

NOTES

WHY THE RELIGIOUS FREEDOM RESTORATION ACT PROVIDES A DEFENSE IN SUITS BY PRIVATE PLAINTIFFS

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INTRODUCTION

CITIZENS today can obtain relief against a federal law burdening religion in two ways—under the First Amendment’s Free Exercise Clause¹ or under the Religious Freedom Restoration Act (“RFRA”).² RFRA provides greater protection for the free exercise of religion than current doctrine under the First Amendment. It establishes a compelling-interest test, requiring courts to apply strict scrutiny to the government’s justification for burdening religion. As such, individuals may rely upon RFRA to vindicate core religious rights not otherwise protected by the Constitution. Although RFRA has been struck down as applied to the states in *Boerne v. Flores*,³ it continues to provide protection against federal laws burdening religion. Moreover, many states have adopted legislation analogous to RFRA at the state level.⁴

An ambiguity in RFRA’s judicial relief section,⁵ however, has led some circuits to sharply limit protections available to religious organizations and individuals based solely on the composition of the parties to the suit. The judicial relief section creates a cause of action, stating that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”⁶ The

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¹ U.S. Const. amend. I.

² Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

³ 521 U.S. 507, 536 (1997).

⁴ See Christopher C. Lund, Religious Liberty After *Gonzales*: A Look at State RFRAs, 55 S.D. L. Rev. 466, 476–78 (2010) (collecting state RFRA statutes that follow the language of the federal RFRA).

⁵ 42 U.S.C. § 2000bb-1(c).

⁶ *Id.*

circuits are split as to whether RFRA can be claimed as a defense in citizen suits—suits solely between private citizens in which the government is not a party. This split is based on an ambiguity in the text: whether the phrase “and obtain appropriate relief against a government” is meant to limit the set of cases in which a “claim or defense” may be raised in a judicial proceeding, or whether the phrase simply signifies an additional right upon which a litigant may rely.

Some circuits (hereinafter “defense circuits”) have allowed RFRA to provide a defense in citizen suits, finding the statute’s language and purpose sufficiently broad to create a defense regardless of the parties to the suit.⁷ Under this reading, an unambiguous version of the text would be modified to say, “A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and may obtain appropriate relief (*including* against a government).”⁸ This reading makes clear that relief against a government is merely an additional right—a subset of the more generally obtainable relief under RFRA. Thus, “claim or defense in a judicial proceeding” is freestanding and not limited by the “obtain relief” phrasing.

Other circuits (hereinafter “nondefense circuits”) have held that the language in the judicial relief section and in the remainder of the statute suggest that RFRA meant to provide a defense only when obtaining appropriate relief against a *government* and therefore cannot apply to suits in which the government is not a party.⁹ A nondefense view of the text would be modified to say, “A person whose religious exercise has been

⁷ *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006) (stating that “[t]he RFRA’s language surely seems broad enough . . . [t]he statutory language states that it ‘applies to all federal law, and the implementation of that law.’” (quoting 42 U.S.C. § 2000bb-3(a))); see also *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1120–21 (9th Cir. 2000) (allowing the Philadelphia Church of God to raise an affirmative defense under RFRA but then finding that it had failed to demonstrate that the generally applicable copyright laws imposed a “substantial burden” on the exercise of its religion); *In re Young v. Crystal Evangelical Free Church*, 141 F.3d 854, 863 (8th Cir. 1998) (permitting the church to assert RFRA as a defense against a trustee in bankruptcy); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 468–69 (D.C. Cir. 1996) (treating the EEOC and the private plaintiff alike in holding that Catholic University was allowed to claim a RFRA defense).

⁸ All changes to the statute have been made in italics.

⁹ See, e.g., *Gen. Conference Corp. of Seventh Day Adventists v. McGill*, 617 F.3d 402, 410–11 (6th Cir. 2010) (finding that the legislative history and the text of the statute make clear Congress’s intent only to provide a defense when the government is a party to the suit); *Hankins*, 441 F.3d at 114 (Sotomayor, J., dissenting); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding ~~and obtain appropriate relief~~ against a government *and may obtain appropriate relief.*¹⁰ By moving the “obtain relief” phrase to the end of the sentence, this rewriting clarifies that “government” is meant to limit the types of cases in which a “claim or defense” can be asserted. This modification limits applicability of RFRA to only those suits in which a claim or defense is raised against a government party, thus excluding a defense in citizen suits.

This controversy is not insignificant. In many cases, private parties sue under generally applicable statutes, or under the common law, without involving a government entity as a co-plaintiff.¹¹ A significant number of these cases occur when private citizens seek to enforce employment laws or antidiscrimination laws against private religious organizations and individuals. In *Hankins v. Lyght*, for example, a former clergy member brought suit under the Age Discrimination in Employment Act against his church-employer, arguing that church doctrine forced his retirement due to his old age.¹² Other examples involve private suits against religious landlords for refusing to rent apartments to unmarried couples,¹³ and bankrupt plaintiffs attempting to recover religious contributions previously paid to the Church.¹⁴ Under a nondefense reading of the statute, RFRA would not provide the more stringent compelling-interest protection for the free exercise of religion in those cases.

At least one case is currently being litigated on this issue at the federal level. In *In re Archdiocese of Milwaukee*, plaintiff creditors have brought suit against the Archdiocese claiming fraudulent transfer of money under the Bankruptcy Code.¹⁵ The Archdiocese has raised RFRA as a defense, arguing that the federal bankruptcy transfer laws substan-

¹⁰ Original text is struck through and changes are made in italics.

¹¹ See *supra* notes 7, 9; see also *Rweyemamu v. Cote*, 520 F.3d 198, 200 (2d Cir. 2008); *Catholic High Sch. Ass’n v. Culvert*, 753 F.2d 1161, 1163 (2d Cir. 1985); *In re No. CF Foods*, No. 01-2849, 2001 WL 1632272, at *1 (E.D. Pa. Dec. 20, 2001); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 58 (E.D. Pa. 1991); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 267 (N.D. Iowa 1980); *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 848 (Bankr. D. Or. 2005); *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 4 (D.C. 1987); *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 810 (Minn. Ct. App. 1992); *Miller v. Catholic Diocese of Great Falls*, 728 P.2d 794, 795 (Mont. 1986); *Hutchison v. Luddy*, 606 A.2d 905, 906 (Pa. Super. Ct. 1992).

¹² *Hankins*, 441 F.3d at 100.

¹³ See *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 696 (9th Cir. 1999).

¹⁴ See *In re Young v. Crystal Evangelical Free Church*, 141 F.3d 854, 863 (8th Cir. 1998).

¹⁵ No. 11-02459-svk, 2013 WL 175546 (Bankr. E.D. Wis. 2013).

tially burden its religious freedom. As of this time, the creditors have filed a motion for summary judgment,¹⁶ citing to Seventh Circuit precedent for the proposition that RFRA is applicable “only to suits to which the government is a party.”¹⁷

Moreover, the language of the federal RFRA has been copied verbatim into several state RFRAs, recreating the ambiguity at the state level.¹⁸ This has most notably become an issue in *Elane Photography v. Willock*, in which private Christian photographer Elaine Huguenin was fined \$7000 by the New Mexico Human Rights Commission for declining a job photographing a homosexual wedding ceremony.¹⁹ Huguenin appealed the commission’s decision, arguing in part that New Mexico’s RFRA provided a defense. The New Mexico Court of Appeals found against Elaine, holding that:

[t]he text of the NMRFRA is clear in limiting its scope to cases in which a “government agency” has restricted a person’s free exercise of religion. Elane Photography claims that the language of the statute authorizing a litigant to “assert [a NMRFRA] violation as a claim or defense in a judicial proceeding” allows cases between private parties. Elane Photography takes this language out of context. In context, parties may raise NMRFRA violations as a claim or defense to “obtain appropriate relief against a government agency[.]” Willock is not included in the definition of a “government agency” under the NMRFRA, and this statute was not meant to apply in suits between private litigants.²⁰

¹⁶ Response to Motion for Partial Summary Judgment at 6, *In re Archdiocese of Milwaukee* (No. 11-02459-svk).

¹⁷ *Id.* at 9.

¹⁸ Ariz. Rev. Stat. Ann. § 41-1493.01(D) (2011); Conn. Gen. Stat. § 52-571b(c) (2005); Fla. Stat. § 761.03(1)(c) (2012); Idaho Code Ann. § 73-402(4) (2006); 775 Ill. Comp. Stat. 35/20 (2010); N.M. Stat. Ann. § 28-22-4 (2011); 71 Pa. Cons. Stat. § 2405(a) (2012); R.I. Gen. Laws § 42-80.1-4 (1998); S.C. Code Ann. § 1-32-50 (2005).

