



From the SelectedWorks of Sara Kohen

August 2011

Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work

Available at: http://works.bepress.com/sara_kohen/3

**Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits
Involving Only Private Parties**

Sara Lunsford Kohen¹

Introduction.....	1
I. Background.....	4
A. Supreme Court Free Exercise Jurisprudence and the Religious Freedom Restoration Act.....	6
B. An Unresolved Question: Does RFRA Apply to Suits Between Private Parties?	6
1. Courts Holding that RFRA Applies.....	7
a. The Second Circuit: <i>Hankins v.</i> <i>Lyght</i>	7
b. The Eighth Circuit: <i>In re</i> <i>Young</i>	8
c. The Circuit for the District of Columbia: <i>EEOC v. Catholic</i> <i>University of America</i>	9
2. Courts Holding that RFRA Does Not apply.....	10
a. The Fifth Circuit: <i>Boggan v. Mississippi Conference of the</i> <i>United Methodist Church</i>	10
b. The Sixth Circuit: <i>General Conference Corporation of</i> <i>Seventh-Day Adventists v. McGill</i>	11
c. The Seventh Circuit: <i>Tomic v. Catholic Diocese of</i> <i>Peoria</i>	12
3. A Third Option: The Ninth Circuit’s Approach in <i>Sutton</i>	12
II. Analysis: When RFRA Creates a Claim or a Defense in an Action Involving Only Private Parties.....	13
A. RFRA’s Text is Ambiguous.....	14
B. The Relevance of Section 1983.....	19
C. When a RFRA Claim is Available.....	20
1. Section 1983 State Actor Liability.....	21
a. Action Under Color of Law.....	21
b. Section 1983 Immunities and Defenses.....	26
c. Implications for RFRA.....	27
2. Legislative History.....	28
3. Public Policy.....	30
D. When a RFRA Defense is Available.....	31
1. Legislative History.....	31

¹ Law Clerk for the Honorable William Jay Riley, Chief Judge of the United States Court of Appeals for the Eighth Circuit; University of Nebraska College of Law, J.D., with highest honors, 2011; James Madison University, B.A., *summa cum laude*, 2007. The author wrote this article before beginning to clerk for Judge Riley, and the views expressed therein are the author’s own and not necessarily those of the court.

2. Public Policy.....	38
Conclusion.....	41

Introduction

In a pluralistic society, neutral and generally applicable laws often directly conflict with an individual's or organization's religious practices. This conflict causes these individuals and organizations to request religious exemptions. In these cases, courts must protect one interest at the expense of the other: should they favor the public's interest in an ordered society, governed by laws that apply equally to all, or should they instead favor individuals' interest in religious freedom? An absolutist approach to this question is inconsistent with the principles underlying the American system of government. To always enforce the laws, no matter the burden that doing so places on religious freedom, would stifle a key freedom enshrined the Constitution. On the other hand, allowing people to engage in all religiously-motivated conduct, without regard to the harm it does to society, would invite anarchy. The First Amendment's Free Exercise Clause, Supreme Court jurisprudence, and the federal Religious Freedom Restoration Act ("RFRA")² provide guidance on this issue.

The Supreme Court decided in *Employment Division, Department of Human Resources v. Smith* that the First Amendment's Free Exercise Clause does not require courts to grant exemptions from neutral, generally applicable laws—those that do not target religious conduct and cover non-religious conduct to the same extent as religious conduct.³ Congress, appalled by this holding, passed RFRA, which provides that a federal law may substantially burden a person's religious practice only if the burden is

² Although there are also state RFRAs, *see infra* note 254, unless otherwise indicated, the acronym "RFRA" in this paper refers to the federal RFRA. *See* 42 U.S.C. §§2000bb–2000bb-4.

³ *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990).

the least restrictive means of furthering a compelling governmental interest.⁴ It also allows “[a] person whose religious exercise has been burdened in violation of [RFRA to] assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”⁵

Although it is clear that RFRA creates claims and defenses against the federal government itself and federal officials acting within the scope of their duties,⁶ the federal circuits cannot agree on when—if ever—RFRA applies in a suit involving only private parties who are not government officials.⁷ This question arises when a person either (1) brings a RFRA claim against a private defendant who has acted in accordance with federal law,⁸ or (2) raises RFRA as a defense to a private cause of action created by a federal statute.⁹ The answer to this question is important because it affects the level of scrutiny that courts apply in private lawsuits in which a neutral, generally applicable law burdens a person’s free exercise of religion.¹⁰ If RFRA applies, then the burden must

⁴ See 42 U.S.C. §§ 2000bb–2000bb-4. Though the original version of the law also applied to state law, but the Supreme Court declared that this violated Congress’s Fourteenth Amendment power to make laws ensuring due process and equal protection of the laws. *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also notes 25–26 and accompanying text (further describing the Court’s holding *City of Boerne*). Congress thereafter amended RFRA to apply only to federal law. See Act Sept. 22, 2000, Pub. L. 106-274, 114 Stat. 806.

⁵ *Id.* at § 2000bb-1(c).

⁶ See 42 U.S.C. § 2000bb-2(1); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

⁷ See *infra* section I.D.

⁸ See *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826 (9th Cir. 1999) (The defendant employer, in accordance with federal law, refused to hire the plaintiff after the plaintiff claimed that his religious beliefs forbade him to provide his Social Security number).

⁹ See *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006) (as a defense to a private plaintiff’s claim under the ADEA); *General Conference Corporation of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010), *cert. den’d*, 131 S.Ct. 2097 (2011) (as a defense to a claim for trademark infringement); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (as a defense to private suit under the ADEA); see also *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (as a defense to a suit for copyright infringement).

¹⁰ If the law is either not neutral or not generally applicable, then strict scrutiny applies, even without RFRA. See *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990).

satisfy strict scrutiny.¹¹ If not, the burden is constitutional if it is rationally related to a legitimate government interest.¹²

Not only do the circuits disagree about when RFRA creates a claim or a defense against a private party, they cannot even agree on the correct analysis.¹³ This inquiry is complicated by the fact that RFRA's text is ambiguous.¹⁴ The courts' disagreement on this question demonstrates the need for a comprehensive theory of when RFRA creates claims and defenses in suits between private parties. This Article develops such a theory based on RFRA's text, similar language in other statutes, legislative history, and public policy considerations.

Determining when RFRA applies to suits between private parties involves two, separate inquiries: (1) when it creates a claim against a private defendant; and (2) when it creates a defense to a claim brought by a private plaintiff. Although RFRA's text, standing alone, is ambiguous, similar language in Section 1983, RFRA's legislative history, and public policy lead to the following conclusions. First, RFRA should create a claim against a private defendant whose conduct was sufficiently connected to government action to make the defendant a "state actor" within the meaning of Section 1983, though not if the defendant merely acted as compelled by federal law. In effect, this means that the defendant and the government must have been acting jointly in a way that substantially burdens the plaintiff's religious freedom.¹⁵ Doing so is not only consistent with the RFRA's text and legislative history, but is also the most just result because it assigns liability only to those private party defendants who purposely took

¹¹ 42 U.S.C. §§ 2000bb-2000bb-4.

¹² *Smith*, 494 U.S. 872.

¹³ *See id.*

¹⁴ *See infra* section II.A.

¹⁵ *See infra* section II.C.

advantage of the government's power in order to violate the plaintiff's rights. Secondly, RFRA should create a defense whenever enforcing a federal law would substantially burden the defendant's free exercise of religion, regardless of the plaintiff's identity. This conclusion is supported by RFRA's legislative history and prevents the government from doing indirectly, through creating and adjudicating private causes of action, what it may not do directly.

Part I discusses the relevant background: Supreme Court free exercise jurisprudence before the Court changed the test for burdens on free exercise resulting from neutral, generally applicable laws in *Employment Division, Department of Human Resources v. Smith*;¹⁶ the *Smith* decision itself; Congress's reaction to *Smith* in passing RFRA; and courts' interpretations of RFRA. Part II analyzes RFRA's text, similar language in Section 1983, RFRA's legislative history, and public policy considerations in order to determine when RFRA creates a claim or defense against private parties. Finally, Part III examines the potential effects of a Supreme Court decision on this question.

I. Background

A. Supreme Court Free Exercise Jurisprudence and the Religious Freedom Restoration Act

The Free Exercise Clause of the First Amendment forbids Congress to “prohibit[] the free exercise” of religion.¹⁷ From 1963 until 1990, the Supreme Court subjected burdens on free exercise to strict scrutiny, in other words, allowing the government to substantially burden a person's free exercise of religion only if it proved that doing so

¹⁶ *Id.*

¹⁷ U.S. CONST. amend. I. The Fourteenth Amendment Due Process Clause incorporates this prohibition against the states. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

was the least restrictive means of furthering a compelling governmental interest.¹⁸ The Court abandoned its use of strict scrutiny for burdens on religion resulting from neutral laws of general applicability in *Employment Division, Department of Human Resources v. Smith*.¹⁹ Instead, it held that such laws may burden religious practice as long as the government shows a rational basis for doing so.²⁰ The Court reaffirmed *Smith* three years later in *Church of the Lukumi Babalu Aye v. City of Hialeah*.²¹

The *Smith* decision “produced widespread disbelief and outrage.”²² As a result, Congress passed the Religious Freedom Restoration Act of 1993 (“RFRA”) in order to restore the compelling interest test for *all* free exercise claims.²³ RFRA first provides the

¹⁸ See *Sherbert v. Verner*, 374 U.S. 398 (1963) (announcing the use of strict scrutiny for free exercise claims resulting from requests for exemptions from unemployment claims), *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (applying strict scrutiny to Wisconsin’s refusal to grant Amish students’ requests for religious exemptions from its compulsory education law); see also *Smith*, 494 U.S. 872 (holding that the government need only show a rational basis for burdens on free exercise resulting from neutral, generally applicable laws). Despite the Court’s official adherence to strict scrutiny during the period between *Sherbert* and *Smith*, in practice, it rarely granted free exercise exemptions to neutral, generally applicable laws. See, e.g., *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) (holding that the government’s interest in promoting racial equality in education was sufficiently compelling to overcome the university’s free exercise claim); *U.S. v. Lee*, 455 U.S. 252 (1982) (rejecting a claim for a religious exemption from paying Social Security tax); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting an Orthodox Jew’s request to be exempted from the Air Force’s prohibition of wearing hats indoors so that he could wear a yarmulke); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (rejecting Muslim prisoners’ request for an exemption from prison work schedules so that they could conduct prayer services at particular times).

¹⁹ 494 U.S. 872. A law is not neutral if it singles out religious conduct for disparate treatment, and it is not generally applicable if it restricts religious conduct, but does not reach secular conduct that harms the governmental interest as much as or more than the religious conduct. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542–43 (1993).

²⁰ *Smith*, 494 U.S. 872. The Court asserted that it had only ever applied the compelling interest test to laws regulating belief as such; “hybrid” cases in which the government simultaneously violated more than one constitutional right, for example, parents’ rights to control their children’s educations; unemployment compensation cases involving individualized exemptions; and laws specifically targeting religion. *Id.* at 877–84. Many commentators view this explanation as an attempt to gloss over the Court’s departure from precedent. See generally, e.g., Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235 (1998); Sara Lunsford Kohen, *The Erosion of Nebraska’s Free Exercise Protection: In re Interest of Anaya*, 276 Neb. 825, 758 N.W. 2d 10 (2008), 89 NEB. L. REV. 159 (2010); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259 (1993); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

²¹ 508 U.S. 520.

