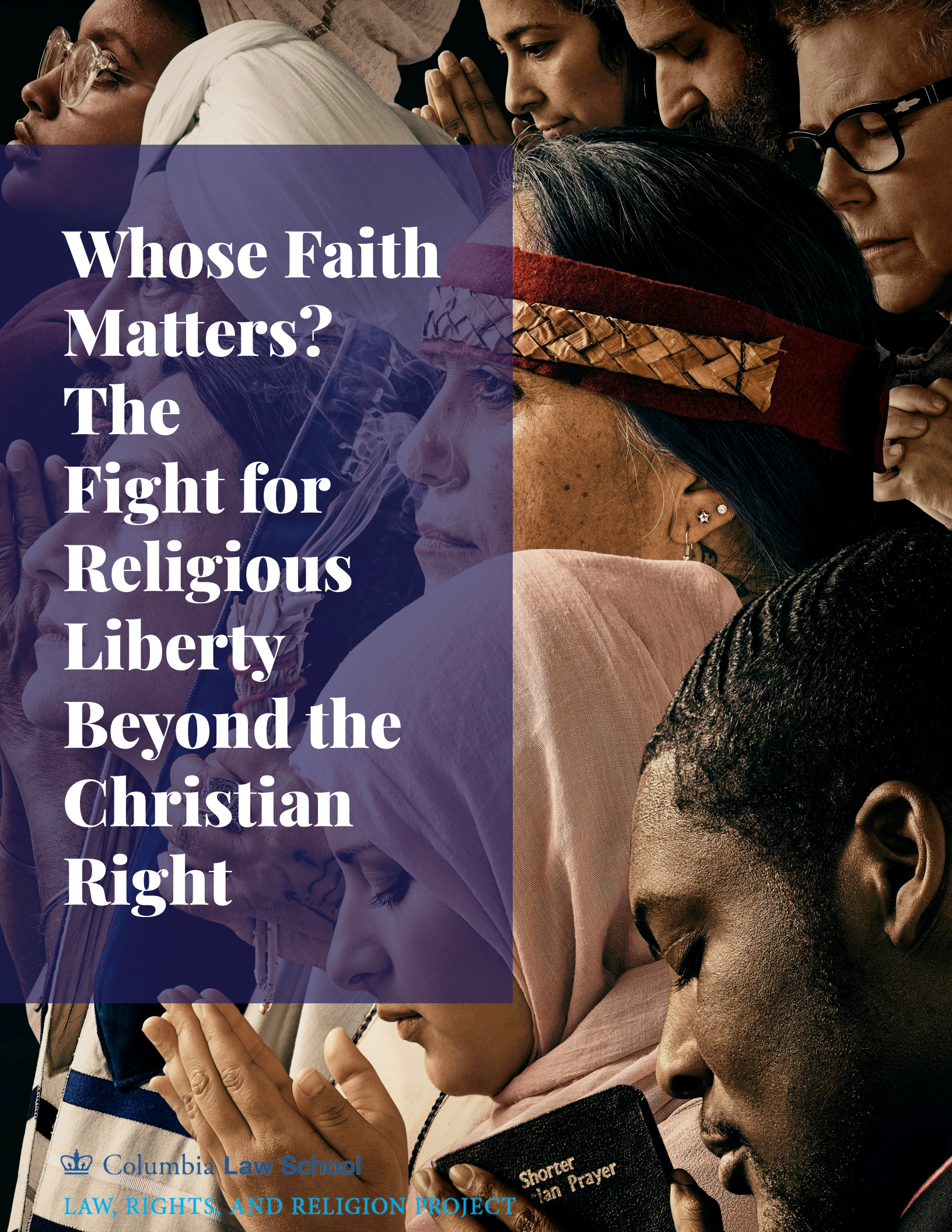

Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right

Columbia Law School
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Note

Much of the litigation described in this report is ongoing. We therefore apologize for any legal developments that occurred after our editing process was finalized, but before the report was released.

