

Verdict

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State RFRAs and the Intent to Discriminate: Why the State RFRAs Are in Trouble

There was a time not so long ago when it was difficult to explain the underbelly of the free exercise statutes like the federal Religious Freedom Restoration Act (“RFRA”), its state counterparts, and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). They have such appealing titles, and who could be opposed to religious liberty? Then came 2014.



At the Supreme Court, the Justices decided **[Burwell v. Hobby Lobby Stores](https://supreme.justia.com/cases/federal/us/573/13-354/)** (<https://supreme.justia.com/cases/federal/us/573/13-354/>), showing that RFRA is a tool that can empower some at the expense of others. In that case, RFRA made it possible for the employer to demand a right to deny contraception coverage at the expense of the female employees. Many eyes were opened, and the discourse about RFRA’s reality became more grounded.

Also in 2014, **[Mississippi enacted a state RFRA](http://rfraperils.com/Mississippi/)** (<http://rfraperils.com/Mississippi/>) that explicitly handed businesses and individuals the power to discriminate against customers, with the overriding and obvious goal to empower businesses to turn away same-sex couples and the LGBT community, as I discussed **[here](https://verdict.justia.com/2014/05/15/lessons-new-mississippi-rfra-shed-light-hobby-lobby-conestoga-wood-cases-pending-supreme-court)** (<https://verdict.justia.com/2014/05/15/lessons-new-mississippi-rfra-shed-light-hobby-lobby-conestoga-wood-cases-pending-supreme-court>). Moreover, the law by its vague terms is just as applicable to every other category of discrimination. (Arizona passed a similar law, but Governor Jan Brewer, under pressure from the National Football League and Major League Baseball among other businesses, vetoed it.)

RFRA Defenders Say That It Will Not Be a Tool to Discriminate: Not

The RFRA movement was at one time a coalition of organizations from the ACLU to the

Christian Legal Society and everyone in between. That era is over. It is now primarily a project of conservative religious believers. The RFRA defenders treat charges of potential discrimination by religious businesses and believers as some kind of hysterical exaggeration. But it is the RFRA advocates who have made the case for RFRA as an aid to discrimination against the LGBTQ community and same-sex marriage.

Take for example, **[Tony Perkins of the Family Research Council](http://www.frc.org/)** (<http://www.frc.org/>), who, in a recent op-ed, **[explained](http://patriotpost.us/opinion/33349)** (<http://patriotpost.us/opinion/33349>) what role RFRAs are to play for Christians:

The clash between religious liberty and same-sex ‘marriage’ continues to explode in businesses across America, where shop owners, B&Bs, and other vendors try to come to grips with the government’s twisted definition of ‘tolerance.’ Faced with losing their jobs, businesses, and life savings, most Christians want to know: isn’t there anything we can do?

There is. In at least 10 states, conservatives are fighting back with a string of Religious Freedom Restoration Acts (RFRAs), [which] give men and women of all faiths a powerful tool to stop the government from walking all over their beliefs on issues like marriage and sexuality. If Washington State had a RFRA, for example, Baronelle Stutzman would actually have legal grounds for beating back the government’s attack on her store.

It would be hard to be more explicit that the intent behind the current state RFRA push is to permit businesses to deny service to same-sex couples, and even the LGBTQ community altogether.

Then there is the **[National Organization for Marriage](https://nationformarriage.org/main/ourwork)** (<https://nationformarriage.org/main/ourwork>), which “promote[s] an understanding of marriage as the union of one man and one woman.” They call what they promote “conscience protection,” which not coincidentally is the title of the Arkansas RFRA awaiting the Governor’s signature: “We’re looking to get states to pass legislation specifically mentioning conscience protection for religious entities, businesses and individuals who do not want to solemnize a same-sex ‘marriage,’” **[said Joseph Grabowski](http://www.ncregister.com/daily-news/same-sex-marriage-issue-cited-in-bid-for-more-state-religious-liberty-bills/#ixzz3VnWCG7SL)** (<http://www.ncregister.com/daily-news/same-sex-marriage-issue-cited-in-bid-for-more-state-religious-liberty-bills/#ixzz3VnWCG7SL>), a spokesman for the National Organization for Marriage. Add to these two **[explicit statements](http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102Protects-Religious-Freedom-but-Does-Notre-Dame-Want-the-Protection.aspx)** (<http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102Protects-Religious-Freedom-but-Does-Notre-Dame-Want-the-Protection.aspx>) the Cardinal Newman Society’s call for Notre Dame University to eliminate its policy of extending benefits to same-sex couples in light of the passage of the Indiana RFRA.

