



4 Laws That Allow Religion to Be Used to Harm Gay and Transgender People November 2014

As gay and transgender people gain greater equality under the law nationwide, there is an aggressive effort to ensure that anyone with religious objections (including businesses) will still be allowed to discriminate. Laws attempting to codify such religiously-based discrimination come in many forms, but below are four common types of bills.

1. Religious Freedom Restoration Acts (RFRAs)

Summary: allow religious objections (via lawsuits) to any governmental policies that burden religious beliefs. The government must prove that the policy being challenged furthers an important goal and that there is no other way of achieving that goal.

Typical language: Government may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden to the person is both (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.

Examples:

- An individual challenges government dress code prohibiting employees from wearing non-approved head wear.
- A business challenges governmental policy requiring health insurance plans to offer contraception on the same terms as any other prescription drugs.
- A business owner challenges a state civil rights commission's investigation of alleged violations of the state nondiscrimination law.

Note: Even though *Hobby Lobby*, which allowed a for-profit business to challenge burdens on religious exercise, affects only the federal RFRA, states may start to adopt this definition¹.

2. "Super" RFRAs

Summary: expand the scope of typical RFRAs to allow for more types of religious claims. Some versions will allow lawsuits between two private parties, i.e., even if the government is not involved.

¹ Among states that already have RFRAs, Kansas and South Carolina include for-profit corporations in their definition of "persons".



Typical language: they likely will include the RFRA language above, but may have additional language, such as, “A burden includes indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities” and/or “‘Government’ means any action by the government or the implementation or application of any law, including state and local laws, ordinances, rules, regulations and policies, whether statutory or otherwise, and whether the implementation or application is made or attempted to be made by the government or nongovernmental persons.”

Example: a wedding photographer refuses to photograph a lesbian wedding, which violates a state law prohibiting businesses that are open to the public from discriminating based on a customer’s sexual orientation. The customer files a legal complaint. The photographer uses the super RFRA to defend her discriminatory conduct.

3. (a) Laws allowing religious objections to certain kinds of marriages – very broad

Summary: allow businesses and individuals to refuse performing marriages, providing wedding services, or even treating any marriage as valid because of that individual’s religiously based beliefs about sex or gender. They often will not explicitly mention gay people or same-sex couples, or even the words, “sexual orientation.”

Typical language: No individual or religious entity shall be required by any governmental entity to do any of the following, if it would be contrary to the sincerely held religious beliefs of the individual or religious entity regarding sex or gender:

- (a) Provide any services, accommodations, advantages, facilities, goods, or privileges; provide counseling, adoption, foster care and other social services; or provide employment or employment benefits, related to, or related to the celebration of, any marriage, domestic partnership, civil union or similar arrangement; or
- (b) solemnize any marriage, domestic partnership, civil union or similar arrangement; or
- (c) treat any marriage, domestic partnership, civil union or similar arrangement as valid.

(b) Laws allowing religious objections to certain kinds of marriages – narrower

Summary: would allow governmental officials (e.g., clerks, judges) to discriminate by refusing to perform marriages that contradict their religious beliefs.

4. Overbroad religious exemptions to nondiscrimination laws protecting LGBT people

Summary: allow a wide range of businesses and individuals – and not just places of worship or religious institutions – to refuse following nondiscrimination laws.



Typical language: These vary depending on the context. We should not accept exemptions that treat LGBT discrimination differently than race, sex, or other prohibited forms of discrimination.