RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (RFRA)

IMPACT: The Religious Freedom Restoration Act (RFRA) was passed by the United States Congress in 1993 to prohibit the federal government from burdening a person's free exercise of religion. Currently, twenty-one states have also passed religious freedom restoration acts. The use of the RFRA in *Burwell v. Hobby Lobby* (2014) drew concerns about the law being used to permit discrimination against communities such as religious minorities, nonreligious people, people of color, women, and the LGBTQ community. In February 2019, Representative John Kennedy III and then-Senator Kamala Harris reintroduced the Do No Harm Act to ensure that the RFRA would not be used to permit discrimination.

- The Religious Freedom Restoration Act (RFRA) was enacted by the United States Congress in 1993. The law "prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion … except that the … burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

- The RFRA was passed in reaction to two substantial court cases involving the free exercise of religion: *Lyng v. Northwest Indian Cemetery Protective Association* (1988) and *Employment Division v. Smith* (1990). In *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court ruled that "the free exercise clause of the First Amendment does not prohibit the federal government from timber harvesting or constructing a road through a portion of a national forest that is considered a sacred religious site by three Native American tribes."

- In *Employment Division v. Smith*, the Supreme Court held that "the Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use." **The two men at the center of the case—Alfred Smith and Galen Black—were fired from their jobs "for ingesting peyote as part of a sacrament of the Native American Church" and were denied unemployment benefits because they had "violated a state criminal statute."**

- In each case, the free exercise clause of the First Amendment did not prevent the federal and state government from disregarding religious exemptions. The passage of the RFRA made it easier to "carve out an exemption from general legal requirements for religious objectors unless the government can carry an especially heavy burden to show that the objectors should be required to comply with the law."

- While the RFRA as enacted in 1993 applied to both the federal and state governments, *City of Boerne v. Flores* (1997) confined the act to the federal government. The case involved the archbishop of San Antonio, Patrick J. Flores, who sued local zoning authorities, claiming they had violated the RFRA after his request for a permit to expand

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a local Catholic church was denied "because of an ordinance barring the alteration of historical landmarks." **The Supreme Court ultimately ruled that the "RFRA was an unconstitutional intrusion into state authority, and was invalid as applied to state law."**

- **Despite the restriction brought about by City of Boerne v. Flores, twenty-one states currently have passed religious freedom restoration acts.** Among the states are Connecticut and Rhode Island, who "passed religious freedom restoration acts before the federal government passed its law in 1993." The state RFRAs "are intended to echo the federal RFRA, but are not necessarily identical to the federal law."

- **City of Boerne v. Flores also featured prominently in the rationale behind the passage of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which "protect[s] individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws." Furthermore, the RLUIPA acts to protect the right of incarcerated individuals:** "Under federal law, a prison or jail cannot substantially burden a prisoner's exercise of his or her religion unless it can demonstrate that it has a compelling interest that cannot be achieved through any other less restrictive means."

- According to the ACLU, the RLUIPA also "bars government officials from restricting women's ability to practice hijab when they are confined to any institution that receives federal funding (such as state prisons), unless the government can demonstrate that its action was the "least restrictive means" for achieving a "compelling governmental interest."

- **Although the initial aim of the RFRA was to provide extra safeguards to the free exercise of religion, the act has also been used as a tool of discrimination.** As deputy legal director of the American Civil Liberties Union (ACLU) Louise Melling wrote in *Religion News* in May 2016: "When Congress passed the Religious Freedom Restoration Act in 1993, the American Civil Liberties Union supported it because we believed it would provide important protections for people to practice their faith … we were troubled that the interpretation of the Constitution at the time did not sufficiently protect minority faiths. But today RFRA is being used as a vehicle for institutions and individuals to argue that their faith justifies myriad harms —to equality, to dignity, to health and to core American values."

- The use of the RFRA as a tool of discrimination was questioned during *Burwell v. Hobby Lobby* (2014), a case in which the Supreme Court held that the RFRA "permits for-profit corporations that are closely held (e.g., owned by a family or family trust) to refuse, on religious grounds, to pay for legally mandated coverage of certain contraceptive drugs and devices in their employees' health insurance plans." **According to the Center for American Progress (CPAC), the ruling "affected thousands of employees, and it**

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expanded the use of religious exemptions by redefining the scope of federal RFRA protections to include for-profit corporations." Furthermore, "the legacy of the Hobby Lobby decision [was] continued under the Trump administration as religious liberty [was] misused to discriminate against vulnerable communities, such as religious minorities, nonreligious people, people of color, women, and the LGBTQ community."

