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Free Religion is not Free Discrimination

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Abstract
"When Indiana Governor Mike Pence signed Indiana's version of the Religious Freedom Restoration Act (RFRA) into law on March 26, it kicked up a firestorm of controversy and is already seeing a wave of backlash... and a variety of other public criticisms sounding the same general concern that this bill is creating a 'license to discriminate' or that it is blatantly 'anti-gay'. But is the rhetoric regarding the Indiana law and the Arkansas bill justified?"

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When Indiana Governor Mike Pence signed Indiana's version of the Religious Freedom Restoration Act (RFRA) into law on March 26, it kicked up a firestorm of controversy and is already seeing a wave of backlash, such as the City of San Francisco banning any work-related travel to the state, Salesforce Inc. publicly cancelling any programs that require people to enter Indiana, and a variety of other public criticisms sounding the same general concern that this bill is creating a "license to discriminate" or that it is blatantly "anti-gay." This backlash seems set to continue further with the potential passage of a similar bill in Arkansas.

But is the rhetoric regarding the Indiana law and the Arkansas bill justified? To assess this question, we should look at context this legislation originally arose from, how similar laws have been applied in other jurisdictions, and whether these iterations of the law are different from other versions in a way that raises special concerns. Doing this, it will become clear that, on the whole, while there are other laws[1] out there directly keyed to the LGBT issues, characterizing these pieces of legislation as authorizing discrimination is unjustified.

Where did RFRA come from?

One fact that might support claims that either Indiana's law or Arkansas' bill is anti-gay would be if the language of these legislative acts was just a neutral-sounding veneer over discriminatory motivation. However, the language used in both cases is virtually identical to a family of similar bills adopted by 19 other States and the federal government running all the way back to 1993, and this larger context defies categorization in such a fashion.

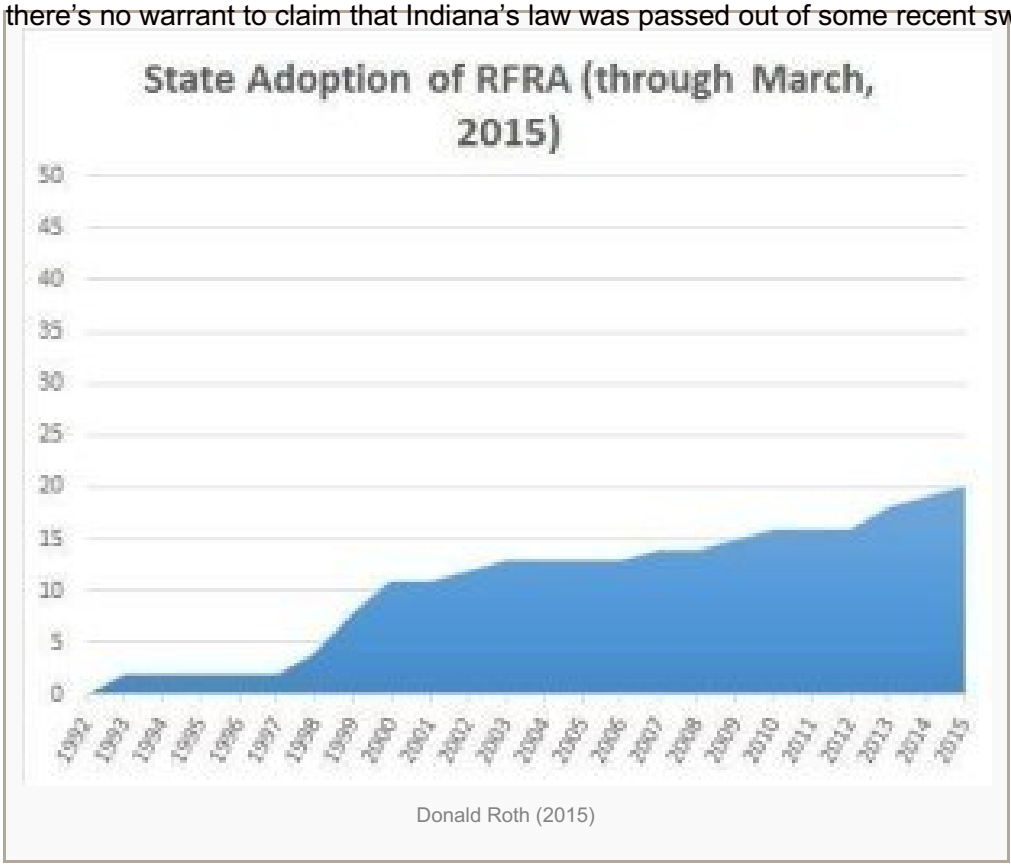
The Religious Freedom Restoration Act started out its life as a federal law passed as a strongly bipartisan reaction to the Supreme Court's decision in *Employment Division v. Smith* (a case I previously discussed as one of Five U.S. Supreme Court Cases Every Christian Should Be Aware Of). In passing this law, the near unanimous opinion of Congress was that the government would need to show that it had used the least restrictive means of advancing a compelling governmental interest in order to place a substantial burden on someone's free exercise of their religion. In plain English, this law made it more difficult for state or federal law to limit the ability of individuals to live their lives in accordance with their religious beliefs. In practical terms, this law was explicitly designed to wind back the clock to the judicial standard that had been in place before *Smith*.