¹⁹ 284 P.3d 428, 428 (N.M. Ct. App. 2012), cert. granted, No. 33,687 (N.M. Aug. 16, 2012).

²⁰ *Id.* at 444 (citations omitted). This case has received significant press, including a blog post by Professor Eugene Volokh. Eugene Volokh, *Do Religious Freedom Restoration Acts Apply When Courts Enforce Civil Causes of Action?*, Volokh Conspiracy (June 4, 2012, 5:07 AM), <http://www.volokh.com/2012/06/04/do-religious-freedom-restoration-acts-apply-when-courts-enforce-civil-causes-of-action/>. Volokh is currently filing an amicus brief in support of *Elane Photography* in the New Mexico Supreme Court. Eugene Volokh, *Seeking New Mexico Local Counsel for a Pro Bono Amicus Brief Before the New Mexico Supreme Court*, Volokh Conspiracy (Aug. 27, 2012, 10:47 PM), <http://www.volokh.com/2012/08>

This Note excavates the statutory language and the underlying legislative history of the religious freedom statutes²¹ in order to resolve this circuit split. In doing so, the Note defends the conclusion in *Hankins v. Lyght* and finds that RFRA does provide a defense in citizen suits.

Part I outlines the textual ambiguity inherent in the judicial relief section and tackles the main textual argument relied upon by the nondefense circuits. Part II rebuts then-Judge (now Justice) Sotomayor's dissent in *Hankins*, which argued that RFRA authorizes only the *government* to justify the burden on religious exercise by identifying a compelling interest.²² Neither Judge Sotomayor nor any other circuit has examined this language in the context of established Supreme Court state-action doctrine under *New York Times v. Sullivan*.²³ This Note situates RFRA within this background principle and offers an alternate explanation of the statutory language consistent with a prodefense reading of the statute. Part III resolves any remaining ambiguities in the judicial relief section by looking to the policy considerations and codified purposes of RFRA. This Part argues that these purposes encourage a broad reading of RFRA, thus finding a defense in citizen suits.

Finally, Part IV investigates the debate over the proposed 1999 Religious Liberty Protection Act ("RLPA")²⁴ in order to unearth congressional intent regarding citizen-suit defenses under RFRA. Although courts of appeals have alluded to the legislative history on both sides of the split, their analyses have been shallow and fleeting.²⁵ The RLPA debates illuminate a congressional understanding that the religious freedom bills were intended to apply broadly to all suits, including those between private citizens. Significantly, the most contentious issue during the RLPA congressional debate, a broad carve-out for laws furthering

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²¹ Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2006); Religious Land Use and Institutionalized Persons Act, id. § 2000cc; Religious Liberty Protection Act, H.R. 1691, 106th Cong. (1999).

²² *Hankins*, 441 F.3d at 114 (Sotomayor, J., dissenting) (“[G]overnment’ must ‘demonstrate[] . . . that application of the burden’ is the least restrictive means of furthering a compelling governmental interest.”) (quoting 42 U.S.C. § 2000bb-1(b)).

²³ 376 U.S. 254 (1964).

²⁴ H.R. 1691.

²⁵ See, e.g., *Hankins*, 441 F.3d at 115 n.9 (Sotomayor, J., dissenting) (referencing the legislative history only once to note incorrectly that “[a]ll of the examples cited in the Senate and House Reports on RFRA involve actual or hypothetical lawsuits in which the government is a party”).

civil rights, focused both on cases involving government parties, and also on those involving only private-citizen suits. These debates lay a foundation for understanding Congress's intent on this issue and can help courts resolve the ambiguities inherent in a purely textual reading of the judicial relief section.

I. REBUTTING THE NONDEFENSE CIRCUITS

Circuit courts understand the phrase “obtain appropriate relief against a government” in two ways: either as a limitation to “claim or defense” or as an independent phrase providing an additional remedy to citizens. Section I.A rebuts the “limitation” theory adopted by nondefense circuits, finding that application of this view results in grammatically imprecise or nonsensical results. Section I.B then offers textual and historical support for the alternate understanding that “obtain appropriate relief against a government” is an independent phrase providing an additional right. Specifically, it situates RFRA within Supreme Court case law on Congress's power to abrogate state sovereign immunity with a clear statement in the text.

A. Rebutting the “Limitation” Theory Adopted by Nondefense Circuits

Nondefense circuits have relied on the phrase “and obtain appropriate relief against a *government*”²⁶ (hereinafter “obtain relief”) to hold that RFRA authorizes a specific remedy only against a government party.²⁷ These courts have yet to recognize, however, the grammatically imprecise structure and the resulting ambiguity of the judicial relief section. As written, it is unclear whether “obtain relief” is meant to *limit* the prior phrase “a person whose religious exercise has been burdened . . . may assert that violation as a claim or defense in a judicial proceeding,” or whether “obtain relief” is an add-on that states or clarifies an additional right upon which a litigant may rely. Other nondefense circuits and Justice Sotomayor assume the former. Under this reading of the text, “obtain relief” would modify the entirety of the prior phrase, thus authorizing relief against a government, and only a government, regardless of whether a claim *or* defense is asserted.

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

²⁷ See *supra* note 9.

This reading contradicts the accepted understanding in law that relief may be obtained only when a *claim* has been stated. Regardless of the form of relief (declaratory injunction, damages, or restitution), a litigant must first assert a cause of action under which relief may be afforded. Conversely, a litigant cannot obtain relief solely by raising a defense. A defense can only defeat liability. A defense is not itself a cause of action that provides a litigant the opportunity to obtain an injunction or damages.

To illustrate, let us take a generic tort claim as an example. Plaintiff slips and falls on Defendant's icy driveway. Plaintiff sues and claims that Defendant was negligent in his failure to maintain the safety of the property. Plaintiff seeks monetary damages as relief. At this point, Defendant can attempt to defeat liability by raising a defense. For example, he may argue that Plaintiff had assumed the risk because it was clear that the driveway was icy. If this defense is successful, Defendant may defeat liability but would not be able to "obtain relief" against the Plaintiff.

To sharpen this point, let us now assume that Plaintiff was in fact trespassing upon Defendant's property at the time of the injury. Defendant can use this information in two ways. He can raise a defense asserting that he owes no duty of care to a trespasser-Plaintiff, thus defeating liability. As before, this defense alone will not allow Defendant to obtain relief from Plaintiff. Defendant can now also *counterclaim*, however, and seek damages against Plaintiff under a separate cause of action for trespass. The key distinction is that in order to obtain relief, Defendant first had to assert a *claim* of trespass against the Plaintiff.

The pleading requirements under the Federal Rules of Civil Procedure ("FRCP") further confirm this understanding. In describing the requirements necessary to file a "pleading that states a *claim* for relief,"²⁸ Rule 8(a)(3) states that any adequately pleaded claim must include a "demand for the relief sought."²⁹ This is not the case for defenses. The basic pleading requirements for defenses under Rule 8(b) require the defendant only to state his "defenses to each claim asserted against"³⁰ him and to "admit or deny the allegations asserted."³¹ The FRCP do not require a

²⁸ Fed. R. Civ. P. 8(a) (emphasis added).

²⁹ Fed. R. Civ. P. 8(a)(3).

³⁰ Fed. R. Civ. P. 8(b)(1)(A).

³¹ Fed. R. Civ. P. 8(b)(1)(B).

party to demand relief in order to plead an adequate defense and do not permit him to obtain relief without stating a claim.

Once it is understood that only defendants who bring *claims* under RFRA (and not merely defenses) can ever “obtain appropriate relief against a government,” it becomes clear that the “limitation” theory adopted by nondefense circuits leaves the judicial relief section with two grammatically imprecise alternatives. One reading suggests that “obtain relief” is meant to limit the scope of both claims and defenses. Under this view however, “obtain relief” would be linguistically nonsensical as a limit upon defenses since a litigant cannot obtain relief when merely asserting a defense.³² On an alternate view, “obtain relief” could be understood as applying inconsistently to the prior phrase, thus acting as a limit to “claims” but not similarly to “defenses.” Under this reading, RFRA would provide a defense in citizen suits. It would not, however, allow litigants to go further and counterclaim in citizen suits because RFRA provides judicial relief for claims and counterclaims solely in government-party suits. There is no indication that Congress intended such a lopsided result, nor is there a clear policy justification for this inconsistent application of RFRA. As a result, courts that insist upon understanding “obtain relief” as a limiting phrase are left with two possible grammatical ambiguities in the judicial relief section.

