PROTECTING RELIGION OR PRIVILEGING RELIGION: AN ANALYSIS OF THE GENESIS AND UNINTENDED CONSEQUENCES OF THE INDIANA RELIGIOUS FREEDOM RESTORATION ACT

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Religious Freedom is a tentpole of American society. This right is so important that it was codified in the first sentence of the very first amendment to the constitution "Congress shall make no law respecting an establishment of religion." This phrase in the first amendment is referred to as the Free Exercise Clause. The Free Exercise Clause was never truly litigated for the first 100 years of United States existence. The Free Exercise Clause was first examined in the *Reynolds* decision of 1878 when the Supreme Court held that religious freedom would not trump neutral laws that as a byproduct impact particular religious practice. The Supreme Court's interpretation of the Free Exercise clause remained unchanged until the 1960's when it grew in prominence. In 1963 the Supreme Court held in the *Sherbert* case that there must be a compelling interest in refusing to accommodate religious conduct. The Free Exercise Clause would then be narrowed by the *Smith* decision of 1990 which reinstituted the original test of allowing neutral laws that as a by-product impact religious practice.

The *Smith* decision caused a surprisingly large backlash of groups across the ideological spectrum in America at that time. This ultimately led the United States legislature to pass the Religious Freedom Restoration Act which required all federal, state, and local laws to justify neutral laws that might impact religious practices with a compelling interest. This law was ultimately found unconstitutional as applied to states. Prompting 22 states to pass their own state level Religious Freedom Restoration Act's.

On March 26, 2015 Indiana governor Mike Pence signed into law the Indiana Religious Freedom Restoration Act. Soon thereafter a pizzeria in Walkerton, Indiana announced that based on their interpretation of the law they would no longer cater same-sex weddings. While it is unclear how many, if any, same-sex weddings this pizzeria in rural Indiana had been asked to cater the statement still alarmed observers nationally.

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The law was met with massive nationwide condemnation from many groups accusing the bill of being a way to legalize discrimination against LGBTQ+ groups. The National Basketball Association threatened to pull its annual all-star game from Indianapolis. CEO's from a variety of massive fortune 500 corporations, including Salesforce one of Indiana's largest employers, stated that they would have to re-consider their investments in Indiana if the law was not changed. Ultimately, this prompted an amendment to be signed to the bill just a week later adding explicit protection for LGBT groups in the bill.

This paper will examine the Indiana Religious Freedom Restoration act to determine if the outrage over the law was warranted. The first part of this paper will document the history of the Free Exercise Clause, its interpretations in the Supreme Court that prompted the creation of the Federal Religious Freedom Restoration Act by the Clinton administration, and finally how the law was ruled only applicable to the federal government. The second part of this paper will examine the very divisive *Hobby Lobby* decision by the Supreme Court which using the standards put in place by the Religious Freedom Restoration Act invalidated a key point of the Affordable Care Act, contraceptive mandate, showing the true power of the Religious Freedom Restoration Act. The final part of the paper will focus in on the passage of Indiana's own Religious Freedom Restoration Act. This final part of the paper will look at what caused the outcry over the passage of this law, examine whether the law the exact same as the federal version as some have claimed, and finally attempt to answer the question of would the law have actually legalized discrimination.

PART 1 – Background of 1st Amendment Jurisprudence and The Creation of RFRA

Indiana's Religious Freedom Restoration Act followed in the footsteps of and was modeled after the federal Religious Freedom Restoration Act which proceeded it by a few decades. To understand what Indiana's Religious Freedom Restoration Act is capable of and how people viewed it contemporarily it is important then to understand the federal Religious Freedom Restoration Act and the and the national conversations around the 1st amendment and the Free Exercise Clause that motivated its creation.

The first case that really examined the scope of the Free Exercise Clause occurred approximately 100 years after it was

approved. In fact, *Reynolds v. United States*[1] was the very first Supreme Court opinion to examine the 1st amendments religious protections. In that case George Reynolds a member of The Church of Jesus Christ of Latter-day Saints, also known as the Mormon Church, sued the United States alleging that his 1st amendment rights were being violated after he was charged with bigamy following taking a second wife.[2] The Supreme Court was hence tasked with deciding "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land."[3]

The Supreme Court ultimately held that Reynolds legitimate religious belief in polygamy was not a sufficient justification to overturn his conviction for bigamy.[4] The court relied on a distinction between religious belief itself and the actions that flow from the religious belief.[5] This distinction is important in the opinion of the Supreme Court because there can be no laws passed outlawing any religious opinions but, laws legislating action that me spurred be religion are allowed.[6] A law outlawing Reynold's right to believe in polygamy would not be constitutional but, that does not mean Reynold's would be allowed to engage in the act of polygamy if it was made illegal. Furthermore, the Supreme Court was worried that siding with *Reynolds* could lead to a breakdown of the legal system if any and all law could be invalidated based on a religious belief. [7] Therefore, the *Reynolds* court set the precedent that as long as a law was neutral and generally applicable a law that incidentally impinge on certain religious practices was constitutional. [8] Since the law outlawing polygamy in *Reynold* was applied to everyone regardless of religion it was generally applicable and therefore the fact it impinged on Reynold's religious practice did not matter.

After the *Reynolds* decision laws were rarely challenged using the first amendment until the 1960's when the Supreme

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[1] Reynolds v. United States, 98 U.S. 145 (1878).
[2] *Id.* at 161.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Reynolds*, 98 U.S. at 167 ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances").
[8] *Id.*

Court overruled *Reynolds* and changed the way it analyzed these types of claims. The generally applicable test articulated in *Reynold*'s would no longer stand after the *Sherbert v. Verner* decision.[9]

In *Sherbert* the plaintiff, a member of the Seventh-day Adventist Church and a resident of South Carolina, was fired from her job after she declined to work on Saturdays due to her religious beliefs.[10] She was unable to find other employment afterwards because of the same issue, she would not work on Saturdays.[11] Unable to find work she filed for unemployment compensation under the South Carolina Unemployment Compensation Act ("SCUCA"). However, a review board decided that her unwillingness to work Saturdays violated the SCUCA which required her to accept "suitable work when offered."[12] The review boards decision was challenged all the way up to the South Carolina Supreme Court was it was upheld.[13] Eventually the decision was appealed to the United States Supreme Court.

When analyzing the claim instead of using the generally applicable test articulated in *Reynolds* they required that governmental actions that substantially burden religious practices would have to be justified by the government by showing a compelling governmental interest.[14] Whereas before if a court found a law burdened religious practices the government would have to only show that the law was generally applicable regardless of religion now the government would have to show a compelling governmental interest in continuing to burden the religious practices. This greatly expanded the power of the 1st amendment as a compelling interest is a high burden.

In the *Sherbert* case the Supreme Court found that disqualifying the plaintiff from unemployment insurance because she would not work on Saturdays was a burden on her religion.[15] The Supreme Court then could find no compelling state interest to

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[9] Sherbert v. Verner, 374 U.S. 398 (1963).
[10] *Id.* at 399.
[11] *Id.* at 400.
[12] *Id.*; S.C. CODE ANN. §§ 68-1 to 68-404 (2010).
[13] *Sherbert*, 374 U.S. at 401.
[14] *Id.* at 422.
[15] *Id.* at 406.

justify this burden.[16] Therefore, the Supreme Court reversed the South Carolina Supreme Court decision and remanded the case.[17]

The case that most directly caused the creation of The Religious freedom Restoration Act was The Supreme Court's controversial 1990 decision in *Employment Division of Oregon v. Smith*[18].