Cover Image

For Freedoms (Hank Willis Thomas and Emily Shur in collaboration with Eric Gottesman and Wyatt Gallery of For Freedoms), Freedom of Worship, 2018. Archival pigment print, 42 x 52.5 in.

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I An Overview of Religious Liberty Law

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Before detailing the broad array of religious liberty activism and litigation that has arisen out of social justice, humanitarian, and progressive movements, the report provides a basic background on religious liberty law. Below is a timeline demonstrating how religious liberty rights—including the right to religious exemptions—have evolved over time.

Religious Liberty Law Timeline

Pre-Revolutionary War: Several colonies adopted some of the very first religious exemption laws—conscientious objector statutes, which exempted Quakers and other religious pacifists from militia service.[1]

1791: First Amendment to the U.S. Constitution was ratified, including the two "religion clauses"—the "Establishment Clause" and the "Free Exercise Clause," which together state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

1879: In the first Supreme Court religious exemption case, *Reynolds v. United States*,[2] a Mormon man argued that the Free Exercise Clause barred the federal government from prosecuting him under a law that criminalized bigamy, because polygamy was an essential requirement of his religious faith. The Supreme Court disagreed, finding that the Free Exercise Clause protects religious belief, but not "actions which were in violation of social duties or subversive of good order." The Court voiced the concern that granting a faith-based exemption from the law "would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become

What is a "Religious Exemption"?

A religious exemption is a legal right to avoid compliance with a government law, regulation, or policy because it substantially burdens your religious beliefs and/or practices.

Religious exemptions range from the modest and relatively uncontroversial (say, an exemption from a public school's no-hats policy for a Jewish student to wear a yarmulke) to the hotly contested (an exemption from a state mandatory vaccination law).

Religious exemptions may be explicitly guaranteed under a federal, state, or local law or administrative policy. Or they may be granted as part of a lawsuit. Examples include:

Congress exempts Native Americans who use peyote during religious rituals from compliance with a federal law criminalizing peyote use.

A city police department exempts observant Muslim and Sikh officers from a policy requiring officers to be clean-shaven.

The federal government files discrimination charges against a religious school for firing a teacher with a disability. The Supreme Court finds that the Free Exercise Clause exempts the school from compliance with the Americans with Disabilities Act with regards to the selection of its 'ministers," including the teacher.

a law unto himself." This rejection of a constitutional right to religious exemptions held sway for nearly 100 years—though during this time, legislators were free to pass religious exemption laws, like those protecting conscientious objectors to military service.

1961: In a series of decisions starting in the 1960s, the Supreme Court, led by Chief Justice Earl Warren, began to construe the Free Exercise Clause in broader terms than it had previously. In the 1961 case *Braunfeld v. Brown*, for example, an Orthodox Jewish business owner sought the right to open his store on Sundays, despite a state law requiring businesses to close on Sundays.[3]

While the Court ruled against the shopkeeper, it noted that upholding any law that burdens religious practice, so long as it applies generally to all people, would be a "gross oversimplification."[4]

It is worth noting that during this era, the Warren Court decided numerous other landmark cases expanding individual rights, including *Loving v. Virginia*[5] (striking down anti-miscegenation laws as unconstitutional), *Gideon v. Wainwright*[6] (recognizing a right to a free attorney for criminal defendants), and *Griswold v. Connecticut*[7] (recognizing a right to privacy, including the use of contraceptives).

1963: In *Sherbert v. Verner,*[8] the Supreme Court departed from its interpretation of the Free Exercise Clause in *Reynolds v. United States*, ruling that South Carolina violated the Free Exercise Clause when it denied unemployment insurance benefits to a Seventh Day Adventist because she refused to work on Saturdays, her Sabbath. Thus, the Court introduced for the first time the constitutional requirement that religious believers be exempted from government laws and policies that burden their faith—even if the laws or policies do not intentionally target religious believers—where the government cannot show a compelling reason for imposing such a burden.