B. The Drafting History and Historical Context of RFRA Support the “Additional Right” Theory

The grammatical ambiguities caused by the “limitation” theory can be resolved if courts understand “obtain relief” as granting or clarifying an additional right to RFRA litigants rather than limiting “claim or defense.” If the “obtain relief” phrase does not act as a modifier, however, there must be an alternate explanation for why inclusion of the phrase was necessary to specify an additional right. Subsection I.B.1 situates RFRA within the state sovereign immunity context and explains why Congress believed it was necessary to make a clear statement specifically authorizing relief against a government. Subsection I.B.2 then examines the drafting history of the judicial relief section and demonstrates that the ambiguity regarding citizen-suit defenses arose as an incidental result of grammatical restructuring.

³² Only RFRA’s ability to provide a *defense* in citizen suits has been at issue in litigation and is thus the focus of this Note.

1. Supreme Court Doctrine Abrogating State Sovereign Immunity Can Explain Congress's Inclusion of the "Obtain Relief" Phrasing

Congress's desire to abrogate state sovereign immunity and authorize relief against government entities best explains why the original bill's judicial relief section read: "A person aggrieved by a violation of this section may obtain appropriate relief (including relief against a government) in a civil action."³³ At the outset, the structure of this version illuminates Congress's clear intent to authorize relief against a government as a *subset* of a larger authorization of relief against all individuals. It was not meant to act as a limit upon the relief citizens could already obtain against private plaintiffs.

Furthermore, established Supreme Court doctrine allowed Congress to use its Section Five enforcement power under the Fourteenth Amendment to abrogate state sovereign immunity through a clear statement in the text of a statute.³⁴ Abrogation of state sovereign immunity would authorize lawsuits seeking monetary damages against individual states.³⁵ The parenthetical "including relief against a government" is thus best understood as a Congressional attempt to draft a clear statement authorizing additional relief for citizens against governments.

This attempt was found partially inadequate in *Sossamon v. Texas*,³⁶ which held that the phrase "appropriate relief" was too open-ended and did not "unambiguously include damages against a sovereign."³⁷ Still, the majority in *Sossamon* recognized that the phrase "and obtain appropriate relief against a government" at least authorized a private cause of action for injunctive relief against state governments, if not for damages.³⁸ Justices Sotomayor and Breyer went further in the *Sossamon* dis-

³³ Religious Freedom Restoration Act, S. 3254, 101st Cong. (1990); Religious Freedom Restoration Act, H.R. 5377, 101st Cong. (1990). RFRA was first introduced in the House of Representatives in July 1990 and in the Senate in October 1990. The House version was only slightly different from the Senate version. The House version read, "[a] party aggrieved by a violation of this section may obtain appropriate relief (including relief against a governmental authority) in a civil action." H.R. 5377 § 2(c).

³⁴ See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455–56 (1976).

³⁵ *Fitzpatrick*, 427 U.S. at 455–56.

³⁶ 131 S. Ct. 1651 (2011). Although *Sossamon* was about RLUIPA, both statutes used the phrase "obtain relief against a government" in their judicial relief sections. RLUIPA's relief section was taken directly from RFRA's text. Thus, *Sossamon*'s holding is equally applicable to the "obtain relief" language in RFRA.

³⁷ *Id.* at 1659.

³⁸ *Id.*

sent, finding that the majority's limiting interpretation undermined clear congressional intent to authorize broad relief.³⁹ Congress's unmistakable intent in passing RFRA was to protect religious freedom broadly, applying the statute to *all* "[f]ederal or [s]tate law" and implementation of that law.⁴⁰ For the dissent, this broad protection of religious liberty was enough to provide a clear statement abrogating state sovereign immunity for both injunctive relief and damages.⁴¹

At the time of RFRA's drafting, however, a broad rule of applicability would not have been enough to abrogate sovereign immunity. The Supreme Court had invalidated other attempts at abrogation when the statute did not explicitly specify that relief could be obtained against governments.⁴² For example, in *Atascadero State Hospital v. Scanlon*, the Supreme Court found that the phrase "remedies . . . shall be available to any person aggrieved by . . . any recipient of Federal assistance," did not authorize relief against states receiving federal assistance, because the phrase "any recipient of Federal assistance" did not make an explicit reference to state governments.⁴³ Although there was a slight relaxation of this doctrine in *Pennsylvania v. Union Gas Co.*, *Union Gas* stands on shaky ground and still requires Congress to make a clear statement in the text to abrogate immunity.⁴⁴ In light of this case law, RFRA's explicit authorization of "relief against a government" is an unambiguous attempt to ensure that RFRA abrogated state sovereign immunity and allowed plaintiffs to recover against the states. Therefore, state sovereign immunity provides the animating purpose behind Congress's inclusion of the "obtain relief" parenthetical.

³⁹ Id. at 1669 (Sotomayor & Breyer, JJ., dissenting).

⁴⁰ Religious Freedom Restoration Act, H.R. 5377, 101st Cong. (1990).

⁴¹ 131 S. Ct. at 1669 (Sotomayor & Breyer, JJ., dissenting).

⁴² See, e.g., *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 475–76 (1987) (holding that although the statute extended to "[a]ny seaman who shall suffer personal injury in the course of his employment," this general authorization did not suffice to abrogate the Eleventh Amendment); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

⁴³ 473 U.S. at 245–46.

⁴⁴ 491 U.S. 1, 7–8 (1989) (finding that including "states" in the definition of "persons" covered by the statute was sufficient to abrogate state sovereign immunity).

2. RFRA's Drafting History Explains How Ambiguity in the Judicial Relief Section Arose as an Incidental Result of Grammatical Restructuring

The statute's drafting history illuminates that a grammatical restructuring required drafters to delete the "obtain relief" parenthetical and append the clear statement abrogating state sovereign immunity to the end of the judicial relief section. These textual changes were not intended to limit the judicial relief available under RFRA. In fact, both the 1990 draft and the current formulation of the judicial relief section (concretely developed by 1991) conveyed two distinct thoughts: (1) citizens had a cause of action under RFRA, and (2) state sovereign immunity was abrogated, thus extending the cause of action to governments.

The first thought was conveyed in the 1990 draft by the phrase "may obtain appropriate relief . . . in a civil action"⁴⁵ and in the 1991 draft by the phrase "may assert that violation as a claim or defense in a judicial proceeding."⁴⁶ The second thought was conveyed in the 1990 draft by the parenthetical "including relief against a governmental authority"⁴⁷ and in the 1991 draft by the phrase "and obtain appropriate relief against a government."⁴⁸ Each draft expressed these two thoughts completely. "Obtain relief" was never meant to limit the prior phrase "claim or defense." Instead, the ambiguity arose incidentally as a result of the restructuring of the section. A step-by-step analysis of the changes to the statute can better illustrate this point:⁴⁹

1990 Draft: A party aggrieved by a violation of this section may obtain appropriate relief (including relief against a governmental authority) in a civil action.⁵⁰

1991 Draft: A *person* ~~party aggrieved by a~~ *whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief* ~~(including relief against a governmental authority) in a civil action.~~⁵¹

⁴⁵ H.R. 5377.

⁴⁶ Religious Freedom Restoration Act, H.R. 2797, 102nd Cong. (1991).

⁴⁷ H.R. 5377.

⁴⁸ H.R. 2797.

⁴⁹ In the analysis that follows, additions are italicized and removed text is struck through.

⁵⁰ H.R. 5377.

⁵¹ H.R. 2797.

1993 Final Version: A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.⁵²

There are two substantive changes made by the 1991 draft. First, the statute redefines the term “a party aggrieved” as a “person whose religious exercise has been burdened.” Second, the 1991 draft clarifies that the statute may be asserted as a defense and not merely as a claim for relief. As already explained in Section I.A, relief can be obtained only when a claim is asserted. The 1990 draft focused on obtaining relief and thus did not make clear whether RFRA could also be asserted as a defense.