The Supreme Court in *Smith* was tasked with deciding whether the Free Exercise Clause of the First Amendment[19] allowed the State of Oregon to include peyote used in religious ceremonies under the general criminal prohibition on use of the drug in Oregon.[20] In this case Smith and Black the two respondents were fired from jobs at a private drug rehabilitation program because they ingested peyote for sacramental purposes at a ceremony for the Native American Church, of which both were members.[21] After being fired, Smith and Black both applied for unemployment compensation but were determined ineligible for benefits because they had been fired for "misconduct"[22]. Both Smith and Black eventually sued the Employment Division alleging that their religious freedoms under the 1st amendment were being violated.

The Oregon Supreme Court held Smith and Black's peyote use fell within Oregon's statute because the statute makes "no exception for the sacramental use of peyote."[23] However, the Oregon Supreme Court further held that "outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly."[24] Therefore, the Oregon Supreme ultimately sided with Smith and Black and held that they both were entitled to unemployment compensation because forbidding members of the Native American Church from using peyote would violate the 1st Amendment.

The case was appealed to The Supreme Court which ultimately did not agree with the Oregon Supreme Court that

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[16] *Id.* at 409 ("No such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.").
[17] *Id.* at 410.
[18] 494 U.S. 872 (1990).
[19] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .").
[20] *Smith*, 494 US at 874.
[21] *Id.*
[22] *Id.*
[23] Smith v. Empl. Div., 763 P.2d 146, 148 (Or. 1988), *rev'd sub nom.* Empl. Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).
[24] *Id.*

prohibiting religious peyote usage violated the First Amendment.[25] The Supreme Court ultimately ruled against *Smith* and re-affirmed the precedent in *Reynolds* that if a statute is generally applicable and does not target a religion, it would be allowed regardless if it infringed on religious practices or not.[26] Therefore, criminalizing *Smith*s peyote usage in religious ceremonies would be constitutional.

This marked a large change from what was then the test. Previously, a claim for a religious exemption to a law would be evaluated under the test laid out in *Sherbert v. Verner*.[27] Under the *Sherbert* test governmental actions that substantially burden religious practices would have to be justified by the government by showing a compelling governmental interest.[28] Under *Smith* this changed to; as long as prohibiting the exercise of religion was not the goal of the law "but merely the incidental effect of a generally applicable [statute] the First Amendment has not been offended" and the law is constitutional.[29]

In overruling the *Sherbert* test and not requiring the government to show a compelling interest in infringing on a religious practice the court made what many would consider a seismic shift that gave a lot more leeway to the government to pass generally applicable laws that might infringe on religious rights.

The ruling in *Smith* ultimately created a large backlash from a diverse coalition.[30] The coalition of groups publicly opposed to the *Smith* decision included the National Association of Evangelicals, The American Civil Liberties Union, Concerned Women for America, The National Council of Churches, the American Jewish Congress, the National Conference of Catholic Bishops, the Mormon Church, and the Traditional Values Coalition among others.[31] These varied groups considered the decision in *Smith* to be an assault on their constitutional right to freedom of religion.[32] Members of smaller religions felt they would be at the mercy of legislative

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[25] *Smith*, 494 US at 878.
[26] *Id.*
[27] *Sherbert*, 374 U.S. at 398.
[28] *Id.* at 422.
[29] *Smith*, 494 US at 878.
[30] Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J. L. & RELIGION 531 (1993).
[31] Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 13, 1993, at A18.
[32] Drinan & Huffman, *supra* note 30, at 532.

majorities that did not represent them.[33] Even, religions that made up a larger percentage of the American population feared that their religious rights would be altered.[34]

These fears were not unfounded. Under the *Smith* precedent more than 50 cases of government infringement on religion were upheld.[35] Vice President Al Gore summed up the many problematic applications of the Smith precedent stating:

> Those whose religion forbids autopsies have been subjected to mandatory autopsies," he said "Those who want churches close to where they live have seen churches zoned out of residential areas. Those who want the freedom to design their churches have seen local governments dictate the configuration of their building.[36]

This backlash first led the groups displeased with the *Smith* decision to seek a rehearing at the Supreme Court, this effort was denied.[37] With their effort to have the *Smith* decision reheard blocked the coalition turned to Congress in an attempt to get legislation passed. This effort paid of in 1993 when Bill Clinton signed the Religious Freedom Restoration Act, which overturned the *Smith* decision and required a standard similar to the one articulated in *Sherbert*.[38] The bill was passed 97 to 3 in the senate and Bill Clinton claimed that the bi-partisan passage of the act was evidence that "even in the legislative process miracles can happen."[39]

The Religious Freedom Restoration Act ("RFRA") stated that "compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[40] The RFRA

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[33] *Id.*

[34] *Id.* ("For example, A Christian wishing to take communion might not be granted an exemption from a generally applicable statute prohibiting the consumption of alcohol.).

[35] Steinfels, *supra* note 31.

[36] *Id.*; *See, e.g.*, You Vang Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990); Elsaesser v. Hamilton Bd. of Zoning Appeals, 573 N.E.2d 733 (Ohio App. 12th Dist. 1990).

[37] Empl. Div., 496 U.S. at 913.

[38] Steinfels, *supra* note 31.

[39] *Id.*

[40] 42 U.S.C. § 2000bb(a)(5).

explicitly targeted laws of general applicability explicitly stating "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[41] The effect of the act was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[42]

By enacting the RFRA the legislature statutorily restored the compelling interest *Sherbert* test for free exercise claims alleging violations of the 1st amendment.[43] By requiring the *Sherbert* test for all free exercise claims the legislature did not only restore the status quo to pre-*Smith* it provided much more robust protections to religious liberties.[44] The passage of the RFRA was met with applause and dread.[45] The RFRA as written applied to federal, state, and local adjudications.[46] This RFRA would soon be challenged in court.

Those that did not support RFRA felt that statutorily overriding the Supreme Court's interpretation of the Free Exercise Clause was a violation of the separation of powers and the establishment clause to.[47] This argument against RFRA was addressed in the Supreme Court case *City of Boerne v. Flores*.[48] In

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[41] *Id.* § 2000bb(a)(2).
[42] *Id.* § 2000bb(b).
[43] Keith Jaasma, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering Reynolds*, 16 WHITTIER L. REV. 211 (1995).
[44] *See* Mary L. Topliff, *Validity, Construction, and Application of Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb et seq.)*, 135 A.L.R. FED. 121, Westlaw (originally published in 1996). Before the RFRA courts had discretion to apply the *Sherbert* test when they saw fit. Post RFRA courts did not have this discretion.
[45] *Compare The Religious Freedom Restoration Act Of 1993: Restoring Religious Freedom After The Destruction Of The Free Exercise Clause*, 20 DAYTON L. REV. 383 (1994) (arguing that RFRA is beneficial to religious freedoms restoring a "cornerstone" of American society) *with* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) (Law Review article written shortly after the passage of the RFRA arguing that the standard in the RFRA violates religious freedoms, exceeds the bounds of federal authority, and forces the judiciary to adopt an unworkable standard).
[46] 42 U.S.C. § 2000bb.
[47] Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998).
[48] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Flore an archbishop of a Church within the city of Boerne Texas applied for a local zoning ordinance to enlarge his church. [49] However, the local zoning authorities denied the application based on local ordinances concerning historic landmarks. The archbishop then sued claiming that under the RFRA his religious rights were being infringed and the government was without a compelling interest for doing so.[50]

