
THE NEW INDIANA RFRA

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On March 26, 2015, Indiana Governor Mike Pence signed Senate Bill 101 (the Religious Freedom Restoration Act) into law as Indiana Code § 34-14-9. One week later, after a nationwide firestorm, Gov. Pence signed Senate Bill 50, which added a section to the new RFRA, specifying that it did not “authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service.”

Background

Shortly after the Supreme Court issued its seminal decision in *Employment Division v. Smith*, a meeting of interested organizations convened in the United States House of Representatives to consider legislative solutions to the debasement of the traditional protections of religious liberty. I attended this first meeting.

During the discussion that followed, I suggested naming the law to be drafted the “Religious Freedom Restoration Act,” and was made the co-chair of the drafting committee to prepare the legislation. Mark Stern, of the American Jewish Congress, was the other co-chair. Mark and I also served on the overall steering committee of organizations that advocated for the passage of RFRA.

I was selected for participation in the leadership of the RFRA coalition because of my background in religious liberty litigation—primarily through my work as the Founder of the Home School Legal Defense Association. I have argued cases with religious

freedom claims and components in the United States Supreme Court, several federal circuits, and in many state appellate courts.

The coalition which supported RFRA was composed of faith groups across a broad spectrum and received overwhelmingly-bipartisan support in Congress.

The Federal RFRA vs. the Original Indiana RFRA

Contrary to the assertions of bill opponents, the original Indiana version of RFRA contained in Senate Bill 101 tracked the major provisions of the federal version, as do all other state RFRA statutes.

Opponents of the original RFRA in Senate Bill 101 contended that it differed in three respects from the original federal version:

- a. The inclusion of organizations and businesses as protected persons;
- b. The ability to use RFRA in private litigation; and
- c. The intention (or lack thereof) to override anti-discrimination ordinances.

Although Senate Bill 101 did not use the precise wording in the federal RFRA, the differences in wording were not differences in substance. Instead, the federal RFRA had exactly the same meaning as the original Indiana measure on all three of these issues. This is apparent if one examines not only the text of the federal RFRA, but also how it has been interpreted and applied the federal courts, especially the Supreme Court of the United States in the *Hobby Lobby* decision. In short, the original Indiana RFRA correctly reflected the current state of religious freedom protection contained in federal law.

The inclusion of juridical persons

The federal RFRA only protects the free exercise of “persons.” As drafters, we were fully cognizant that many of our claims would

be made by religious organizations. Religious organizations are not natural persons—they are juridical persons.

We all knew that the term “person” included both natural persons and juridical persons. We used the term “person” because we were cognizant of specific examples of religious actions by organizations that needed legal protection:

- A Catholic church being required to get permission from a landmarks commission before it can relocate its altar
- Forcing evangelical and Catholic denominations to ordain and employ female ministers and priests
- Granting churches exemptions from laws forbidding serving sacramental wine to minors.¹

This understanding that RFRA protected both natural and juridical persons was buttressed, of course, by the federal definition of “person” contained in 1 U.S.C. § 1 (“Person ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”). The Supreme Court recognized in *Hobby Lobby* that this definition allowed both natural and juridical persons to claim the protection of the federal RFRA.

The original Indiana law and federal RFRA are operationally identical on this point.

The ability to use RFRA as a defense in private litigation

There is no question that the federal RFRA allows for a religious freedom defense in any judicial proceeding. The Federal RFRA provides:

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or

¹ See statement of Robert Dugan, Director Office of Public Affairs, National Association of Evangelicals, Hearing before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, One Hundred First Congress, Second Session, (H.R. 5377, Religious Freedom Restoration Act of 1990), at 38, *et seq.*, available at <http://www.justice.gov/sites/default/files/jmd/legacy/2013/11/05/hear-150-1990.pdf> (accessed May 4, 2015).

defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

This recognition carried over to Senate Bill 101. Section 9 of the original Indiana RFRA provided:

A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding. If the relevant governmental entity is not a party to the proceeding, the governmental entity has an unconditional right to intervene in order to respond to the person's invocation of this chapter.

As originally conceived, both the federal and Indiana RFRA included a defense in a lawsuit brought by a private party or by the government. Affirmative relief against a party, however, can only be obtained against the government.

The Indiana RFRA is identical on the ability of a party to defend on the basis of religious freedom in both private and government litigation. However, there is a theoretical difference in the ability of a person to obtain affirmative relief in private litigation.

This difference, however, quickly evaporates when one considers what is required for a religious freedom violation. The core operative provision in Section 8 of the Indiana law reads: “Except as provided in subsection (b), a *governmental entity* may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.” Thus, there is no possible scenario where a religious claimant could raise a private action and file an affirmative case against another private actor for a RFRA violation. The only religious burdens that are actionable under either RFRA are burdens caused by the government.

Though the wording is slightly different, the two statutes are functionally identical. Defenses can be raised in government and private litigation. Affirmative relief can only be obtained against the government.

Application to Anti-discrimination laws

The examples cited above are just the tip of the iceberg when it comes to potential conflicts that might arise between anti-discrimination laws and religious freedom. Would the Catholic Church be successful in defending a lawsuit for gender discrimination in its refusal to ordain and hire women priests?

Nothing in RFRA suggested that this was seen as the primary motivation for the law, but it was recognized that it was a possible application of the federal statute. Just as with the Indiana law, there was no agreement among the parties backing RFRA as to the likely or desirable outcome of such a case. Rather, the agreement was simply this: such cases ought to be judged by the compelling interest standard traditionally applied to all fundamental rights.

The balancing test employed in such cases does not make it very likely that a religious freedom claim would prevail in any case lacking substantial coercion of conscience or interference with a religious practice. It would also depend on the ability of the government to demonstrate that there was no alternate means of accomplishing its objective—that all persons receive the services or opportunities at issue—without invading religious freedom.

RFRA does not dictate the outcome of any such case; it only establishes the standard to be used.

The Amended Indiana Law

The amendments to the Indiana law contained in Senate Bill 50 were adopted as the result of a massive disinformation campaign about the intentions for RFRA and the legal meaning of its provisions.

While the detrimental legal implications of amending SB 101 with the language in SB 50 will no doubt be ultimately decided in

court, it is clearly apparent that the language in SB 50 will now provide religious freedom protection for only a very narrow group of churches, religious organizations and a religious school affiliated with a church and pastors in certain circumstances. All other "individuals, partnerships, associations, limited liability companies, corporations and other organized groups of persons" are excluded from the religious freedom protection previously given them in SB 101.

Because of the passage of Senate Bill 50, Indiana citizens will now have less protection for religious freedom than do citizens in the 30 other states that have a RFRA either by statute or case law. Additionally, as a result of Senate Bill 50, individuals or organizations in Indiana will now have less protection for religious freedom if they appear in a state court in Indiana under the state RFRA than if they appear in a federal court in Indiana where they can utilize the federal RFRA. Rather than creating parity with federal law, Indiana was forced by demagoguery into adopting the lowest legal standard in the nation for religious liberty.

The damage to the cause of religious liberty as a concept is incalculable. We have seen national business entities use their clout in a clearly coercive manner to force the legislature of Indiana to conclude that same-sex marriage is a higher value than religious freedom. Coercion of conscience was the chief evil that religious freedom was intended to eradicate. That coercion has just been politically sanctioned in Indiana.