In 1997 in *City of Boerne v. Flores*, the Supreme Court determined that RFRA could restrict the federal government, but the law would not apply to the states. In reaction to both *Smith* and *Flores*, 20 states have since adopted their own versions of RFRA, with the vast majority of them drawing their language very closely along the lines of the federal statute.[2] As the chart shows, the passage of these state laws has continued at a slow, rolling pace since the federal law was first passed (with a spike of adoptions right after *Flores*), and the progressive trend of adoption provides counterevidence to the notion that this legislation is part of a recent pro-discrimination effort.

Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. This act is structured slightly differently in order to sustain constitutional challenge, and it focuses specifically on zoning issues and the religious rights of inmates, two of the most litigious concerns RFRA had tried to address. As of yet, this law

has been held to apply to both the federal government and the states within this limited scope. This second measure provides further clarity as to what these legislative efforts function primarily to address.

Given all of this context, there's no warrant to claim that Indiana's law was passed out of some recent swell of anti-gay animus or that it reflects a unique inhospitality of the State, and the same thing is true of Arkansas' bill. Instead, this legislation is well-seated in the context of a significant body of similar laws aimed at protecting free exercise in a general sense.



How has RFRA been applied?

Even if RFRA was born out of different concerns, criticism might be justified if the history of its various enactments led to either nearly automatic religious exemptions or a pattern of regularly justifying discrimination. In other words, perhaps anti-gay groups are here taking up a tool that, while couched in neutral terms and other considerations, has a history of enabling discrimination. As we will see, this is not the case.

Smith held that Oregon was not constitutionally required to provide a religious exemption from its criminal drug laws for the sacramental use of peyote by members of the Native American Church. A related case in 1988, *Lying v. Northwest Indian Cemetery Protective Association*, had already said the government did not impose on free exercise by building a paved road through sacred tribal lands. RFRA was, at its inception, born out of a bipartisan legislative desire to limit future or ongoing harms like these.

However, raising the hurdle that the government has to clear when burdening religious exercise is a far cry from saying that the law creates the blanket religious exceptions that the "license to discriminate" rhetoric implies. As prominent UCLA Law Professor Eugene Volokh points out, even though the pre-*Smith* standard sounded like "strict scrutiny," (a test of the constitutionality of laws often called "strict in theory, fatal in fact") many laws were found to pass the compelling interest and least restrictive means tests.

By all appearances, this seems to still be the case when it comes to how courts have viewed the various RFRA laws. For instance, while the sacramental use of peyote is protected, Arizona courts (along with many other states) have rejected a similar religious exemption for marijuana usage.[3] Pennsylvania ruled that, despite their religious confidentiality, the Allentown Diocese had to turn over internal documents regarding the behavior of one of their priests for limited review in a murder trial.[4] Finally, and probably most prominently, New Mexico (who, it should be pointed out, has a slightly different version of RFRA) rejected an appeal to its version of the law when a photography company was sued for refusing to photograph a gay wedding.[5]

The various iterations of this law have been around for some time, and it's important to note that cases based on these laws have certainly been raised successfully. Probably most controversially, RFRA was found to protect the closely-held Hobby Lobby Corporation from being required to provide contraceptive coverage that the owners believed to cause abortion.[6] However, these cases have overwhelmingly not been used to permit private discrimination based on sexual orientation.[7] Based on this history, there is no warrant to claim that RFRA, in general terms, is really just a "license to discriminate," and even if the reason for the success of these specific bills was the hope that they would be, there's ample reason to be skeptical of their suitability for that task.

Is this version of RFRA different?

The final question, then, is whether there is something unique about these specific enactments of RFRA that, as the Human Rights Campaign has said, sends "a dangerous and discriminatory message." As summarized by University of Toledo Law Professor Howard Friedman, the primary differences from federal law (the original RFRA) and Indiana's law are that it (1) defines protected entities to include corporations, (2) permits the law to be invoked when a person's exercise of religion is "likely" to be burdened, and (3) permits claiming protection under the law when the government is not a party.

