

## To RFRA or not

By James Russell

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In a 1989 decision, *Employment Division v. Smith*, involving two men who were fired for smoking peyote as part of a sacred Native American ritual and then denied state unemployment benefits, the U.S. Supreme Court vacated a lower court ruling declaring that the two were not fired out of religious bias but because they violated state drug laws.

The U.S. Supreme Court returned the case to the Oregon Supreme Court to decide if a state could deny unemployment benefits to a worker fired for using illegal drugs for religious purposes? The Oregon Supreme Court ultimately sided, in a 6-3 decision, with Oregon's Employment Division.

That ruling concerned both secular civil libertarians and those with deeply held religious beliefs, said Elizabeth Oldmixon, an associate professor of political science at the University of North Texas in Denton. A broad coalition then worked with Congress to pass the Religious Freedom Restoration Act of 1993, and President Bill Clinton signed it into law.

That bill, said Oldmixon, told the Supreme Court that in such cases, to give the benefit of the doubt to the plaintiffs, not the government.

Among the groups in that earlier coalition was Americans United for the Separation of Church and State, a nonpartisan educational organization that preserves church-state separation.

Today that group is actively involved in debate over state versions of religious freedom restoration bills popping up in legislatures across the country, primarily in response to court rulings legalizing same-sex marriage and an upcoming decision from the U.S. Supreme Court expected to legalize same-sex marriage nationwide.

The first RFRA to pass and be signed into law this year came in Indiana. Gov. Mike Pence signed that bill on Thursday, March 26.

Sarah Jones, AU's communications associate, said the federal RFRA "passed as a shield to protect religious minorities, such as non-theists, Muslims and Jews. It strikes a balance between religious expression and the federal government's interest in enforcing laws."

But the federal law soon fell under scrutiny again, when the Supreme Court again struck down a portion of the 1997 *Boerne v Flores* ruling, said Chicago Kent College of Law Professor Sheldon H. Nahmod. That case asked whether or not the city of Boerne, Texas could prevent a Catholic church from expanding because of historical landmark and preservation laws. The court ruled for the church.

Striking RFRA's application to state and local governments left only the federal application intact, Nahmod explained. Then another act of Congress resulted in the Religious Land Use and Institutionalized Persons Act, signed by President Clinton in 2000.

That ruling set a precedent for another Supreme Court ruling, however.

In 2012, Hobby Lobby, the national arts and crafts chain, sued the federal government over a provision in the Patient Protection and Affordable Care Act requiring employers to provide contraception coverage. *Hobby Lobby v Burwell* claimed covering contraception was a violation of the chain's owners' religious beliefs under the RFRA. In a 5-4 decision, the court ruled in favor of Hobby Lobby.

What conservative groups praised about the ruling, others panned.

#### **At the state level**

If one term could sum up the dispute between the two factions in the battle over state religious freedom laws, it's "broad." In the *Burwell* case, the term means either an unconstitutional overreach or a victory for religious liberty. Supporters of current religious liberty bills, said Jones, "claim they just reaffirm what the federal bill already says. That isn't true. These state level bills are written much more broadly and contain discriminatory provisions that aren't present in the federal bills."

She said additionally the Hobby Lobby decision ultimately "granted special privileges. One of the most common 'special privileges' is allowing small businesses the right to discriminate against customers, such as same-sex couples."

But Rep. Matt Krause, R-Fort Worth, author of the Texas bill — [HJR 125](#) — disagreed. Krause, a lawyer, interprets the federal RFRA much like Oldmixon or Jones. In written answers emailed to him, Krause said the federal RFRA "walks that fine line by asserting that the federal government can only burden the free exercise of religion (or conscience) if it has a compelling interest in doing so and it's done in the least restrictive means possible. It gives citizens a cause of action to challenge the actions of government in these certain contexts."

The bill, if enacted, he wrote, would codify in the state Constitution the state's current religious freedom act, which passed in 1999.

In its current state, according to the Texas Freedom Network, the Texas RFRA bars measures that "substantially burden" the free exercise of religion. In addition, it includes other carefully crafted language that has helped avoid unnecessary lawsuits while providing various remedies and ensuring that the law is not abused. It currently mirrors the federal RFRA.

Passage of HJR 125 would change nothing, according to Krause.

"All I am trying to do is give our Texas RFRA constitutional protection," he wrote. "There were efforts to make Texas' RFRA language constitutional as far back as two sessions ago. It's important to remember this is not a

reaction to recent events ... before we had any instances of bakers, florists or photographers. The intent was by no means an 'intent to discriminate' or 'license to discriminate' but rather good policy that has served Texas well for over a decade and it deserved constitutional protection."

Selisse Berry, founder and CEO of Out & Equal Workplace Advocates, is convinced that bills like Krause's and its Senate companion, HJR 10 by Sen. Donna Campbell, are discriminatory.

"It reminds me of people of color not being served. It's an overall sad state of affairs, especially given the advances of LGBT workplace equality," she said by phone.

After signing Indiana's religious freedom bill into law amidst backlash from a wide variety of groups, Gov. Mike Pence asked that state's legislature to assure discrimination against LGBT people will not be allowed. But, if Krause and others said discrimination is not their intention, are activists wrong about the RFRAs?

Chicago Kent's Nahmod said it's difficult to tell if these pieces of legislation are motivated by anti-LGBT animus.

"Indiana doesn't have a statewide nondiscrimination ordinance," he said, and while it could be argued signing the RFRA was a last-ditch push to prevent passage of a statewide nondiscrimination ordinance, that can't be proven.

"But if discrimination is the intention, then they may be seriously unconstitutional," Nahmod said.

But Berry disagreed.

"It's naïve to say Pence's decision to sign the bill was not motivated by discrimination," she said. "Whether [these bills are] intentionally meant to discriminate or not, it's clear the LGBT community needs a federal nondiscrimination ordinance," she said. "We have state and city nondiscrimination ordinances [but] we still need a federal law to protect LGBT people."

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**Religious liberty bills currently under consideration in the Texas Legislature include:**

- **HB 3567** by **Rep. Scott Sanford**. Would prevent the government from punishing a clergy member or person of faith who does not perform same-sex marriages.
- **HB 3864**, also by **Rep. Sanford**. Would allow child welfare organizations to deny care to children of LGBT parents based on religious beliefs. **Sen. Donna Campbell** filed its Senate companion, **SB 1935**.
- **HB 3602** by **Rep. Cecil Bell**. Would bar retaliation against "conscientious objectors" who refuse to perform same-sex marriages. **SB 1799** by **Sen. Larry Taylor** contains similar language.
- **HB 55** by **Rep. Jason Villalba** and **SJR 10** by **Sen. Campbell**. Would allow Texas' businesses to refuse service or deny employment to LGBT people based on individual's or religious organization's beliefs. Villalba has since said he would reconsider his resolution, but **Rep. Matt Krause** filed the identical **HJR 125** late on March 12.
- **HB 2553** by **Rep. Molly White**. Would allow business owners to decide whom they serve or conduct business with based on religious convictions.
- **HB 1355** by **Rep. Matt Shaheen**. Would make it a criminal offense for an elected official to threaten, punish or intimidate a person based on the person's religious beliefs.

<http://www.dallasvoice.com/rfra-10193069.html>