The Supreme Courts analysis of *Flores* was less about whether the state had a compelling interest in denying the growth of the church and more about whether RFRA was constitutional. Those defending the RFRA argued that Congress had under Article 5 of the United States Constitution power to enact legislation that was designed to either prevent or remedy constitutional violations.[51] The court agreed noting that legislation that remedies a constitutional violation can be within congresses power even if it prohibits conduct which is not necessarily unconstitutional.[52] The court drew parallels between RFRA and the Voting Rights Act because both were ostensibly passed under Congress article 5 powers in order to prevent constitutional violations.[53] The Supreme Court felt that the record of racial discrimination the Voting Rights Act was meant to remedy was robust and deserving of a strong remedy.[54] Whereas the Supreme Court felt the "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years."[55] Due to this the Supreme Court felt that RFRA could not be considered a remedial or preventative remedy because the "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." [56] Furthermore, the massive reach of the RFRA, allowing every law at every level to be challenged under RFRA, further distinguished the

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[49] *Id.* at 508.
[50] *Id.*
[51] U.S. CONST. art. 1, § 5; *Id.* at 517.
[52] The Supreme Court cites numerous examples to prove this point. *See, e.g.*, *Flores*, 521 U.S. at 518; South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970).
[53] *Flores*, 521 U.S. at 38.
[54] *Id.*
[55] *Id.* at 39.
[56] *Id.* at 42.

bill from the Voting Rights Act.[57] Unlike, the Voting Rights Act which mainly applied to regions that had histories of violating citizens rights RFRA applied to every level and facet of government.[58] Finally, unlike the RFRA the Voting Rights Act would self-terminate once there was evidence of no voting discrimination for five years.[59] Overall, the Supreme Court felt that the RFRA had a "lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."[60]

Additionally, the Supreme Court considered the massive burden that would fall on states to now justify all previously passed laws. Every state law passed before RFRA was even contemplated would now need to satisfy the heavy compelling interest test it required.[61] This would open the floodgates of litigation "requiring searching judicial scrutiny of state law with the attendant likelihood of invalidation."[62] Large swaths of state law could potentially be invalidated. The Supreme Court felt this would cause large amounts of litigation costing money and requiring non-problematic laws to be re-written.[63] Ultimately the Supreme felt this interfered with the "States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[64]

Finally, the Supreme Court noted that RFRA does more than return the courts to a pre-*Smith* test because RFRA "imposes in every case a least restrictive means requirement."[65] This means that not only would the government have to justify a law challenged under RFRA by showing it has a compelling interest in doing so but, that it would be required in every instance to also show that this was the least restrictive means of accomplishing this interest. The Supreme Court noted that in pre-*Smith* jurisprudence the least restrictive means test was not always required. [66] The Supreme Court found this as evidence that "the legislation [RFRA] is broader

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[57] *Id* at 43-44.
[58] *Id.*
[59] *Flores*, 521 U.S. at 43-44.
[60] *Id.* at 44.
[61] *Id.* at 46.
[62] *Id.*
[63] *Id.* at 47.
[64] *Id.*
[65] *Flores*, 521 U.S. at 48.
[66] *Id.*

than is appropriate if the goal is to prevent and remedy constitutional violations."[67]

Due to these reasons the Supreme Court ultimately held that the Congress had overstepped its authority in dealing with the states.[68] The Supreme Court thought RFRA to be breaking the separation of power and balance of power between the states and federal government. [69]

Therefore, the Supreme Court held that since RFRA was beyond the legislature's authority "it is this Court's precedent, not RFRA, which must control."[70] This led the Supreme Court to reverse the lower court's ruling sustaining RFRA's constitutionality.[71] While RFRA was held to be an overstepping of the legislatures authority as applied to the states however later Supreme court cases upheld it constitutionality as applied to the federal government.[72]

PART 2: Hobby Lobby The Case that Showed the Power of RFRA and Inspired State Equivalents

The most recent Supreme Court case to analyze RFRA was the extremely polarizing *Burwell v. Hobby Lobby Stores, Inc.* decision. While any case involving claims of religious persecution that makes it's way to the Supreme Court is bound to be polarizing and watched closely the *Hobby Lobby* was even more so because of the religious freedom's *Hobby Lobby* claimed was being violated. The intense national debate surrounding the *Hobby Lobby* ruling and RFRA's place within it ultimately caused spectators to realize how powerful the protections RFRA afforded really were.

For context, in 2010 Barrack Obama signed into law the Affordable Care Act ("ACA") sometimes referred to as "ObamaCare". The ACA , a healthcare reform law, was described by the New York Times as "the most expansive social legislation

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[67] *Id.*
[68] *Id.*
[69] *Id.* at 50 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").
[70] *Id.*
[71] *Flores*, 521 U.S. at 50.
[72] *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) [hereinafter *Hobby Lobby*]; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

enacted in decades."[73] The ACA was a sweeping reform of the U.S. healthcare system changing a host of things with the ultimate goal with the ultimate goal of increasing quality and access to health coverage for Americans. The ACA was also highly controversial and faced staunch opposition to its passage by Republicans.[74]

After its passage the ACA became one of the most talked about and polarizing and important political issues of its day. Disdain for the ACA was so central to the Republican platform that soon after the ACA's passage Republicans in there "Pledge to America" vowed to challenge it at every avenue.[75] In fact between 2010 and 2016 the GOP voted over sixty times to attempt to repeal the ACA.[76]

One of the most controversial aspects of the ACA was its mandate that corporations provide health insurance coverage for contraception (birth control) even if the use of that contraception violated the religious beliefs of the company's owner. It was this mandate that *Hobby Lobby* claimed violated RFRA in its suit.

The *Hobby Lobby* case tasked the Supreme Court with deciding the mandate that private corporations cover contraceptives could constitute a violated the religious beliefs of the company's owners and if so did this violate RFRA.[77]

To determine this first the Supreme Court detailed at all of the prior Supreme Court precedent clarifying that its previous decision in *City of Boerne* found RFRA did not apply to the States or their subdivisions but as "applied to a federal agency, RFRA is based on the enumerated powers that supports that particular agency's work."[78] The court noted this to remind readers who may have thought after the *City of Boerne* decision that RFRA was completely innate that it would still apply to federal agencies.

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[73] Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (Mar. 23, 2010), https://www.nytimes.com/2010/03/24/health/policy/24health.html.

[74] David Pratt, *Health Care Reform: Will It Succeed?*, 21 ALB. L.J. SCI. & TECH. 493 (2011).

[75] David M. Herszenhorn, *G.O.P. Cites Tax Cuts and Health Care as Main Focus*, N.Y. TIMES (Sept. 22, 2010), https://www.nytimes.com/2010/09/23/us/politics/23repubs.html?searchResultPosition=81.

[76] Steve Benen, *On Groundhog Day, Republicans Vote to Repeal Obamacare*, MSNBC (Feb. 2, 2016), http://www.msnbc.com/rachel-maddow-show/groundhog-day-republicans-vote-repeal-obamacare.

[77] *Hobby Lobby*, 573 U.S. at 688.