1964: Congress passed the Civil Rights Act, which prohibited religious discrimination in public accommodations and employment.[9] The Act was amended in 1972 to require employers to reasonably accommodate the religious practices of their employees.[10]

1960s-1990: *Sherbert* was expanded upon in a series of decisions that interpreted the Free Exercise Clause far more broadly than under the earlier *Reynolds* standard. These decisions allowed people of faith, in some circumstances, to violate laws that conflicted

with their religious practice. Most notably, in the 1972 case *Wisconsin v. Yoder*,[11] the Supreme Court ruled that Amish families who wanted to remove their children from public school after 8th grade, despite a state law requiring school attendance until 16 years of age, should be permitted to do so without facing punishment.

In these cases, the Supreme Court established the principle that where a law or government policy, even if generally applicable to all people regardless of their faith, imposes a substantial burden on a person's sincerely held religious practice, the person may claim an exemption from the law or policy—unless the government can demonstrate that enforcing the law is necessary to accomplishing an important state interest.

The Court's Free Exercise opinions during this period drew a connection between the protection of religious liberty and principles of nondiscrimination. In *Sherbert v. Verner*, for instance, the Court grounded its constitutional standard of review for religious liberty claims in the standard of review honed in Fourteenth Amendment equal protection cases.[12]

Thus, religious liberty rights and rights to equality were understood to be mutually reinforcing values. During this period, the Court granted faith-based exemptions from generally applicable laws to members of minority Christian sects, including Jehovah's Witnesses,[13] Seventh Day Adventists,[14] and the Amish.[15] That said, even during this time, many exemption claims—including cases brought by Native American religious practitioners and Jews—were denied.[16]

1990: Less than three decades after *Sherbert*, the Supreme Court reversed course again in *Employment Division v. Smith*.[17] This case involved two Native American men who were denied unemployment benefits because they had been fired for illegally smoking peyote as part of a religious ritual, which the state of Oregon considered "misconduct." Rather than find that their religious beliefs justified an exemption from the law, as the Court had ruled in *Sherbert*, the Court upheld Oregon's decision to deny them benefits.[18] In language very similar to the 1879 *Reynolds* case, the Court emphasized the difference between religious belief and religious practice, and said "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law" conflicts with his religious observance.[19] Justice Antonin Scalia, the author of the Court's majority opinion, even claimed that the Court had "never held that an individual's religious beliefs excuse him from compliance

Al Smith speaking after the Supreme Court's decision in Employment Division v. Smith.
Courtesy of Jane Farrell-Smith.

with an otherwise valid law prohibiting conduct that the State is free to regulate."[20]

While *Smith* greatly reduced the circumstances under which the Free Exercise Clause entitled people of faith to religious exemptions, it did not eliminate such exemptions entirely. For example, the Supreme Court has since held that under the Free Exercise Clause, religious institutions should be exempt from certain employment laws with respect to their employment of ministers.[21] And nearly every scholar of religion law would agree that the First Amendment protects the performance of most religious rites according to terms set by the religion—even if those terms might conflict with secular legal rules, such as laws prohibiting discrimination. Thus, a woman cannot sue the Catholic Church to be ordained as a priest on the grounds that the church is discriminating on the basis of sex, and a same-sex couple cannot sue an Orthodox rabbi to marry them on the grounds that the congregation is discriminating on the basis of sexual orientation.

1993: *Employment Division v. Smith* proved to be a highly unpopular decision, and provoked Congress to pass the Religious Freedom Restoration Act (RFRA). This law recreated the robust right to religious exemptions outlined in *Sherbert v. Verner* and *Wisconsin v. Yoder*.[22] RFRA was passed with the support of a broad coalition of advocates from across the political spectrum—from the deeply conservative TraditionalValues Coalition to the liberal American Civil Liberties Union (ACLU)[23]—and was signed into law by President Bill Clinton.

