What is RFRA?
(Religious Freedom Restoration Act)

Religion holds a privileged place in America. The First Amendment prohibits government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof."

The Amendment prohibits two kinds of government action with respect to religion. First it prohibits government establishment of religion through what is known as the Establishment Clause. Second, it prohibits government intrusion on the practice of religion through the Free Exercise Clause. The Supreme Court of the United States has regularly been called upon to interpret and apply the Amendment's terms.

The Religious Freedom Restoration Act (RFRA) was passed by Congress in 1993 to provide enhanced protection for religious free exercise. It followed a controversial decision in 1990 by the Supreme Court in *Employment Division v. Smith*. The historical and jurisprudential background to that case provides a necessary foundation to understand the significance of RFRA.

Historical Background

In *Employment Division v. Smith* the Court revised long-standing case law that permitted parties to seek exemptions from laws that infringed upon their free exercise of religion. Exactly how that case law developed and was altered by *Employment Division* is well summarized by Justice Alito in a 2014 decision that applied RFRA to a federal law mandate that imposed burdens on some person's free exercise of religion. The case was *Burwell v. Hobby Lobby*, wherein the court explained:

> Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U. S. 398 (1963), and *Wisconsin v. Yoder*, 406 U. S. 205 (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest…
>
> In *Smith*, however, the Court rejected "the balancing test set forth in

> *Sherbert*." *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the *Sherbert* test, held that the denial of benefits violated the Free Exercise Clause.
>
> This Court then reversed, observing that use of the *Sherbert* test whenever a person objected on religious grounds to the enforcement of a generally applicable law "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."
>
> Congress responded to *Smith* by enacting RFRA. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "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." 573 U.S. at ___, 134 S.Ct. at 2751, 2760-61.

The development of statutory free exercise protection did not end there. Subsequent case law, recognizing limits on Congressional power, restricted application of RFRA to federal action, thereby freeing states from the 'strict scrutiny' standard of REFA. Once again, the majority opinion in *Hobby Lobby* developed the ongoing history:

> As enacted in 1993, RFRA applied to both the Federal Government and the States… [I]n attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. In *City of Boerne* [*v. Florida*], however, we held that Congress had overstepped its Section 5 authority because "[t]he stringent test RFRA demands" "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."
>
> Following our decision in *City of Boerne*, Congress passed the Religious

> Land Use and Institutionalized Persons Act of 2000 (RLUIPA). That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. And, what is most relevant for present purposes, RLUIPA amended RFRA's definition of the "exercise of religion." (importing RLUIPA definition). Before RLUIPA, RFRA's definition made reference to the First Amendment (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 573 U.S. at ___, 134 S.Ct. at 2761-2762 (citations omitted)

The congressional response to *Smith* and its post *City of Boerne* amendment of RAFA's definition of "exercise of religion" were seismic. The aftershocks rippled through state legislatures as well. About half the states have state constitutional strict scrutiny similar to the *Sherbert v. Verner* test or have now adopted RFRA like legislation imposing strict scrutiny on state and local law, regulations, and government action that impose unnecessary burdens on religious free exercise.

Current Experience

RFRA and state analogs provide strong protection for religious free exercise. When government imposes on religious believers free exercise, RFRA arms them with various options. Affirmative litigation can aggressively challenge application of law or government action. One prominent example was the successful challenge by an employer, Hobby Lobby, to a federal health care law mandating employee insurance coverage for contraceptive drugs that likely interfere with implantation of an embryo – a mechanism of action that the employer had a religious objection to facilitating. Alternatively, a defendant in a government prosecution or regulatory enforcement action may be in a position to raise a RFRA defense if the government rule at issue imposes upon free exercise without a compelling reason or where alternatives to enforcement would nonetheless allow the government to realize its compelling interest without enforcement of the rule at issue.

Unless and until the Supreme Court reverses or narrows the holding of *Employment Division*, RFRA will be an essential protection of religious liberty. In states whose courts apply a rule similar to *Employment Division*, state RFRAs will provide substantial protection against unnecessary government infringement of this most important freedom.