The ambiguity surrounding citizen-suit defenses arises as a result of this second substantive addition of “claim or defense.” Once the text was altered explicitly to authorize both claims and defenses under RFRA, there was no longer a need to specify that a litigant could also “obtain relief.” Including that language would have been redundant because the right to obtain relief is already implicit in asserting a claim. Once the reference to relief was removed from the statute completely, however, the parenthetical specifically including relief against a government had no antecedent noun to modify. The section would have read:

A person ~~party aggrieved by a~~ whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding ~~obtain appropriate relief~~ (including relief against a government) ~~in a civil action.~~

“[I]ncluding relief” may have been able to modify the antecedent word “claim,” which is a prerequisite to relief. This would not have been a grammatically accurate modification, however, because “claim” is not completely synonymous with “relief.”⁵³ Even if one conceded that “claim” was equivalent in meaning to “relief,” the “including relief” phrase could not have been elegantly placed anywhere in the statute while in the form of a parenthetical. If “including relief” were left at the

⁵² Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(c) (2006).

⁵³ To illustrate the inaccuracy in the phrasing, a sentence in which “including relief” modified “claim” would read: “A *person whose religious exercise has been burdened in violation of this section may assert that violation as a claim* (including relief against a government) *or defense in a judicial proceeding.*” The phrase “including relief” is too specific to match up correctly with “claim” as the head.

end of the sentence, it would have been separated from “claim” by two other nouns that it was not modifying—“defense” and “judicial proceeding.” Alternately, if the “including relief” parenthetical were placed immediately adjacent to “claim,” the statute would have become confusing and unwieldy. As a consequence, the “including relief” phrasing was no longer a grammatically viable option.

Of course, the “obtain relief” phrase could not just be deleted from the statute since it was this phrase that allowed Congress to abrogate state sovereign immunity. In light of this grammatical restructuring, the drafters rephrased the parenthetical so that it would act as an independent verb rather than a participial phrase modifying “relief.” As a quick fix, the newly rephrased parenthetical was attached to the end of the section with the conjunction “and.” Any ambiguity resulting from the placement of the phrase is due purely to this restructuring of the section.

II. THE GOVERNMENT’S BURDEN

The “obtain relief” clause has been the language most relied on by judges who refuse to entertain a RFRA defense in suits by private parties.⁵⁴ But Judge Sotomayor’s dissent in *Hankins v. Lyght* offered an additional argument, based on RFRA’s affirmative defense of compelling governmental interest.⁵⁵ RFRA states that, “[g]overnment may substantially burden a person’s exercise of religion only if *it demonstrates*” that the burden serves a compelling interest by the least restrictive means.⁵⁶ “Demonstrates” is a defined term; it means to carry “the burdens of going forward with the evidence and of persuasion.”⁵⁷ Judge Sotomayor noted that these burdens are placed only on the government, not on private parties, and consequently that RFRA cannot be a defense in a suit between private parties.⁵⁸ As she noted, in order to “go[] forward” with the evidence, the government must be a party to the suit.⁵⁹ Judge So-

⁵⁴ See, e.g., *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

⁵⁵ 441 F.3d 96, 109–19 (2d Cir. 2006) (Sotomayor, J., dissenting).

⁵⁶ 42 U.S.C. § 2000bb-1(b) (2006) (emphasis added).

⁵⁷ *Id.* § 2000bb-2(3).

⁵⁸ *Hankins*, 441 F.3d at 114–15 (Sotomayor, J., dissenting).

⁵⁹ *Id.*

tomayor concluded that this language “strongly suggests that Congress did not intend RFRA to apply in suits between private parties.”⁶⁰

This argument neglects a large body of law holding that government can burden constitutional rights when it creates legal rules, even if a burdensome legal rule is enforced by a private plaintiff. The Supreme Court’s best-known statement of this rule came in *New York Times v. Sullivan*.⁶¹ The plaintiff in that case brought a private libel action against the *New York Times*.⁶² The Alabama Supreme Court rejected all constitutional defenses on the ground that “[t]he Fourteenth Amendment is directed against State action and not private action.”⁶³

The U.S. Supreme Court reversed, holding that even in civil lawsuits between private parties, a legal rule that burdens a constitutional right is state action for which the government is responsible.⁶⁴ “It matters not that th[e] law has been applied in a civil action and that it is common law only The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”⁶⁵ Alabama’s common law of defamation was thus state action, subject to the First and Fourteenth Amendments even when enforced in a private lawsuit. The relevant inquiry is not the *enforcement mechanism* (government plaintiff or private plaintiff), but rather the *source of the burden* (law created by government).

Of course, the plaintiff in *New York Times v. Sullivan* was a public official, but he was suing in his private capacity.⁶⁶ The damages awarded in the Alabama courts were payable to Sullivan individually, in his private capacity, and not to any government agency.⁶⁷ The Court has applied the same rule in other cases with wholly private plaintiffs who had no connection to the government—such as defamation suits by public figures who are not public officials.⁶⁸ An earlier example from a different context is *American Federation of Labor v. Swing*, in which the

⁶⁰ Id. at 115.

⁶¹ 376 U.S. 254, 254 (1964).

⁶² Id.

⁶³ *N.Y. Times v. Sullivan*, 144 So. 2d 25, 40 (Ala. 1962), rev’d, 376 U.S. 254 (1964).

⁶⁴ *N.Y. Times*, 376 U.S. at 265.

⁶⁵ Id. Later cases have cemented this holding. See, e.g., *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (extending *New York Times* by finding that public figures could bring suit for libel against private newspaper companies).

⁶⁶ *N.Y. Times*, 376 U.S. at 256.

⁶⁷ *N.Y. Times*, 144 So. 2d at 28–29.

⁶⁸ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988); *Herbert v. Lando*, 441 U.S. 153, 156 (1979); *Butts*, 388 U.S. at 155.

Court invalidated portions of an anti-picketing injunction issued on the basis of a common law rule in a suit by a private employer.⁶⁹ The same rule has been applied without controversy to privately owned abortion clinics suing protesters⁷⁰ and to merchants suing civil rights organizations.⁷¹ Additionally, cases imposing constitutional limits on punitive damages depend on this rule: punitive damages are state action even when awarded to private plaintiffs in private litigation.⁷² Therefore, regardless of the parties to the suit, the starting point of analysis is state action.

This rule was well established when RFRA was enacted. The starting point for analysis is not RFRA's affirmative defense, but RFRA's basic rule: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in" the affirmative defense.⁷³ Since it is well established that government burdens constitutional rights when it creates constitutionally burdensome rules to be enforced by private plaintiffs, this prohibition on government-imposed burdens is most naturally read to include suits by private plaintiffs. RFRA expressly applies to the "implementation" of federal law, and private plaintiffs suing over defendants' exercises of religion are enforcing, or "implement[ing]," a government-imposed burden on religion.⁷⁴ RFRA's core prohibition applies, and the private plaintiff can undertake to justify the burden if he chooses to do so.

Judge Sotomayor bolstered her textual analysis with a policy argument, finding that it would not be "appropriate to require private parties

⁶⁹ 312 U.S. 321, 325–26 (1941); see also *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

⁷⁰ See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 361 (1997) (invalidating parts of injunctions against protestors); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 757 (1994) (same).

⁷¹ *NAACP v. Claiborne Hardware*, 458 U.S. 886, 915 (1982).

⁷² See *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); see also *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007) (invalidating award of punitive damages in a private lawsuit); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (same); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434–35 (1994) (same).

⁷³ 42 U.S.C. § 2000bb-1(a).

⁷⁴ *Id.* § 2000bb-3(a).

to satisfy the stringent burden” that RFRA places on the government.⁷⁵ This is unsupported by the case law. First Amendment free-speech doctrine requires private citizens to meet such a heightened standard (often a “compelling” or “significant” government interest) when they restrict the constitutional right to protest. In *Schenck v. Pro-Choice Network*, the Court required a private abortion clinic to demonstrate a significant government interest for erecting a “buffer zone” designed to limit protesters’ demonstrations around the clinic.⁷⁶ Courts have also unproblematically imposed the burden of a heightened-interest test upon private citizens in the free-exercise context, where the contested law is found not to be neutral and generally applicable.⁷⁷ Free-exercise doctrine applies the compelling-interest test to private plaintiffs and government plaintiffs alike. Although these cases do not properly fall under RFRA, they undermine the policy explanation for limiting the burden of the compelling-interest test to government plaintiffs.

Judge Sotomayor’s policy argument is similarly unsupported by the unambiguous purposes of RFRA. Congress’s primary purpose in enacting RFRA was to extend applicability of the compelling-interest test to a broader set of cases than those authorized by *Employment Division v. Smith*.⁷⁸ Congress expected religious freedom to be protected by the stringent compelling-interest requirement even in cases in which the statute was found to be neutral and generally applicable.⁷⁹ Contrary to Judge Sotomayor’s policy justification, there is in fact *every* indication that Congress intended private plaintiffs to bear the stringent burden of the compelling-interest test. There is no indication, however, that Congress substantially expanded upon First Amendment rights only to limit that expansion to a subset of plaintiffs.⁸⁰

III. ARGUING FOR A BROAD READING OF RFRA

RFRA’s drafting history provides a strong case for resolving the ambiguity in the judicial relief section by authorizing a defense in citizen

⁷⁵ *Hankins*, 441 F.3d at 115 n.8 (Sotomayor, J., dissenting).