²² Laycock, *supra* note 19, at 1.

²³ 42 U.S.C. § 2000bb.

general rule that “[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.”²⁴ However, it then provides an exception, allowing government to “substantially burden a person’s exercise of religion,” but “only if it demonstrates” that the burden is the least restrictive means of furthering a compelling government interest.²⁵ RFRA then allows “[a] person whose religious exercise has been burdened in violation of [RFRA to] assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”²⁶

The Supreme Court invalidated RFRA with regard to state action because it found that RFRA exceeded Congress’s power under Section Five of the Fourteenth Amendment to make laws ensuring due process and equal protection of the laws.²⁷ The Court reached this conclusion because it found that RFRA, rather than merely enforcing the right to free exercise of religion protected by the First and Fourteenth Amendments, purported to redefine what that right was.²⁸ Although RFRA no longer constrains state action, it continues to apply to actions taken by the federal government.²⁹

B. An Unresolved Question: Does RFRA Apply to Suits Between Private Parties?

Though it is clear that RFRA applies to conduct by federal officers and agencies, the lower federal courts disagree about whether it applies to suits involving only private

²⁴ *Id.* at § 2000bb-1(a). RFRA defines government as “includ[ing] a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States” *Id.* § 2000bb-2(1).

²⁵ *Id.* § 2000bb-1(b). “Demonstrates” is defined as “the burden of going forward with the evidence.” *Id.* § 2000bb-2(3).

²⁶ 42 U.S.C. § 2000bb-1(c).

²⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁸ *Id.*

²⁹ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *see* Act Sept. 22, 2000, Pub. L. 106-274, 114 Stat. 806 (amending RFRA so that it only applies to federal law).

parties. This question arises when an individual either (1) brings a RFRA claim against a private party who has acted in accordance with federal law,³⁰ or (2) raises RFRA as a defense to a private cause of action created by a federal statute.³¹ Three circuits have held that RFRA applies in such a situation,³² three have held that it does not,³³ and one has charted an intermediate course.³⁴ The Supreme Court has not considered the issue.

1. Courts holding that RFRA applies

a. The Second Circuit: *Hankins v. Lyght*

The Second Circuit held that RFRA creates a defense to a lawsuit brought by a private plaintiff, at least where the government also could have sued.³⁵ In *Hankins*, a pastor sued his former employer, a church, for violating the Age Discrimination in Employment Act (“ADEA”).³⁶ The district court dismissed the claim based on the common law ministerial exception, which bars courts from adjudicating employment discrimination suits brought against religious institutions by certain employees in order to

³⁰ See *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F. 3d 826 (9th Cir. 1999) (The defendant employer, in accordance with federal law, refused to hire the plaintiff after the plaintiff claimed that his religious beliefs forbade him to provide his Social Security number).

³¹ See *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006) (as a defense to a private plaintiff’s claim under the ADEA); *General Conference Corporation of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010), *cert. den’d*, 131 S.Ct. 2097 (2011) (as a defense to a claim for trademark infringement); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (as a defense to private suit under the ADEA); *see also* *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (as a defense to a suit for copyright infringement).

³² See *Hankins*, 441 F.3d 96; *In re Young*, 82 F.3d 1407, 1416-1417 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir.), *cert. denied*, 525 U.S. 811 (1998); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 467-470 (D.C. Cir. 1996).

³³ See *Boggan v. Mississippi Conference of the United Methodist Church*, 222 Fed. App’x 352 (5th Cir.), *cert. denied*, 552 U.S. 813 (2007), *aff’g* 433 F. Supp. 2d 762 (S.D. Miss. 2006); *McGill*, 617 F.3d 402; *Tomic*, 442 F.3d 1036.

³⁴ See *Sutton*, 192 F.3d 826, 843 (holding that an individual can only state a RFRA claim against a private defendant if the defendant has “willfully participat[ed] in a joint activity” with the government such that it is “fair to attribute liability to the private entity as a governmental actor”). *But see* *Worldwide Church of God*, 227 F.3d 1110 (stating that it “seems unlikely” that Congress intended for RFRA to create a defense to a copyright suit brought by a private plaintiff, without deciding this question because it found that the defendant had not shown that the copyright laws would substantially burden its exercise of religion).

³⁵ *Hankins*, 441 F.3d 96 (2d Cir. 2006).

³⁶ *Hankins*, 441 F.3d at 96-100.

avoid burdening the employer's free exercise rights.³⁷ The Second Circuit held that RFRA had replaced the ministerial exception's flat ban on such suits with a test that allowed them if doing so was the least restrictive means of furthering a compelling governmental interest.³⁸ The court then held that the defendant could assert RFRA as a defense, even though the plaintiff was a private person.³⁹ The court based its holding on both the language of RFRA itself and the fact that ADEA allows both individuals and the EEOC to sue.⁴⁰ The court reasoned that it would be illogical for "the substance of the ADEA's prohibitions [to] change depending on whether it is enforced by the EEOC or an aggrieved private party."⁴¹ However, the court declined to decide whether "RFRA applies to a federal law enforceable *only* in private actions between private parties."⁴²

b. The Eighth Circuit: *In re Young*

Similarly, the Eighth Circuit allowed a RFRA defense in a bankruptcy case.⁴³

The debtors had contributed a percentage of their income to their church as tithes during

³⁷ *Id.* at 100. The ministerial exception has been applied to both clergy and "lay employees of religious institutions whose 'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship . . .'" EEOC v. Catholic Univ. of America, 83 F.3d 455, 461 (D.C. Cir 1996). Though *Hankins* involves the ADEA, courts also have applied the ministerial exception to suits under Title VII of the Civil Rights Act of 1964. *See generally, e.g., id.* The ministerial exception is discussed further in *infra* note 195 and accompanying text.

³⁸ *Id.* at 102. The court noted that it had never resolved whether the ministerial exception even existed (the circuits are split on the issue). *See id.* It went on to state that the ministerial exception was not based on the text of any statute, and therefore "RFRA must be deemed the full expression of Congress's intent with regard to religion-related issues before us and displace earlier judge-made doctrines that might have been used to ameliorate the ADEA's impact on religious organizations and activities." *See id.*

³⁹ *Id.*

⁴⁰ *See id.* at 102-03.

⁴¹ *Id.* at 103 (citing *United States v. Brown*, 79 F.3d 1550, 1559 n. 16 (11th Cir.1996) ("The meaning of the statutory words 'scheme to defraud' does not change depending on whether the case is Civil RICO or criminal.")).

⁴² *Id.* at 103 (emphasis added). *See also* John LeVangie, *Hankins v. Lyght and the Unnecessary Intersection of the Religious Freedom Restoration Act and the Ministerial Exception*, 30 W. NEW ENG. L. REV. 641, 654-55 (2007-2008) (citing *Hankins*, 441 F.3d at 103) ("The *Hankins* decision was based on the assumption that the RFRA applied in all cases in which the government could have been a party, regardless of whether it actually was.").

⁴³ *In re Young*, 82 F.3d 1407, 1416-1417 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir.), *cert. denied*, 525 U.S. 811 (1998).

a period in which they were insolvent.⁴⁴ The trustee sued the church to recover these funds as fraudulent transfers under federal bankruptcy law.⁴⁵ The church raised RFRA as a defense, asserting that requiring it to return the contributions would substantially burden the religious practice of tithing, and was not narrowly tailored to serve a compelling governmental interest.⁴⁶ The Eighth Circuit allowed the RFRA defense, even though only private parties were involved in the suit, because:

RFRA . . . ‘applies to all Federal . . . law, and the implementation of that law’ . . . [and] RFRA defines the term ‘government’ broadly to include ‘a branch, department, instrumentality and official (or other person acting under color of law) of the United States’ The bankruptcy code is federal law, the federal courts are a branch of the United States, and our decision in the present case would involve the implementation of federal law.⁴⁷

On remand, the Eighth Circuit clarified that a RFRA defense was available because RFRA amends all federal law.⁴⁸

c. The Circuit for the District of Columbia: *EEOC v. Catholic University of America*

Additionally, the Circuit for the District of Columbia implicitly held that a RFRA defense is available against a private plaintiff by holding that RFRA barred Title VII employment discrimination claims brought by both a private plaintiff and the EEOC.⁴⁹ In this case, a Catholic nun, Sister McDonough, and the EEOC sued McDonough’s employer, Catholic University, for sex discrimination in violation of Title VII of the Civil

⁴⁴ *Id.* at 1410.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1418

⁴⁷ *Id.* at 1416–17 (citations omitted).

⁴⁸ 141 F.3d at 861 (“RFRA . . . has effectively amended the Bankruptcy Code[, such that] a recovery that places a substantial burden on a debtor’s exercise of religion will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest.”).

⁴⁹ *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 467–470 (D.C. Cir. 1996).

Rights Act of 1964.⁵⁰ Catholic University asserted the ministerial exception in defense, but the plaintiff contended that *Smith* had eliminated the ministerial exception because Title VII is both neutral and generally applicable.⁵¹ The court held that *Smith* did not eliminate the ministerial exception, but even if it did, RFRA “revalidated” the exception.⁵² Subsequently, the court concluded that the ministerial exception barred the claims brought by the EEOC and Sister McDonough.⁵³ The court applied RFRA equally to both plaintiffs, without considering the possibility that it might not apply to a private plaintiff like Sister McDonough.⁵⁴

2. Courts holding that RFRA does not apply

a. The Fifth Circuit: *Boggan v. Mississippi Conference of the United Methodist Church*

The Fifth Circuit, in an unpublished opinion, affirmed a district court’s holding that RFRA does not apply to lawsuits between private parties.⁵⁵ The plaintiff in *Boggan*, a pastor, sued his former church under Section 1981 and Title VII for discriminating against him because of his race.⁵⁶ The plaintiff argued that RFRA replaced the ministerial exception and allowed ministers to sue their churches if doing so was the least restrictive means of furthering a compelling governmental interest.⁵⁷ The District Court rejected this argument in part because it believed that “RFRA does not apply to suits

⁵⁰ *Id.* at 459

⁵¹ *See id.* at 461–62.

⁵² *Id.* at 462–70.

⁵³ *Id.*

⁵⁴ *See id.* at 467–70.

⁵⁵ *Boggan v. Mississippi Conference of the United Methodist Church*, 222 Fed. App’x 352 (5th Cir.), *cert. den’d*, 552 U.S. 813 (2007), *aff’g* 433 F. Supp. 2d 762 (S.D. Miss. 2006) (“*Boggan I*”).

⁵⁶ *Boggan v. Mississippi Conference of the United Methodist Church*, 433 F. Supp. 2d 762, 763–64 (S.D. Miss. 2006), *aff’d* 222 Fed. App’x 352 (5th Cir.), *cert. den’d*, 552 U.S. 813 (2007) (“*Boggan II*”).