RFRA was initially understood by many advocates and policymakers to be a civil rights law intended to prevent unintentional discrimination against religious minorities. In 1992, Senator Orrin Hatch, an ardent supporter of RFRA, called the bill "a civil rights bill for religious belief."[24] A Senate report on the bill stated that it was necessary because "State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths."[25] In fact, only three Senators voted against the bill, two of whom, Senators Jesse Helms and Robert Byrd, had previously filibustered civil rights legislation.[26] Many supporters of

President Bill Clinton signing RFRA. Courtesy of the U.S. National Archives.

the bill argued that religious exemptions were essential for the protection of small or unpopular religious groups, whose beliefs and practices were unintentionally restricted by numerous laws and policies that failed to consider or understand their faiths.[27]

Considering that anti-abortion groups have since benefited greatly from RFRA, it is worth noting that the passage of RFRA took several years in significant part due to opposition from religious groups opposed to abortion. The U.S. Catholic Conference and the National Right to Life Committee were concerned that RFRA could establish a religious right to

abortion that could be used in the event that *Roe v. Wade* was overturned.[28] RFRA was eventually signed into law three years after the Supreme Court's decision in *Employment Division v. Smith*.

Under RFRA, whenever a federal law, policy, or action substantially burdens a person's sincere religious exercise, they have the right to an exemption unless the government can show that the religious objector's compliance with the law is necessary to further a compelling government interest. For example, in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,[29] a church whose members used hoasca (a substance made illegal under federal law) during religious services argued that it was entitled to a RFRA exemption from federal enforcement of the Controlled Substances Act (CSA). The Supreme Court agreed, holding that the government had failed to show that enforcing the CSA against the church was necessary to furthering any compelling government interest.

RFRA, 42 U.S. Code § 2000bb–1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

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

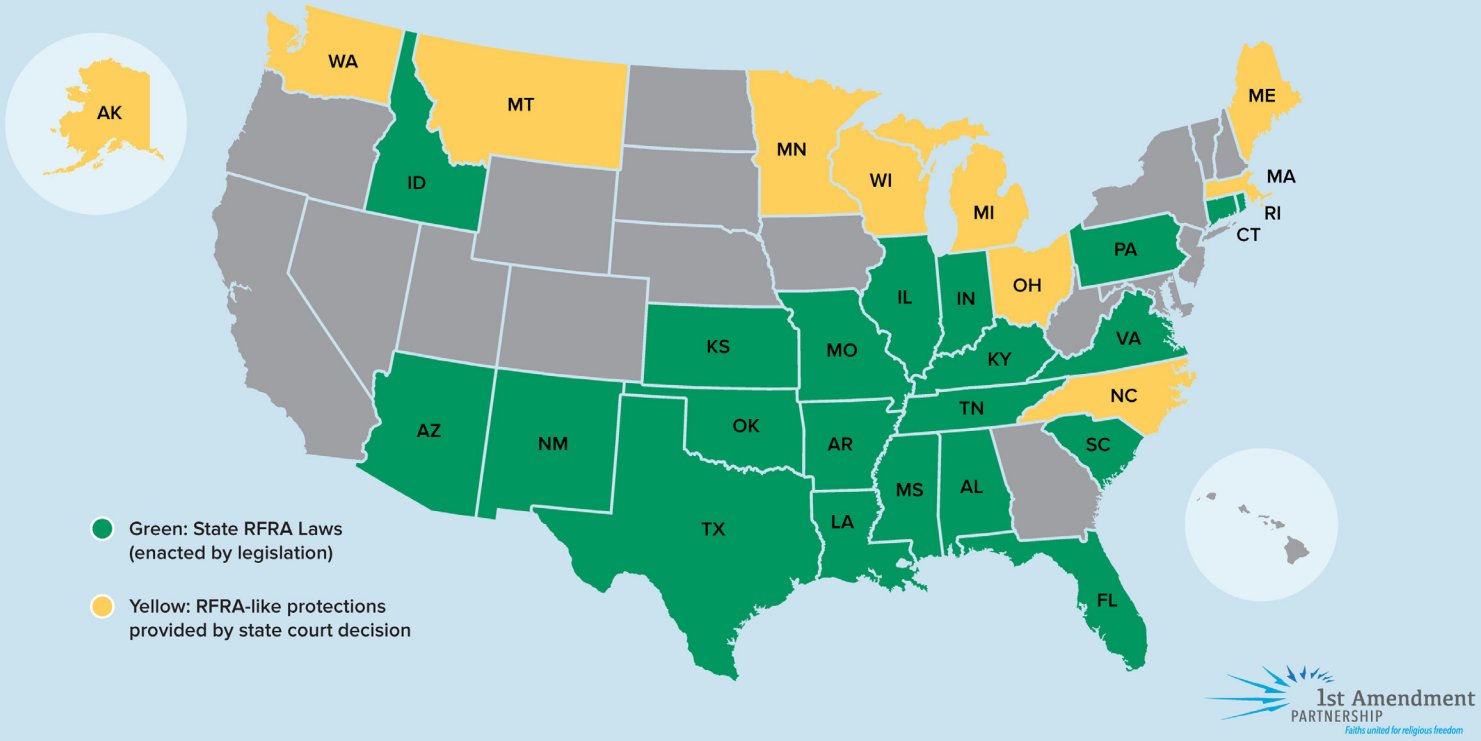
(2) is the least restrictive means of furthering that compelling governmental interest.