⁷⁶ 519 U.S. 357, 374 (1997).

⁷⁷ See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 627–28 (1978); *Paul v. Watchtower Bible & Tract Soc’y of N.Y.*, 819 F.2d 875, 882–83 (9th Cir. 1987).

⁷⁸ 42 U.S.C. § 2000bb(a); *id.* § 2000bb-1(a); *Emp’t Div. v. Smith*, 494 U.S. 872, 886–87 (1990).

⁷⁹ 42 U.S.C. § 2000bb-1(a).

⁸⁰ See *supra* Part I.

suits. Even if nondefense circuits are not convinced by the drafting history, however, RFRA's enacted purposes, legislative history, and policy justifications illuminate Congress's intent for RFRA broadly to protect the free exercise of religion. Thus, any remaining ambiguity in the judicial relief section should be resolved in favor of broad coverage in all cases in which federal law burdens the free exercise of religion.

RFRA's codified purposes and legislative history reflect the political backdrop against which the statute was enacted. In 1990, the Supreme Court decided *Employment Division v. Smith*, shifting free-exercise doctrine under the First Amendment in potentially radical ways.⁸¹ Prior to 1990, burdens upon the free exercise of religion could be upheld only if they were justified by a "compelling state interest in the regulation of a subject."⁸² The compelling-interest test is the most stringent protection afforded by the Constitution, and in *Wisconsin v. Yoder*, the Court expanded application of the test to both facially discriminatory laws and laws that were neutral and generally applicable.⁸³ As a result, the free exercise of religion enjoyed broad protections, and religious claimants were afforded exemptions in a variety of situations. In *Smith*, however, the Court strictly limited the application of the compelling-interest test, holding instead that exemptions from neutral and generally applicable laws are not required.⁸⁴ *Smith* therefore significantly limited the protections afforded to religiously motivated conduct.

RFRA passed with broad coalition support due to the public outrage following *Smith*.⁸⁵ Congress found *Smith* to be an "abrupt, unexpected rejection of longstanding Supreme Court precedent"⁸⁶ and found the reversal from the compelling-interest test to "denigrate '[t]he very purpose of a Bill of Rights.'"⁸⁷ The committee reports recognized that:

[b]ecause the "rational relationship test" only requires that a law must be rationally related to a legitimate state interest, the *Smith* decision . . . created a climate in which the free exercise of religion is continually in jeopardy After *Smith*, claimants will be forced to convince courts that an inappropriate legislative motive created statutes

⁸¹ 494 U.S. 872.

⁸² *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

⁸³ 406 U.S. 205, 215, 235 (1972).

⁸⁴ 494 U.S. at 885.

⁸⁵ H.R. Rep. No. 103-88, at 1 (1993).

⁸⁶ *Id.* at 2.

⁸⁷ *Id.* at 6.

and regulations. However, legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.⁸⁸

As a result, RFRA “restore[d] the compelling-interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and . . . guarantee[d] its application in *all cases* where free exercise of religion is substantially burdened.”⁸⁹ Additionally, it “provide[d] a claim or defense to persons whose religious exercise is substantially burdened by government.”⁹⁰ This latter element was directly incorporated into the judicial relief section and significantly mirrors the language found in the codified purposes.⁹¹ But RFRA provided even more expansive protection for religious exercise by applying to “all Federal law, and the implementation of that law”⁹² and applying the compelling-interest test to any “burden result[ing] from a rule of general applicability.”⁹³ This latter provision effectively restored a pre-*Smith* level of protection for religious claimants.

The legislative history further confirms RFRA’s wide-ranging application. The committee reports note that RFRA would afford protection for “[a]ll governmental actions which have a substantial external impact on the practice of religion,”⁹⁴ further explaining that “the definition of governmental activity covered by the bill is meant to be all inclusive [T]he test applies *whenever a law . . . burdens a person’s exercise of religion.*”⁹⁵

This evidence supports authorizing citizen-suit defenses for two reasons. First, the codified legislative purposes of RFRA provide a strong textual basis for reading the statute broadly, especially when confronted with the kind of textual ambiguities found in the judicial relief section.

⁸⁸ Id. at 5–6.

⁸⁹ 42 U.S.C. § 2000bb(b)(1) (2006) (emphasis added) (citations omitted).

⁹⁰ Id. § 2000bb(b)(2).

⁹¹ Id. (“The purpose of this chapter [is] . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”).

⁹² Id. § 2000bb-3(a).

⁹³ Id. § 2000bb-1 (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.”).

⁹⁴ H.R. Rep. No. 103-88, at 6 (1993) (emphasis added); see also S. Rep. No. 103-111, at 8 (1993) (noting that RFRA “is needed to restore the compelling interest test” in order to “assure that all Americans are free to follow their faiths free from governmental interference”).

⁹⁵ H.R. Rep. No. 103-88, at 6 (emphasis added).

RFRA's language is sweeping, applying to "all cases" and to "all federal law" and the "implementation of that law." As such, courts should be reluctant to read in implicit limitations, especially limitations that would restrict a citizen's access to relief.

Second, the legislative history and codified purposes of RFRA illuminate Congress's focus on *alleviating burdens* placed upon religious freedom, rather than focusing only on regulating governmental actions that burden religion. In explaining the broad applicability of the statute, the committee reports noted that "[i]t is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute."⁹⁶ This is why Congress ensured that RFRA would bind all future state and federal laws⁹⁷ and why RFRA expanded stringent protections for burdens stemming from generally applicable laws in addition to laws enacted with a discriminatory intent.

The floor debates and congressional hearings provide additional evidence that, in enacting RFRA, Congress's primary focus was on broadly *protecting religious liberty*, not on creating distinctions in enforcement mechanisms. The bulk of the discussion centered on the burdens *Smith* placed upon religious claimants. The record points to several examples of burdens upon core religious beliefs that would likely be upheld under the post-*Smith* "rational relationship test."⁹⁸ Such burdens included a requirement of large reflective warning signs affixed to Amish buggies,⁹⁹ infringements upon the right to keep Sabbath,¹⁰⁰ and restrictions upon the ability to use wine in religious ceremonies¹⁰¹ and to observe religious dietary laws.¹⁰² Congress's primary purpose in applying RFRA broadly to *all* cases and *all* governmental activity was to provide relief for these sorts of religious claimants who would otherwise be unprotected under *Smith*.

A broad reading of RFRA is further strengthened by public policy considerations. Restricting RFRA to government-party suits results in

⁹⁶ Id.

⁹⁷ 42 U.S.C. § 2000bb-3(a).

⁹⁸ H.R. Rep. No. 103-88, at 5-6; S. Rep. No. 103-111, at 7-8, 8 n.13.

⁹⁹ *State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990) (relying on state instead of federal constitutional grounds after *Smith* to uphold the Amish's free exercise right not to display fluorescent emblems on their horse-drawn buggies).

¹⁰⁰ 139 Cong. Rec. 9,684 (1993) (statement of Rep. Jerrold Nadler).

¹⁰¹ Id.

¹⁰² Id.

inconsistent protection of religious liberty for similarly situated defendants. In mixed-party suits, where the government and private citizens are both plaintiffs, courts do not restrict application of RFRA to the government-plaintiff. Rather, they allow defendants to claim RFRA as a defense against both the government party and the private-citizen plaintiff.¹⁰³ The same defendant would not be afforded protection under the compelling-interest test if only sued by a private party. As a result, in nondefense circuits, stringent protection for religious freedom would turn simply on whether the government decides to join the suit as a plaintiff.

