To: Governor Mike Pence
Date: September 22, 2014
From: Kevin M. LeRoy[1] & John M. Westercamp[2]
RE: Indiana Should Pass a State-RFRA

I. Introduction

Religious liberty has a venerable history of protection in the United States. The Declaration of Independence identifies "our Creator" as the source of our fundamental rights; the "first freedom" of the U.S. Bill of Rights is the free exercise of religion; and—twenty-one years ago—Congress passed the Religious Freedom Restoration Act (RFRA), which offers *more* protection of religious liberty than the First Amendment.

Indiana also takes religious liberty seriously. However, recent trends in law and culture have exposed gaps in Indiana's religious liberty framework. These gaps could leave Hoosiers without any remedy for numerous religious liberty infringements. For example:

1. Religious organizations—like Christian churches or Christian businesses—could be forced to support marriage policies and practices that violate their beliefs;[3]

2. Religious businesses could be forced by state or municipal mandates to participate in healthcare practices that violate their beliefs;[4]

3. Religious food preparers—like kosher supermarkets—could be prevented by food safety guidelines or other business regulations from preparing and selling their products according to their religious dietary restrictions;[5]

4. Religious individuals whose beliefs require them to wear particular articles of clothing or maintain a particular appearance—like Orthodox Jews, Sikhs, and Muslims—could be forced to remove such articles or alter their appearance to comply with state or municipal regulations for state buildings, organizations, or universities;[6]

---

[1] J.D. Candidate 2015, Indiana University Maurer School of Law

[2] J.D., Indiana University Maurer School of Law; M.S. in Finance, Purdue University Krannert School of Management

[3] *See, e.g.,* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (Free Exercise Clause did not protect Christian photographer from state law requiring her to participate in same-sex commitment ceremony); Joshua Rhett Miller, *Indianapolis Bakery Declined Order for Rainbow Cupcakes, Sparking City Inquiry*, FOX NEWS, Sept. 29, 2010, http://www.foxnews.com/us/2010/09/29/city-officials-launch-inquiry-cupcake-denial-gay-student-group/.

[4] *See, e.g.* Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (Affordable Care Act's Contraception Mandate violated Religious Freedom Restoration Act as applied to closely-held corporations).

[5] *Cf.* Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961) (examining "Sunday closing laws" as applied to kosher supermarket).

[6] *See, e.g.*, Dong Seong Lyu, *US Air Force Swears in Its First Bearded Rabbi*, JSPACE NEWS, Sept. 15, 2014, http://www.jspacenews.com/us-air-force-swears-first-bearded-rabbi/; *see generally* Eugene

5. Religious groups that use minimal amounts of hoasca or peyote in sacramental ceremonies could be prevented by state or municipal law from acquiring these essential items.[7]

In an effort to close these gaps, this memorandum explains the Indiana and federal religious liberty frameworks and concludes with a recommendation that Indiana pass a state RFRA, modeled after the federal RFRA.[8]

II. Indiana Religious Liberty Framework

The Indiana Constitution has seven provisions devoted to the protection of religious liberty.[9] Indeed, the Indiana Supreme Court has held that religious liberty is a "core constitutional value."[10] When evaluating state action that affects a core constitutional value—like free exercise, political speech, or the right to self-defense—Indiana courts engage in a "material burden analysis." The Indiana Supreme Court first applied material burden analysis to religious liberty in City Chapel Evangelical Free Inc. v. City of South Bend.[11] However, the most developed version of this analysis is found in State v. Economic Freedom Fund, which dealt with political speech.[12]

In the more developed version of material burden analysis, the courts engage in a two-step process: "magnitude of the impairment" and "particularized harm."[13]

1. "Magnitude of the impairment" looks to whether state action creates a "substantial obstacle on the right to engage in political speech," that is, whether the right "no longer serve[s] the purpose for which it was designed" in light of the state action.[14] The courts "do[] not take into account the social utility of the state action at issue," thus the state's interests are not balanced

---

Volokh, *Why Have RFRA-Like Religious Exemption Regimes?*, THE VOLOKH CONSPIRACY (Dec. 2, 2013, 12:02 PM), http://www.volokh.com/2013/12/02/1b-rfra-like-religious-exemption-regimes/.

[7] *See* Gonzales v. O Centro Espirita, 546 U.S. 418 (2006); Employment Division v. Smith, 494 U.S. 872 (1990).

[8] RFRA is codified at 42 U.S.C. §§ 2000bb to 2000bb-4. The full text of the federal Religious Freedom Restoration Act is appended to this memo.