- **The RFRA of Indiana—signed into law in March 2015 by then-Governor Mike Pence—also enabled discrimination.** According to reporting in *Vox*, the law mandated that the "government can't intrude on a person's religious rights unless it has a compelling government interest and is acting in the least intrusive way possible" and critics claimed it "could legally protect employers, landlords, and business owners who discriminate against LGBT people on religious grounds." In April 2015, Pence issued an amendment of the law that would "bar businesses and individuals from using the law to refuse employment, housing, or service to people based on their sexual orientation or gender identity." However, "churches and other nonprofit religious organizations" were exempt from the clarification. **According to January 2016 reporting in Forbes, Indiana's 2015 RFRA cost the city of Indianapolis a loss of $60 million in revenue.**

- **In February 2019, Congressional Democrats reintroduced the Do No Harm Act, a proposed amendment to the RFRA. The bill "prohibits the application of the Religious Freedom Restoration Act of 1993 (RFRA) to specified federal laws or the implementation of such laws."** Under the bill, the RFRA is also inapplicable to laws under the following criteria: "[laws that] protect against discrimination or the promotion of equal opportunity (e.g., the Civil Rights Act of 1964); require employers to provide wages, other compensation, or benefits, including leave; protect collective activity in the workplace; protect against child labor, abuse, or exploitation; or provide for access to, information about, referrals for, provision of, or coverage for, any health care item or service."

- **The Do No Harm Act was introduced in 2017 in response to the 2014 Burwell v. Hobby Lobby Stores decision but did not advance in Congress.** Representative Joseph P. Kennedy III (D-Mass)—who reintroduced the bill along with then-Senator Kamala Harris (D-Calif)—said in a statement "We cannot be equal or free if our government grants select Americans a license to discriminate against their neighbors under the guise of religious freedom … By passing the Do No Harm Act, we can reestablish the sacred balance between religious liberty and the personal liberties of those who have too often had their civil rights bargained away."

- **In Tanzin v. Tanvir (2020), the Supreme Court unanimously ruled that "that the Religious Freedom Restoration Act allows plaintiffs to get money damages against individual federal officials who have violated their rights."** At the center of the case were Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari—three

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Muslims who claim that "Federal Bureau of Investigation agents placed them on the No Fly List in retaliation for their refusal to act as informants against their religious communities." Due to their placement on the No-Fly List, the men "were unable to see spouses, children, sick parents, and elderly grandparents who are overseas … [and] They lost jobs, were stigmatized within their communities, and suffered severe financial and emotional distress."

- The Trump administration issued new guidance for religious exemptions for nonprofit and for-profit contractors "who 'hold themselves out to the public as carrying out a religious purpose'" in December 2020. **The final rule, issued through the US Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), was "'intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions.'"** According to the office—as reported by *NBC News*—the rule also "'reduces confusion' and reinforces existing statutes, including the Religious Freedom Restoration Act."

- In December 2020, the *Washington Post* reported that the Museum of the Bible in Washington, DC was "considering suing DC Mayor Muriel E. Bowser (D) over the city's latest round of coronavirus restrictions, saying they prevent the museum's employees from exercising their religious freedom and its visitors from possibly having a religious experience." **In a letter to the mayor, "museum officials argue[d] that the city [was] violating the Religious Freedom Restoration Act by not allowing the museum to exercise religion."**

- In January 2021, the *Guardian* reported that the Trump administration had "set in motion the transfer of sacred Native American lands to a pair of Anglo-Australian mining conglomerates." The land in question was the Oak Flat—a "2,422-acre Arizona parcel … of enormous significance to the Western Apache." **The San Carlos Apache Tribe filed a lawsuit "alleging … that by moving forward with the land exchange the Forest Service is violating the National Historic Preservation Act, the Religious Freedom Restoration Act and an 1852 treaty between the United States and Western Apache tribes."**