

**Questions and Answers
About
State Religious
Freedom Acts**

2nd Edition



**The Council on Religious Freedom
and
SIDLEY AUSTIN BROWN WOOD'S
Religious Institutions Group**

What is the state of your religious freedom?



Because of recent weakening in federal protection for religious liberty, the answer is now found largely in your state laws.

Religious freedom, born in the early colonies of America, is undergoing a rebirth in the heirs of those colonies—the states. State Religious Freedom Restoration Acts are the single most important development in religious freedom in the last decade. This revised booklet gives an overview of the state Acts and explains why they are a critical part of the legal framework that protects religious liberty today.

The original booklet was an invaluable tool for the lobbyist, the busy legislator, and the concerned citizen seeking to understand or promote religious freedom at the state level. This revision, which includes developments into the early 2001 legislative session, will heighten the booklet's effectiveness.

The booklet was prepared and reviewed by attorneys and others associated with the Coalition for the Free Exercise of Religion, a national alliance of more than 70 religious and civil rights groups dedicated to preserving our nation's heritage of religious freedom.

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Why This Book?

A new tool has emerged for use in the effort to protect religious freedom—the state Religious Freedom Restoration Act (“RFRA”). In the last decade, nearly a dozen state RFRA have become law. Despite the dire predictions of critics, these Acts have not given rise to a flood of prisoner suits, protected child abusers, empowered churches to run amuck over zoning laws, or negated other civil rights. Rather, these Acts have responsibly given religious people and institutions protection from an increasingly intrusive government bureaucracy.

This history should be argument enough for states considering RFRA to pass them. However, many RFRA opponents are not deterred by the reality of what is happening under the RFRA legal standard. Rather, they are driven by speculations about extreme claims that might be brought under RFRA—no matter how fantastic such claims are or how remote their chances of success. Legislatures must create and evaluate laws based on their likely and reasonable effects, as shown by legal precedent, history, and common sense.

That is where this booklet can help. It shows that the compelling interest standard that RFRA institute has a stellar history of nearly half a century of fairly protecting the religious freedom of individuals and institutions. Rather than a doorway to an uncertain and chaotic future, a state RFRA is a “back to the future” portal that restores a known and responsible legal protection. This booklet is a guide to that portal for the religious or civil rights leader, the state legislator, and the concerned citizen.

The first edition of this booklet was prepared and published by the Maryland-based Council on Religious Freedom,¹ a non-profit advocacy group active in promoting religious liberty nationally. With the Council’s permission, attorneys in the Religious Institution Practice Group at the Washington D.C. law

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firm of Sidley Austin Brown & Wood² have taken a leading role in revising the booklet in light of recent changes in the law. The booklet has also been modified in light of the comments of a wider group of religious and civil rights leaders and attorneys who are a part of the State RFRA Task Force of the Coalition for the Free Exercise of Religion.

This booklet is prepared as an overview of State Religious Freedom Acts. It is not intended as legal advice, as the facts of each case, as well as the applicable procedure of each jurisdiction, are unique. If legal action under a state RFRA is being considered, an attorney should be consulted.

1. What Are State Religious Freedom Acts?

State Religious Freedom Restoration Acts (State RFRAs) are a response to significant losses of federal religious liberty protection over the last decade. They are passed by state legislatures to restore the standard that has historically protected religious freedom – a standard known as the “compelling state interest test.” This standard requires that any state action that substantially burdens the religious freedom of any person be justified by showing that the state act is the least restrictive means of protecting a “compelling state interest.”³

Legislatures must create and evaluate laws based on their likely and reasonable effects, as shown by legal precedent, history, and common sense.

Such interests would include the protection of the life, liberty, property and health of others, and similarly strong community interests. The test requires the state to show that it has no other less restrictive ways of protecting this interest that avoids a con-

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flict with religious exercise.