The *Hankins* majority relied in part on this inconsistent result to find a RFRA defense in citizen suits. There, private plaintiff Hankins brought suit under the Age Discrimination in Employment Act of 1967 (“ADEA”), alleging that the defendant-church impermissibly forced him into retirement at the age of seventy.¹⁰⁴ Although Hankins decided to bring suit as an individual private plaintiff, the ADEA allows the Equal Employment Opportunity Commission (“EEOC”) to join the suit as a plaintiff.¹⁰⁵ The majority and the dissent agreed that RFRA would have provided a defense against both the EEOC *and* private citizen Hankins had the EEOC decided to join as a party to the suit.¹⁰⁶ But the *Hankins* majority argued that “the substance of the ADEA’s prohibitions cannot change depending on whether it is enforced by the EEOC or an aggrieved private party.”¹⁰⁷ Avoiding this inconsistent application of the

¹⁰³ See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 469–70 (D.C. Cir. 1996) (allowing Catholic University to raise RFRA as a defense against both the EEOC and Sister McDonough and treating the EEOC and Sister McDonough alike in finding the claims barred by RFRA).

¹⁰⁴ *Hankins v. Lyght*, 441 F.3d 96, 99 (2d Cir. 2006).

¹⁰⁵ This procedure also applies to other civil rights statutes, including Title VII and the Americans with Disabilities Act.

¹⁰⁶ *Hankins*, 441 F.3d at 103.

¹⁰⁷ *Id.* Some circuits have read *Hankins* narrowly to hold that plaintiffs are afforded a RFRA defense only in cases in which *either* a private plaintiff *or* a government agency could have brought the same claim. See, e.g., *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 411 (6th Cir. 2010) (finding no RFRA defense in a trademark enforcement action because, unlike in *Hankins*, trademark protections could not be enforced both by private parties *and* by the government). Although the *Hankins* decision could plausibly be limited in this way, the public policy considerations recognized by the majority support finding a defense even in purely private-citizen suits. The *McGill* reasoning merely shifts from inconsistent application based on the plaintiff party to inconsistent application based on the subject matter of the suit. These implied limitations have neither a textual hook nor a policy justification.

law provides additional policy support for a RFRA defense in citizen suits.

IV. LEGISLATIVE HISTORY

The drafting history and the broad remedial purposes of RFRA provide strong objective evidence to find a defense in citizen suits. Nevertheless, the case is further strengthened by the committee hearings and floor debates from the 1993 RFRA and 1999 RLPA. The Congressional Record highlights a shared assumption among dissenters and supporters alike in finding that RLPA's and RFRA's applicability was not dependent upon the composition of parties to the suit.

A. Legislative History of RFRA, 1990–1993

Although RFRA's legislative history is sparse, the congressional testimony and committee reports confirm RFRA's applicability in private-citizen cases. The primary issue during RFRA's enactment revolved around whether Catholic institutions would be required to perform abortions in violation of their religious duties. To shed light on this issue, Professor Douglas Laycock's written congressional statement offered a list of cases in which RFRA could be raised as a defense by Catholic institutions, where *Smith* would have otherwise made a defense unavailable.¹⁰⁸ A significant number of these cases were between private citizens.¹⁰⁹ For example, without RFRA, private religious universities would have no defense when forced to provide student gay rights groups with equal access to student funds,¹¹⁰ churches would have no defense when forced to produce records from "secret archives" otherwise only available to the Bishop under canon law,¹¹¹ and churches would be unable to defend the use of religious criteria in hiring and firing their own

¹⁰⁸ Religious Freedom Restoration Act of 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights, 102d Cong. 361–69 (1992) (entered testimony of Douglas Laycock, Professor of Law, University of Texas at Austin).

¹⁰⁹ See, e.g., *Catholic High Sch. Ass'n of Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161 (2d Cir. 1985); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980); *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987); *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992); *Miller v. Catholic Diocese of Great Falls*, 728 P.2d 794 (Mont. 1986); *Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super. Ct. 1992).

¹¹⁰ *Gay Rights Coal.*, 536 A.2d at 1.

¹¹¹ *Hutchison*, 606 A.2d at 905.

chaplains in violation of the ADEA.¹¹² Significantly, neither proponents nor opponents of abortion rights objected to RFRA's application in these cases. Although Congress debated the merits of allowing RFRA to provide a defense to religious institutions, not one member voiced disagreement with Professor Laycock's assessment that the statute would be applicable in private-citizen suits.¹¹³

The language in the committee reports further confirms RFRA's drafting history—that the “obtain relief” phrase was not intended as a limit upon “claim or defense.” The House Report's “Section-by-Section Analysis”¹¹⁴ conspicuously ignores the supplemental “obtain relief” phrase in paraphrasing the judicial relief section, noting only that “[a] person may assert a free exercise violation as a claim or defense in a judicial proceeding.”¹¹⁵ Although the “obtain relief” phrase had long been incorporated into the formal text of the bill by this time, the words “and obtain appropriate relief against a government” do not appear once in the House committee report.¹¹⁶ This omission reaffirms RFRA's textual focus on broad protections for the free exercise of religion and implicitly rejects a principle limiting remedies on the basis of party composition.

B. Why the RLPA Debates May Shed Light on RFRA's Shared Public Meaning

Unlike RFRA's sparse legislative history, the RLPA debates generated a significant amount of data by both supporters and opponents of the bill. RLPA was proposed as a solution to the Supreme Court's decision in *Boerne v. Flores*, which struck down RFRA as applied to the states.¹¹⁷ RLPA sought to reenact RFRA's significant protections for religious liberty against state governments by using Congress's powers under the Commerce Clause¹¹⁸ and the Spending Clause.¹¹⁹ To achieve that result, Congress borrowed heavily from RFRA's text. The text of that statute, and Congress's shared understanding of its implementation and application, laid the foundation upon which the RLPA debates took place.

¹¹² *Lukaszewski*, 764 F. Supp at 57.

¹¹³ S. Rep. No. 103-111 (1993); H.R. Rep. No. 103-88 (1993).

¹¹⁴ H.R. Rep. No. 103-88, at 9.

¹¹⁵ *Id.* at 10.

¹¹⁶ H.R. Rep. No. 103-88.

¹¹⁷ 521 U.S. 507, 536 (1997).

¹¹⁸ U.S. Const. art. I, § 8, cl. 3.

¹¹⁹ *Id.* § 8, cl. 1.

Therefore, these debates shed important light on the original understanding and application of the 1993 RFRA statute.

Of course, the RLPA debates took place six years after RFRA's enactment, thus constituting post-enactment legislative history. Some scholars argue that post-enactment history does not offer credible insight into the purposes and justifications for enacting a prior statute and can thus mislead courts during interpretation.¹²⁰ Additionally, scholars have expressed concern that there may be an incentive for legislators to insert politicized statements into the record in order to influence the meaning of a prior enacted statute.¹²¹ However, as explicated below, RFRA and RLPA share significant similarities in their texts, in the citizens they intend to protect, and in the animating purpose of the legislation, and therefore do not raise issues of credibility or authenticity.¹²² A majority of RLPA's core provisions were modeled after those in RFRA. For example, RLPA's judicial relief section and compelling-interest test are nearly identical to the text in RFRA,¹²³ and RLPA's stated purpose was to respond to "the Supreme Court's partial invalidation of the Religious Freedom Restoration Act (RFRA)."¹²⁴

Unlike other post-enactment circumstances, in which the group of lawmakers debating the later statute was wholly distinct from the group that enacted the earlier statute, several key sponsors and active proponents of RFRA in 1993 were still members of Congress during the RLPA debates. Senator Hatch, for example, was a sponsor of both

¹²⁰ See, e.g., Caleb Nelson, *Statutory Interpretation* 487, 488 & n.18 (2011) (questioning the accuracy of statements *intending* to shed light on the interpretation of a prior-enacted statute).

¹²¹ *Id.* at 232–33.

¹²² See Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999); Religious Freedom Restoration Act of 1990, H.R. 5377, 101st Cong. (1990).

¹²³ Compare Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(c) (2006) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."), and *id.* § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest[,] and . . . is the least restrictive means of furthering that compelling governmental interest."), with H.R. 1691 § 4(a) ("A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."), and *id.* § 2(b) ("A government may substantially burden a person's religious exercise if the government demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest[,] and . . . is the least restrictive means of furthering that compelling governmental interest.").

¹²⁴ H.R. Rep. No. 106-219, at 4 (1999).

RFRA and RLPA.¹²⁵ Several other active proponents of RFRA continued to participate vigorously throughout the RLPA floor debates and congressional hearings.¹²⁶ As a result, the RLPA Congress had special insight into the original understanding of RFRA.