[9] *See* Ind. Const. art. 1, §§ 2-8 ("Natural Right to Worship;" "Freedom of Religious Opinions and Rights of Conscience;" "Freedom of Religion;" "Religious Test for Office;" "Public Money for benefit of Religious or Theological Institutions;" "Witness Competent Regardless of Religious Opinions;" "Oath or Affirmation, Administration"); *see also* City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 446 (Ind. 2001) (quoting Price v. State, 622 N.E.2d 954, 960 (Ind. 1993)).

[10] *See City Chapel*, 744 N.E.2d at 447. Core constitutional values are "a cluster of essential values which the legislature may qualify but not alienate." *Price*, 622 N.E.2d at 960.

[11] 744 N.E.2d at 446 (holding that City Chapel was allowed to challenge South Bend's condemnation proceeding against its church building under a material burden analysis).

[12] 959 N.E.2d 794 (Ind. 2011).

[13] *Id.* at 805.

[14] *Id.*; *see also City Chapel*, 744 N.E.2d at 451 (citing *Price*, 622 N.E.2d at 960); Lacy v. State, 903 N.E.2d 486, 490 (Ind. Ct. App. 2009) (quoting Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973, 984 (Ind. 2005)).

against the core constitutional value.[15] The court will not proceed further "[i]f a substantial obstacle does not exist."[16]

2. But "if a substantial obstacle *does* exist," the court will advance to the "particularized harm" analysis.[17] This step "look[s] at whether the speaker's actions are analogous to conduct that would sustain tort liability against the speaker."[18] Thus if the speaker's actions cause particularized harm to others, then no material burden is present and the state action limiting the right is permissible.[19]

Therefore, state action constitutes a material burden (and is therefore impermissible) on a core constitutional value only if "there is the presence of a substantial obstacle on the right *and* the absence of particularized harm caused by the speaker."[20] State action that impairs a core constitutional value without rising to the level of a material burden is simply a "permissible qualification" of that value.[21]

The Indiana Supreme Court first applied this test in Price v. State.[22] In *Price*, the defendant's disorderly conduct conviction—based solely on the her verbal protests of the arrest of her friend and herself—was a violation of the core constitutional value of political speech because the harm bystanders suffered did not rise "above the level of a fleeting annoyance."[23] The *Economic Freedom Fund* Court summed up *Price* well: "In essence, arresting the defendant for disorderly conduct based on her political speech, when her conduct could not be considered abuse under the particular facts, was a material burden on the defendant's right to engage in political speech."[24]

It is likely that the Indiana courts would apply this more developed version of the material burden analysis to future religious liberty cases. As can be seen above and described more fully below, this analysis leaves the courts with tremendous discretion.

---

[15] *City Chapel*, 744 N.E.2d at 447.

[16] *Econ. Freedom Fund*, 959 N.E.2d at 806.

[17] *Id.* (emphasis added).

[18] *Id.* Restated, particularized harm is found if the speaker "inflicts upon determinable parties harm of a gravity analogous to that required under tort law." *Id.* at 805.

[19] See, e.g. Redington v. State, 992 N.E.2d 823, 834 (Ind. Ct. App. 2013) *trans. denied* ("Even were we to deem the magnitude of the impairment [of the appellant's right to bear arms] as substantial . . . [the] challenge fails . . . [because the appellant] continuing to own firearms threatens to inflict 'particularized harm' analogous to tortious injury on readily identifiable private interests.").

[20] *Econ. Freedom Fund*, 959 N.E.2d at 806.

[21] City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 447 (Ind. 2001). For example, in Lacy v. State, 903 N.E.2d 486, 492 (Ind. Ct. App. 2009), a statute banning switch blades was held to be a permissible qualification on the core constitutional value of self defense because not all knives were banned by the statute, thus leaving other ways to exercise the right available.

[22] 622 N.E.2d 954 (Ind. 1993).

[23] *Id.* at 964.

[24] 959 N.E.2d at 805.

III. Federal Religious Liberty Framework

Federal religious liberty protections come from the Free Exercise Clause of the First Amendment and from RFRA.[25]

The Free Exercise Clause absolutely prohibits the government from mandating/prohibiting religious beliefs and prohibits the government from imposing discriminatory laws against religion (i.e. targeting religion specifically for special burdens).[26] Neutral laws of general applicability that burden religion—even substantially—are generally not violations of the Free Exercise Clause[27].