⁵⁷ *Id.* at 766. The plaintiff argued that the compelling interest in this case was eliminating racial discrimination. *See id.*

between private parties but rather only applies to governmental action.”⁵⁸ It did not, however, explain why it concluded that RFRA does not apply against private parties, and the Fifth Circuit did not discuss this issue at all.⁵⁹

b. The Sixth Circuit: *General Conference Corporation of Seventh-Day Adventists v. McGill*

The Sixth Circuit concluded in *General Conference Corporation of Seventh-Day Adventists v. McGill* that RFRA does not create a defense to claims brought by private plaintiffs.⁶⁰ The plaintiffs sued Walter McGill for trademark infringement after he started his new church and named it “Creation Seventh Day Adventist Church,” even though the plaintiffs had trademarked the names “Seventh-Day Adventist” and “Adventist.”⁶¹ McGill raised RFRA as a defense, arguing that enforcing the trademark laws “would violate his Free Exercise Clause rights because” he believed that God required him to name his church thusly, even though doing so infringed on the plaintiffs’ trademarks.⁶² Because trademark law is neutral and generally applicable, free exercise is a defense to a claim for trademark infringement only if RFRA applies.⁶³ The Sixth Circuit concluded that RFRA does not create a defense to suits brought by private parties,⁶⁴ relying primarily on then-Judge Sotomayor’s dissent in *Hankins v. Lyght*, quoting it at length.⁶⁵ The court found further support in the fact that *McGill* involved trademark law, which

⁵⁸ *Id.* at 766.

⁵⁹ *See Boggan I*, 222 Fed. App’x 352.

⁶⁰ 617 F.3d 402 (6th Cir. 2010), *cert. den’d*, 131 S.Ct. 2097 (2011).

⁶¹ *Id.* at 404–06; 409.

⁶² *Id.* McGill also created the Internet domain names “7th-day-adventist.org” and “creation-7th-day-adventist-church.org.” *Id.* at 405–06.

⁶³ *Id.* at 409–10. If RFRA *does* apply, it would require strict scrutiny in this case because governmental action (enforcing trademark law) would substantially burden McGill’s sincerely held religious belief. *Id.* at 410. The plaintiffs do not dispute the sincerity of McGill’s belief that God requires him to use their trademarks. *Id.* Forcing him to stop doing so would be a substantial burden. *Id.*

⁶⁴ *Id.* at 410.

⁶⁵ *Id.* at 410–11 (quoting *Hankins v. Lyght*, 441 F.3d 96, 114–15 (2d Cir. 2006) (Sotomayor, J., dissenting)).

can only be enforced by private entities, unlike the ADEA, involved in *Hankins*, which allows both private parties and the government (through the EEOC) to sue.⁶⁶ McGill has petitioned the Supreme Court for certiorari.⁶⁷

c. The Seventh Circuit: *Tomic v. Catholic Diocese of Peoria*

Similarly, the Seventh Circuit held that RFRA does not create a defense to suits brought by private plaintiffs.⁶⁸ The court reached this issue in the course of deciding whether RFRA replaces the ministerial exception to the ADEA.⁶⁹ The court did not extensively analyze RFRA’s applicability, noting only that RFRA allows “appropriate relief against a *government*,” and that it seemed unlikely that in attempting to protect religious rights, Congress eliminated the ministerial exception, which protects religious freedom more than RFRA does.⁷⁰

3. A Third Option: The Ninth Circuit’s Approach in *Sutton*

The Ninth Circuit held that a plaintiff may state a claim under RFRA against a private defendant when the federal government’s close involvement in the defendant’s conduct makes the defendant a state actor within the meaning of Section 1983,⁷¹ but not when the defendant merely acts as compelled by federal law.⁷² The court reached this conclusion because it presumes that Congress intended to adopt the judicial interpretation

⁶⁶ *Id.* at 411.

⁶⁷ *See generally* Petition for a Writ of Certiorari, McGill v. General Conference Corporation of Seventh-Day Adventists, No. 10-902 (U.S. Nov. 8, 2010) (hereinafter McGill Petition).

⁶⁸ *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006).

⁶⁹ *Id.* at 1039–42. *See also infra* note 195 and accompanying text (discussing the ministerial exception). For an argument that RFRA replaces the ministerial exception, see the discussion of the Second Circuit’s decision in *Hankins v. Lyght* in *supra* subsection I.D.1.a.

⁷⁰ *Id.*, quoting 42 U.S.C. § 2000bb-1(c) (emphasis added).

⁷¹ For further discussion of the Section 1983 state actor analysis, and its applicability to RFRA claims, see *infra* section II.C.1.

⁷² *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826 (9th Cir. 1999).

of a phrase borrowed from an earlier statute, and RFRA applies to parties who act “under color of law,” a phrase which also appears in 42 U.S.C. § 1983 (“Section 1983”).⁷³

The claim in *Sutton v. Providence Saint Joseph Medical Center* arose when the defendant, a private company, rescinded its offer to hire the plaintiff because the plaintiff refused to provide his Social Security number, as required by federal law.⁷⁴ The plaintiff sued under RFRA, alleging that his religion forbade him to provide his Social Security number.⁷⁵ He argued that the defendant was acting under color of law because federal law requires employers to obtain workers’ Social Security numbers.⁷⁶ The court rejected this argument because it concluded that merely acting as compelled by federal law was not sufficient to make a defendant a state actor under Section 1983.⁷⁷

II. Analysis: When RFRA Creates a Claim or a Defense in an Action Involving Only Private Parties

The circuits disagree on both their conclusions and their reasoning about when RFRA applies to suits between private parties. In addition, one court discussed only the availability of RFRA claims,⁷⁸ others only examined the availability of RFRA defenses,⁷⁹ and still another appeared not to distinguish between the two.⁸⁰ Until now, no one has developed a comprehensive theory that separately analyzes when RFRA creates claims and defenses in actions between only private parties. This Part develops such a theory by

⁷³ *Id.* at 835, *citing* 42 U.S.C. §§ 1983, 2000bb-2(1).

⁷⁴ *Id.* at 829.

⁷⁵ *Id.* He “believes that a Social Security Number is ‘the Mark of the Beast’ prophesied in the Book of Revelations.” *Id.* at 829–30.

⁷⁶ *Id.* at 836.

⁷⁷ *Id.* at 835.

⁷⁸ *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826 (9th Cir. 1999).

⁷⁹ *See Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006); *In re Young*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir.), *cert. den’d*, 525 U.S. 811 (1998); *EEOC v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996)

⁸⁰ *Boggan v. Mississippi Conference of the United Methodist Church*, 433 F. Supp. 2d 762, *aff’d* 222 Fed. App’x 352 (5th Cir.), *cert den’d*, 552 U.S. 813 (2007).

analyzing RFRA's text, similar language in other statutes, RFRA's legislative history, and considerations of public policy.

An attempt to understand RFRA's applicability involves two, separate inquiries: (1) when RFRA creates a claim in a lawsuit between only private parties; and (2) when it may be used as a defense in such a suit. Courts must give RFRA the meaning Congress intended, if it can be ascertained.⁸¹ The starting point for determining when Congress intended for RFRA to apply to lawsuits between only private parties is the text of the statute.⁸² If the text clearly stated the answer to this question, that would end the inquiry.⁸³ However, the text is ambiguous. Therefore, it is permissible to look at other factors in order to discover the meaning Congress intended.⁸⁴ A look at how courts have interpreted similar language in Section 1983, combined with an examination of the legislative history and public policy concerns indicate that courts should interpret RFRA (1) as creating a claim against a private defendant if and only if the defendant would be acting under color of law for purposes of Section 1983; and (2) as creating a defense in any case in which enforcing federal law against the defendant would substantially burden the defendant's free exercise of religion.

A. RFRA's Text is Ambiguous.

Read in isolation, the text of RFRA is ambiguous. Different courts have used the same language to reach opposite conclusions about RFRA's applicability. Although, as a whole, the text of RFRA indicates that it ought to apply to at least some private actors, the extent to which it does so is unclear.

⁸¹ NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 45:5 (7th ed. 2007).

⁸² *Id.* at § 46:1.

⁸³ *Id.*

⁸⁴ *Id.*

RFRA “applies to *all* federal law, and the implementation of that law.”⁸⁵ This provision seems to indicate that RFRA creates a claim or defense *any* time enforcing federal law burdens religious practices, regardless of whether or not the federal government is a party to the suit.⁸⁶ This view interprets RFRA as amending the “entire United States Code.”⁸⁷ However, Judge Sotomayor argued in dissent in *Hankins* that RFRA’s application to “all Federal law” merely indicates that courts must “apply RFRA ‘to all Federal law’ in any lawsuit to which the government is a party.”⁸⁸ Nonetheless, others argue that, had Congress intended this limiting construction, “it would have drafted [RFRA] to apply only to ‘all Federal law in cases where the United States is a party.’”⁸⁹

Both those who argue that RFRA should apply to suits between only private parties and those who argue to the contrary find support in the fact that RFRA forbids “government” to substantially burden religious exercise without demonstrating that the burden is narrowly tailored to serve a compelling governmental interest.⁹⁰ RFRA defines “government” to include a “branch, department, agency, instrumentality, and official (or

⁸⁵ 42 U.S.C. § 2000bb-3(a) (emphasis added).

⁸⁶ *See Hankins v. Lyght*, 441 F.3d 96, 103 (2nd Cir. 2006) (holding that a defendant may assert RFRA as a defense whenever a federal law substantially burdens the defendant’s religious exercise, even if the burden comes from an ADEA lawsuit brought by a private party. The court notes, however, that it is not deciding whether RFRA applies to federal laws that can only be enforced by private parties against private parties, unlike the ADEA, which creates a cause of action for both private plaintiffs and the Equal Opportunity Employment Commission (“EEOC”). *See id.*; *see also* 29 U.S.C. § 626 (provision of the ADEA authorizing suit).

⁸⁷ *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) (emphasis added); *see also In re Young*, 141 F.3d 854, 861, *cert. denied*, 525 U.S. 811 (1998) (stating that RFRA amends the Federal Bankruptcy Code); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 468 (D.C. Cir. 1996) (noting that RFRA amends Title VII).

⁸⁸ *Hankins*, 441 F.3d at 115 (Sotomayor, J., dissenting).

⁸⁹ McGill Petition, *supra* note 66, at 15.

⁹⁰ 42 U.S.C. §§ 2000bb-1(a)–(b).

other person acting under color of law) of the United States.”⁹¹ This definition has given rise to two arguments that RFRA *should* apply when the federal government is not a party. The first is that RFRA applies whenever the federal courts are being used because the courts are a branch of the government.⁹² *Shelley v. Kraemer*, in which the Supreme Court held that a court is a state actor when enforcing a racially discriminatory restrictive covenant in a suit with only private parties, at first appears to support this view.⁹³ Arguably, a court is even more of a state actor when it enforces a federal law that burdens an individual’s religious exercise than when enforcing a discriminatory covenant as in *Shelley*. In the first instance, all three branches of government must act to impose the burden: a court burdens religious freedom by enforcing a law passed by Congress and signed by the President. By contrast, the court in *Shelley* enforced a privately-created covenant according to the common law of covenants; the judiciary was the only branch of government involved. Nonetheless, *Shelley*’s holding has never been extended beyond its facts,⁹⁴ and there is authority this “expansive view of the ‘state action doctrine’ that courts apply in race discrimination cases does not always transfer to other contexts, including other constitutional claims.”⁹⁵ The second argument comes from RFRA’s use

⁹¹ 42 U.S.C. § 2000bb-2(1).

⁹² See *In re Young*, 82 F.3d 1407, 1417 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir.), *cert. denied*, 525 U.S. 811 (1998) (“[T]he federal courts are a branch of the United States.”); McGill Petition, *supra* note 66, at 16, (citing BLACK’S LAW DICTIONARY 864 (8th ed., 2004) (The “judiciary” is the “branch of government” that interprets the laws and administers justice)).