Since 1997, RFRA's have been introduced in dozens of state legislatures across the country. RFRA's have become law in the following states: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina and Texas.⁴

2. Why Do We Need State RFRA's?

State RFRA's are needed because federal law no longer provides the protection for religious liberty that it once did, and most states have inadequate religious freedom protection. To be sure, some state constitutions provide strong protection. Some other states already have a state RFRA. But the majority of states have not passed RFRA statutes and have not clearly interpreted their state constitutions. Unless your state is one of the following, the law that protects your religious liberty is at best uncertain, and you are in need of a state RFRA: Arizona, Alabama, Connecticut, Florida, Idaho, Illinois, Massachusetts, Michigan, Minnesota, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Vermont, Washington, and Wisconsin.⁵

Some wonder if there is an actual, real-world need for heightened religious freedom protection. Most of us are not confronted from day to day with overt religious discrimination. But some faith groups, especially minority ones, are experiencing real difficulties. By definition, the problems of minority groups do not impact most of us most of the time. However, accounts of mistreatment of minority faiths are on the rise, and include Orthodox Jews forced to submit their deceased loved ones to autopsies,⁶ health care workers losing their jobs for religious-based refusals to perform abortions,⁷ state workers losing their jobs over holy day or religious clothing requirements,⁸ and religious home schoolers harassed or raided.⁹

Because a legal right is abstract, its disappearance may not be

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immediately noticed. This is especially true for a right that is viewed with respect by society at large. The widespread, though sometimes shallow, esteem for religious freedom found in America may serve to temporarily restrain religious discrimination. But history shows that during times of social or economic crisis, religious minorities often serve as scapegoats and targets for the discontent of the majority. To wait for such a dark day before restoring religious freedom will be to wait too long.

3. Doesn't the U.S. Constitution Already Protect Our Religious Liberty?

No, not like it used to anyway. In the last ten years the U.S. Supreme Court has greatly diminished the strength of the religious guarantees of the First Amendment to the U.S. Constitution.

Prior to 1990, the First Amendment was interpreted to give protection to religious belief and conduct in all cases where such belief or conduct was not outweighed by some compelling government interest in protecting life, liberty, property or some other similarly weighty community concern.¹⁰ But in the 1990 case of *Employment Division v. Smith*,¹¹ the Court decided that, in many cases, the First Amendment should only protect religion from laws or regulations that were targeted at religion.

Under the Court's reasoning, a law that forbade orthodox Jews from wearing yarmulkes on government property would be unconstitutional, as it would be targeting religion. However, if the law were to forbid *all* people from wearing hats on state property, it would be constitutional—even though the law would require Orthodox Jews to violate either their consciences or the law in order to walk on government property. Because the law is “neutral” towards religion and “generally applicable” to all persons, the First Amendment would no longer apply, despite the very real burden the law placed on a religious minority.

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Because many difficulties faced by minority religions are caused by legislative ignorance or insensitivity and not by open malice, religious groups were dealt a severe blow by the *Smith* decision. And most legislatures are clever enough to couch even anti-religious legislation in neutral and generally applicable terms, thereby evading the First Amendment. Thus, as the Harvard Law Review put it, the *Smith* decision as a practical matter “eviscerated” and “gutted” much of the protection previously enjoyed under the Free Exercise Clause of the First Amendment.¹²

4. Isn't There Federal Legislation that Protects Religious Freedom?

For a brief period from 1993 to 1997, there was a federal law that protected religious freedom generally. Known as the federal Religious Freedom Restoration Act (“RFRA”), it no longer applies to state laws and actions.

That law resulted largely from the efforts of the Coalition for the Free Exercise of Religion, which was formed in response to the *Smith* decision. With the support of unlikely allies such as the Catholic church, the ACLU, the Christian Legal Society and People for the American Way, the federal RFRA was passed by a virtually unanimous Congress in 1993. It restored the compelling interest standard to claims of religious freedom.

But the Supreme Court had the next word. In the 1997 case of *City of Boerne v. Flores*,¹³ the Court declared that RFRA was an unconstitutional exercise of Congressional power, insofar as it applied to the states. In *Boerne*, the Court ruled that RFRA was an infringement on the “traditional prerogative and general authority” of the states.¹⁴ Thus, while RFRA continues to apply to the federal government,¹⁵ it is now a dead letter as to the states.

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In September of 2000, with the Coalition’s active support, a partial replacement of RFRA, entitled the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), was signed into law. This law restores the compelling interest test in most cases dealing with the application of land use and zoning laws to property owned by religious persons or institutions. It also provides religious freedom protection to prisoners and other persons in the custody of the state.

Although this new statute provided added protection to religious liberty in some circumstances, its reach is limited. It only protects religious convictions associated with the use of land and property, or for those institutionalized by the state.¹⁶ This leaves a wide array of religious liberty concerns unprotected—such as the rights of religious home schoolers, the consciences of religious health care workers, and the religious rights of state employees and students at state schools or colleges.