Ultimately, the significant similarity between the two statutes should overcome concerns about post-enactment history. More importantly, Congress did not intend to create legislative history for RFRA at all. The record shows that Congress was focused on debating the civil rights carve-out, an issue that was the centerpiece of disagreement in the committee report and floor debates.¹²⁷ These debates, however, were based on a shared assumption regarding RLPA's meaning—a meaning that was derived from RFRA's borrowed language. Thus, the debates are still probative of a common interpretation of RFRA's provisions. In fact, some Justices would argue that this does not even constitute post-enactment history. Under Justice Scalia's approach, statements made in "examination of a variety of legal or other sources to determine *the public understanding* of a legal text in the period after its enactment" would constitute its shared public meaning and would be applicable in statutory interpretation.¹²⁸ While the RLPA debates were not intended to show the subjective intent of the RFRA drafters, they shed light on the shared public meaning of RFRA's judicial relief section, rendering them useful for determining the meaning of RFRA.

C. Legislative History RLPA, 1999–2000

The RLPA debates focused primarily on the Nadler Amendment, a proposal to exempt certain civil rights claimants from meeting the burden of the compelling-interest test.¹²⁹ Proponents of the Amendment worried that RLPA might be raised by religious parties to suppress gay rights, and thus recommended a broad carve-out for laws furthering civil rights. Private groups and members of Congress supporting and oppos-

¹²⁵ Religious Liberty Protection Act of 2000, S. 2081, 106th Cong. (2000); Religious Freedom Restoration Act of 1992, S. 2969, 102d Cong. (1992).

¹²⁶ Co-sponsors include Senator Kennedy, Senator Hatch, Representative Smith, Representative Sensenbrenner, Representative Edwards, and Representative Canady. S. 2081; H.R. 1691; S. 2969; H.R. 5377.

¹²⁷ See, e.g., Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 55, 58, 71, 81, 94, 133 (1999).

¹²⁸ *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

¹²⁹ 106 Cong. Rec. 16,233–35 (1999).

ing the bill clearly assumed that RLPA and the Nadler Amendment would provide defenses in citizen suits. Although RLPA failed in the Senate,¹³⁰ the discussion surrounding RLPA is still instructive in resolving any remaining ambiguity in RFRA's judicial relief section.

The civil rights discussion in RLPA reflected a larger political realignment on the issue of religious liberty. The Left-Right coalition that secured enactment of RFRA disappeared as the gay rights movement began to make inroads into mainstream American consciousness and politics.¹³¹ In 1996, the Supreme Court decided *Romer v. Evans*, striking down a Colorado state constitutional amendment discriminating against gays and lesbians, but applying only a rational basis inquiry to do so.¹³² By 1997, several states had enacted anti-discrimination laws protecting gays and lesbians.¹³³ Developing alongside the gay rights movement was a backlash spearheaded by the religious Right. This conflict played out in a series of prominent landlord-tenant cases at the federal court of appeals and state supreme court levels.¹³⁴

As a result, the American Civil Liberties Union ("ACLU") switched sides in the 1999 RLPA hearings, advocating for a broad civil rights carve-out. It worried that "some courts may turn RLPA's shield for religious exercise into a sword against civil rights."¹³⁵ This was especially problematic because "many of the groups claiming protection under state and local civil rights laws do not currently receive heightened scrutiny for their claims in court"¹³⁶ and so "it is likely that at least some

¹³⁰ Michael Paisner, Note, *Boerne* Supremacy: Congressional Responses to *City of Boerne v. Flores* and the Scope of Congress's Article I Powers, 105 Colum. L. Rev. 537, 537 (2005).

¹³¹ ACLU, Effect of the Religious Liberty Protection Act on State and Local Civil Rights Laws (Jan. 25, 1999), <http://www.aclu.org/religion-belief/effect-religious-liberty-protection-act-state-and-local-civil-rights-laws>.

¹³² 517 U.S. 620, 635 (1996).

¹³³ Iowa Code §§ 216.6-.8 (1994) (amended 2007 and 2009); Minn. Stat. § 363.03 (1991) (renumbered 2003); N.H. Rev. Stat. Ann. §§ 354-A:7, 354-A:10, 354-A:17 (1995); N.J. Stat. Ann. §§ 10:5-3-4 (Supp. 1995) (amended 2002 and 2006); Okla. Stat. tit. 25, §§ 1302, 1402 (1987) (amended 2011); 43 Pa. Cons. Stat. §§ 953, 955 (Supp. 1995); S.D. Codified Laws §§ 20-13-10, 20-13-22, 20-13-23 (1995).

¹³⁴ See, e.g., *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 696 (9th Cir. 1999); *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 912 (Cal. 1996).

¹³⁵ Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, supra note 127, at 81 (testimony of ACLU).

¹³⁶ *Id.* at 85.

courts would find that the governmental interest in ending discrimination against these groups is not compelling.”¹³⁷

As in the RFRA debates, the ACLU focused primarily on the *constituency* it meant to protect—here, persons who might claim discrimination on the basis of marital status, sexual orientation, disability, or pregnancy status.¹³⁸ That protection was intended to cover *all* civil discrimination cases, regardless of the party composition in the suit. This is evidenced both by the ACLU’s citation to private-citizen suits¹³⁹ and by its focus on anti-discrimination statutes enforceable by either private plaintiffs or government agencies.¹⁴⁰

One such set of statutes involved state fair housing laws prohibiting discrimination against unmarried couples. These statutes captured Congress’s attention due to then-recent landlord-tenant cases in which small religious landlords refused to rent apartments to cohabitating unmarried couples.¹⁴¹ The ACLU argued for a broad civil rights carve-out that “would make clear that RLPA has no effect on state or local civil rights laws, thus *leaving in place . . . the rights of civil rights plaintiffs*.”¹⁴² Such a broad carve-out would be unnecessary if RLPA could have been raised as a defense only in government-party suits. Since the fair housing laws could be enforced by either privately aggrieved plaintiffs or the state government,¹⁴³ a private party could easily circumvent RLPA simply by asking the state government to refrain from joining as a party. State governments might have incentives to comply with such requests. Government involvement as a party to the suit would trigger the compel-

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Id. (citing *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 4–5 (D.C. 1987) (adjudicating a dispute between two private gay rights organizations and a private religious school)).

¹⁴⁰ Id. at 84 (noting for example that RLPA could provide a religious defense to “civil rights claims based on state or local laws protecting against discrimination in housing based on marital status”).

¹⁴¹ See, e.g., *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 696 (9th Cir. 1999); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 276 (Alaska 1994); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 912 (Cal. 1996); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 234 (Mass. 1994); *Cooper v. French*, 460 N.W.2d 2, 3 (Minn. 1990).

¹⁴² Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, supra note 127, at 83 (testimony of ACLU) (emphasis added).

¹⁴³ See, e.g., Massachusetts Fair Housing Law, Mass. Gen. Laws ch. 151B, § 5 (1996) (amended 2002 and 2003) (allowing suit to be brought by any aggrieved party, the Attorney General, or the housing commission).

ling-interest test and would require the plaintiffs to justify the civil rights laws' burden on religion under a more stringent standard of proof. This would run contrary to the government's interest in enforcing its civil rights laws. To avoid this result, the government might simply provide assistance to the private party behind the scenes (that is, without joining as a party to the suit), thus avoiding the compelling-interest test. In this way, the government could strategically trammel on religious liberty protections.

Discussion surrounding the Nadler Amendment also considered RLPA's effect on other antidiscrimination statutes enforceable by private plaintiffs. Proponents and opponents agreed that RLPA would provide a defense to allow sectarian vocational schools the ability to offer single-sex education despite federal laws prohibiting sex discrimination.¹⁴⁴ Similarly, it would permit a religiously affiliated day care center to discriminate on the basis of religion in hiring instructors, and would permit employers with sincerely held religious beliefs to discriminate against gays and lesbians in hiring, despite state or local laws prohibiting discrimination on the basis of sexual orientation.¹⁴⁵

Arguments opposing the Nadler Amendment also relied on the assumption that RLPA could provide a defense in purely private-citizen suits. Opponents argued that the carve-out for civil rights plaintiffs gave preference to civil rights based on marital status or identity politics, relegating religious freedom protections to second-class status.¹⁴⁶ As a result, the carve-out would force religious defendants to forfeit their right to raise RLPA as a defense in challenges to core religious practices, many of which involved private-citizen suits. Opponents worried that private congregations that prefer employees of their own faiths could face liability under a broad carve-out because, for example, a "preference for Jews [could] be attacked as racial rather than religious."¹⁴⁷ Such a carve-out would also preclude a defense for private convents and monasteries that rent dwellings only to one sex and only to adherents of one religion, for religious organizations operating nursing or retirement homes that give preference to members of their organizations, and for

¹⁴⁴ Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, supra note 127, at 85 (testimony of ACLU).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 119 (testimony of Douglas Laycock, Professor of Law, University of Texas at Austin).