⁹³ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁹⁴ JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 2:30 (*Shelley* “has not been extended, cited, or overruled. It is simply a principle confined to the case’s unique facts.”).

⁹⁵ RODNEY A. SMOLLA, 1 FEDERAL CIVIL RIGHTS ACTS § 1:9 (3d ed. 2011); see *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423, 432 (Conn. 2005) (“the [United States Supreme Court’s] minimal reliance on *Shelley* as precedent evinces the court’s reluctance to extend *Shelley*’s holding beyond the context of racial discrimination.”); 896 Associates, LLC v. Gillespie, 2008 WL 2025629 (Del. Ch. 2008) (refusing to extend the state action doctrine of *Shelley* to a case involving the First Amendment’s protection of speech); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622

of the phrase “under color of law” in defining “government”⁹⁶ This phrase also appears in Section 1983, and courts interpret “under color of law” in the Section 1983 context to include some private litigants who are not government officials.⁹⁷ Some argue that this phrase should mean the same thing in RFRA that it means in Section 1983.⁹⁸ This argument is discussed further in subsection III.C.1.c.

Conversely, this same language has been used to argue that RFRA *should not* apply to at least some cases involving only private parties. For example, the Ninth Circuit noted that it usually deems general items contained in a list of specific items to be of the same category as the specific items.⁹⁹ The court concludes that the fact that the specific entities listed in RFRA’s definition of government are either parts or agents of government—and not completely private entities—supports the conclusion that RFRA does not apply to suits between purely private parties.¹⁰⁰ However, this argument is undermined by the fact that RFRA defines “government” to include people acting under color of law, which includes at least some private parties who are not government officials.¹⁰¹

In addition, the requirement that the government demonstrate that the burden is narrowly tailored may indicate that Congress intended for RFRA to apply only to suits to which the government is a party.¹⁰² This is because RFRA defines “demonstrate” as “meeting the burdens of going forward with the evidence and of persuasion,” and the

(1991) (“[P]rivate use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action.”).

⁹⁶ See 42 U.S.C. § 2000bb-2(1).

⁹⁷ See 42 U.S.C. § 1983; *infra* section II.C.1.a.

⁹⁸ See *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826 (9th Cir. 1999).

⁹⁹ See *id.* at 834.

¹⁰⁰ See *id.*

¹⁰¹ 42 U.S.C. § 2000bb-2(1); see also *infra* subsection II.C.1.c (discussing action under color of law).

¹⁰² See 42 U.S.C. § 2000bb-1(b)

government can only go forward with the evidence if it is a party.¹⁰³ Judge Sotomayor asserts that the only alternative to restricting RFRA to suits to which the government is already a party would be to require the government to intervene in every lawsuit in which RFRA is a claim or defense, which would be expensive and time consuming.¹⁰⁴ However, this conclusion is unnecessary: RFRA defines government to include various individuals, including government officials and others acting under color of law.¹⁰⁵ Therefore requiring “government” to carry the burden of strict scrutiny would mean only requiring such an individual to do so. Such an interpretation has precedent: courts require individual litigants to prove that a statute or other government action is constitutional in other contexts. For example, the Court has required plaintiffs to demonstrate that allowing recovery in tort would not unduly burden a defendant’s freedom of speech.¹⁰⁶ It has also required a private plaintiff to satisfy strict scrutiny where the defendant asserted that enforcing a state public accommodations law would violate its First Amendment freedom of association¹⁰⁷ and when reviewing a state court’s race-based custody order.¹⁰⁸

Finally, RFRA allows a person whose religious exercise has been improperly burdened to “obtain appropriate relief *against a government*.”¹⁰⁹ Some argue that this demonstrates that Congress intended RFRA to apply only where the government is a

¹⁰³ *Hankins v. Lyght*, 441 F.3d 96, 114 (2d Cir. 2006) (Sotomayor, J., dissenting) (citing 42 U.S.C. § 2000bb-2(3)).

¹⁰⁴ *Id.* at 114–15.

¹⁰⁵ 42 U.S.C. § 2000bb-2(1).

¹⁰⁶ This line of cases began in 1964 with *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (libel), and continues to the present. *See Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (intentional infliction of emotional distress).

¹⁰⁷ *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

¹⁰⁸ *See Palmore v. Sidoti*, 466 U.S. 429 (1984); *see also* McGill petition, *supra* note 66, at 19 (stating that “[t]here is nothing unusual about” requiring a private party “to prove that a statute satisfies heightened scrutiny” and providing examples).

¹⁰⁹ 42 U.S.C. § 2000bb-1(c) (emphasis added)

party.¹¹⁰ However, as discussed above, RFRA defines government as including certain individuals and other quasi-private entities, and allowing relief against the government means simply allowing relief against these entities.¹¹¹ In addition, the Second Circuit has argued that providing for relief against the government broadens, rather than narrows, a defendant's rights under RFRA.¹¹²

Taken as a whole, RFRA's text indicates that it ought to apply to at least some private actors. However, the extent to which it does so is not clear, and so it is necessary to use other tools of statutory interpretation.

B. The Relevance of Section 1983

In general, when a new statute includes a judicially-interpreted phrase from another statute, courts presume that Congress meant to adopt the judicial interpretation of the older statute.¹¹³ This principle applies to RFRA, which creates a claim and a defense against people who are acting “under color of law.”¹¹⁴ Similar language appears in Section 1983, assigning liability to:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws¹¹⁵

¹¹⁰ *Hankins v. Lyght*, 441 F.3d 96, 114 (2d Cir. 2006) (Sotomayor, J., dissenting) (citing 42 U.S.C. § 2000bb-1(c)).

¹¹¹ *See supra* notes 104–07 and accompanying text.

¹¹² *See Hankins*, 441 F.3d 96 at 103 (citing 42 U.S.C. § 2000bb-1(c)).

¹¹³ *See Jerman v. Carlisle*, 130 S. Ct. 1605, 1616 (2010) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)); *see also Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 370 (2008) (applying the interpretation of a provision of the Airline Deregulation Act of 1978 to a provision containing similar language in the Federal Aviation Administration Authorization Act of 1994); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit* 547 U.S. 71, 85 (2006) (interpreting a provision of the Securities Litigation Uniform Standards Act); *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (with regard to RFRA and Section 1983). For a critique of this method of interpretation, see William W. Buzbee, *The One Congress Fiction in Statutory Interpretation*, 149 U. PENN. L. REV. 171, 173 (2000).

¹¹⁴ 42 U.S.C. § 2000bb-2(1).

¹¹⁵ 42 U.S.C. § 1983. Such language also appears in two other statutes, but the interpretation of the phrase in Section 1983 should be given the most weight because its function—creating a civil claim for a

Although this language is similar to that found in RFRA and has been extensively interpreted by the courts,¹¹⁶ this does not end the inquiry for two reasons. First, the existence of similar language in a prior statute is not conclusive, and courts will consider other factors.¹¹⁷ Secondly, and more importantly, Section 1983 only creates a claim, and RFRA expressly creates both a claim *and* a defense.¹¹⁸ Consequently, RFRA must apply to private parties in addition to those defendants who were acting under color of law within the meaning of Section 1983 jurisprudence (“state actors”). Doing otherwise would completely eliminate the RFRA defense, a result that would contradict RFRA’s plain meaning. Although Section 1983 is a helpful aid to interpreting when a plaintiff may assert a RFRA *claim* against a private defendant, it does not provide any guidance as to when a RFRA *defense* is available. Therefore, it is clear that any attempt to determine when RFRA applies to suits between private parties must involve separately analyzing the availability of RFRA as a claim and as a defense in such suits.

C. When a RFRA Claim is Available

The Ninth Circuit correctly concluded that a plaintiff may state a claim under RFRA against a private defendant when the federal government was so closely involved in the defendant’s conduct that the defendant was a state actor within the meaning of

deprivation of constitutionally-protected rights—is most similar to that of RFRA. *See* 18 U.S.C. § 242 (creating a criminal penalty for someone who, acting “under color of any law, statute, ordinance, regulation, or custom” deprives any person of constitutionally-protected rights or privileges or punishes a person differently because that person is an alien or because of his or her race); 18 U.S.C. § 2511(2)(c) (providing an exception to the prohibition on wiretaps for certain individuals acting under color of law); 42 U.S.C. § 1983; Buzbee, *supra* note 112, at 212 (noting that drafters are more likely to try to “harmonize new bills with pre-existing . . . laws attacking a similar problem . . . than they are to focus on unrelated bodies of law.”). In any event, “under color of law” in Section 242 means the same thing as in Section 1983. *Monroe v. Pape*, 365 U.S. 167, 185 (1961)

¹¹⁶ *See Sutton*, 192 F.3d at 835 (interpreting “under color of law” to have the same meaning in RFRA as in Section 1983).

¹¹⁷ *See Jerman*, 130 S. Ct. at 1611–15 (also considering general principles of law, the dictionary definition of a term, and other provisions in the same act as the disputed provision).

¹¹⁸ *See* 42 U.S.C. §§ 1983, 2000bb-1(c).

Section 1983, but not when the defendant was merely acting as compelled by federal law.¹¹⁹ The court reached this conclusion because RFRA creates a claim against, among others, persons who violated RFRA’s substantive protections while acting under color of law.¹²⁰ As discussed above, the fact that courts have settled the meaning of similar language in Section 1983 weighs strongly in favor of giving it the same meaning in RFRA.¹²¹ RFRA’s legislative history and public policy considerations support this view.¹²² Before reaching legislative history and public policy, however, it is first necessary to discuss when a private defendant acts under color of law in the Section 1983 context.

1. Section 1983 State Actor Liability

In order to establish a Section 1983 violation, the plaintiff must show that (1) the defendant deprived the plaintiff of a federal constitutional or statutory right (2) while acting under color of law.¹²³ In addition, the defendant may be able to assert certain immunities and defenses.¹²⁴

a. Action Under Color of Law

A private party is only acting under color of law if its conduct may fairly be attributed to the government. Conduct is fairly attributable to the government if (1) the defendant violated the plaintiff’s rights by exercising a state-created right or privilege or

¹¹⁹ See *Sutton*, 192 F.3d 826. Of course, Section 1983 applies to defendants who have acted under color of state law, and RFRA applies only to federal law. In this paper, the argument that RFRA should create claims against defendants who would be state actors under Section 1983 refers to defendants whose conduct involves sufficient involvement by the federal government that they would be state actors under Section 1983 if the government involved were a state government.

¹²⁰ 42 U.S.C. §§ 2000bb-1(c), 2000bb-2(1); *Sutton*, 192 F.3d 834–35.

¹²¹ See *supra* section II.B.

¹²² See *infra* sections II.C.2 & II.C.3.

¹²³ See 42 U.S.C. § 1983; *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 930 (1982) (citing *Flagg Brothers v. 436 U.S. 149, 155–56 (1978)*).