[78] *Id.*

The Supreme Court moved next to look at the mandate itself. The ACA required an employer's health insurance to cover "preventative care and screenings" for women.[79] However, Congress never defined what preventative case was and instead "authorized the Health Resources and Services Administration ("HRSA"), a component of the [United States Department of Health and Human Services] HHS, to make that important and sensitive decision."[80] HHS ultimately required that coverage for all FDA-approved methods of contraception which included four methods that "have the effect of preventing an already fertilized egg from developing any further by inhibiting it attachment to the uterus."[81] These four methods of contraceptive are the ones at issue because they are the ones *Hobby Lobby* contends are abortifacients that violate their religious belief against abortions.

The only organizations the HHS exempts from this mandate are, employers with fewer than 50 employees, Employers providing grandfathered in health plans, and organizations the HHS considered non-profit religious organizations.[82] All together this meant the contraceptive mandate did not apply to tens of millions of people.[83]

The Supreme Court described the Green's, the family that owns *Hobby Lobby,* religious beliefs. Hobby Lobby is closely held company with David Green serving as CEO and his children serving as president, vice president, and vice CEO.[84] Hobby Lobby has a statement of purpose that commit the company to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles."[85] Additionally, "each family member has signed a pledge to run the businesses in accordance with the families religious beliefs and to use the family assets to support Christian ministries."[86] As part of their religious beliefs that Greens believe that life begins at conception.[87] Therefore, they believe that the 4 contraceptive methods they are required to cover

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[79] 42 U.S.C. § 300gg-13(a)(4).
[80] *Hobby Lobby*, 573 U.S. at 688.
[81] *Id.* at 690.
[82] *Id.* at 25-26.
[83] *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1143 (10th Cir. 2013), *aff'd sub nom. Hobby Lobby*, 573 U.S. at 682.
[84] *Id.* at 1143.
[85] *Id.* at 1144.
[86] *Id.*
[87] *Id* at 1146.

that work after this point constitute abortions and violate their religious beliefs.[88]

In making its decision the Supreme Court first had to deal with HHS' contention that neither *Hobby Lobby* nor the Greens could be heard under RFRA because as the Supreme Court puts it " the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals."[89]

The Supreme Court dismissed the contention rather swiftly noting that this line of thinking would require a business owner considering incorporating their business to decide to "either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, or operation as corporations."[90] Furthermore, the Supreme Court noted that RFRA was meant to provide sweeping protection so it would not make sense to put business owners in such a precarious position.[91]

Turning to the text of RFRA the Supreme Court noted that RFRA covers all persons and to protect a corporation's rights or to give a corporation rights is just a way of protecting those human beings that are part of the corporation.[92] The Supreme Court notes that "Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[93]

Since the term person is not defined in RFRA the Supreme Court used the Dictionary Act definition of the word person which includes corporations and companies.[94] Finally, the Supreme Court noted that nothing suggests that there was congressional intent for RFRA to not apply to corporations.[95] Therefore, the Supreme Court concluded that RFRA did apply to corporations. [96]

Next, the Supreme Court dealt with HHS' argument that Hobby Lobby is not protected by RFRA because, as a corporation, it cannot exercise religion. [97] The Supreme Court is not swayed by this

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[88] *Id.*
[89] *Sebelius*, 723 F.3d at 1146.
[90] *Id.* at 1147.
[91] *Id.* at 1148.
[92] *Id.*
[93] *Id.* at 1150.
[94] *Id.*
[95] *Sebelius*, 723 F.3d at 1150.
[96] *Id.* at 1143.
[97] *Id.*

argument either. The Supreme Court notes that HHS already concedes that nonprofit corporations can have religious beliefs but rejects that there is actually a distinction between non-profit and for-profit corporations.[98] In fact the Supreme Court points out that today corporations can be formed for any lawful purposes or business.[99] This means that "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else"[100] The Supreme court goes on to say that "Organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of the corporate form, such as the freedom to participate in lobbying for legislation or campaigning for pollical candidates who promote their religious charitable goals."[101] Taken together this led the Supreme Court to conclude that if a non-profit corporation can have a religious view point, as the HHS conceded, then a for-profit corporation could also have a religious view point.[102]

Next, the Supreme Court dealt with the argument that "Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation."[103] This argument does not sway the Supreme Court as it points out private corporations can be pursued for "any lawful purpose", including religious ones.[104] Next, the Supreme Court points out that Hobby Lobby is also a privately held company not a publicly traded one, so while it is at least debatable the religious standing of a publicly traded company, there is less debate for a privately held company. [105]

Additionally, the Supreme Court noted that even though no pre-*Smith Free Exercise Clause* precedents explicitly held that a for-profit corporation has free exercise rights, for-profit corporations are still protected by RFRA.[106] The Supreme Court decided this for three reasons. First, the Supreme Court noted that nothing in the text of RFRA was meant to be tied to the Supreme Courts pre-*Smith*

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[98] *Id.* at 1143-44.
[99] *Id.* at 1146.
[100] *Id.*
[101] *Sebelius*, 723 F.3d at 1147.
[102] *Id.*

[103] *Id.* at 1157.
[104] *Id.* at 1158.
[105] *Id.*
[106] *Id.* at 1152.

interpretation. The Supreme Court notes that if Congress had meant to do that "it knows how to do so."[107] Second, the Supreme Court notes that nothing within RFRA restricts the definition of "exercise of religion" to practices addressed in pre-*Smith* decisions.[108] Third, the Supreme Court noted that the singe pre-*Smith* case involving free exercise rights "of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights."[109] These reasons taken together led the Supreme Court to conclude that "federal regulations restriction on the activities of a for-profit held corporation must comply with RFRA."[110]

With the Supreme Court deciding that RFRA applied to the regulation on Hobby Lobby the next step the Supreme Court took was to determine if the Hobby Lobby's religious rights were being substantially burdened by HHDS contraceptive mandate. [111] The Supreme Court first re-affirms that the owners of Hobby Lobby have a sincere religious belief that life beings at conception.[112] Based on this the Supreme Court rejected the argument that the coverage "would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage."[113] The Supreme Court felt that this was an incorrect argument because it asks the Supreme Court to deal with the reasonableness of Hobby Lobby's religious beliefs and not just whether or not RFRA applies.[114] By not allowing Hobby Lobby to opt out of HHS regulations the Supreme Court feels that the HHS is calling Hobby Lobby's religious beliefs "flawed."[115]This ultimately led the Supreme Court to conclude that HHS contraceptive mandate imposed a substantial burden on the free exercise of Hobby Lobby religious beliefs.[116]

After determining that RFRA applies to private corporations and that the HHS regulations burden Hobby Lobby's religious practice the next step is for the Supreme Court to determine

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[107] *Sebelius*, 723 F.3d at 1152.
[108] *Id.*
[109] *Id.* at 1153.
[110] *Id.* at 1161.
[111] *Id.* at 1163.
[112] *Id.*
[113] *Sebelius*, 723 F.3d at 1169.
[114] *Id.*
[115] *Id.* at 1171.
[116] *Id.* at 1173.

whether or not the Government has a compelling interest in doing so. HHS defined its interest as being in public health and gender equality.[117] The Supreme Court was skeptical and labeled these as "broad" however they ultimately held that this was enough to be a governmental interest under RFRA.[118]

The final step now for the Supreme Court to consider in its RFRA analysis is whether or not this is the least restrictive way of furthering this interest. The Supreme Court notes that the least restrictive test is "exceptionally demanding."[119] Under this standard the Supreme Court concluded that HHS failed the least restrictive means test. [120] The Supreme Court noted that:

> HHS itself has demonstrated that it has at its disposal an approach that is less restrictive that requiring employers to fund contraceptive methods that violate their religion beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations.[121]

Since the Supreme Court held that RFRA applied to private corporations, that Hobby Lobby had sincere religious beliefs, that the contraceptive mandate burdened Hobby Lobby, and that there was a less restrictive means of accomplishing this objective. The Supreme Court ultimately struck down the contraceptive mandate promulgated by the HHS.[122]

Understanding, the *Hobby Lobby* decision and the debate it created is important to understanding why the Indiana Religious Freedom Restoration Act was passed in Indiana as well as why it caused such a controversy.