5. Is the “Least Restrictive Means” Portion of the Compelling Interest Test a Recent Invention?

No. Despite recent claims to the contrary, the “least restrictive means” prong of the compelling interest test was firmly embedded in Supreme Court jurisprudence prior to 1990. As the Court stated in a 1981 case, the test for deciding if state action violated religious freedom was whether the state’s intrusion on religious conduct “is the *least restrictive means* of achieving some compelling state interest.”¹⁷ As early as 1963 the Court said that the state must “demonstrate that *no alternative forms of regulation* would combat such abuses without infringing First Amendment rights.”¹⁸ Certainly the lower federal courts understood the test as articulated by the Supreme Court to contain a least restrictive analysis prong, as these courts consistently applied that prong in resolving cases involving religious freedom claims prior to 1990.¹⁹

Without the “least restrictive means” requirement, the compelling interest test would be effectively neutered. Most state activi-

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ties, from drivers' licensing to student-aptitude testing to land regulation, can be described by state officials as advancing "important" or "compelling" public interests. For instance, the state needs to license drivers so it can prevent injury and death on its roads. But to meet this safety interest, the state does not need to give all licensing tests on Saturday—or all on Sunday—thereby forcing those who attend church on those days from choosing between their worship observance or driving legally. The state can reasonably meet its interest by giving the test on both days, or perhaps on some other day.

In short, while the "compelling interest" requirement is the bark of a state RFRA, the "least restrictive means" prong is its bite.²⁰

6. Who Opposes State RFRA's and Why?

Some opposition to state RFRA's arises from the bureaucratic self-interest of certain state and local agencies that do not want the "hassle" associated with respecting the religious convictions of the citizens they serve. Among these groups are some correctional agencies, zoning and land use boards, associations of county attorneys and the occasional state attorney general. The concerns of most of these groups have been mooted, if not muted, by the passage of the federal Religious Land Use and Institutionalized Act of 2000, which deals directly with these groups' areas of greatest concern.

More significant opposition can be expected from groups concerned about discrimination against gays and lesbians. These groups fear that state RFRA's may be used by religious landlords and employers to deny housing or employment to persons based on marital status or sexual orientation. These groups have sometimes taken an active role in opposing state RFRA's and have influenced a number of civil rights organizations to view State RFRA's as a threat to civil rights generally. Some states do include sexual orientation in their public accommodation, employment and housing laws. Federal laws and the laws of many other

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states do not.

The discrimination concerns voiced by these groups, however, overlook the fact that RFRA does not create a certain victory for religious landlords or employers in a contest with asserted rights of association or marital status protection. Rather, a state RFRA would restore fairness to an arena in which the rights of privacy, association, and religion sometimes need to be balanced. Supporters of state RFRA are merely requesting that religious freedom be given back its place among the pantheon of fundamental rights, without determining ahead of time what result would be achieved when there are competing claims. (For a further discussion of this issue, see “Will State RFRA Cancel Other Civil Rights Laws?” below.)

7. Should State RFRA Contain Exemptions for Prisoners?

Such exemptions would presently be futile, as prisoners are now generally protected under the Religious Land Use and Institutionalized Persons Act of 2000. But the question is relevant, as the history of the federal RFRA shows that no legislation necessarily lasts forever. If RLUIPA disappeared, could a state RFRA serve as the basis for a flood of prisoner litigation? History says no. A state RFRA creates no further opportunities for prisoner suits beyond those existing under the federal RFRA during its period of operation from 1993 to 1997, and during this time no significant increase in prisoner claims for religious freedom occurred.

At its height, the federal RFRA only produced an increase in reported prisoner religious freedom decisions by a per state average of about 1.5 cases a year. The state attorney generals’ own reported data show that RFRA caused an increase per state of only about 3.5 prisoner religious freedom filings a year, which is consistent with a figure of 1.5 reported decisions.²² Both of these numbers are insignificant compared to the large volume of other

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prisoner lawsuits brought every year during this same period, more than 4,000 per state.

Federal legislation was passed in 1996 to curtail frivolous suits brought by prisoners (the Prison Litigation Reform Act). This Act discourages all frivolous prisoner litigation, including any such suits brought as religious freedom claims. Because of these safeguards, there is no need to further diminish prisoners' rights to bring religious freedom claims. While a state RFRA may have a very minor affect

on prisoner litigation, in terms of number of cases, it will be vital in allowing genuine claims for religious freedom by prisoners to be vindicated. Further, there were no cases during the 1993-1997 period in which a court granted an inmate a

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religious right that threatened the security or operations of a correctional facility. The same holds true in the dozen or so states that have passed state RFRAs covering prisoners.