The Religious Freedom Restoration Act—passed by a large majority of Congress and signed by President Bill Clinton[28]—requires religious exemptions to neutral laws of generally applicability, unless the application of such laws to such persons passes strict scrutiny.[29] Therefore, under RFRA, the federal government cannot pass a law that substantially burdens religious liberty unless that law furthers a compelling government interest via the least restrictive means.[30] Because RFRA subjects neutral laws of general applicability to strict scrutiny, it is more protective of religious liberty than the Supreme Court's current interpretation of the Free Exercise Clause.[31] RFRA was originally intended to apply to the states; however, in City of Boerne v. Flores, the Supreme Court held that Congress lacked the authority to require states to comply with RFRA.[32]

Three additional points about RFRA capture its proper scope and show why this statute is a reasonable approach to protecting religious liberty while maintaining public order:

1. To win under RFRA, a challenger must be sincere,[33] the challenger must be *religious*,[34] and the challenger must challenge a law that targets his own conduct;[35]

---

[25] The Religious Land Use and Institutionalized Persons Act also protects religious liberty in the specialized context of zoning laws and prisons. 42 U.S.C. §§ 2000cc—2000cc-5. RLUIPA applies both to the federal government and to state governments (either through the federal spending power or the federal commerce clause). *Id.*

[26] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

[27] Employment Div. v. Smith, 494 U.S. 872 (1990). Prior to *Smith*, however, the Supreme Court interpreted the Free Exercise Clause to offer a level of protection similar to that of RFRA. *See* 42 U.S.C.A. § 2000bb ("Congressional findings and declaration of purposes"). The Court's decision in *Smith* was the catalyst for the passage of RFRA. *See id.*

[28] RFRA was passed unanimously in the House of Representatives and 97-3 in the Senate. John T. Noonan Jr. & Edward McGlynn Gaffney, Jr., Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government 496 (2001).

[29] *See* 42 U.S.C. § 2000bb-1; *see also* Gonzales v. O Centro Espirita, 546 U.S. 418 (2006).

[30] 42 U.S.C. § 2000bb-1; *see also* Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014); *O Centro*, 546 U.S. 418.

[31] *Hobby Lobby*, 134 S. Ct. at 2767.

[32] 521 U.S. 507 (1997).

[33] *See, e.g., Hobby Lobby*, 134 S. Ct. at 2759.

[34] As opposed to simply holding strong beliefs of conscience

2. Only substantial burdens, not incidental burdens, are covered by RFRA;[36]

3. RFRA does not dictate a winner in any specific case; a law that passes strict scrutiny is valid under RFRA even if it substantially burdens religious liberty.

IV. Indiana Should Pass a State RFRA

Unlike the freedom of speech—which is protected in equal force at the state and federal levels by the First Amendment—robust protection of religious liberty depends heavily on the states. Therefore, it is not surprising that eighteen states have passed state RFRAs, while "[a]nother twelve or thirteen states interpret their state constitutions to provide similar protection."[37] Indiana should be next.

The benefits of passing a state RFRA are numerous, but it must be noted that the large, bipartisan coalition that passed the federal RFRA has dissolved. Today, robust protection of religious liberty is wrongly branded by some as a conservative-only issue. Thus, when Arizona attempted to simply *amend* its state RFRA to remove ambiguities related to sovereign immunity, the entire statute was attacked by many on the political left.[38] The most cogent response to these unjust criticisms came in the form of an open letter to Arizona Governor Janice K. Brewer from a bipartisan group of law faculty, led by notable religious liberty proponent Douglas Laycock.[39] Laycock and his cosigners rightly stated that the Arizona RFRA was being "egregiously represented by many of its critics."[40] Despite the potential for political friction, the benefits to Indiana of a state RFRA vastly outweigh the potential costs.

A state RFRA, properly modeled after the federal RFRA, would provide numerous advantages to Indiana as compared to the material burden analysis currently used by the courts.

1. The material burden analysis explicitly refuses to balance the state's interest against burdens on religious liberty, yet then requires a court to

---

[35] *Cf.* Bowen v. Roy, 476 U.S. 693, 700 (1986) (holding that, for purposes of the Free Exercise Clause, an individual does not have the right to "dictate the conduct of the Government's internal procedures").

