



April 16, 2015

Re: Effects of Indiana SB 50 to SB 101 (the Indiana RFRA)

I serve as General Counsel of Liberty Institute. Liberty Institute is the largest law firm dedicated solely to preserving religious liberty in the United States. We are a non-profit, public interest legal organization that provides advice, representation, and education on a pro bono basis. Our clients range from (1) veterans organizations in the defense of memorials containing religious imagery to (2) churches and other faith-based ministries who are threatened with adverse legal action because of their religious beliefs to (3) public school students who want to practice their faith to (4) state and local governments who seek our advice and defense on religious liberty issues. Currently, Liberty Institute is working on over 100 legal matters in over 20 states involving religious liberty issues.

You asked Liberty Institute to review the effects that implementation of Indiana SB 50 would have on Indiana SB 101 (“Indiana RFRA”), with particular attention to whether SB 50 is a substantive change to SB 101 or a mere technical clarification. It is our opinion that SB 50 is a significant and substantial change to SB 101 that, in many respects, gives Hoosiers even less protection for religious freedom than had SB 101 and SB 50 never been passed. In effect, SB 50 removes protections that would have been recognized under Indiana’s Constitution. Not only does SB 50 remove these protections, it is particularly egregious because it explicitly permits criminal prosecution of religious adherents who are simply trying to be faithful to their religious convictions.

As Prof. Doug Laycock’s letter explains, the Indiana Constitution has been interpreted to permit the legislature to “qualify” fundamental rights so long as those rights are not completely eliminated. SB 50 is such a qualification, effectively removing important religious protections from those covered by either Indiana RFRA or the Indiana Constitution. While SB 50 states that it does not “negate any rights available under the Constitution of the State of Indiana,” there is a difference between negating a right and defining the contours of a right, which is what SB 50 appears to do.

SB 50 exempts from Indiana RFRA (and, because it makes a determination of the legislature's view what religious freedom does not cover, from the Indiana Constitution) any ability 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." This is a very broad category of exemptions from the Indiana RFRA. SB 50 provides relief from this broad exemption only to a very narrow group: churches, religious non-profit organizations, a "rabbi, priest, preacher, minister, pastor, or designee of a church or other nonprofit religious organization or society when the individual is engaged in a religious or affiliated educational function of the church or other nonprofit religious organization or society."

This broad exemption from the Indiana RFRA, combined with the limited nature of the relief provided in SB 50, means that, for example, a young woman looking for a college roommate who has sincerely held religious beliefs that she may not live with a man to whom she is not married has no religious liberty protection against prosecution if she refuses to accept a male roommate. In this example, she is not engaged in the religious function of the church, and she is refusing to offer housing on the basis of sex, which removes all protection for her attempts to stay faithful to her religious beliefs.

Because protections for rabbis and ministers are limited to situations in which the person is "engaged in a religious ... function of the church," a rabbi or minister who engages in religious activity outside the operation of the church—for example, by offering counseling to non-church-members during his off time—may be subject to criminal prosecution or civil suit if his counseling, in line with this religious beliefs, is perceived the wrong way.

SB 50 would also permit criminal prosecution of a wedding photographer who believes that active participation in a same-sex wedding would violate her sincerely-held religious beliefs. Prior to SB 50, there was a reasonable argument that the Indiana Constitution would be interpreted to provide religious liberty protection in such situations, but SB 50 is a clear expression of the Indiana legislature's views that such conduct is not to be afforded religious liberty protection—a view the Indiana Supreme Court can adopt.

SB 50 also does not exempt groups or churches that, either for practical reasons or because of their religious beliefs about accepting aid from the state, have not sought tax-exempt status. To the extent SB 50 discriminates against these churches' religious beliefs, it likely violates the Establishment Clause. This could also apply to small groups that, due to lack of necessity or resources, have not incorporated. Incorporating and seeking tax-exempt status requires a financial commitment that many small groups, who often take in no money anyway, do not have. SB 50 would effectively require all religious groups, no matter how small, to incorporate and seek tax-exempt status.

The use of the word “affiliated” in SB 50’s exemption is also very troubling. While most religious schools would be a “nonprofit religious organization[.]” as described in SB 50, qualifying schools with the word “affiliated” indicates that non-affiliated religious schools—that is, religious schools not affiliated with a particular church—are not exempt from SB 50. Were this not the case, the word “affiliated” would be superfluous, and it is a rule of statutory construction that statutes should be interpreted in such a way that no words are superfluous. Under this analysis, independent religious schools are required to hire teachers who do not share the religious beliefs of the school. A Christian school may be forced to hire an atheistic teacher, or a Jewish school may be forced to hire a Christian teacher.

SB 50 also removes any religious freedom protections from those who have religious convictions that bathrooms should be gender segregated. Under the above analysis, any business or even religious schools that are not affiliated with churches may be forced to permit men to use the women’s restrooms without any religious freedom defense against doing so.

Ultimately, Hoosiers would have had stronger religious liberty protections had SB 101 and SB 50 never been passed than they now have with SB 50. This “fix” to the Indiana RFRA eliminates broad protections provided by all other state RFRA and the federal RFRA and, because of Indiana’s constitutional ambiguity, may even reduce constitutional religious liberty protections for Hoosiers.

If you have any further questions, please do not hesitate in contacting me.

Very truly yours,



Jeffrey C. Mateer
General Counsel



Jeff Mateer, J.D.

Jeff Mateer is General Counsel for Liberty Institute. Mr. Mateer joined Liberty Institute in 2010, after 19 years in private litigation practice. Mr. Mateer has represented clients ranging from large international organizations to local businesses, schools, ministries, churches and individuals in complex federal and state court actions involving religious liberty, civil rights, employment, intellectual property and business matters. In private practice, his clients included the National Collegiate Athletic Association (NCAA), Citigroup, CNA, ConAgra Foods, former officers and directors of EDS, Ford Motor Company, Pilgrim's Pride and PNC Bank. He has tried numerous jury and bench trials in both federal and state courts, and has successfully argued before the United States Court of Appeals for the Fifth Circuit and Texas appellate courts.

In addition to having received an A-V rating by Martindale-Hubbell, Mr. Mateer has been honored as a Texas Rising Star and Texas Super Lawyer. He received his undergraduate education at Dickinson College, where he graduated with honors in 1987, and his legal education at Southern Methodist University, where he graduated with honors in 1990. While in law school, he served as an editor of the law review. He is licensed to practice law by the state of Texas and is admitted to practice before all Texas State and Federal District Courts and the United States Court of Appeals for the Second, Fifth, and Ninth Circuits.

Justin Butterfield, J.D.

Justin Butterfield is Senior Counsel and Director of Research and Education for Liberty Institute. He graduated from Harvard Law School in 2007. During his time at Harvard, Mr. Butterfield served as the student coordinator for the Veritas Forum, was a member of the Federalist Society, and was heavily involved with the Harvard Law School Christian Fellowship. He is also a Blackstone Fellow. A native Texan, Mr. Butterfield completed his undergraduate studies at the University of Texas at El Paso where he graduated summa cum laude, with honors, and University Banner Bearer with a bachelor's degree in Electrical Engineering.

In addition to his practice in the area of religious liberty, Mr. Butterfield co-authored two scholarly articles: "The Light of Accountability: Why Partisan Elections Are the Best Method of Judicial Selection," published in *The Advocate*, and "The Parsonage Exemption Deserves Broad Protection," published in the *Texas Review of Law & Politics*.