1997-Present: In the 1997 decision *City of Boerne v. Flores*,[30] the Supreme Court held RFRA to be unconstitutional as applied to state laws and policies. After this decision, RFRA only provides religious exemptions from federal laws and policies. In response to *City of Boerne*, many states passed their own RFRA laws, or "mini-RFRAs," which apply the RFRA standard to state and local activities. Today, nearly half the states have such laws.[31] In addition, several states have a right to religious exemptions under their state constitutions, thus providing broader protections for religious practices than the U.S. Constitution after *Smith*.[32]

2000: Three years after City of *Boerne v. Flores*, Congress passed another significant religious liberty law, the Religious Land Use and Institutionalized Persons Act (RLUIPA).[33] This law applied the RFRA test to state and local actions in two specific contexts—land use regulations that burden religion (such as the use of zoning laws to prevent the construction of a house of worship), and regulations on persons being held in state institutions (such as jails and public psychiatric facilities). RLUIPA is commonly used to

ensure that detained and incarcerated people have access to religious necessities like kosher or halal food, religious books, devotional practices, and clothing.

State Religious Freedom Restoration Acts (RFRA)



2014-Present: In response to the marriage equality movement and policies that have increased access to contraception, religious conservatives have initiated a wave of religious exemption lawsuits, several of which have succeeded before the Supreme Court. In the 2014 decision *Burwell v. Hobby Lobby*,[34] the Court held that RFRA provides a religious exemption to for-profit businesses that object to providing their employees with insurance coverage for contraceptives, as required by the Affordable Care Act (ACA). The Court's decision to grant large corporations religious liberty rights was highly controversial among religion scholars and the broader public. Two years later, in *Zubik v. Burwell*, an eight-person Court declined to rule on the question of whether requiring nonprofit organizations to submit a form opting out of the contraceptive mandate also violated RFRA.[35]

In the 2018 case *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*, the Supreme Court dismissed a civil rights case that the State of Colorado had brought against a bakery for refusing to make a wedding cake for a same-sex couple, in violation of the state's antidiscrimination law.[36] The Court declined to hold that companies have a constitutional right to an exemption from compliance with civil rights laws, instead finding that the state human rights commission had not given the bakery owner an impartial hearing, and had expressed bias towards his religious views. The question of whether religious adherents are entitled to any constitutional exemption from antidiscrimination laws is likely to come back before the Supreme Court soon.

In addition to these cases, many other lawsuits requesting similar exemptions from health and civil rights laws have been brought in state and federal courts across the country.[37] Moreover, in July 2019, an appeal was filed to the Supreme Court asking the Court to revisit its holding in *Employment Division v. Smith*.[38] While the case does not involve reproductive or LGBTQ rights, it could create a sea change in Free Exercise law.

Rally outside the Supreme Court in support of Hobby Lobby. © 2014 American Life League via flickr.