[36] *Cf., e.g.* Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640 (1981). The Court in *Heffron* held that a law prohibiting the distribution of literature at a state fair was not impermissible under Free Exercise Clause, even though it prevented a religious group from evangelizing, because the group could distribute literature elsewhere, like in a traditional public forum. *Id.*

[37] Letter from Douglas Laycock and 10 Other Law School Faculty to Governor Janice K. Brewer, February 25, 2014 *available at* http://www.adfmedia.org/files/SB1062LegalProfsLetter.pdf. Additionally, the federal government has operated under RFRA for over 20 years.

[38] *See, e.g.,* Catherine E. Shoichet and Hallmah Abdullah, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062*, CNN, Feb. 26, 2014, http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/.

[39] Letter from Douglas Laycock and 10 Other Law School Faculty to Governor Janice K. Brewer, (February 25, 2014) *available at* http://www.adfmedia.org/files/SB1062LegalProfsLetter.pdf.

[40] *Id.*

consider potential "particularized harm" to third parties. This inherent contradiction can lead to results-driven judging, which opens the door to lopsided religious liberty protection. RFRA's approach of explicitly considering state interests is far more logical and transparent.

2. Building on the previous point, friction between religious liberty and state action will only increase as the growth of government continues. As universities, school boards, cities, and other state entities continue to expand, they will inevitably push against free exercise. Adopting the RFRA approach of balancing religious liberty and compelling government interests as soon as possible will resolve much of this friction.

3. Indiana constitutional law is underdeveloped in the religious liberty context, thus future application of material burden analysis to religious liberty is unpredictable.[41] In contrast, courts across the nation routinely apply RFRA, providing ample precedent for our court's to draw upon.

4. Currently, inmates in Indiana enjoy broader religious liberty protection against state action than law abiding Hoosiers because inmates can invoke RLUIPA, which, like RFRA, requires exemptions to neutral laws of general applicability.[42] All Hoosiers should have the same rights as inmates, at least.

5. Because a state RFRA would be in the control of the legislature and not the judiciary, the exact contours of the statute can be modified at will should unforeseen problems arise. Further, RFRA would be a clear expression to the courts of the legislature's intent: Indiana courts should interpret state statutes in such a way as to avoid infringing religious liberty.

6. The courts asking whether religious liberty "serves the purpose for which it is designed" invites the courts to tell religious persons the purpose of their own religion, which is an illegitimate role for any government branch. The government should not determine the purpose of any person's religious practices.

7. RFRA does not determine which interests the state can and cannot pursue; it merely has the potential to limit the extent to which the state may require a religious individual or organization to participate in furthering these

[41] As of September 21, 2014, only four Indiana Supreme Court cases and seven Indiana Court of Appeals cases have cited *City Chapel*, the Indiana Supreme Court decision that applied material burden analysis to religious liberty for the first time. Many of these decisions cite *City Chapel* for material unrelated to religious liberty. *See, e.g.* Doe v. Town of Plainfield, 893 N.E.2d 1124, 1132 (Ind. Ct. App. 2008) (citing *City Chapel* while considering if the right to enter public parks is a core constitutional value).

[42] 42 U.S.C. § 2000cc-1.

interests.[43] Additionally, RFRA's requirement of least restrictive means can have the effect of checking the expansive growth of the government.

8. A state RFRA is constitutional under the Indiana Constitution: it simply gives religious persons a shield to protect themselves from excessive state action that substantially burdens their religious liberty. A properly drafted state RFRA would not subvert existing constitutional protections.

The future of Indiana's robust religious liberty protection is in the hands of Governor Pence, the General Assembly, and all Hoosiers. A state Religious Freedom Restoration Act is a sure way to secure that future.

Best regards,

KEVIN M. LEROY
J.D. Candidate 2015
Indiana University
Maurer School of Law

847-754-5968
kmleroy@indiana.edu

JOHN M. WESTERCAMP, M.S.(F), J.D.

317-850-1609
jmwestercamp@gmail.com

[43] *See* Ryan T. Anderson, *Kristen Powers Demagogues on Religious Liberty, Again*, THE DAILY SIGNAL, February 26, 2014, http://dailysignal.com/2014/02/26/kirsten-powers-demagogues-religious-liberty/.

APPENDIX A:
FULL TEXT OF THE RELIGIOUS FREEDOM RESTORATION ACT

107 Stat 1488 PL 103–141, Nov. 16, 1993,

Public Law 103-141
103d Congress

An Act
To protect the free exercise of religion

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the 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.

(b) PURPOSES.—The purposes of this Act are—

(1) 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

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes (42 U.S.C.1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) IN GENERAL.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION.—Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Approved November 16, 1993.