GUEST COMMENTARY: RFRA breeds rancor, not faith freedom

Rob Earnshaw, The Times

Valparaiso Advisory Human Relations Council member Ivan Bodensteiner listens to public comment during a meeting to address a disputed arrest in the city in August.

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Don't be misled by the demand in Indiana and elsewhere for a religion-based exemption from anti-discrimination laws. While billed as a demand for "religious freedom," it is really a demand for a "religious preference" because the goal is a state-granted license to discriminate against people who are otherwise protected from discrimination.

More particularly, the proponents of such exemptions claim that laws prohibiting discrimination based on sexual orientation, gender identity and same-sex marriage interfere with their religious beliefs.

Religious freedom is protected by two clauses in the First Amendment to the U.S. Constitution, most obviously the "free exercise" clause, but also the "establishment" clause. The current controversy flows in part from the Supreme Court's interpretation of the free exercise clause in

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1990, when it held that a state criminal law prohibiting the use of a wide variety of controlled substances, including peyote, may be applied to “religiously inspired peyote use” without violating the free exercise clause.

According to the court, a religion-neutral law of general applicability, i.e., it is not aimed at a religion or a religious practice, may be enforced even when it conflicts with a religious practice. Otherwise, one could use religion to effectively “become a law unto himself.”

While including exemptions in laws prohibiting discrimination is not a novel concept, we should be concerned about widespread-based religious exemptions. We should be concerned, in part, because the term “religion,” as used in the First Amendment, has not been defined. Similarly, legislation usually avoids defining religion because we don’t believe that is a task for government. Individuals are allowed to define their religion. Therefore, anyone can determine her/his religious belief, and the courts will ask only whether that belief is sincerely held in determining whether it is protected.

When a state decides to get in the business of granting religion-based exemptions to anti-discrimination laws, it has to be prepared to address such claimed exemptions based on racial animosity. For example, if a county clerk in Indiana is granted a religion-based excuse for refusing to issue a marriage license to a same-sex couple, what happens when a clerk in another county asserts a religion-based excuse for refusing to issue a marriage license to an interracial couple? If you think that is far-fetched, you might want to consider the Bob Jones University case in which the university claimed a religion-based exemption to an IRS rule that precluded charitable tax status to an organization that engaged in racial discrimination. The U.S. Supreme Court, in 1983, rejected the university’s claim.

If a state law grants a religion-based exemption only to those who want to discriminate on the basis of sexual orientation or gender identity but not to those who want to discriminate on the basis of race or gender, that law actually discriminates among religions because it prefers a religion that opposes sexual orientation equality over a religion that opposes racial or gender equality. The Supreme Court has held in several cases that the establishment clause prohibits laws that establish a denominational preference.

Religious freedom is a good thing, and the First Amendment protects it adequately. Let’s not, under the guise of religious freedom, create a statutory religious preference that trumps laws aimed at achieving equality by prohibiting various types of discrimination.

The Indiana Legislature should expand its anti-discrimination laws to include sexual orientation, gender identity and marital status, but it should reject the demand for a religion-based exemption from those expanded laws.

Ivan Bodensteiner is a professor at the Valparaiso University School of Law.

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