¹²⁴ See *infra* subsection II.C.1.b.

by enforcing a state-imposed rule of conduct; and (2) the defendant was a state actor.¹²⁵ Merely acting pursuant to statutory authority, without more, does not make a private defendant a state actor.¹²⁶ Whether that something more exists is necessarily a fact-based inquiry,¹²⁷ and may vary depending on whether the defendant is a government entity or a private party.¹²⁸ The Ninth Circuit correctly held that a private defendant should only be liable under Section 1983 or RFRA if the defendant acted jointly with the government to violate the plaintiff's rights—and that such a defendant should not become liable merely by acting pursuant to governmental compulsion.¹²⁹

The Supreme Court has found private parties to be state actors in five main situations.¹³⁰ The first is where the government has profited from the private party's wrongdoing.¹³¹ An example of this is where the state leases space to a restaurant that discriminates based on race.¹³² A private party also becomes a state actor when does something that traditionally has been the government's exclusive prerogative, such as

¹²⁵ See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

¹²⁶ See *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) (private defendant threatened to sell goods entrusted to him for storage, as allowed by law).

¹²⁷ See *Brentwood Academy v. Tennessee Secondary Schools Ass'n*, 531 U.S. 288, 298 (2001). Relevant factors include whether the state substantially encouraged the conduct, whether the private actor willfully participated in joint activity with the government or government officials, if a nominally private entity is actually controlled by the government, if a private entity performs a public function, and whether government is significantly entwined with managing a nominally private entity. See *id.* at 296.

¹²⁸ See *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826 (9th Cir. 1999).

¹²⁹ *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826 (9th Cir. 1999).

¹³⁰ MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 88 (2008). However, the Court also has sometimes not used a test and found a state actor “based on ad hoc evaluations of a variety of connections between the private party and the state.” *Id.* (citing *Georgia v. McCollum*, 505 U.S. 42 (1992) (criminal defense attorney's exercise of race-based preemptory challenge); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (private civil litigants exercise of race-based preemptory challenge); *West v. Atkins*, 487 U.S. 42 (1988) (private physician's provision of medical care to inmates)).

¹³¹ SCHWARTZ & URBONYA, *supra* note 129, at 88 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

¹³² *Burton*, 365 U.S. 715.

conducting primary elections or exercising eminent domain powers.¹³³ The Supreme Court has refused to apply this doctrine to functions that are not exclusively governmental, such as providing nursing home care.¹³⁴ Another type of state action occurs where the state has coerced the private conduct or “provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”¹³⁵ However, this type of state action does not include governmental authorization of private action;¹³⁶ a private party’s use of a government-furnished dispute resolution mechanism;¹³⁷ a private party’s request for police assistance;¹³⁸ a private party’s attempt to influence governmental action;¹³⁹ governmental regulation;¹⁴⁰ or governmental financial assistance.¹⁴¹ A private party also may become a state actor by acting pursuant to a conspiracy with a government official, if the two shared the common goal of violating the plaintiff’s civil rights.¹⁴² Finally, state action exists where the government is pervasively entwined with private conduct.¹⁴³ The Supreme Court found this last type of state action in *Brentwood Academy v. Tennessee Secondary Schools Association*, in which it held that an interscholastic athletic association was a state actor

¹³³ *Terry v. Adams*, 345 U.S. 461, 469 (1953) (primary elections); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (eminent domain); see also SCHWARTZ & URBONYA, *supra* note 129, at 89 (discussing this type of state actor analysis).

¹³⁴ SCHWARTZ & URBONYA, *supra* note 129, at 90 (citing *Rendell-Baker*, 457 U.S. at 842).

¹³⁵ *Blum*, 457 U.S. at 1004.

¹³⁶ SCHWARTZ & URBONYA, *supra* note 129, at 91 (citing *Flagg Bros.*, 436 U.S. at 164; *Jackson*, 419 U.S. at 354).

¹³⁷ *Id.* at 91, citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

¹³⁸ *Id.* at 91 (citing *Ginsberg v. Healey Car & Truck Leasing*, 189 F.3d 268, 271–72 (2d Cir. 1999)).

¹³⁹ *Id.* at 91 (citing *NCAA v. Tarkanian*, 488 U.S. 179, 193–94 (1988)).

¹⁴⁰ *Id.* at 91 (citing *Rendell-Baker*, 457 U.S. at 841; *Blum*, 457 U.S. at 1008; *Jackson*, 419 U.S. at 350).

¹⁴¹ *Id.* at 91 (citing *Rendell-Baker*, 457 U.S. at 840; *Jackson*, 419 U.S. at 351–52).

¹⁴² *Dennis v. Sparks*, 449 U.S. 24 (1980); see also SCHWARTZ & URBONYA, *supra* note 129, at 91 (setting forth the elements of liability under the conspiracy approach to the state action doctrine). *But see* *National Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988) (no state action where the private and state entity had opposite goals).

¹⁴³ See *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288 (2001). The Supreme Court has not defined pervasive entwinement, so lower courts decide it on a case-by-case basis. SCHWARTZ & URBONYA, *supra* note 129, at 93.

because most of the association's members were public schools, public officials were on the association's board, and much of its funding came from revenue produced by public school athletic events.¹⁴⁴

The Ninth Circuit correctly concluded in *Sutton v. Providence St. Joseph Medical Center* that acting pursuant to governmental compulsion, without more, does not make a private actor liable for acting under color of law, even though it may make the government liable.¹⁴⁵ Rather, a private defendant should only be liable under Section 1983 or RFRA if the defendant acted jointly with the government to violate the plaintiff's rights.¹⁴⁶ Although the circuits disagree about whether the state actor analysis should differ depending on whether the defendant is a government actor or a private party,¹⁴⁷ the view that acting pursuant to governmental compulsion alone does not make a private defendant liable under Section 1983 or RFRA is correct for two reasons. First, though it makes sense to hold the government liable for compelling an act because it is morally responsible for bringing it about, it is not fair to assign liability to a private actor who had no choice but to engage in the act.¹⁴⁸ Second, the coercion factor "originated in cases in

¹⁴⁴ *Brentwood Academy*, 531 U.S. 288.

¹⁴⁵ *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826 (9th Cir. 1999).

¹⁴⁶ *Id.*

¹⁴⁷ The Tenth Circuit has suggested that it would agree with the Ninth Circuit's approach in *Sutton*. See *Carey v. Continental Airlines, Inc.*, 823 F.2d 1402, 1404 (10th Cir.1987) ("When a constitutional claim is asserted against private parties, to be classified as state actors under color of law they must be jointly engaged with state officials in the conduct allegedly violating the federal right. This concerted action constitutes both the state action essential to establish a constitutional violation, and action under color of state law, custom or usage.") (footnote and citations omitted). The Fourth, Fifth, and Eleventh Circuits have suggested that the same standard applies whether the government or a private party is the defendant. See *Carter v. Norfolk Community Hosp. Ass'n*, 761 F.2d 970, 972 (4th Cir.1985);); *Frazier v. Board of Trustees of N.W. Miss. Reg'l Med. Ctr.*, 765 F.2d 1278, 1284-85 n. 12; *NBC v. Communications Workers of Am.*, 860 F.2d 1022, 1025 n. 4 (11th Cir.1988). The Supreme Court has not decided the issue. See *Sutton*, 192 F.3d at 838.

¹⁴⁸ *Sutton* 192 F.3d at 838, quoting Barbara Rook Snyder, *Private Motivation, State Action, and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L.REV. 1053, 1067, 1069 (1990) (footnote omitted); cf. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982) (If private entities' Section 1983 liability was not limited to state actors, they "could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.").

which the government itself, not a private entity, was the defendant,”¹⁴⁹ and the Supreme Court has only found private defendants to be acting under color of law when they have taken affirmative joint action with the government.¹⁵⁰ For example, the Court held that the defendants in *Lugar v. Edmondson Oil Co., Inc.*¹⁵¹ were state actors because they affirmatively sought a writ of attachment, which was issued by a state court and executed by a sheriff.¹⁵² The Court reached a similar result in *Moose Lodge No. 107 v. Irvis*, where a state Liquor Board regulation required the private defendant to enforce the defendant’s own racially discriminatory by-laws.¹⁵³ The defendant in *Moose Lodge No. 107* took affirmative discriminatory action by adopting the by-laws.¹⁵⁴ The Ninth Circuit also cited *Adickes v. S.H. Kress & Co.* for support.¹⁵⁵ The defendant in *Adickes*, a restaurant, refused to serve the plaintiff and her African-American students.¹⁵⁶ As they were leaving, the police arrested the plaintiff for vagrancy.¹⁵⁷ The Supreme Court held that the defendant restaurant was a state actor if it had conspired with the police to violate the plaintiff’s constitutional rights.¹⁵⁸ The Court also stated in *Adickes* that segregation

Such a situation is distinguishable from where the private actor also bears some moral responsibility for his or her actions, for example by seeking out and taking advantage of state replevin procedures. *Cf.* *Wyatt v. Cole*, 504 U.S. 158 (1993) (involving a defendant who used state replevin procedures to violate the plaintiff’s right to due process).

¹⁴⁹ *Sutton* 192 F.3d at 836, citing *Petersen v. City of Greenville*, 373 U.S. 244, 245–46 (1963) (holding that where a restaurant complied with a city ordinance by refusing to serve the plaintiffs because they were African-Americans, the defendant city “could not escape responsibility merely because a private entity actually carried out the discrimination”); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (holding that the defendant city was liable under Section 1983 where a restaurant refused to serve the plaintiffs, in accordance with the city’s prohibition of sit-ins at segregated restaurants).

¹⁵⁰ *Id.* at 839.

¹⁵¹ 457 U.S. 922 (1982)

¹⁵² *Sutton*, 192 F.3d at 839 (citing *Lugar*, 457 U.S. at 942).

¹⁵³ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177–79 (1972); *see also Sutton*, 192 F.3d at 840 (describing the conduct in *Moose Lodge No. 107* as joint action between the state and the private defendant).

¹⁵⁴ *Moose Lodge No. 107*, 407 U.S. at 179.

¹⁵⁵ *Id.* at 840 (citing *Adickes*, 398 U.S. 144 (1970)).

¹⁵⁶ *Id.* at 840 (citing *Adickes*, 398 U.S. at 149).

¹⁵⁷ *Id.* (citing *Adickes*, 398 U.S. at 149).

¹⁵⁸ *Id.* (citing *Adickes*, 398 U.S. at 152).

compelled by a enforced policy would be state action.¹⁵⁹ However, one need not read *Adickes* as saying that a defendant becomes a state actor merely by acting as compelled by the government for two reasons.¹⁶⁰ First, the ample evidence of conspiracy in *Adickes* made it unnecessary to reach the issue of whether governmental compulsion alone makes a private defendant's conduct state action.¹⁶¹ Secondly, the defendant in *Adickes* likely knew that the state segregation policies were unconstitutional because the conduct at issue occurred ten years after the Supreme Court decided *Brown v. Board of Education*.¹⁶² Therefore, the defendant in *Adickes* was "hiding behind the authority of law" and acting jointly with the state to deprive the plaintiff of her constitutional rights.¹⁶³ Thus, defendants should not be considered state actors under Section 1983 simply because they acted pursuant to governmental compulsion.

b. Section 1983 Immunities and Defenses

The immunities and defenses available to private defendants under Section 1983 should also apply to RFRA suits. Qualified immunity protects government officials from being sued under Section 1983 if a reasonable official could have believed he or she was acting lawfully "in light of clearly established law and the information the [official] possessed."¹⁶⁴ The Supreme Court later held that qualified immunity does not protect either private defendants who use unconstitutional state replevin, garnishment, or

¹⁵⁹ *Adickes*, 398 U.S. at 171.

¹⁶⁰ *Sutton*, 192 F.3d at 840–41.

¹⁶¹ *Id.* at 841 (citing *Adickes*, 398 U.S. 144).