The above data explain why the Department of Justice "strongly supports" the application of RFRA standards to prisoners.²³ Further, prisoners are the most highly regulated and controlled segment of society. But this control does not legitimately extend to all matters of the soul and spirit. Prisoners may lose their physical freedom, but not their humanity. Their duties before God must receive a decent respect from society. State RFRAs would ensure no more than this.

8. Will State RFRA's Cancel Other Anti-Discrimination Laws?²⁴

Some have raised the concern that state RFRA's will undermine racial anti-discrimination laws. This is simply not true. The U.S. Supreme Court, under the First Amendment's old compelling interest standard, held that claims of religious conviction would not override the government's interest in preventing private acts of racial discrimination. The leading case on this issue is *Bob Jones University v. United States*,²⁵ in which the Court upheld the IRS's denial of tax exemption to the University because of its racially discriminatory policies. This and other federal court decisions have made it apparent that overcoming racial discrimination practiced by private, church-related schools, is a government interest that outweighs religiously based claims.²⁶ While the outcome may be less certain when non-racial characteristics, such as gender or sexual orientation or marital status, are the basis of religiously motivated discrimination, these interests have been found by some courts to override religiously based housing and employment decisions.²⁷ In other cases the free-exercise right has prevailed, protecting the freedom of choice of the landlord or employer with religious scruples.²⁸

The lesson is that each instance of alleged discrimination will likely require its own weighing of the facts and circumstances. A devout widow who rents the apartment over her garage or who is a live-in landlord at a four-unit complex may be protected in her conviction that she does not want to facilitate and live with what she views as immoral conduct. However, the claim of an absentee religious landlord who owns a forty-unit facility will come out differently, with the balance likely tipping in favor of the associational rights of the renters.

While most people agree that anti-discrimination laws protect important rights, almost all people agree that religious liberty is

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a fundamental right. The U.S. Supreme Court has affirmed it as such and it is plain from the text of the First Amendment. For many years courts have developed a body of law to deal fairly with conflicts between and among individual and societal rights. Those complaining that state RFRA's will skew the balance of civil rights in favor of religion overlook the fact that the status quo is profoundly skewed against religion. State RFRA's are merely an attempt to restore balance to a system that has lost its equilibrium.

9. Will State RFRA's Disrupt the School System or Endanger Children?²⁹

No. A state RFRA could provide religious students in a public school the right to form student religious and Bible clubs, the ability to opt out of some types of objectionable curriculum, the option to wear religious clothing or ornamentation, and the right to have their holy days or religious holidays respected in the scheduling of classes and exams. These claims would not prove disruptive to America's educational system, as shown by the many decades prior to 1990 during which these claims did have legal protection and yet did not disrupt school operations.

Police powers of the state are generally understood to be as broad and expansive as the needs of the community, being only limited by constitutional guidelines such as state and federal bills of rights.

A state RFRA would also provide some protection to private

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religious and home schools against intrusive government regulation. While these entities, especially the latter, are protected in most states, the protection is at times based on a regulation, or even a policy, that can rather easily be changed by state officials without the need for legislative approval. State RFRA would place claims for religious home schooling on a surer and firmer footing than presently exists in many states.

Some child welfare advocates worry that state RFRA will be used to justify child abuse or endangerment. However, these concerns have no basis in the nearly half-century history of the compelling interest test that RFRA seek to restore. No court has ever applied the compelling interest test to a claim for religious freedom in a way that protected child abuse or endangerment. While parents have rights under the U.S. Constitution to direct the “upbringing and education” of their children,³⁰ the physical safety and welfare of children lies at the core of those state interests that are serious and compelling and which a state has broad discretion to protect.

10. Are State RFRA Constitutional?³¹

Given that state RFRA are nearly identical to the failed federal RFRA, might not they suffer from the constitutional problems found in the federal bill? The answer is no, and it is based on a fundamental difference between the authority of state and federal governments.

As high school civics students learn, the federal government is one of limited and express powers. In other words, its authority is limited to those powers expressly delegated to it by the Constitution. All other powers of governing, also known as the broad police powers of the state, are expressly recognized by the Tenth Amendment of the Constitution to reside in state governments. These police powers are generally understood to be as broad and expansive as the needs of the community, being only limited by constitutional guidelines such as state and federal bills of rights.