In summary—today, most religious exemptions are secured through legislation rather than the Free Exercise Clause of the U.S. Constitution. In addition to RFRA and RLUIPA, there are hundreds if not thousands of more discrete religious exemptions within federal, state, and local law—from those exempting religious objectors from state vaccine laws to those exempting Jehovah's Witnesses and others from certain oath requirements. While the initial decision to pass RFRA was largely motivated by a concern for religious minorities, several recent Supreme Court cases have led to a widespread focus on claims brought by Christian conservatives. However, as will be discussed in the following section, the Christian right by no means holds a monopoly on contemporary religious liberty rights.

Endnotes, Section I: An Overview of Religious Liberty Law

1 Ellis M. West, T*he Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J. L. & Religion 367, 375 (1993) ("exemptions from conscription laws were often granted to religious conscientious objectors before, during, and after the Revolution"); Richard P. Fox, *Conscientious Objection to War: The Background and a Current Appraisal*, 31 Clev. St. L. Rev. 77, 79 (1982) ("Prior to 1775, the American colonies enacted 600 laws governing their militias, most of which contained provisions for the exemption of conscientious objectors.").

2 *Reynolds v. United States*, 98 U.S. 145 (1879).

3 *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961).

4 *Id*. at 607.

5 *Loving v. Virginia*, 388 U.S. 1 (1967).

6 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

7 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8 *Sherbert v. Verner*, 374 U.S. 398 (1963).

9 42 U.S.C. § 2000a *et seq.*

10 John D. Dadakis and Thomas M. Russo, *Religious Discrimination in Employment: The 1972 Amendment— A Perspective*, 3 Fordham Urb. L. J. 327, 328 (1975), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1460&context=ulj.

11 *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972).

12 *Sherbert,* 374 U.S. at 403 ("If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'").

13 *Thomas v. Review Bd. of the Indiana Emp't Sec. Div.*, 450 U.S. 707, 719 (1981).

14 *Hobbie v. Unemp't Appeals Comm'n of Fla*., 480 U.S. 136, 146 (1987).

15 *Yoder*, 406 U.S. at 234.

16 *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying an Orthodox Jew's request for an exemption from a military regulation prohibiting headwear so that he could wear a yarmulke); *Bowen v. Roy*, 476 U.S. 693 (1986) (denying a claim brought by Native American parents requesting that their daughter not be assigned a social security number, as this would violate their religious beliefs); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (denying an exemption request from three tribes seeking to prevent the construction of a road on holy land essential to their religious practice).

17 *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

18 *Id*. at 884 ("Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").

19 *Id*. at 879 (internal citations omitted).

20 *Id.* at 878-79.

21 *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C*., 565 U.S. 171, 174-5 (2012).

22 42 U.S.C. § 2000bb *et seq*.

23 *The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom*, Baptist Joint Committee for Religious Liberty, 6, https://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf. The ACLU has since advocated amending the law. Louise Melling, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law,* Wash. Post (June 26, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html ("It's time for Congress to amend the RFRA so that it cannot be used as a defense for discrimination.").

24 *The Religious Freedom Restoration Act: Hearing on H.R. 1308 before the S. Comm. on the Judiciary*, 102nd Cong. 241 (1992) (statement of Sen. Hatch). *See also id.* at 171 (statement of Nadine Strossen, President, American Civil Liberties Union) ("the Religious Freedom Restoration Act, [is] the civil rights act of first amendment law"); *id.* at 74 (statement of Douglas Laycock, Professor, University of Texas Law School) ("Racial and ethnic minorities are often also religious minorities. The civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice").

25 S. Rep. No. 103-111, at 8 (1993).

26 R. Laurence Moore and Isaac Kramnick, Godless Citizens in a Godly Republic: Atheists in American Public Life 147 (2018); Rob Boston, *Past Due Bill: Religious Freedom Restoration Act Finally Becomes Law*, Church & State 7-8 (Dec. 1993), https://www.au.org/sites/default/files/2018-11/RFRA%20Dec.%201993.pdf.