¹⁴⁷ *Id.* (quoting *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616 (1987)).

religious organizations that require their members to adhere to the religion's moral code.¹⁴⁸ In the latter example, religious institutions could easily run afoul of the Pregnancy Discrimination Act when they apply their moral code to unwed mothers, and could violate sexual-orientation laws when applying their tenets to gays and lesbians.¹⁴⁹

Consistent with the ACLU's testimony, the cases cited by opponents of the Nadler Amendment focused on RLPA's broad remedial purpose to protect core religious freedoms against *all* generally applicable statutes. As a result of this broad purpose, RLPA would provide a defense against antidiscrimination statutes, such as fair housing and employment discrimination laws, that are enforceable by both private plaintiffs and state governments.

This general understanding was not limited to the congressional hearings. The floor debates also provide evidence that members of Congress, including both supporters and opponents of RLPA, shared a common understanding that the statute would provide a defense in private-citizen suits. For example, Representative Canady, Chair of the Subcommittee on the Constitution of the Committee on the Judiciary and chief sponsor of RLPA in the House, explicitly cited to citizen-suit cases during the floor debates, finding that RFRA provided a defense to:

a Jehovah's Witness who was denied employment for refusing to take a loyalty oath; the Catholic University of America, which was sued for gender discrimination by a canon-law professor denied tenure; a religious school resisting a requirement that it hire a teacher of a different religion; . . . and a church that was required to disgorge tithes contributed by a congregant who later declared bankruptcy.¹⁵⁰

He went on to note that "[t]he same sorts of cases would be affected by [RLPA]."¹⁵¹ Unlike the antidiscrimination statutes that were enforceable by both government and private parties, the church-bankruptcy example cited by Representative Canady exclusively involved a private-citizen suit.¹⁵² In cases involving bankruptcy and churches, the plaintiff is a trustee in bankruptcy—a court-appointed attorney representing the private interests of creditors. These trustees sue religious organizations to

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 106 Cong. Rec. 16,216–24 (1999) (statement of Rep. Charles Canady).

¹⁵¹ *Id.*

¹⁵² *Id.*

recover contributions made to the church. Proponents recognized that RLPA would afford protection for organizations whose bank accounts were otherwise being depleted by private citizens.¹⁵³

Opponents of RLPA also shared this understanding. Representative Conyers, a key supporter of the Nadler Amendment, considered the effect that a RLPA defense would have on private civil rights plaintiffs:

Defendants in discrimination cases brought under State or local fair housing, employment laws may seek to avoid liability by claiming protection under the Religious Liberty Protection Act. This would require *individuals* proceeding under such State and local antidiscrimination laws to prove that the law they wish to utilize is a least restrictive means of furthering a compelling governmental interest. This requirement would significantly increase the litigation time and expense of pursuing even ordinary antidiscrimination actions and as a result could even preclude some plaintiffs from pursuing their claims.¹⁵⁴

Representative Conyers explicitly recognized that RLPA would provide a defense against *individuals* who sued to effectuate local antidiscrimination laws. Representative Conyers was further concerned that a heightened compelling-interest standard would deter private citizens from bringing suit. Since discrimination is generally targeted at individual citizens, antidiscrimination statutes rely significantly on private parties as an enforcement mechanism. RLPA's deterring effect would consequently be under-enforced. Of course, this would only be a concern if RLPA provided a defense against private-citizen suits, thus requiring private citizens to meet the compelling-interest test.

RLPA dissenters made explicit reference to RLPA's applicability in private-citizen suits in the RLPA House committee report, stating that:

¹⁵³ Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, *supra* note 127, at 78–79 (testimony of Clarence E. Hodges, Vice President, Seventh-Day Adventist Church of North America). RLPA likely was not necessary to correct this problem, however, because RFRA's application to federal bankruptcy law was unaffected by *Boerne*. Additionally, Congress enacted the Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (codified in scattered sections of 11 U.S.C. (2006)). Regardless, Congress still felt that an additional remedy was necessary. And importantly, all parties agreed that RLPA would provide a defense to churches in these bankruptcy scenarios.

¹⁵⁴ 106 Cong. Rec. 16,226 (1999) (statement of Rep. John Conyers) (emphasis added).

We can expect that, if passed, RLPA will invite more of these challenges, *because it specifically authorizes individuals to raise a religious liberty affirmative defense in any judicial proceeding*. Thus, the religious liberty defense could be asserted against federal civil rights plaintiffs in cases concerning disability, sexual orientation, familial status and pregnancy.¹⁵⁵

As the legislative history illustrates, influential political organizations and members of Congress on both sides of RLPA assumed that the statute would apply as a defense in private-citizen suits. Significantly, the congressional record does not contain a single objection raised against this assumption.¹⁵⁶ All parties agreed upon RLPA's broad applicability to both government and private-citizen suits.

CONCLUSION

The circuits are split over whether RFRA provides a defense to citizen suits. Those circuits that have rejected citizen-suit defenses have relied primarily on the text of RFRA, namely the phrase "and obtain relief against a government" found in RFRA's judicial relief section. This phrase, however, is not as unambiguous as the nondefense circuits have argued. Since only those individuals who bring claims (and not those who merely raise defenses) can obtain relief, an interpretation that reads this phrase as a limitation on RFRA's application creates two confusing and undesirable interpretive alternatives. Either "obtain relief" applies to the entire prior phrase (nonsensically assuring that religious individuals solely claiming a defense may obtain relief), or "obtain relief" applies inconsistently—that is, to "claim" but not "defense."

A more coherent reading of the judicial relief section understands "obtain relief" as an *additional* guarantee of relief that does not otherwise limit the ability of parties to bring claims or raise defenses under RFRA. This reading comports with RFRA's original drafting history, which provides evidence that the ambiguity in the judicial relief section arose as an incident of the section's restructuring. Congress's specific inclusion of "relief against a government" was always meant to provide a clear statement of intent to override state sovereign immunity, as the

¹⁵⁵ Religious Liberty Protection Act of 1999, H.R. Rep. No. 106-219, at 38 (1999) (dissenting views of Representative Conyers and others) (emphasis added); see also *id.* at 41 (dissenting views of Representative Berman and others).

¹⁵⁶ See 106 Cong. Rec. 16,216–45 (1999).

Supreme Court allows Congress to do under its Section Five enforcement power.

Nondefense circuits have often relied on RFRA's textual requirement that the "government" justify religious burdens under the compelling-interest test as evidence that private plaintiffs would not be required to uphold that same burden. This reading, however, does not account for the doctrinal background against which RFRA was enacted—namely, established state action doctrine. After *New York Times v. Sullivan*, the Court began to look to the *form* of the burdens on protected rights, rather than to the enforcement mechanism. Applied to RFRA, this ought to encourage courts to ask instead whether the law burdening religion was promulgated using state power, not whether it is the state enforcing the action.

If any lingering doubts remain, the codified purposes of RFRA as well as its policy justifications should encourage nondefense circuits to err on the side of greater religious freedom. The codified purposes of RFRA make clear that the statute is meant to protect broadly the free exercise of religion, even if burdens stem from generally applicable laws. The applicability section also utilizes broad, sweeping language—applying RFRA to all past and future federal laws. Furthermore, limiting RFRA to only government-party suits would create impermissibly inconsistent protection of religious freedom—allowing two identically situated defendants to be treated differently simply due to the composition of parties to the suit. Such a result has no significant policy benefits and is inconsistent with the remedial purposes of the statute.

Finally, the legislative history also provides significant support for a RFRA defense in citizen suits. In both RFRA and RLPA, Congress focused on the rights it was attempting to protect rather than on the identity of the party bringing the suit. The committee reports and floor debates overwhelmingly confirm that Congress intended to extend RFRA (and RLPA) broadly to protect religious liberty for the greatest number of people. Furthermore, the legislative history is rife with specific examples of both government-party and citizen suits. Specifically, the debate surrounding the RLPA civil rights carve-out demonstrated a consensus among both the proponents and the opponents of the statute that defendants could claim RLPA as a defense in purely citizen suits.

Whether RFRA can be raised as a defense in suits between private citizens continues to be a significant area of confusion in religious liberty remedies. Moreover, cases requiring resolution of this conflict arise fre-

quently. Given the ambiguity in the relevant statutory provisions and the implausibility of the nondefense circuits' interpretation, courts should find that RFRA provides a defense in private-citizen suits. Such a holding ensures that the statutory purpose of RFRA is strengthened, rather than undermined, by judicial enforcement.