Before the *Hobby Lobby* case most major 1st amendment free exercise and RFRA claims involved subject matter that was not nearly as controversial. For example, prior cases involved peyote use among Native Americans, the potential height of a church, and unemployment insurance for those unable to work on Saturday (CITES). The *Hobby Lobby* decision implicated, corporate personhood, abortion rights, and healthcare rights. All while being

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[117] *Id.* at 1174.
[118] *Id.* at 1177.
[119] *Sebelius*, 723 F.3d at 1177.
[120] *Id.* at 1182.
[121] *Id.*
[122] *Id.* at 1191.

in the center of a national debate about the efficacy of the ACA. Exactly how powerful RFRA and its required least restrictive means test began to come into focus for both Republican and Democratic supporters.

After the *Hobby Lobby* decision Republican's began to view RFRA as an important to protecting their political values. Republicans such as Texas Senator Ted Cruz viewed the *Hobby Lobby* decision as protecting citizens "right to live and work in accordance to their conscience."[123] According to Mitch Mcconell the Senate Republican Leader the ACA was :

> [The] single worst piece to pass in the last 50 years, and I was glad to see the Supreme Court agree that this particular Obamacare mandate violates the Religious Freedom Restoration Act (RFRA),[124]

Republicans continued to heap praise on RFRA in the wake of *Hobby Lobby* because they saw it as protecting them from a piece of legislation that was seen as protecting core Republicans values, such being anti-abortion, from the ACA was almost universally hated among republicans.[125] However, in the wake of *City of Boerne* RFRA and the broad protections it allowed no longer applied to the states, only the federal government. So, if legislatures liked the test imposed by RFRA they would need to pass a state level equivalent.

Part 3 – Passing IFFRA in the Wake of *Hobby Lobby*. Why? Exploring the Controversy Around it and Considering if it was Deserved or Not?

On March 26th 2015 Indiana Governor Mike Pence signed into law Indiana Senate Bill 101, titled the Religious Freedom Restoration Act ("IRFRA").[126] The bill passed through the Indiana

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[123] Ferdous Al-Faruque, *Republicans Hail Hobby Lobby Decision as Religious Victory*, THE HILL (June 30, 2014, 11:51 AM), https://thehill.com/policy/healthcare/210963-gop-hails-hobby-lobby-decision-as-religious-victory (last visited Mar. 8, 2020).

[124] *Id.*

[125] *Id.*

[126] Scott Neuman, *Indiana's Governor Signs 'Religious Freedom' Bill*, NPR (Mar. 26, 2015, 2:28 PM), https://www.npr.org/sections/thetwo-way/2015/03/26/395583706/indianas-governor-signs-religious-freedom-bill (last visited Mar. 8, 2020).

house easily with a vote of 40 to 10.[127] This section will explore why IRFRA was passed, then delve into the uproar about the bill, next this section will compare it to other state level Religious Freedom Bill, and ultimately determine whether the uproar was warranted or not.

The Indiana Religious Freedom Restoration Act like its federal predecessor was created ostensibly to prevent state and local governments from "substantially burdening" a person's exercise of religious unless a compelling governmental interest can be proved. While IRFRA was based upon the federal RFRA there still are some differences that are important to understanding the outrage over the law. First, IRFRA explicitly protects the exercise of religion of entities, which includes for profit corporations, while the federal RFRA does not.[128] Second, unlike the federal RFRA which only protected religious practices that *have* or *are* being burdened, IRFRA also protects religious practices that are *likely* to be substantially burdened by the government.[129] Finally, some feel the language in IRFRA allows using the exercise of religion as a defense in judicial or administrative proceedings between private parties, something not contained in the federal RFRA.[130] Too supporters of IRFRA these differences are trivial, or non-existent, and have no bearing on the bill.[131] However, to the bills many detractors these difference are signs that the true intent of the bill is not to protect religion but, instead to facilitate legal discrimination.[132]

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[127] Jacqueline Jones, Indiana Lawmakers Approve 'Religious Freedom' Bill, JURIST (Mar. 26, 2015, 7:55 AM), https://www.jurist.org/news/2015/03/indiana-lawmakers-approve-religious-freedom-bill/.

[128] Kristine Guerra & Tim Evans, *How Indiana's RFRA Differs from Federal Version*, INDY STAR (Mar. 31, 2015, 4:15 PM), https://www.indystar.com/story/news/politics/2015/03/31/indianas-rfra-similar-federal-rfra/70729888/?from=global&sessionKey=&autologin= (last visited Mar. 8, 2020) (defining a person who is protected from religious discrimination as "A partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company . . . .").

[129] Ind. Code § 34-13-9 (2015) ("A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, buy a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding . . . .") .

[130] *Id.* ("regardless of whether the state or any other governmental entity is a party to the proceeding. If the relevant governmental entity is not a party to the proceeding, the governmental entity has an unconditional right to intervene in order to respond to the person's invocation of this chapter . . . .")

[131] Guerra & Evans, *supra* note 128.

[132] *Id.*

In order to really understand the controversy over IRFRA first the stated reasons for passing the bill in the first place must be examined. Mike Pence released a statement after signing the bill attempting to explain his reasoning for passing the law:

> One need look no further than the recent litigation concerning the Affordable Care Act. A private business and our own University of Notre Dame had to file lawsuits challenging provisions that required them to offer insurance coverage in violation of their religious views.
>
> Fortunately, in the 1990s Congress passed, and President Clinton signed, the Religious Freedom Restoration Act—limiting government action that would infringe upon religion to only those that did not substantially burden free exercise of religion absent a compelling state interest and in the least restrictive means.
>
> Last year the Supreme Court of the United States upheld religious liberty in the Hobby Lobby case based on the federal Religious Freedom Restoration Act, but that act does not apply to individual states or local government action. At present, nineteen states—including our neighbors in Illinois and Kentucky—have adopted Religious Freedom Restoration statutes.
>
> . . .
>
> This bill is not about discrimination, and if I thought it legalized discrimination in any way in Indiana, I would have vetoed it. In fact, it does not even apply to disputes between private parties unless government action is involved. For more than twenty years, the federal Religious Freedom Restoration Act has never undermined our nation's anti-discrimination laws, and it will not in Indiana.

. . .