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In light of the Tenth Amendment and their own inherent police powers, state governments can and do create legal rights to protect their citizens beyond those found in their own state constitutions. Indeed, the *Smith* decision itself recognized that the federal Constitution allows state legislatures to provide greater protection for religious liberty than the Court believed was provided by the federal Constitution.³² Moreover, as long as a state RFRA is worded so that it is clear that the legislature is creating a new right, and not merely telling the courts how to interpret the state constitution, there will be no violation of the separation of powers mandated by most state constitutions.

At times the claim is made that state RFRA's violate the federal Establishment Clause because they have the purpose and affect of advancing religion. Such arguments have never been accepted by the Supreme Court in similar contexts.³³ Moreover, they ignore the fact that the compelling state interest test was applied in protecting religion for nearly fifty years prior to 1990, yet the Supreme Court never ruled that this was a violation of the Establishment Clause.

The existence of the Free Exercise Clause, which explicitly protects religion, shows that the founders envisioned the Establishment Clause as allowing the special protection and treatment of religion vis-a-vis secular ideologies and groups. Perhaps the most telling point against the Establishment Clause objection is that the accommodation of religion is not the same as the advancement of religion.³⁴ The act of a state lifting a regulatory burden that it has placed upon religion is not the same thing as a state singling out religion for favor, advancement or support. Rather, such an accommodation is merely a recognition that the state's regulatory burden has intruded beyond the proper limits of its jurisdiction into the realm of religion.

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11. Should Churches, Synagogues, Mosques, and Other Religious Groups Support State RFRAs?

Yes. While religious organizations are legally forbidden from endorsing individual candidates for political office, such groups can support legislation, as long as such support is an “insubstantial” part of their activities. “Insubstantial” is understood to mean less than five percent of total budget expenditures. As most churches and other religious groups spend most of their time in worship, scripture study, education and community welfare programs, they are generally safe in supporting the occasional bill or legislative proposal.

A state RFRA is just the type of legislation that a religious group should involve itself with, as these bills go to the heart of a religious organization’s ability to carry out its religious missions and functions free from state interference. Safeguarding the individual conscience is a precept found, in one form or another, in the traditions of many of the world’s great religions, including the Christian, Jewish and Islamic faiths. The advocacy of state RFRAs can be an opportunity for religious groups to share their views about the importance of personal and spiritual freedom in their respective traditions.

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Endnotes

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³ While its roots lie in the first half of last century, the modern formulation of the compelling interest test was first expressed in *Sherbert v. Verner*, 374 U.S. 398 (1963) (employee fired for “misconduct” of Sabbath-keeping was entitled to unemployment benefits).

⁴ Texas passed a RFRA with a number of exemptions that make it unacceptable to many religious groups. These include exemptions for prisoners, land use issues and civil rights claims. The Texas experience highlights the danger of allowing an exemption to become attached to a bill, as others will almost inevitably follow.

⁵ This list loses its currency shortly after printing. To get an up-to-date list of states with sufficient protections, visit the Council on Religious Freedom’s web page at www.freedomcouncil.com and look at the “Freedom: State by State” page.

⁶ Editorial, “Bolstering Religious Freedom,” *The Christian Science Monitor*, July 21, 1999, at 9.

⁷ Tom Callahan, “Backing the Right of Nurses Not to Assist in Abortions,” *The New York Times*, Jan. 4, 1998, at 1.

⁸ Peggy Stack, “Islamic Panel Offers Guide to Health Care,” *Salt Lake Tribune*, May 27, 2000, at C1.

⁹ Andrea Billups, “Home-Schooler’s Lawsuit Says Civil Rights Violated,” *The Washington Times*, Sept. 1, 2000, at A4.

¹⁰ *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath-keeper’s convictions protected); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish protected in conviction re need to educate children at home after age of 14); *McDaniel v. Paty*, 435 U.S. 618 (1978) (State cannot inquire into religious belief as condition of employment); *Thomas v. Review Board*, 450 U.S. 707 (1981) (Jehovah’s witness protected in conviction against making war materials); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987) (employee protected in observing holy days even when conversion occurred after hiring).

¹¹ 494 U.S. 872 (1990).

¹² “Religious Exemptions from Generally Applicable Laws,” 104 *Harv. L. Rev.* 198, 204 (1990).

¹³ 521 U.S. 507 (1997).