¹⁶² *Id.* (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 955–56 (1982) (Powell, J., dissenting)).

¹⁶³ *Lugar*, 457 U.S. at 954–56 (Powell, J., dissenting). *See also* David Lagos, *Damned If You Do . . . The Supreme Court Denies Qualified Immunity to Section 1983 Private Party Defendants in Wyatt v. Cole*, 71 N.C. L. REV. 849, 864 (1993) ("[T]he private party's culpability in using state power was central to a finding of liability under *Adickes*.").

¹⁶⁴ *Wyatt v. Cole*, 504 U.S. 158 (1992); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

attachment statutes or private prison guards.¹⁶⁵ It has not decided whether qualified immunity protects other private defendants from suit under Section 1983,¹⁶⁶ and lower courts have reached contrary conclusions on the issue.¹⁶⁷ However, the Court expressly refused to decide in *Wyatt* whether private defendants who are sued under Section 1983 for invoking such procedures could assert the affirmative defenses of good faith or probable cause.¹⁶⁸ In fact, on remand in *Wyatt*, the Fifth Circuit held that such defendants may avoid liability by demonstrating that they neither knew nor should have known that the statute on which they relied was unconstitutional.¹⁶⁹ This is an affirmative defense, though, and not immunity from suit; the defendant still must defend against the claim.¹⁷⁰

c. Implications for RFRA

Because RFRA adopts the “under color of law” language from Section 1983, courts should interpret this language in RFRA as allowing claims against private defendants who would be considered state actors under Section 1983 and as interpreted by the Ninth Circuit in *Sutton*. This means that a RFRA claim should be available against a private defendant who acted jointly with the federal government in a way that substantially burdened the plaintiff’s religious exercise. However, a defendant should not be liable under RFRA simply for acting as required by federal law. In addition, any immunities and defenses available to private defendants under Section 1983 should apply to similarly situated private defendants under RFRA. As the following sections discuss, RFRA’s legislative history and public policy considerations support these conclusions.

¹⁶⁵

¹⁶⁶ See MARTIN A. SCHWARTZ, SEC. 1983 LITIG. CLAIMS & DEFENSES § 9A.03.

¹⁶⁷ See *id.* (collecting cases).

¹⁶⁸ See *Wyatt*, 504 U.S. at 169.

¹⁶⁹ *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir.), *cert. den’d*, 510 U.S. 977, 1118 (1993).

¹⁷⁰ See *id.*

2. Legislative History

The legislative history supports this interpretation of when a RFRA claim is available.¹⁷¹ First, the House and Senate Judiciary Committees were concerned with burdens placed on religious practice by neutral laws of general applicability.¹⁷² Most laws that can be enforced by private plaintiffs against private defendants are neutral and generally applicable—the very type of law with which Congress was concerned. Therefore, RFRA should apply to at least some suits involving only private parties. Second, RFRA’s statement of purpose states that Congress intended for RFRA “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)”¹⁷³ The House and Senate reports clarify that RFRA’s purpose was to restore the compelling interest test for free exercise as it existed immediately before *Smith*, rather than to codify the holding of any particular case.¹⁷⁴ The House Report elaborates that RFRA does not “expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence” before *Smith*.¹⁷⁵ These statements indicate that an individual can assert a RFRA claim or defense if he or she could have asserted a violation of the Free Exercise Clause as a claim or defense under the law existing immediately before *Smith*. Prior to

¹⁷¹ Though some object to using legislative history to interpret statutes because it may be difficult to ascertain a single intent and is subject to manipulation, *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17–18 (1997), this is less of a concern where, as here, the legislative history unambiguously expresses a single congressional intent and points to the same conclusion as other methods of statutory interpretation.

¹⁷² S. Rep. 103-11, at 1–8 (1993), *reprinted in* 1993 USCAAN 1892; H.R. Rep. No. 103-88, at 5–6 (1993). Laws are neutral and generally applicable if they are not targeted at religious exercise and they affect non-religious conduct to the same extent as religious conduct. *See* *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990).

¹⁷³ 42 U.S.C. § 2000bb(b)(1).

¹⁷⁴ S. Rep. 103-11, at 8–9, *reprinted in* 1993 USCAAN 1892, 1898 (1993); H.R. Rep. No. 103-88, at 6–7 (1993).

¹⁷⁵ H.R. Rep. No. 103-88, at 8 (1993).

Smith, a plaintiff could not sue a purely private party for violating the plaintiff’s free exercise rights.¹⁷⁶ This is because, in general, the Bill of Rights only constrains the federal and state governments—not private actors.¹⁷⁷ Prior to *Smith*, plaintiffs could only sue a private defendant for violating their free exercise rights if the defendant was a state actor, meaning that the defendant’s conduct involved such significant “governmental action . . . that [the defendant was] subjected to the values and limitations reflected in the Constitution and its amendments.”¹⁷⁸ There are two types of state actor cases: (1) those based solely on a constitutional provision; and (2) those based on a statute that “protect[s] the principles of” a constitutional amendment, such as Section 1983.¹⁷⁹ The Supreme Court analyzes both types of cases in the same way.¹⁸⁰ For example, in *Columbia Broadcasting System, Inc. v. Democratic National Commission*, the Court faced the question of whether a broadcaster was a state actor because it was licensed by the FCC, a federal governmental entity.¹⁸¹ In holding that it was not, the Court conducted a fact-based analysis similar to that used in Section 1983 cases.¹⁸² In fact, the Court even cited

¹⁷⁶ See C.J.S. CONSTITUTIONAL LAW § 752 (“The guaranties of religious freedom contained in the First Amendment are limitations on the powers of the government, and not on the rights of private persons. They proscribe governmental action, not private action. Thus, in the absence of governmental involvement, they do not bind the actions of private corporations or organizations, and have no bearing on individual actions or transactions.”) (citations omitted).

¹⁷⁷ See *id.*

¹⁷⁸ 2 RONALD D. ROTUNDA, ET AL., TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE 157 (1986, updated by 1991 pocket part); see also *Granfield v. Catholic Univ. of America*, 530 F.2d 1035, 1046–47 (1976) (holding that the salary scale for employees of a private religious university was an internal matter to which the First Amendment’s protection of free exercise does not apply because the university was not a state actor, even though it received federal government grants).

¹⁷⁹ ROTUNDA, *supra* note 175, at 158.

¹⁸⁰ See *Columbia Broadcasting System, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973); see also JOHN E. NOWAK, ET. AL., CONSTITUTIONAL LAW 337 (3d ed. 1986) (The analysis for “problems involving the federal government under the Bill of Rights . . . is identical to that used to determine whether a state government has acted under the fourteenth Amendment.”).

¹⁸¹ See *Columbia Broadcasting System, Inc.*, 412 U.S. at 114–21.

¹⁸² See *id.*; see also ROTUNDA, *supra* note 175, at 194 (discussing the fact-based nature of the state actor analysis).

Section 1983 cases and the Fourteenth Amendment for support.¹⁸³ In sum, the analysis before *Smith* for whether a private defendant could be sued for violating a plaintiff’s free exercise rights was essentially the same as the Section 1983 state actor analysis. Therefore, applying a Section 1983 analysis to RFRA claims is consistent with Congress’s intent to restore the compelling interest test for free exercise claims, as it existed immediately before *Smith*.

3. Public Policy

Public policy considerations also weigh in favor of interpreting RFRA as allowing a claim against a private defendant who would be a state actor under Section 1983. Such defendants have used government procedures or acted together with a government official to violate the plaintiff’s rights.¹⁸⁴ They have purposely taken advantage of the government’s power, and indeed could not have burdened the plaintiff’s religious freedom without that power. Therefore, shielding them from liability because they are not government agencies or officials would mistakenly elevate form over function. On the other hand, it would be unfair to assign liability to private parties whose only tie to governmental action was acting as compelled by federal law. These private parties would be forced to choose between violating a neutral, generally applicable law that burdens someone’s religious exercise and obeying that law, but violating RFRA. For example, federal law requires employers to obtain their employees’ Social Security numbers, but some new hires may refuse to provide their Social Security number on free exercise

¹⁸³ See *Columbia Broadcasting System, Inc.*, 412 U.S. at 119 (citing *Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723–24 (1961)); cf. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 928 (1982) (“Under color of law” in Section 1983 means the same thing as “state action” for Fourteenth Amendment purposes.).

¹⁸⁴ See *supra* subsection II.C.1.a. (discussing who is a state actor).

grounds.¹⁸⁵ If RFRA allows suits against private parties who burden an individual's free exercise merely by complying with an otherwise valid federal law, the employer is in a no-win situation. If it complies with federal law by rescinding its offer hire the employee, then it risks a RFRA suit. If, however, the employer accommodates the religious objection by hiring the employee, then it risks prosecution for violating the law.¹⁸⁶ It would be unfair to force private parties to make such choices. The Section 1983 state actor analysis strikes a middle ground and is the most just approach to when to allow a RFRA claim against a private defendant.

D. When a RFRA Defense is available

Courts should interpret RFRA as creating a defense in all lawsuits in which enforcing federal law would substantially burden a defendant's free exercise rights, even those involving only private parties. Section 1983 does not affect when a RFRA defense is available because it only creates a claim.¹⁸⁷ Therefore, because RFRA's text is ambiguous,¹⁸⁸ it is necessary to resort to the legislative history in order to determine when it creates a defense.

1. Legislative History

The legislative history indicates that RFRA should create a defense against claims brought by private parties whenever allowing such a claim would burden the defendant's religious freedom. This is not to say that such plaintiffs may not ultimately succeed. Rather, RFRA would permit imposing liability only if doing so is the least restrictive

¹⁸⁵ See *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826, 829–30 (9th Cir. 1999) (describing such a circumstance).

¹⁸⁶ *Cf. Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982) (If Section 1983 liability was not limited to state actors, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.").

¹⁸⁷ See 42 U.S.C. § 1983.

¹⁸⁸ See *supra* section II.A.

means of furthering a compelling governmental interest.¹⁸⁹ The legislative history supports this conclusion in two ways.

As discussed above, the legislative history establishes that Congress intended for RFRA to restore the compelling interest test for free exercise issues as it existed immediately before the Supreme Court decided *Smith*.¹⁹⁰ Before *Smith*, the Free Exercise Clause often provided a defense against private claims. This indicates that RFRA, too, should create a defense against such claims.

Prior to *Smith*, the Free Exercise Clause sometimes completely barred recovery by private plaintiffs. For example, it forbade courts to decide the correctness of any religious belief.¹⁹¹ In practice, this principle meant that courts could not resolve church property disputes based on religious doctrine¹⁹² or determine whether a church had acted in a way that contravened its own religious tenets.¹⁹³ It also prohibited interfering in church governance because doing so would undermine individuals' right to form religious associations and to create mechanisms within the association for deciding theological disputes.¹⁹⁴ For example, the Free Exercise Clause forbade transferring control of churches from one religious hierarchy to another.¹⁹⁵ It also gave rise to a "ministerial exception," according to which many courts refused to consider employment discrimination suits brought against religious organizations by employees with a pastoral

¹⁸⁹ See 42 U.S.C. § 2000bb-1.

¹⁹⁰ See *supra* notes 170–73 and accompanying text.

¹⁹¹ *U.S. v. Ballard*, 322 U.S. 78 (1944).