> Faith and religion are important values to millions of Hoosiers and with the passage of this legislation, we ensure that Indiana will continue to be a place where we respect freedom of religion and make certain that government action will always be subject to the highest level of scrutiny that respects the religious beliefs of every Hoosier of every faith.[133]

Understanding the political context of 2015 is important to understanding Governor Pence's comments for why the bill was passed. Just a few months earlier in the year the Supreme Court in Obergefell v. Hodges ruled that marriage is a fundamental right and is guaranteed to same sex couples under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution.[134] Additionally, the Affordable Care Act, or Obamacare, just had its highly controversial, especially to Republicans, contraceptive mandate struck down in the *Hobby Lobby* decision because of the federal RFRA.[135]

Taken together these developments do a lot of work in explaining why the Indiana legislature and Governor Mike Pence decided that it was time to pass a state equivalent of the federal RFRA. According to a Pew Research Poll in 2015, when *Obergefell* was decided only 38 percent of republicans support gay marriage.[136] This is important because Indiana is deeply republican[137] and many republicans based their opposition to *Obergefell* on their religious convictions.[138] Therefore, many republicans felt their religious freedoms were being trampled.

At the same time many republicans felt their religious views were being attacked by *Obergefell* they saw their religious views

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[133] Kylee Scales & James Gherardi, *Indiana Gov. Mike Pence Signs The Religious Freedom Bill*, FOX 59 (Mar. 26, 2015, 10:27 AM), https://fox59.com/news/governor-pence-signs-the-religious-freedom-bill/ (last visited Mar. 8, 2020).
[134] Obergefell v. Hodges, 574 U.S. 1118 (2015).
[135] *See Hobby Lobby*, 573 U.S. at 682.
[136] *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ (last visited Mar. 8, 2020).
[137] *Id.*
[138] *Id.*

being protected by the federal RFRA in the *Hobby Lobby* decision, when the Supreme Court struck down the contraceptive mandate. Which most republicans opposed based on their religious views around abortions.[139]

With this context in mind it becomes apparent Mike Pence's statement starts to make more sense. Governor Pence knew that many citizens of Indiana felt their religious views were being overridden by the Supreme Court. Governor Pence also knew that many of his constituents also considered the *Hobby Lobby* decision, which is based on the federal RFRA, a big win for them. Since the federal RFRA no longer applied to states Governor Pence felt that by passing IRFRA he would be doing something his constituents wanted. The bill signing was a closed event however lobbyists from the American Family Association and the Indiana Family Institute, who previously pushed for a same-sex marriage ban in Indiana, were invited guest to the bill signing.[140]

Those upset about IRFRA were concerned that the law, combined with Indiana's lack of laws protecting gays, was a backdoor way to allow businesses and individuals to deny services to gays.[141] Adding credence to this claim was the fact that within a week of signing the bill Memories Pizza, a family owned pizzeria in Walkerton Indiana announced that they would refuse to cater same-sex weddings as because of the law.[142]

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[139] *Public Opinion on Abortion*, PEW RSCH. CTR. (Aug. 29, 2019), https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/ (last visited Mar. 8, 2020).

[140] Greg Hernandez, *Indiana Governor Was Surrounded by Anti-Gay Activists When He Signed Religious Freedom Bill*, GSN (Mar. 30, 2015), https://www.gaystarnews.com/article/indiana-governor-was-surrounded-anti-gay-activists-when-he-signed-religious-freedom-bill3003/; Tony Cook, *Gov. Mike Pence Signs 'Religious Freedom' Bill in Private*, Indy Star (Mar. 27, 2015, 4:54 PM), https://www.indystar.com/story/news/politics/2015/03/25/gov-mike-pence-sign-religious-freedom-bill-thursday/70448858/.

[141] Mary Wisniewski, *Indiana Governor Signs Religious Freedom Bill That Could Affect Gays*, REUTERS (Mar. 26, 2015, 10:31 AM), https://www.reuters.com/article/us-usa-indiana-bill/indiana-governor-signs-religious-freedom-bill-that-could-affect-gays-idUSKBN0MM1UR20150326.

[142] *RFRA: Michiana Business Wouldn't Cater a Gay Wedding*, ABC 57 (Apr. 1, 2015, 12:40 AM), https://www.abc57.com/news/rfra-first-business-to-publicly-deny-same-sex-service (last visited Mar. 8, 2020) (the owners stated that "if a gay couple or a couple belonging to another religion came into the restaurant to eat, they would never deny them service. . . they just don't agree with gay marriages").

Unfortunately, for Governor Mike Pence almost immediately after signing IFRA into law there was a massive public outcry coming from elected officials as well as the business community.

The Republican mayor of Indianapolis, Greg Ballard, called for either the repeal of the law, or adding explicit protections for sexual orientation.[143] Mayor Ballard issued a statement stating that "I want everyone who visits and lives in Indy to feel comfortable here. [I]RFRA sends the wrong signal."[144] Mayor Ballard was joined in his condemnation of IRFRA by the other four living mayors of Indianapolis: Richard Luger, William H. Hudnut III, Stephen Goldsmith, and Bart Peterson.[145]

This outrage was shared and parroted by notable figures in Indiana higher education as well. Mitch Daniels, a former republican Governor of Indiana and current president of Purdue University opposed the bill on the grounds that he felt it interfered with Purdue's anti-discrimination policies.[146] The president of Butler University, which is located in Indianapolis, stated that IRFRA was "ill-conceived" and had done "significant damage to our state."[147] Even, Michael McRobbie, the president of Indiana University, who is not known for taking pollical stances opposed the bill urging the government to "reconsider this unnecessary legislation."[148]

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[143] Brian Eason, *Ballard, Council to Legislature: Repeal Law, Protect LGBT From Discrimination*, INDY STAR (Mar. 30, 2015, 1:04 PM), https://www.indystar.com/story/news/politics/2015/03/30/ballard-council-address-rfra-today/70674176/.

[144] *Mayor Greg Ballard Speaks Out Against Religious Freedom*, 13WTHR (Mar. 25, 2015, 2:23 PM), https://www.wthr.com/article/news/local/mayor-greg-ballard-speaks-out-against-religious-freedom-bill/531-a57919d8-2cd0-4866-b543-86353323f216.

[145] *Fallout from RFRA Very Concerning to Indianapolis Mayor*, INDY STAR (Mar. 31, 2015, 7:17 PM), https://www.indystar.com/story/opinion/readers/2015/03/31/fallout-rfra-concerning/70744904/.

[146] Sabrina Adams, *Butler, Purdue and Other Indiana University Presidents Issue Statements on Religious Freedom Bill*, CBS 4 INDY (Mar. 29, 2015, 12:37 PM), https://cbs4indy.com/news/butler-university-president-issues-statement-on-rfra/.

[147] Justin L. Mack, *IU, Butler Presidents Decry 'Religious Freedom' Law*, INDY STAR (Mar. 29, 2015, 11:55 AM), https://www.indystar.com/story/news/education/2015/03/29/butler-president-speaks-religious-freedom-bill/70628622/.

[148] *IU Voices Concerns Over State's Religious Freedom Restoration Act, Reaffirms Commitment to Equality*, IND. UNIV. (Mar. 29, 2015), https://archive.news.iu.edu/releases/iu/2015/03/rfra-mcrobbie-statement.shtml.

