THE DAILY CALLER

# Is Indiana's RFRA Really A License To Discriminate?

**By Robert A. Levy**

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A quarter-century ago, Oregon denied two Native Americans unemployment benefits after they were fired for using peyote. They sued, claiming the peyote was used in a religious ceremony, but the Supreme Court upheld the denial in *Employment Division v. Smith*. The Court decided that government could restrict the exercise of religion as long as the regulation was generally applicable and didn't specifically target religious practices.

Congress responded in 1993 by passing the Religious Freedom Restoration Act, which required that government demonstrate a compelling need when it regulated religion, and show that the regulation was no more restrictive than necessary. Ted Kennedy and Chuck Schumer sponsored the bill; it was signed by President Clinton. Four years later, the Supreme Court held in *City of Boerne v. Flores* that RFRA was unconstitutional when applied to the states via the 14th Amendment. The law is still enforceable against the federal government, but the states had to pass their own versions.

That's what 20 states did – including, most recently, Indiana and Arkansas, as well as Illinois, where state senator Barack Obama supported the legislation. In another 11 states, courts interpreted state constitutions to provide similar protections. Thus, some version of RFRA controls 31 states and the federal government, notwithstanding Hillary Clinton's astonishment that "this new Indiana law can happen in America today."

Indiana's RFRA – until the state legislature caved and amended the law – protected businesses as well as individuals. It did not, despite claims to the contrary, authorize businesses to deny service to gays and lesbians. But if a photographer, florist, or baker, for example, were to be sued by a gay couple for declining service at their wedding, the business could have asserted RFRA as a defense. The owners would have to show that serving gays "substantially" burdened their religious freedom, in which case the government had to offer a compelling interest in barring such discrimination and no less intrusive means to satisfy that interest. That was the rationale for Indiana Governor Mike Pence's declaration that the original law was not a "license to

discriminate" and he would have vetoed any "bill that legalized discrimination against any person or group."

Pence was correct. No statewide Indiana law expressly legalized refusal to serve gays. Interestingly, no state law expressly *illegalized* such acts – except in a few localities that had enacted non-discrimination ordinances. Indeed, only 21 states prohibit discrimination based on sexual orientation. Accordingly, there was substantial wiggle room in Indiana and elsewhere.

Meanwhile, the state's application of RFRA would have replicated the Court's application of the federal version in the recent *Hobby Lobby* case. There, the question was whether Obamacare could require employer-provided health insurance to cover birth control without violating the owners' religious freedom. The Court said "no," because the law wasn't narrowly tailored as demanded by RFRA. That same framework would have controlled in Indiana, pre-amendment. Now, however, Indiana has bowed to political pressure. Its revised law bars discrimination by service providers – except churches, affiliated schools, and other nonprofit religious organizations – on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or military service. Indiana's RFRA can no longer be used as a defense for refusing to serve customers.

Libertarians have a different view. When private parties are involved, property rights govern – not religious freedom or anti-discrimination laws. Business owners should be able to serve gays only, straights only, both, or neither; for good reasons, bad reasons, or no reasons at all. Does that mean anti-discrimination laws such as the 1964 Civil Rights Act are unconstitutional? At a minimum, it suggests that those laws have a disputable constitutional pedigree. Because they address private (not government) acts, they cannot be shoehorned into the 14th Amendment, which requires state action. And because the '64 Act had nothing to do with eliminating state-imposed barriers to interstate trade, it should not have been upheld under the Commerce Clause as originally understood. Still, the Civil Rights Act helped erase an unconscionable assault on human dignity. It's now settled American law, not to be revisited despite possible constitutional infirmities.

Nonetheless, clones of the Civil Rights Act – preventing private discrimination by gender, age, disability, or sexual orientation – are more difficult to justify. If state actions foster private discrimination, the Constitution can bar those actions, when and where they occur, without compromising rights of private association. Invidious private discrimination can be condemned via non-governmental means – e.g., refusal to patronize bigots, social ostracism, and public opprobrium. Jefferson reminds us that "Governments are instituted among men" to secure "certain unalienable Rights," not to compel moral behavior.

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