¹⁹² See *Jones v. Wolf*, 443 U.S. 595, 602 (1979); J. NOWAK, ET AL., CONSTITUTIONAL LAW § 17.12, at 1089 (3d ed. 1986) (noting that courts must decide such disputes using neutral legal principles because doing otherwise "would violate both religion clauses by "simultaneously establish[ing] one religious view as correct for the organization while inhibiting the free exercise of the opposing belief.").

¹⁹³ *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969)

¹⁹⁴ *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 114 (1952).

¹⁹⁵ *Id.*

function in order to prevent the government from “intrud[ing] upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern.”¹⁹⁶

In addition, the Free Exercise Clause provided at least some protection against tort liability for religiously-motivated conduct before *Smith*.¹⁹⁷ As a threshold question, courts first determined whether the claim would require them to determine the correctness of a religious belief.¹⁹⁸ If so, then the Free Exercise Clause was a complete defense, requiring the court to dismiss the claim.¹⁹⁹ If not, then most courts balanced the government’s interest in “protecting the public from the alleged harm . . . against the religious interests at stake.”²⁰⁰ This was based on the Supreme Court’s decision in *Cantwell v. Connecticut* that the Free Exercise Clause protects both “the freedom to believe and the freedom to act. The first is absolute but, in the nature of things, the

¹⁹⁶ McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972), *cert. den’d*, 409 U.S. 896 (1972); *see also* Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1167 (4th Cir. 1985), *cert. den’d*, 478 U.S. 1020 (1986) (holding that the Free Exercise Clause precludes an employment discrimination suit against a church by an employee who provides religious counseling and advises the Sunday school program); Miller v. Bay View United Methodist Church, Inc., 141 F.Supp.2d 1174, 1180–81 (E.D. Wisc. 2001); *see generally* 45C AM. JUR. 2D § 2195 (providing an overview of the ministerial exception); Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM L. REV. 1514, 1534–39 (1979) (similar). *But cf.* Hankins v. Lyght, 441 F.3d 96 (2nd Cir. 2006) (holding that RFRA has replaced the ministerial exception’s flat ban on such suits with the compelling interest test).

¹⁹⁷ *See, e.g.*, Molko v. Holy Spirit Assn., 762 P.2d 46 (Cal. 1988), *citing* New York Times v. Sullivan, 376 U.S. 254 (1964) (“While judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes and other legislative actions”); *see generally* Alan Stephens, *Annotation: Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93 ALR Fed. 754 (1989) (citing cases and explaining general themes).

¹⁹⁸ Stephens, *supra* note 194, at 758; *see Molko*, 762 P.2d at 56.

¹⁹⁹ U.S. v. Ballard, 322 U.S. 78 (1944); Molko v. Holy Spirit Assn., 762 P.2 46 (Cal. 1988).

²⁰⁰ Stephens, *supra* note 194, at 760; *see, e.g.*, Von Schaick v. Church of Scientology, Inc., 535 F.Supp. 1125 (D. Mass. 1982); Molko, 762 P.2 46; Bear v. Reformed Mennonite Church, 341 A.2d 105 (Pa. 1975) (applying the Sherbert compelling interest test to various tort claims based on religiously-motivated conduct). Although most courts used a balancing test, the Ninth Circuit held that the Free Exercise Clause provided a *complete* defense to tort claims based on religiously-motivated conduct in *Paul v. Watchtower Bible and Tract Society of New York, Inc.*, 819 F.2d 875, 880 (9th Cir. 1987). *Paul* involved claims for defamation, invasion of privacy, fraud, and outrageous conduct based on the defendants’ religiously-motivated shunning. *Id.* The court noted that “[i]mposing tort liability for shunning on the Church or its members would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings.” *Id.* at 881.

second cannot be. Conduct remains subject to regulation for the protection of society.”²⁰¹
The result of courts’ balancing depended heavily on the facts of each particular case.²⁰²

The U.S. District Court for the District of Massachusetts applied such a balancing test in *Von Schaick v. Church of Scientology, Inc.*²⁰³ There, the court noted that the Free Exercise Clause only permits imposing liability in such cases if doing so is the least restrictive means of achieving a compelling governmental interest.²⁰⁴ Similarly, the Supreme Judicial Court of Massachusetts held in *Alberts v. Devine* that courts could only burden a defendant’s right to free exercise with tort liability when that burden was justified by a compelling governmental interest.²⁰⁵ In that case, the court held a minister’s clerical superiors liable for inducing his psychiatrist to disclose confidential information because it found that doing so would only minimally burden the defendants’ religious freedom and was justified by the compelling interest in keeping psychiatrist-patient conversations confidential.²⁰⁶

The Supreme Court of California used a slightly different balancing test in *Molko v. Holy Spirit Association*.²⁰⁷ The plaintiffs in *Molko* sued for fraud, intentional infliction of emotional distress, and false imprisonment, alleging that the defendant church misrepresented its identity in order to bring the plaintiffs to a remote location where it brainwashed them.²⁰⁸ The court used a three-part test. First, it asked whether the claim required determining the correctness of a religious belief—which the Free Exercise

²⁰¹ *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

²⁰² *Id.*

²⁰³ *Von Schaick*, 535 F.Supp. 1125.

²⁰⁴ *Id.* at 1135.

²⁰⁵ 479 N.E.2d 113, 123 (1985).

²⁰⁶ *Id.*

²⁰⁷ 762 P.2d 46.

²⁰⁸ *Id.* at 49–52. The defendants, members of the Reverend Sun Myung Moon’s Unification Church, falsely represented that their organization was not religious in order to persuade the plaintiffs to come to and remain at the Church’s indoctrination facility. *Id.*

Clause forbade—or merely involved religiously-motivated conduct—which could be regulated.²⁰⁹ Next, it weighed the government’s interest in “allowing tort liability for the Church's deceptive practices [against] any burden such liability would impose on the Church's religious conduct.”²¹⁰ The court noted that a greater burden on religious conduct required a more compelling governmental interest.²¹¹ Second, it held that a burden that passed the balancing test must also be the least restrictive means of achieving the government’s interest and must not discriminate based on religion.²¹² After applying this test, the court found the fraud claim constitutionally permissible.²¹³ It held that holding the defendants liable for fraud would not require the court to decide the validity of any religious belief.²¹⁴ Second, it found that doing so would burden the defendants’ religious freedom, but that this burden was outweighed by the state’s compelling interests in preventing the harm that brainwashing does to people who undergo it and their families.²¹⁵ Next, the court concluded that tort liability for fraud was the least restrictive means of protecting these interests, that its purpose and effect was to advance these secular interests, and that it applied equally to both religious and nonreligious organizations.²¹⁶ The court next used the same reasoning to find that the Free Exercise Clause also allowed the claim for intentional infliction of emotional distress (based on the same conduct).²¹⁷ Finally, the Court held that the Free Exercise Clause forbade the claim

²⁰⁹ *Id.* at 56–57.

²¹⁰ *Id.* at 59.

²¹¹ *Id.* at 1113.

²¹² *Id.* (citations omitted).

²¹³ *Id.* at 58–61.

²¹⁴ *Id.* at 56–57.

²¹⁵ *Id.* at 60.

²¹⁶ *Id.* at 61.

²¹⁷ *Id.* at 61–63.

for false imprisonment—based on threats of divine retribution—because these threats were protected religious speech.²¹⁸

The above cases show the Free Exercise Clause was sometimes a defense against claims by private plaintiffs prior to *Smith*. Depending on the circumstances, it either completely barred suit²¹⁹ or required a balancing test similar to RFRA’s compelling interest test.²²⁰ Therefore, because Congress intended for RFRA to restore the compelling interest test for free exercise claims as it existed immediately before *Smith*, RFRA should create a defense against suits brought by private plaintiffs.

Further, Congress passed RFRA because it believed that protecting religious liberty from governmental interference is important, and that the *Smith* standard did not adequately protect it. The Senate Report reflects these concerns, noting that, “[t]he [United States] was founded upon the conviction that the right to observe one’s faith, free from Government interference, is among the most treasured birthrights of every American.”²²¹ The federal government burdens religious liberty in two ways: directly, as party to a lawsuit, and indirectly, by creating and adjudicating private causes of action. The second type of burden restricts religious liberty at least as much as the first: the fear of damage awards can chill an individual’s willingness to engage in an activity as much as criminal penalties.²²² It would be illogical for Congress, which was deeply concerned

²¹⁸ *Id.* at 63–64.

²¹⁹ See *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 460 (D.C. Cir. 1996); *Paul*, 819 F.2d 875; *Miller v. Bay View United Methodist Church, Inc.*, 141 F.Supp.2d 1174, 1180–81 (E.D. Wisc. 2001).

²²⁰ See 42 U.S.C. § 2000bb–1(2); see, e.g., *Von Schaick*, 535 F.Supp. 1125; *Molko v. Holy Spirit Assn.*, 762 P.2 46 (Cal. 1988); *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975) (applying the Sherbert compelling interest test to various tort claims based on religiously-motivated conduct); *Stephens*, *supra* note 194, at 760.

²²¹ S. Rep. No. 103-111, at 4 (1993), *reprinted in* 1993 USCAAN 1892, 1893–94; *id.* at 8, 1897 (discussing the effect of *Smith*).

²²² See *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

with protecting religious liberty, to protect it against only one type of burden. This suggests that Congress intended for RFRA to create a defense to both kinds of lawsuits.

Although the examples cited in the House and Senate Reports involve only “actual or hypothetical lawsuits in which the government is a party,”²²³ Congress’s stated purpose should outweigh its failure to provide an exhaustive list of examples. There is no reason to think that the reports’ authors cited these examples for any purpose other than to illustrate some of the problems created by *Smith*.²²⁴ There certainly is no indication that they intended for RFRA to apply only to the situations described in these examples. In addition, in enacting RFRA, Congress relied on a Congressional Research Service report that cites examples of courts holding that *Smith* required denying religious exemptions in litigation involving only private parties.²²⁵ For example, the report cites a wrongful death suit in which the court refused to find liability based on the avoidable consequences doctrine where a Jehovah’s witness refused a blood transfusion that might have saved her life because doing so would violate her religious beliefs;²²⁶ a private lawsuit against the Boy Scouts for violating a public accommodations law by accepting only members who would declare that they believed in God;²²⁷ a court allowing a private ADEA lawsuit against a religiously affiliated hospital;²²⁸ a suit by a dissolved church’s

²²³ *Hankins v. Lyght*, 441 F.3d 96, 115 n.9 (2d Cir. 2006) (Sotomayor, J., dissenting) (citing S. Rep. No. 103-111 (1993), reprinted in 1993 U.S.C.C.A.N. 1892 ; H.R. Rep. 103-88 (1993)).

²²⁴ See generally S. Rep. 103-11, at 8–9 (1993), reprinted in 1993 USCAAN 1892; H.R. Rep. 103-88 (1993).

²²⁵ DAVID ACKERMAN, CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS FREEDOM ACT: A LEGAL ANALYSIS 14–17 (1992). Though every member of Congress who voted for RFRA may not have read this report, the rest of the legislative history points to the same conclusion: Congress intended for RFRA to create a defense in all suits in which enforcing federal law would substantially burden the defendant’s religious exercise.

²²⁶ *Id.* at 14 (citing *Munn v. Algee*, 924 F.2d 568 (5th Cir.), cert. den’d, 112 S.Ct. 277 (1991)).

²²⁷ *Id.* at 15 (citing *Welsh v. Boy Scouts of America*, 742 F.Supp. 1413 (N.D. Ill. 1990)).