Perhaps most damaging to Governor Pence however was the condemnation he and IRFRA received from the business community. The CEO of Apple Inc., one of the worlds largest companies called for a change in IRFRA stating that he was "deeply disappointed" in the law.[149] Paypal co-found Max Levchin opposed the law and called for other CEO's to rethink doing business in Indiana.[150] Yelp CEO Jeremy Stoppelman publicly opposed the law and warned that it could have a detrimental impact on the Indiana economy.[151] Even Eli Lily and Company, a business founded and headquartered opposed the law and called it "disappointing."[152]

Additionally, major players in both professional and collegiate sports chimed in to express disappointment with IRFRA. The National Basketball Association, the Women's National Basketball Association, the Indiana Pacers, and the Indiana Fever put out a joint statement condemning IRFRA.[153] The owner of the Indianapolis Colt's Jim Irsay tweeted his dismay over IRFRA.[154]Even the president of the National Collegiate Athletic Association condemned the bill expressing concern about how student-athletes, employees, and visitors would be treated in Indiana. [155] At the time of IRFRA's passage Indianapolis was hosting the NCAA basketball final four. Before the final four games Bo Ryan, John Calipari, Tom Izzo, and Mike Kryzewski all very high-profile basketball coaches released a statement condemning

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[149] Ben Rooney & Aaron Smith, *Apple's Tim Cook 'Deeply Disappointed' in Indiana's Anti-Gay Law*, CNN BUSINESS (Mar. 27, 2015, 3:18 PM), https://money.cnn.com/2015/03/27/news/companies/businesses-fight-indiana-gay-discrimination/.

[150] Ben Rooney, *Warren Buffett: Discrimination for Sexual Orientation is 'Wrong,'* CNN MONEY (Apr. 3, 2015, 5:07 PM), https://money.cnn.com/2015/03/31/news/indiana-religious-freedom-law/.

[151] Jeremy Stoppelman, *An Open Letter to States Considering Imposing Discrimination Laws*, YELP (Mar. 26, 2015), https://blog.yelp.com/2015/03/an-open-letter-to-states-considering-imposing-discrimination-laws.

[152] *Lilly, USA Track & Field Response to RFRA*, INSIDE IND. BUS. (Mar. 27, 2015), https://www.insideindianabusiness.com/newsitem.asp?ID=70014.

[153] *League Urges 'Inclusion' as Indiana Law Sparks Gay Rights Concern*, YAHOO! SPORTS (Mar. 28, 2015), https://sports.yahoo.com/news/league-urges-inclusion-indiana-law-sparks-gay-rights-011947613--nba.html; *Statement from NBA, WNBA, Pacers and Fever*, NBA COMMC'NS (Mar. 28, 2015), https://pr.nba.com/nba-wnba-indiana-pacers-fever-statement/.

[154] Jim Irsay (@JimIrsay), TWITTER (Mar. 30, 2015, 3:16 PM), https://twitter.com/JimIrsay/status/582622346172841985.

[155] *Statement on Indiana Religious Freedom Bill*, NCAA (Mar. 26, 2015, 1:10 PM), https://www.ncaa.org/about/resources/media-center/news/statement-indiana-religious-freedom-bill.

the bill and stating, "discrimination of any kind should not be tolerated."[156]

The condemnation of IRFRA even came in a very big form from the Indianapolis Star the largest paper in Indiana. The Star ran a front full-page editorial entitled "Governor, fix 'religious freedom' law now.[157] In the editorial the Indianapolis star stated that whatever the original intent of the bill was IRFRA "has done enormous harm to our state and potentially our economic future"[158] The editorial stopped short of calling for a repeal of IRFRA instead it called for an amendment preventing discrimination based on sexual orientation. [159]

Even in the face of seemingly universal criticism Governor Pence initial stated during a controversial interview on March 29th, 2015 that he "stand[s] by this law,."[160] On March 31st Governor Mike Pence published an Op-ed in the Wall Street Journal addressing the publics concerns about IRFRA.[161] In the Op-ed Governor Pence first links IRFRA to the federal RFRA, which he characterizes as a good law.[162] Next, Governor Pence points out that at that time 19 other states had state level religious freedom laws. Governor Pence additionally notes when Obama was a state senator he voted for a version of the law in Illinois and that "Historically, this law has received wide bipartisan support."[163] Governor Pence next moves to link the need for IRFRA to the *Hobby Lobby* decision stating "With the Supreme Court's ruling, the need for a RFRA at the state level became more important, as the federal law does not apply to

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[156] *Final Four Coaches Release Joint Statement on Controversial Indiana Law*, YAHOO! SPORTS (Apr. 1, 2015), https://sports.yahoo.com/blogs/ncaab-the-dagger/final-four-coaches-release-joint-statement-on-controversial-indiana-law-195514473.html.

[157] *Editorial: Gov. Pence, Fix 'Religious Freedom' Law Now*, INDY STAR (Mar. 30, 2015, 8:27 PM), https://www.indystar.com/story/opinion/2015/03/30/editorial-gov-pence-fix-religious-freedom-law-now/70698802/ (last visited Mar. 8, 2020).

[158] *Id.*

[159] *Id.*

[160] Tom LoBianco & Justin L. Mack, *Pence On 'Religious Freedom' Bill: 'I Stand by This Law,'* INDY STAR (Mar. 29, 2015, 10:27 AM), https://www.indystar.com/story/news/politics/2015/03/29/pence-religious-freedom-bill-stand-law/70627494/ (last visited Mar. 8, 2020).

[161] Mike Pence, *Ensuring Religious Freedom in Indiana*, WALL ST. J. (Mar. 31, 2015, 10:28 AM), https://www.wsj.com/articles/mike-pence-ensuring-religious-freedom-in-indiana-1427757799 (last visited Mar. 8, 2020).

[162] *Id.*

[163] *Id.*

states."[164] Finally, Governor Pence defends IRFRA against claims that it allows discrimination stating:

> [I]RFRA only provides a mechanism to address claims, not a license for private parties to deny services. Even a claim involving private individuals under RFRA must show that one's religious beliefs were "substantially burdened" and not in service to a broader government interest—which preventing discrimination certainly is. The government has the explicit power under the law to step in and defend such interests.[165]

However, as criticism mounted, and more and more business leaders threatened to stop doing business in the state Governor Pence's hand was forced. In fact, the outcry over IRFRA was so massive it is estimated to have caused 256 million in economic damages to Indiana.[166] Due to this, on April 2, 2015, Governor Pence agreed to an amendment to IRFRA that added a clarification to the bill about discrimination. It added a section that clarified that IRFRA does not:

> Authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service.[167]

This amendment was mostly met with praise from groups that had pushed Governor Pence to reconsider the law. For example, Mark Emmert president of the NCAA who had previously condemned the law praised the new amendment. [168]

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[164] *Id.*
[165] *Id.*
[166] *Facts Showing the Economic Damage Mike Pence's RFRA Brought to Indiana*, IND. DEMOCRATIC PARTY, http://www.indems.org/facts-showing-the-economic-damage-mike-pences-rfra-brought-to-indiana/ (last visited Mar. 8, 2020).
[167] IND. CODE §34-13-9 (2015).
[168] Wesley Lowery, *Gov. Pence Signs Revised Indiana Religious Freedom Bill into Law*, WASH. POST (Apr. 2, 2015, 6:48 PM),

However, not everyone was pleased with the fact that Governor Pence agreed to amend IRFRA. While across the United States IRFRA was met with disdain there were still supporters of the bill across Indiana. For example, the Indiana Pastors Alliance led a protest against the proposed amendment to IRFRA. They described how they felt betrayed by Governor Pence in a letter they sent him:

> Governor Pence, we are hurt and disappointed. As the Chief Executive of the state of Indiana, you were the "face" of this RFRA legislation and someone we trusted as a friend and defender of religious liberty. Your desk was the final stop for the bill that purportedly "fixed" this piece of legislation. You received godly counsel from strong and knowledgeable leaders from across our nation who encouraged you to stand strong and to veto this legislation. You failed. In doing so, you betrayed the trust of millions of Hoosiers who elected you to protect the liberties we hold dear.[169]

The pastors believed that without IRFRA there religious liberties would be affected. They were far from the only ones in the Hoosier state that felt that way. Recently, released emails from constituents to Governor Pence's office show that he was flooded with emails begging him not to change IRFRA.[170] This goes to show that even though the national reaction was homogeneous in its viewpoint that IRFRA was irreparably horrible this view was not necessarily shared by everyone in Indiana uniformly.