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¹⁴ *Id.* at 534.

¹⁵ As of this writing, the federal administration takes the position that RFRA continues to apply to federal agencies and employees, although the U.S. Supreme Court has not directly ruled on the question.

¹⁶ For further information on the Religious Land Use and Institutionalized Persons Act of 2000 see the companion booklets in this series “Q&A About the Religious Land Use Act” and “Q&A About the Institutionalized Persons Act.”

¹⁷ *Thomas v. Review Board*, 450 U.S. at 718 (emphasis added).

¹⁸ *Sherbert v. Verner*, 374 U.S. at 407 (1963) (emphasis added). The Supreme Court in the 1987 *Hobbie* case, 480 U.S. at 143-44, strongly reaffirmed the rulings of *Sherbert* and *Thomas*. Even after the *Smith* decision, the Court has recognized that the least restrictive means prong is an important part of the compelling interest test applied against laws that target or uniquely burden religion. Such a law is “invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

¹⁹ See, e.g., *New Life First Baptist Church v. Town of East Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) (opinion by then-Judge Stephen Breyer); *Murphy v. Arkansas*, 852 F.2d 1039, 1041 (8th Cir. 1988); *Leahy v. District of Columbia*, 833 F.2d 1046, 1048 (D.C. Cir. 1987); *United States v. Dickens*, 695 F.2d 765, 772 (3d Cir. 1982).

²⁰ Claims that the “least restrictive means” test was an invention of the 1993 Religious Freedom Restoration Act have no basis in law or history. Rather, they appear to have arisen from a misstatement in the Supreme Court’s opinion in *Boerne v. Flores*. It is unfortunate that opponents of State RFRAs continue to give life to this mistaken statement in light of the indisputable historic legacy and inherent value of the “least restrictive means” analysis.

²¹ More material on this topic can be found at Lee Boothby & Nicholas Miller, “Prisoner Claims for Religious Freedom and State RFRAs,” 32 *U.C. Davis Law Rev.* 573 (1999).

²² The number of cases filed is always more than cases with reported decisions, as many cases, especially those filed by prisoners, are often disposed of summarily with no written opinion.

²³ In a letter on behalf of the U.S. Justice Department to the co-chair of the Coalition for the Free Exercise of Religion, Assistant Director Wallace Cheney wrote that the Department “strongly supported” the application of RFRAs to prisoners. The letter also stated that, in the Department’s experience, an RFRA placed “limited additional administrative burdens on Bureau of Prisons staff,” and that the “burdens are manageable.” Letter to Reverend Oliver Thomas, Esq., dated November 6, 1998.

²⁴ More material on this subject can be found at Robert O’Neil “Religious Freedom and

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Non-Discrimination: State RFRA Laws Versus Civil Rights,” 32 *U.C. Davis Law Rev.* 785 (1999).

²⁵ 461 U.S. 574 (1983).

²⁶ See *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977) (affirming judgment and award of damages against Christian school in racial discrimination case).

²⁷ *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998), *vacated and remanded*, 593 N.W.2d 545 (1999); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994); *Smith v. Fair Employment and Housing Comm’n*, 913 P.2d 909 (Cal. 1996).

²⁸ *State v. French*, 460 N.W.2d 2 (Minn. 1990); *Lewis v. Buchanan*, 21 Fair Empl. Prac. Cas. (BNA) 696 (Minn. Dist. Ct. 1979); *Walker v. First Presbyterian Church*, 22 Fair Empl. Prac. Cas. (BNA) 762, 23 Empl. Prac. Dec. (CCH) ¶ 31,006 (Cal. Super. 1980); *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985).

²⁹ More material on this subject can be found in Thomas Berg, “State Religious Freedom Statutes in Private and Public Education,” 32 *U.C. Davis Law Rev.* 531 (1999).

³⁰ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-535 (1925).

³¹ Further material on this subject can be found at Erwin Chemerinsky, “Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?” 32 *U.C. Davis Law Rev.* 645 (1999).

³² *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (“to say that a non-discriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required”).

³³ *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (rejecting the argument that a Title VII exemption for religious institutions violated the Establishment Clause); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-45 (1987) (“This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.”)

³⁴ See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) (holding that Title VII statutory provision that accommodates religion has a legitimate secular purpose); *accord*, *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 144-45 (1987); *Wisconsin v. Yoder*, 406 U.S. 1526, 1543 n.22 (1972); *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970).