Last, but not least in the push to legalize discrimination against same-sex couples (and every other category given the blank check that is a RFRA), the Alliance Defending Freedom **represented** (<http://www.adfmedia.org/News/PRDetail/5537>) Elane's Photography in its bid to refuse to provide photography services at a same-sex marriage ceremony. The ADF has further **characterized** (<http://national.deseretnews.com/article/3269/here8217s-why-your-state-may-be-expanding-religious-freedom-protections-this-year.html>) a failure to enact a RFRA to permit discrimination against same-sex couples as a “dereliction of a legislator’s most important duty.”

Those RFRA defenders asserting that the law will not operate as a means to discrimination apparently believe that its well-heeled advocates have labored for nothing. Of course it is intended to aid in religiously motivated discrimination. The federal RFRA started with conservative Christians seeking to beat back the fair housing laws so believers could discriminate against unmarried couples, single mothers, and same-sex couples. Thus, this story of discrimination really isn't new. What is new, though, is that affected groups are now stepping up to protect their interests.

This Wave of State RFRA's Is Much More Useful as a Tool for Discrimination Than the Original Federal RFRA

The original federal RFRA was misguided and a leap from prior First Amendment doctrine, but it was nothing like this new iteration in the conservative states. First, it was never intended to apply in any case other than against the government, based on its plain language and its history, as the Seventh Circuit recently held, which I discuss **here** (<https://verdict.justia.com/2015/03/19/the-seventh-circuit-injects-common-sense-into-religious-liberty-debates-with-official-committee-of-unsecured-creditors-v-listecki>).

Second, as believers lost certain RFRA lawsuits, various elements were tightened in favor of the believer and against the government. For example, the definition of “religious exercise” has been expanded to mean beliefs not “central” to the faith, and “substantial burden” has either been watered down by definition or “substantial” removed so all the believer must prove is a *de minimis* burden on religious conduct.

Third, the newer, even more extreme free exercise statutes apply to disputes between private parties and, therefore, are not limited to suits in which the government is a party. Mississippi was the first to take a RFRA in that direction, but the **freshly signed Indiana RFRA** (<http://rfraperils.com/indiana/>) and the **pending Arkansas RFRA** (<http://rfraperils.com/Arkansas/>) share the same feature. Therefore, a business owner can invoke RFRA against a customer to keep them out; a private sector employer can use

it to discriminate against employees; a hotel owner or apartment owner can screen out couples inconsistent with religious belief; or a parent can use it against a child's legal rights.

The Line of Opposition to the RFRAs Grows and Grows

The combination of a religious employer imposing his faith on his employees' benefit plan in *Hobby Lobby* and a state in the Deep South like Mississippi enacting a religious liberty bill smelling of Jim Crow has created a stink around the RFRAs. That is why Indiana is receiving extraordinary pushback from an increasingly long line of powerful entities. One has to wonder what Indiana Governor Pence, who signed the **[Indiana RFRA](http://rfraperils.com/indiana/)** (<http://rfraperils.com/indiana/>) surrounded by a phalanx of clergy, nuns, and religious lobbyists, is now thinking. The cost-benefit analysis at this point tips heavily against the RFRA.

Here is a summary of the most outspoken naysayers so far:

[Tim Cook, CEO of Apple](http://9to5mac.com/2015/03/27/tim-cook-apple-lgbt-legislation/) (<http://9to5mac.com/2015/03/27/tim-cook-apple-lgbt-legislation/>) has **[condemned](http://www.nbcnews.com/tech/tech-news/apples-tim-cook-other-tech-ceos-blast-indiana-religious-freedom-n331736)** (<http://www.nbcnews.com/tech/tech-news/apples-tim-cook-other-tech-ceos-blast-indiana-religious-freedom-n331736>) the enacted Indiana and pending Arkansas RFRAs.

[Yelp.com](http://officialblog.yelp.com/2015/03/an-open-letter-to-states-considering-imposing-discrimination-laws.html) (<http://officialblog.yelp.com/2015/03/an-open-letter-to-states-considering-imposing-discrimination-laws.html>) joined in.

[Mailchimp](http://thinkprogress.org/lgbt/2015/03/28/3640249/no-the-georgia-rfra-is-not-dead-yet/#?d=u) (<http://thinkprogress.org/lgbt/2015/03/28/3640249/no-the-georgia-rfra-is-not-dead-yet/#?d=u>), through which 100 million emails were sent last year, objected to the proposed Georgia RFRA because it "opposes many of our own company's values: inclusiveness, diversity, equality, and respect."

[Salesforce](https://twitter.com/Benioff/status/581108959337136129) (<https://twitter.com/Benioff/status/581108959337136129>) agreed.