Outside of the reputational impact on the state of Indiana there was also a measurable financial impact caused by the uproar

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https://www.washingtonpost.com/news/post-nation/wp/2015/04/02/gov-pence-signs-revised-indiana-religious-freedom-bill-into-law/ (last visited Mar. 8, 2020).

[169] Robert King, *Pastors Alliance: We Feel 'Deeply Betrayed' by RFRA Fix*, INDY STAR (Apr. 27, 2015, 12:26 PM), https://www.indystar.com/story/news/politics/2015/04/27/pastors-alliance-feel-deeply-betrayed-rfra-fix/26455063/ (last visited Mar. 8, 2020).

[170] Brian Slodysko, *Emails: Conservatives Slammed Then-Gov. Mike Pence in 2015 for Changing Religious Freedom Law*, INDY STAR (Mar. 28, 2018, 4:43 PM), https://www.indystar.com/story/news/politics/2018/03/28/emails-conservatives-slammed-then-gov-mike-pence-2015-changing-religious-freedom-law/467254002/ (last visited Mar. 8, 2020).

over IRFRA. Indianapolis, a large convention city, saw many conventions canceled resulting in around $60 million dollars in business for the city being lost[171] Additionally, Governor Pence ended up spending $365,000 of the governor's discretionary budget to hire a large global public relations firm to help repair Indiana's reputation.

Almost immediately after IRFRA was passed there was a massive public outcry. This eventually forced Governor Pence to sign a change to the bill specifically forbidding discrimination based on sexual orientation. Nevertheless, throughout the entire process even when he was forced to sign the amendment Governor Pence stand firm on his claim that IRFRA was no meant to enable discrimination at all.[172]

However, since the unamended IRFRA was only law for about two weeks there were no completed legal challenges under it so it is unclear if the discrimination IRFRA was alleged to allow would have actually been allowed. Therefore, the question remains whether or not the uproar was justified at all. To determine this IRFRA differences to the federal RFRA, as well as other state religious freedom laws will be examined.

While defenders of IRFRA claim that the differences between IRFRA and federal laws are de minimis the differences are actually quite substantial. First, the fact that IRFRA adds the term expands protections for situations where religious freedom is "likely" to be burdened is an obvious difference. This could potentially open the door a lot more litigation. Furthermore, this single word could have opened up Indiana courts to suits where plaintiffs allege, they would "likely" required to not discriminated based on sexual orientation.

Second, and perhaps most troubling is the fact IRFRA allows exercise of religion as a defense in disputes between private parties. This means under the original IRFRA people would be able to use their religious beliefs as a defense if they are being sued for discrimination. This means that for example, should a person be sued for refusing to work with gays or lesbians they would be able

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171 Brian Eason, *Official: RFRA Cost Indy up to 12 Conventions and $60M*, INDY STAR (2016), https://www.indystar.com/story/news/politics/2016/01/25/official-rfra-cost-indy-up-12-conventions-and-60m/79328422/ (last visited Mar. 8, 2020).

172 Tony Cook et al., *Indiana Governor Signs Amended 'Religious Freedom' Law*, USA TODAY (Apr. 2, 2015, 9:08 AM), https://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/ (last visited Mar. 8, 2020).

to use their religious beliefs as a defense in that lawsuit. Those defending the law, including Douglas Laycock, a law professor at the University of Virginia, argued that outrage over this clause is based all on hypothetical situations that would never happen.[173]

While neither of these two differences between IRFRA and the federal RFRA definitively prove that IRFRA allows discrimination they do show that the door for allowing discrimination based on sexual orientation may be a bit wider because of IRFRA. This further adds to the view that the differences between IRFRA and the federal RFRA matter.

Next, as Governor Pence pointed out many other states at the time had Religious Freedom Laws so what was the difference between them that allowed those other states to escape the national outrage. It turns out their differences are substantial. First, the IRFRA statute contains language that explicitly recognizes that a for-profit corporation has "free exercise" rights like those of individuals.[174] Of the twenty other states with religious freedom laws only the Texas RFRA has substantially similar language. While this alarmed many observers the notion that for-profit corporations can have religious rights was affirmed just prior in the *Hobby Lobby* decision, so this clause is not that radical.

Second, as pointed out previously, unlike the federal RFRA or other state RFRA's, IRFRA allows religious free exercise as a defense in private lawsuits not just in actions brought against the government.[175] No other state religious freedom laws have similar language. As described before this opens the door for private individuals to use a religious free exercise as a defense in suits alleging sexual orientation discrimination.

The differences between IRFRA and other states religious freedom laws are largely the same clauses that differentiate it from the federal RFRA. None of these differences explicitly allow discrimination based on sexual orientation but, to many observers that might be the consequences of the law. While the differences are

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[173] Guerra & Evans, *supra* note 128 ("Every judge in every case has said that nondiscrimination laws serve a compelling interest," he said. "They're worried that some red state judge somewhere will do the other way around. That's never going to happen.").

[174] Garrett Epps, *Why Is Indiana's Religious Freedom Law Different From All Other Religious Freedom Laws?*, THE ATLANTIC (2015), https://www.theatlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997/ (last visited Mar. 8, 2020).

[175] *Id.*

not massive they were large enough for the concern over them to be warranted. Even taking Governor Mike Pence's statements that IRFRA was not intentioned to authorize sexual orientation discrimination in good faith. Indiana's lack of laws outlawing discrimination based on sexual orientation combined with the broad protections of IRFRA would make it easier for people to discriminate based on sexual orientation and justify it.

It may not be clear that IRFRA would legalize sexual orientation discrimination in Indiana but, it would clearly move the needle, however slightly, towards that result. Therefore, even if the intent of IRFRA was not to legalize discrimination based on sexual orientation, it appears that the outrage that IRFRA generated was deserving to a large degree. IRFRA was passed as a performance by Governor Pence to signal to his religious base that he was looking out for him, unfortunately this performance backfired.

CONCLUSION

Religious freedom as guaranteed by the 1st amendment to the Constitution is a core tent-pole value of American society. When Bill Clinton signed the federal Religious Freedom Restoration Act into law in response to Native Americans being disqualified from welfare for smoking peyote in religious ceremonies it is unlikely, he realized the far-reaching implications of the law. The Religious Freedom Restoration Act years later went on to invalidate the contraceptive mandate of the affordable care act and inspired Indiana to pass its own version of the law. While the Indiana version was not that much different from the federal version, Americans after seeing the power of the federal Religious Freedom Restoration Act, were wary of Governor Pence's version for Indiana. After examining the Indiana Religious Freedom Restoration Act in the context of the massive effect of the federal version it becomes clear that the outrage of the Indiana Religious Freedom Restoration Act was not unwarranted.