As pointed out by Josh Blackman, Assistant Professor of Law at the South Texas College of Law, the first difference arguably makes no major change from federal law, particularly in the wake of *Hobby Lobby*, and the second difference doesn't appear to be substantive. The final difference may hold some water, primarily because it would prevent a reviewing court from concluding that RFRA didn't apply, the conclusion the New Mexico Supreme Court reached in *Elane Photography*.

However, this third difference is at best a potential concern and not a new one at that. As mentioned above, application of RFRA is not a guarantee of religious exemption, and, as many of the sources I've linked to in this article point out, courts have proven unlikely to okay religious exemptions that impose harms (such as discrimination) on others.[8] Secondly, an existing split in U.S. Courts of Appeals means that this third difference is the current state of the law in many districts, and it has not yet been turned into a blanket "license to discriminate" in any of them.[9]

The Arkansas bill is largely similar to the Indiana enactment. The noticeable differences are (1) the bill provides for the payment of damages and attorney's fees when the government is a party to litigation, (2) the bill exempts the State correctional system, and (3) the bill characterizes the enactment as a "state of emergency."

The third difference is a matter of rhetoric which does not affect the substance of the bill, while the second difference demonstrates an exemption which, to the extent Arkansas takes federal funds for its correctional system, makes no legal difference. The first difference is substantive, but it doesn't change the judicial standard being applied, and unclear drafting may mean it only applies when the State is a party (that is, it provides relief when the State is found to be directly infringing someone's rights). Any or all of these differences are, of course, also subject to change as part of the consideration of the bill by the Arkansas Senate.

In sum, these legislative acts do have some minor differences from the federal law, but they are not unique differences from RFRA in other states (or, indeed, in its application in some federal courts), and the history of the application of the law in these other contexts therefore suggests that there is nothing unique about either Indiana's law or Arkansas' bill that empowers it as a tool of discrimination.

Conclusion

For these reasons, as well as all of those mentioned above, it simply isn't correct to portray the legislative

action taken by Indiana or under consideration in Arkansas as an open affront to gay rights. I am not situated to speculate with any great insight as to why this particular line of rhetoric has been taken up, but it smacks to me of a version of the “culture wars” mentality that is common in some Christian circles. Some prominent advocacy groups on both sides have taken the rhetorical position that this is an “us v. them” battle in which anything good for religion is bad for the LGBT community (and vice versa), but this simply isn’t reality. While Christians are not innocent in the development of this perception, I can’t help but think that LGBT advocates risk doing more harm than good to their cause with such an extreme and adversarial response to the mere chance that a law with a history of enactment and enforcement that has nothing to do with gay rights issues might be enforced in some instances against their interests. It is tragic that a law designed to increase religious freedom (originally for Native Americans, remember) is being cast as a “license to discriminate,” and if either side thinks that’s what RFRA is, they are seriously mistaken.

Footnotes

1. For instance, there have been bills considered by other states, such as one passed by the Kansas House of Representatives (Kansas House Bill 2453), which are clearly targeted at permitting businesses to deny service to same sex couples; however, these bills have, like the Kansas bill, failed to pass into law. ↩

2. See the chart below for adoption dates and links to statutory text for each law.

Adoption of RFRA by States

State	First Adopted	State	First Adopted
Connecticut	Jun. 29, 1993	Oklahoma	Jun. 1, 2000
Rhode Island	Jul. 22, 1993	Pennsylvania	Dec. 9, 2002
Florida	Jun. 17, 1998	Missouri	Jul. 9, 2003
Illinois	Jul. 1, 1998	Virginia	Apr. 4, 2007
Arizona	May 19, 1999	Tennessee	Jul. 1, 2009
South Carolina	Jun. 1, 1999	Louisiana	Jun. 30, 2010
Texas	Aug. 30, 1999	Kentucky	Mar. 27, 2013
Alabama	Nov. 3, 1999	Kansas	Jul. 1, 2013
Idaho	Mar. 31, 2000	Mississippi	Jul. 1, 2014
New Mexico	Apr. 12, 2000	Indiana	Mar. 26, 2015

↩

3. Arizona v. Hardesty, 222 Ariz. 363 (2009). ↩

4. Pennsylvania v. Stewart, 547 Pa. 277 (1997) (decided prior to *Flores*). ↩

5. Elane Photography v. Willock, 309 P.3d 53 (New Mexico 2013). ↩

6. Burwell v. Hobby Lobby, 134 S.Ct. 2751 (2014). ↩

7. My research has not turned up a single case where this was successfully claimed. ↩

8. See, for instance, Volokh's excellent article and Indiana University Law Professor Daniel Conkle's article. To be fair, courts have divided on issues such as renting apartments to unmarried heterosexual couples, so it is conceivable that Indiana could permit discrimination, but its courts have not done so yet. ↩

9. For a breakdown of the Circuit rules, see Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343 (2013). ↩