SB 101 and SB 568 – Indiana's "Religious Freedom Restoration Act" (RFRA)
Indiana Senate Judiciary Committee
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Jane Henegar, Executive Director, American Civil Liberties Union of Indiana

Thank you, Mr. Chairman and members of the Committee, for the opportunity to present testimony on the ACLU's opposition to Senate Bills 101 and 568, both known as Religious Freedom Restoration Acts (RFRAs).

Introduction

Freedom of religion is one of our most fundamental rights as Americans. For almost 100 years, the ACLU has been protecting religious freedom, from defending a student's right to read his Bible during reading period[1] to the right of a Muslim man to wear his religious headwear in a courtroom.[2] State and federal constitutions protect not only the right to believe (or not to believe), but also the right to express our religious beliefs. In this country, we have the absolute right to believe whatever we want about God, faith, and religion, and we have the right to act on our beliefs—but we do not have the right to harm others.

Unfortunately, SB 101 and SB 568 are a solution in search of a problem. The legislation is so broadly written that there may be unforeseen and harmful consequences to our state. Moreover, the bills create a widespread and negative perception of Indiana by appearing to invite the use of religion to discriminate, including on the basis of sexual orientation and gender identity. For these reasons, we urge you to oppose these bills.

Religious Freedom Restoration Acts – 1993 and Now

Some proponents of the Indiana RFRA have claimed that these bills are no different from the federal RFRA. However, the context in which these bills are being introduced in 2015 is very different from what transpired when the federal RFRA was offered with wide support in 1993. The Indiana RFRA was introduced last year after the defeat of HJR-3, which had sought to enshrine discrimination in our state Constitution. And, it is being reintroduced in this session after thousands of gay and lesbian Hoosiers secured the right to marry the person they love.

In contrast, the Federal RFRA responded directly to a U.S. Supreme Court decision that many people saw as a significant setback in constitutional protection for the religious liberty of vulnerable minority faith groups. The coalition that supported the federal RFRA in 1993 included Republicans and Democrats, people of all faiths, and groups that cared generally about civil liberties.

However, this alliance started to change later in the 1990s, as landlords across the country used state religious liberty claims to challenge the application of state and local civil rights laws that protect people from discrimination based on their marital status. A federal appellate court's reasoning and

[1] https://www.aclu.org/religion-belief/aclu-tn-protects-students-right-read-bible-school
[2] http://acluofnc.org/index.php/blog/report-man-removed-from-lenoir-courthouse-forwearing-religious-attire.html

decision[3] on this issue demonstrated that some people will attempt to use religion to avoid complying with civil rights laws, and sometimes courts will allow this to happen. Based on this and other instances, for the past 15 years, the civil rights community has consistently expressed concern about the possibility that general religious liberty protections, such as RFRAs, might create unintended consequences.

More recently, in Utah, a member of a church refused to testify in a U.S. Department of Labor investigation into whether children were involved in farm labor, in violation of child labor laws. He claimed that discussing matters relating to the church's internal affairs would violate his sincerely held religious beliefs. That court agreed he was protected by RFRA and prevented the government from questioning him.[4] If this type of reasoning is adopted more broadly, it would jeopardize reliable civil and criminal investigations.

No Demonstrated Need for RFRA protections in Indiana

Beyond being potentially harmful, this legislation is unnecessary. Government in Indiana, in the wake of marriage equality, has not been on a rampage, stomping on individuals' religious liberties. If such were the case, the ACLU would be the first to defend, for example, a church from any attempt by government to dictate religious rituals or acts. This legislation, as we have said, is a solution in search of a problem.

Neither can these bills be in response to last summer's U.S. Supreme Court decision in Hobby Lobby. RFRAs were introduced here, and in Arizona, last spring, before Hobby Lobby was decided. And, even the legal scholars who support RFRAs (and not all of them do) say the circumstances of Hobby Lobby are very narrow and they caution against inflating its impact.

Nor is this legislation a necessary response to scuffles, such as the recent one between the City of Houston and churches there. When the City of Houston overreached and sought to subpoena the content of sermons, the outcry was swift. Many, including the ACLU, spoke against such government intrusion and the city backed off.[5] The protections of RFRA were not needed to encourage people to work out the issues in good faith.

Potential Harms of a RFRA in Indiana

All this may sound familiar. That's because these poorly written bills are copycats of last year's notorious SB 1062 from Arizona. You may recall that Republican Governor Jan Brewer vetoed the bill after public opposition from the Arizona Cardinals and the National Football League; major corporations representing a wide range of industries, including airlines, technology, and hospitality, to name just a few; and, politicians from both sides of the aisle, including Senators John McCain and Jeff Flake and Governor Mitt Romney.

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[3] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), vacated on other grounds, 220 F.3d 1134 (9th Cir. 2000). For other cases involving claims of religious freedom to discriminate in the rental of housing, see Smith v. Fair Emp. & Housing Comm'n, 913 P. 2d 909 (Ca. 1996); Swanner v. Anchorage Equal Rights Commission, 874 P. 2d 274 (Alaska, 1994); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994). The landlord was successful in *Desilets*.

[4] *Perez v. Paragon Contractors, Corp.*, 2014 WL 4628572 (Dist. Utah, Sept. 11, 2014).

[5] http://www.aclutx.org/2014/10/17/city-of-houston-subpoenas-of-sermons-statement-from-the-aclu-of-texas/

As this list demonstrates, the public outcry was overwhelming and the message from the Arizona business community was crystal clear – do not allow this legislation to misrepresent our values and do harm to our state.

This potential for harm is based not on conjecture, but on the very real experiences of other states and municipalities where similar legislation has already passed. For example:

- A police officer in Oklahoma asserted a religious objection to attending, or even assigning another officer to attend, a community relations event held at a mosque, claiming a "moral dilemma."[6]
- Pharmacists in several states have used religious freedom as a defense for refusing to dispense contraception.[7]
- In Michigan, a school guidance counselor refused to help gay students because of the counselor's religious beliefs.[8]
- Even administrative and commonplace regulations, such as wearing a hardhat or providing a social security number, have been challenged as violations of individuals' religious liberties under RFRAs.[9]

Anyone could claim exemption from state or local laws—including basic civil rights laws related to employment, housing, and public accommodations. And regardless of the legitimacy of those claims, our state and local governments – and potentially private businesses in our state – will have to expend resources digging into whether an individual's religious beliefs are "burdened," whether they are "sincerely held," and whether the law in question serves a "compelling governmental interest." There's no telling how long such lawsuits may take. Indeed, a case in Dallas, Texas, has been dragging on for seven years.[10]

In sum, experience has shown us that this is unnecessary legislation with a host of potential unintended consequences. For the reasons stated above, we urge you to reject these bills.

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[6] Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014).

[7] Rob Stein, *Pharmacists' Rights at Front Of New Debate*, Washington Post (Mar. 28, 2005), available at http://www.washingtonpost.com/wp-dyn/articles/A5490-2005Mar27.html.

[8] *Keeton v.Anderson-Wiley*, 664 F. 3d 865 (11th Cir.2011)

[9] *Harris v. Bus., Transp. & Hous. Agency*, C 07-0459 PJH, 2007 WL 1140667 (N.D. Cal. Apr. 17, 2007) and *Kalsi v. New York City Transit* O. 94-CV-5757(JG).62 F.Supp.2d 745 (1998)

[10] *Big Hart Ministries Assoc. v. City of Dallas* (N.D. Tex. Mar 25, 2013)