

The Never-Ending Spiral of Extreme Religious Liberty

1. 1878-present

Ordered Liberty Under the Constitution, First Amendment, Free Exercise Clause

Employment Division v. Smith, 494 U.S. 872 (1990)

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)

- Rules:
- Believer must prove law imposes a substantial burden.
 - A neutral, generally applicable law is constitutional unless irrational.
 - If law is not neutral or not generally applicable, ordinary strict scrutiny applies: the government must prove a compelling interest and that the law is narrowly tailored
 - the right is only good against the government (state action)



2. 1972

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

- Rules:
- Believer must prove a substantial burden
 - Only case where a neutral, generally applicable law is subjected to strict scrutiny
 - Government must prove a compelling interest and that the law is narrowly tailored



3. 1993

Religious Freedom Restoration Act of 1993

- Rules:
- Believer must prove a substantial burden
 - Government must prove a neutral, generally applicable law serves a compelling interest
 - Narrow tailoring is replaced by the more extreme "least restrictive means"
 - Relief permitted only "against a government"



4. 2000

Amendments to Religious Freedom Restoration Act (further expansion of rights for believers)

- Rules:
- Expands definition of "religious exercise" to be: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including "the use, building, conversion of real property for the purpose of religious exercise" so long as the person, assembly, or institution "uses or intends to use the property for that purpose."



5. 2000

Religious Land Use and Institutionalized Persons Act

- Rules:
- Believer must prove a substantial burden
 - Government must prove a neutral, generally applicable land use or prison law serves a compelling interest
 - Narrow tailoring is replaced by the more extreme "least restrictive means"
 - Relief permitted only "against a government"

State standard RFRA: AZ, FL, IL, LA, SC, TX



would have deleted or deletes "substantial" from substantial burden (AL, CT); removed "substantial burden" and replaced with restrict (RI, NM, MO)

works against homosexuals (AZ*, GA*, ID*, KS*, OH*, MS*, SD*, TN*)

adds to government's burden: clear and convincing evidence (ID, KS, KY, OK, PA, TN, VA)

expands to include suits between private parties (AZ*, ID*, OH*, MS*)
* indicates 2014 pending RFRA law