[Wal-Mart](http://www.lgbtqnation.com/2015/02/walmart-criticizes-arkansas-conscience-protection-religious-freedom-bill/) (<http://www.lgbtqnation.com/2015/02/walmart-criticizes-arkansas-conscience-protection-religious-freedom-bill/>) has expressed concerns, pointing out that it can hurt economic development and recruitment.

[Angie's List](http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/) (<http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/>) has shut down a large expansion planned for Indiana in response to the RFRA.

Many other businesses, like **[Gen Con](https://storify.com/hoopfeed/sports-world-reacts-to-indiana-law-fever-mum)** (<https://storify.com/hoopfeed/sports-world-reacts-to-indiana-law-fever-mum>) and Eli Lilly have negatively responded to the

Indiana RFRA.

Businesses in Georgia (including **Home Depot** (<http://thinkprogress.org/lgbt/2015/03/28/3640249/no-the-georgia-rfra-is-not-dead-yet/#?d=u>)) and **Texas** (<http://www.texasobserver.org/texas-association-of-business-comes-out-against-religious-freedom-amendments/>) have objected.

The **Presidents** (<http://www.indystar.com/story/news/education/2015/03/29/butler-president-speaks-religious-freedom-bill/70628622/>) of Indiana University and Butler University have attacked the Indiana RFRA.

San Francisco's mayor (<http://www.indystar.com/story/news/politics/2015/03/27/san-francisco-joins-planning-boycott-indiana/70531518/>) has instituted a boycott of Indiana, while **Seattle's mayor** (<http://rfraperils.com/emily-shapiro-seattle-mayor-prohibits-city-employees-from-traveling-to-indiana-abc-news/>) prohibited government employees from traveling to Indiana.

The mayor with the most to lose, **Indianapolis Mayor Greg Ballard** (<http://www.indystar.com/story/news/politics/2015/03/25/ballard-religious-freedom-bill-sends-wrong-signal/70433380/>), also says it sends the wrong message.

Prosecutors (<http://wbaa.org/post/marion-co-prosecutor-opposes-rfra-because-legal-worries>) have **opposed** (<http://www.buzzfeed.com/chrisgeidner/mike-bowers-religious-liberty#.nkBxkW2oM>) RFRA's because they can impede criminal prosecution and **imperil children** (<http://www.macon.com/2015/02/08/3574301/long-religious-freedom-bill-isnt.html>).

In the midst of March Madness, with the Men's College Basketball Final Four headed to Indianapolis next weekend, the **NCAA** (<http://rfraperils.com/nancy-armour-armour-ncaas-next-moves-should-be-out-of-indiana-usa-today-sports/>) is unlikely to embrace Indiana for future events.

Celebrities (<http://www.theindychannel.com/news/local-news/miley-cyrus-latest-celeb-to-speak-out-against-pence>) including Ellen DeGeneres, Ashton Kutcher, Audra McDonald, Miley Cyrus, Keith Olbermann, and others have expressed opposition.

The **Indiana Pacers** (<http://www.theindychannel.com/news/local-news/pacers-fever-nba-and-wnba-respond-to-rfra>), the National Basketball Association, and the Women's National Basketball Association have distanced themselves.

Basketball is following in the footsteps of the **National Football League** (<http://www.forbes.com/sites/tommytomlinson/2014/02/27/arizona-gay-rights-and-the-super-bowl/>), which led the charge against the eventually vetoed Arizona extreme RFRA last year.

Finally, there are the dozens of civil rights groups that are now advocating against the RFRAs for the sake of those who can be hurt by religious actors, from **Americans United for Separation of Church and State** (<https://www.au.org/blogs/legislative/religious-freedom-bills-in-the-states-and-rfra-on-the-hill>) to the **Human Rights Campaign** (<http://www.hrc.org/>), the state branches of the National Organization of Women, the state branches of the ACLU, **Better Georgia** (<http://bettergeorgia.com/>), the **Texas Freedom Network** (<https://www.facebook.com/events/819451008126228/>), and numerous children's rights groups.

What Is Happening?

What is happening now is what should have happened years ago: those who will be hurt by religiously motivated conduct are acting before they are harmed. They are not waiting for the RFRA lobbyists' hopes to come true.

The RFRA formula was never a good idea. Many are now coming to understand it is bad public policy. This is a law that has a misleading title (it "restores" nothing previously in the law); features legalistic language that is beyond opaque and therefore the mother of all legislation with unintended consequences; and has been foisted on Americans as benign when in fact it is quite dangerous, all of which I discuss in more detail **here** (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568813).

The solution is to abandon the RFRA formula by blocking the pending state RFRAs and repealing those already in place, whether federal or state. That would result in the restoration of the pre-eminent source of religious liberty in the United States: the First Amendment.



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