27 *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 22 (1990), https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/05/hear-150-1990.pdf (statement of Rep. Lamar Smith) ("For over 40 years we have condemned Communist countries for…persecution of religious minorities…We have to practice what we preach."); *id.* at 20 (statement of Rep. Stephen J. Solarz) ("Even today, Jews from the Soviet Union, Buddhists from Southeast Asia, Catholics from Northern Ireland, Bahais from Iran, and many more, willingly

renounce their homelands and risk their lives for the 'luxury' of religious freedom. Respect for diversity, and particularly religious diversity, was one of the fundamental principles that guided the framers of the Constitution."); *id.* at 66 (statement of American Jewish Congress) ("Some may question why federal legislation to undo the Smith decision is considered so essential. But that is to underestimate the role of the courts in protecting the rights of religious minorities."). *See also Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 54-55 (1992), https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf (Statement of Rep. Craig Washington) ("It is the people who are in the minority…on the question of religion, who need the protection the most, so they can practice it"); *id.* at 25 (statement of Elder Dallin Oaks) ("The worshipers who need its [The Bill of Rights'] protections are the oppressed minorities, not the influential constituent elements of the majority"). *See also* 139 Cong. Rec. 7, 9677 (1993) (statement of Rep. Karen F. Shepherd); *id.* at 9686 (statement of Rep. Bruce Vento) ("Today the balance is tipped against the exercise of religion and especially against those that are minorities in our society, either ethnically, as my colleagues mentioned, the native Americans groups, the Hmong… and/or other minority religious groups"; *id.* at 9687 (statement of Rep. Bob Franks) ("Its [Smiths'] implications are especially burdensome for those whose beliefs lie within the religious minority"); 137 Cong. Rec. 16, 23376 (1991) (statement of Rep. Glenn M. Anderson) ("the illogical refusal to examine any State infringements on religious practices is disastrous to those religious practices which may not conform to general law and do not have the popular support to find politically granted exceptions"); 137 Cong. Rec. 12, 17036 (1991) (statement of Rep. Stephen J. Solarz) ("The test strikes an appropriate balance between the needs of the majority and the rights of religious minorities").

28 *See, e.g.*, *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary,* 102nd Cong. 129-35 (1992) (Statement of Mark Chopko, General Counsel, United States Catholic Conference) ("The Conference has legitimate concerns that S. 2969 will be utilized to attempt to promote the destruction of innocent unborn human lives"); *id.* at 206-37 (Statement of James Bopp, Jr., General Counsel, National Right to Life Committee, titled "Why the Religious Freedom Restoration Act Must Expressly Exclude a Right to Abortion.").

29 *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

30 *City of Boerne v. Flores*, 521 U.S. 507 (1997).

31 *State Religious Freedom Restoration Acts*, Nat'l Conf. of St. Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

32 *See State RFRA Map*, Protect Thy Neighbor (last visited Mar. 9, 2019), http://www.protectthyneighbor.org/rfra (noting RFRA-like protections under state constitutions in Alabama, Alaska, Maine, Massachusetts, Minnesota, Ohio, New York, and Wisconsin).

33 42 U.S.C. § 2000cc *et seq.*

34 *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682 (2014).

35 *Zubik v. Burwell*, 578 U.S. __, 136 S. Ct. 1557 (2016).

36 *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, 584 U.S. __, 138 S. Ct. 1719 (2018).

37 For a list of additional litigation, *see infra* Section III note 40. In addition, two other religion cases were recently heard by the Supreme Court. In one, the Court held that the state of Missouri violated the Free Exercise Clause of the Constitution when it withheld a grant to a church-affiliated preschool because of a state ban on funding religious institutions. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S.__, 137 S. Ct. 2012 (2017). In the other, the Court found that a 40-foot Latin cross dedicated to soldiers killed in WWI, built in 1925 and displayed on government-owned land, did not violate the Establishment Clause. *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. _, 139 S. Ct. 2067 (2019).

38 *Ricks v. State Contractors Bd.*, 435 P.3d 1 (Idaho Ct. App. 2019) *appeal docketed*, No. 19-66 (U.S. Jul. 12, 2019).