²²⁸ *Id.* at 16 (citing *Lukaszewski v. Nazareth Hospital*, 764 F.Supp. 57 (E.D. Pa. 1991)).

trustees that alleged that its assets were improperly distributed;²²⁹ a pastor’s suit against a church for various claims, including breach of contract and wrongful termination;²³⁰ and a private suit by Planned Parenthood enjoining certain religiously-motivated anti-abortion activities.²³¹ These examples provide further evidence that Congress intended to allow RFRA defenses in suits involving only private plaintiffs.

2. Public Policy

Considerations of public policy confirm that defendants should be able to assert RFRA as a defense in suits brought by private plaintiffs. Doing otherwise would allow the federal government to accomplish indirectly, through creating and adjudicating private causes of action, what it may not do directly. Private lawsuits may restrict a defendant’s religious liberty as much or more than criminal sanctions because “[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.”²³² This concern has motivated the Supreme Court to protect other First Amendment rights from burdens imposed by private claims. For example, the First Amendment’s protection of speech constrains private claims for libel and intentional infliction of emotional distress.²³³ The Court has also refused to enforce a private plaintiff’s claim under a state public accommodations statute because doing so would

²²⁹ *Id.* at 17 (citing *Prince v. Firman*, 584 A.2d 8 (D.C. 1990)).

²³⁰ *Id.* at 17 (citing *Black v. Snyder*, 471 N.W.2d 715 (Minn. App. 1991)).

²³¹ *Id.* at 17, (citing *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W. 2d 637 (Iowa 1991)).

²³² *See New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). *See also* *Paul v. Watchtower Bible and Tract. Soc. of New York, Inc.*, 819 F.2d 875, 880 (9th Cir. 1987) (extending the reasoning of *Sullivan* to interpret the Free Exercise Clause as limiting recovery for other torts).

²³³ *See Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (involving a claim for intentional infliction of emotional distress); *Sullivan*, 376 U.S. 254 (libel); *see also* Sara Lunsford Kohen, *What Ever Happened to Veggie Libel?: Why Plaintiffs are not Using Agricultural Product Disparagement Statutes*, ___ DRAKE J. AG. L. ___ (forthcoming 2011) (describing the First Amendment limitations on the torts of libel and product disparagement) (copy on file with the author).

violate the defendant's freedom of association.²³⁴ The right to free exercise of religion is just as important as the freedoms of speech and association. Indeed, the framers of the Constitution saw all three rights as so fundamental that they enshrined them in the First Amendment.²³⁵ In addition, private lawsuits may burden defendants' religious freedom in the same way that they may burden defendants' freedoms of speech and association. It therefore makes sense, as a matter of policy, to interpret RFRA as creating a defense against suits brought by private plaintiffs.

Allowing RFRA defenses against private plaintiffs would strike a workable balance between religious freedom and state interests by requiring courts to apply the compelling interest test to burdens on religious freedom in such cases.²³⁶ RFRA's compelling interest test recognizes the importance of religious liberty, while acknowledging that this liberty must sometimes give way to the government's interest in enforcing the law. The religious use of copyrighted materials illustrates this point. The Copyright Act is neutral and generally applicable because "[i]t regulates . . . intellectual property rights in expressive works . . . without regard to the religious nature of the work at issue and almost entirely without regard to the religious nature of the use."²³⁷ Therefore, it does not need to exempt religious uses of copyrighted works unless RFRA applies.²³⁸ The Copyright Act may be enforced by private plaintiffs,²³⁹ but RFRA should apply where enforcing it would substantially burden the defendant's religious freedom. This does not mean, however, that religious uses of copyrighted works are always exempt

²³⁴ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)

²³⁵ *See* U.S. CONST. amend. I.

²³⁶ 42 U.S.C. §2000bb-1(2).

²³⁷ Steven D. Jamar, *Religious Use of Copyrighted Works after Smith, RFRA, and Eldred*, 32 CARDOZO L. REV. 1879, 1882 (2011); *see generally* 17 U.S.C. §§ 101–1332.

²³⁸ *See Employment Div. v. Smith*, 494 U.S. 872 (1990); *see also generally* Jamar, *supra* note 234 (assuming that RFRA does apply to the Copyright Act).

²³⁹ *See* 17 U.S.C. §§ 501(b).

from the Copyright Act’s remedies. Rather, *if* such a remedy *substantially* burdened the defendant’s religious exercise, it must be the least restrictive, effective means of achieving a compelling governmental interest.²⁴⁰ In fact, most suits for copyright infringement based on religious use would not trigger RFRA at all because any burden would not be substantial.²⁴¹ “For example, in a typical case, requiring a religious organization to buy books at market prices . . . seems unlikely to be considered a substantial impact.”²⁴² RFRA would only apply in unusual circumstances in which the copyright law would impose a substantial burden.²⁴³ This would occur when a copyrighted, sacred work cannot be obtained on the market at all, and the defendants who wish to use it believe that the work itself—rather than merely the ideas it contains—is holy and incapable of substitution.²⁴⁴ In such a situation, RFRA would require any remedy under the Copyright Act to be the least restrictive means of achieving a compelling interest.²⁴⁵ The federal government may well have a compelling interest in enforcing the Copyright Act in such a situation: it provides an incentive for people to create religious works.²⁴⁶ Though issuing an injunction against the use would not be the least restrictive means of furthering this interest, other remedies, such as “[c]ompulsory licensing or merely awarding damages” might be acceptable.²⁴⁷ In this case, RFRA would protect the plaintiff’s—and society’s—interest in protecting copyrighted material while protecting the defendant’s religious freedom.

²⁴⁰ 42 U.S.C. §2000bb-1(2).

²⁴¹ Jamar, *supra* note 234, at 1892–93; *see* 42 U.S.C. §2000bb-1(1)–(2).

²⁴² Jamar, *supra* note 234, at 1892–93.

²⁴³ *See* 42 U.S.C. §2000bb-1(1)–(2).

²⁴⁴ Jamar, *supra* note 234, at 1892–93

²⁴⁵ *See* 42 U.S.C. §2000bb-1(2).

²⁴⁶ *See* Jamar, *supra* note 234, at 1879.

²⁴⁷ *See id.* at 1893.

Though courts should interpret RFRA as creating a defense in *all* cases in which enforcing a federal law would substantially burden the defendant’s religious freedom, the argument for doing so is even stronger when the burden results from statutes, like the ADEA, that can be enforced by either a government entity (the EEOC in the case of the ADEA) or a private plaintiff.²⁴⁸ As the Second Circuit pointed out in *Hankins*, it does not make sense for “the substance of [these] prohibitions [to] change depending on whether it is enforced by the [government entity] or an aggrieved private party.”²⁴⁹ Though the *Hankins* majority did not explain why it reached this conclusion,²⁵⁰ the reasoning seems clear. After all, the strength of the public interest in punishing violations of a federal law remains constant, regardless of who the plaintiff is. Similarly, a defendant’s interest in freely practicing his or her religion is equally strong whether the plaintiff seeking to restrict such religious practice is a private person or a government agency. Public policy clearly weighs in favor of interpreting RFRA as creating a defense whenever enforcing federal law would substantially burden the defendant’s free exercise of religion, without regard to who the plaintiff is.

Conclusion

Until now, there has been no unified theory about when RFRA applies to suits between private parties. Indeed, any attempt to understand this issue that does not separately analyze the availability of RFRA claims and defenses becomes mired in seemingly conflicting provisions of text, legislative history, and policy. Only by

²⁴⁸ See Age Discrimination in Employment Act, 29 U.S.C. § 626.

²⁴⁹ *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006) (quoting *United States v. Brown*, 79 F.3d 1550, 1559 n. 16 (11th Cir. 1996)) (“The meaning of the statutory words ‘scheme to defraud’ does not change depending on whether the case is Civil RICO or criminal.”).

²⁵⁰ See *id.*; see also *id.* at 115 (Sotomayor, J., dissenting) (objecting that the majority did not sufficiently justify this assertion).

separately considering these distinct questions can one form a coherent theory of RFRA's applicability. Although RFRA's text is ambiguous, an analysis of similar language in Section 1983, the legislative history, and public policy leads to the following two conclusions. First, RFRA should create a claim against a private defendant if the defendant would be a state actor within the meaning of Section 1983, but not if the defendant was merely acting as compelled by federal law. Second, RFRA should create a defense in all lawsuits in which applying federal law would substantially burden the defendant's religious exercise, regardless of who the plaintiff is. Saying that RFRA should create a claim or defense in these circumstances does not mean that a court must always create a religious exemption. Rather, it would require applying the compelling interest test.²⁵¹ The compelling interest test properly balances individuals and groups' interest in religious freedom with the federal government's interest in forbidding religious exemptions from neutral, generally applicable laws.

Congress can and should amend RFRA in order to eliminate the statute's ambiguity about when RFRA creates claims and defenses against private parties. Such an action would be the best solution because it would allow Congress to interpret its own statute. Until it does so, the courts must interpret RFRA's applicability. The Supreme Court passed up the opportunity to examine this question when it denied certiorari in *McGill v. General Conference Corporation of Seventh-Day Adventists*.²⁵² However, if this issue comes before the Court again, it should hear the case and resolve the split among the federal circuits. Resolving this issue is important because it affects the level of scrutiny that courts apply in private lawsuits involving a neutral, generally applicable

²⁵¹ 42 U.S.C. § 2000bb-1(2).

²⁵² See generally McGill Petition, *supra* note 66.

law that burdens a party's free exercise of religion. If RFRA applies, then the party burdening free exercise must show that the law satisfies strict scrutiny.²⁵³ If not, then that party must show only that the law is rationally related to a legitimate government interest.²⁵⁴ A decision by the Supreme Court on this question would have far-reaching consequences, affecting not only how courts analyze burdens on religious freedom caused by federal law, but also how some state courts interpret their own state RFRA.²⁵⁵

²⁵³ 42 U.S.C. §§ 2000bb–2000bb-4.

²⁵⁴ *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990).

²⁵⁵ Fourteen states have state RFRA, which are similar to the federal RFRA, but apply to state law. *See* ALA. CONST. art I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (West 2004); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. § 761.01 to 761.05 (West 2010); IDAHO CODE ANN. §§ 73-401 to 73-404 (Lexis Supp. 2005); 775 ILL. COMP. STAT. ANN. 35/1 to 35/99 (West 2001); MO. ANN. STAT. ANN. §§ 1.302 & 1.307 (West Supp. 2011); N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (2000); 51 OKLA. STAT. ANN. §§ 251 to 258 (West 2008) ; 71 PA. STAT. ANN. §§ 2401–07 (West Supp. 2010); R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (1998); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (West 2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 to 110.012 (West 2005); VA. CODE ANN. § 57-2.02 (LexisNexis 2003); UTAH CODE ANN. §§ 63L-5-101 to 63L-5-403 (LexisNexis 2004). Some state courts interpret these laws based on how federal courts have interpreted the federal RFRA. *See, e.g.*, *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) (“Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute.”); *Diggs v. Snyder*, 775 N.E.2d 40, 44 (Ill. App. Ct. 2002) (looking to federal RFRA cases for guidance because few cases involving the state law had been decided); *see also* McGill Petition, *supra* note 66, at 24 (noting that state courts “have looked to the federal courts’ interpretation of the federal RFRA in giving content to” state RFRA).