# Context for the Debate on ‘Religious Freedom’ Measures in Indiana and Arkansas

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By ERIK ECKHOLM 3/31/2015

Gov. Asa Hutchinson of Arkansas appeared set to join Gov. Mike Pence of Indiana in the national debate over religious rights and gay people on Tuesday as the Arkansas legislature passed its own Religious Freedom Restoration Act just a few days after Indiana passed a similar law that has drawn criticism for having the potential to abet discrimination against gay and lesbian couples.

Mr. Pence, in a long and sometimes anguished news conference, said Tuesday that he was working with Indiana lawmakers to devise an amendment to “clarify” that the law does not grant businesses a right to discriminate against anyone. But civil rights groups said the law seemed to have been written to do exactly that — in particular, to protect conservative Christian vendors who decline to provide services to same-sex wedding celebrations. And many of the law’s strongest supporters have openly declared that they hope it will help Christians avoid involvement in same-sex weddings.

The back-and-forth over the measures in Indiana and Arkansas has only deepened the confusion over what the laws would or would not do. Critics describe them as offensive, and a stark example of conservative activism. Supporters describe them as just protection for “religious freedom” — and they note that previous versions of the laws, adopted by Congress in 1993 and by 19 other states since then, attracted bipartisan support.

But in fact, the meaning and potential impacts of these laws have changed over time.

Here is the background needed to keep the debate in context.

**Q. How did these laws originate?**

**A.** Twenty states have now adopted “religious freedom” laws that are largely derived from the Religious Freedom Restoration Act, which was adopted nearly unanimously by Congress in 1993 and signed by President Bill Clinton.

But more recent versions of such laws, like the one in Indiana and the legislation nearing adoption by Arkansas, contain language that broadens the potential impact. For example, both laws apply religious rights to corporations and say that the law can be invoked in private lawsuits, not just when a government agency has taken action said to impinge on a party’s religious beliefs.

The 1993 federal law was narrower in scope. It arose in response to a case in which two members of the Native American Church in Oregon had been fired from their jobs in a drug treatment center after they used peyote, an illegal drug, in a religious ceremony and then the state refused to pay them unemployment benefits. The United States Supreme Court upheld Oregon’s decision not to pay benefits, provoking a bipartisan drive in Congress to pass a law that would deter government actions that impinge upon religious beliefs.

In a subsequent decision, the Supreme Court said the federal law applied only to actions by federal agencies, so many states started adopting similar laws of their own.

The federal and state laws all set up a common structure: When people feel that a “state action,” like a fine or mandate, imposes a severe burden on their religious beliefs, they can go to court, where a judge must determine whether the action is warranted by a “compelling” governmental interest that is being achieved in the least burdensome manner possible.

Over time, civil rights advocates have come to argue that many of these laws are increasingly used not to protect vulnerable religious minorities but to allow some religious groups to impose their views on others. Supporters have argued that reliance on these laws is not an imposition, but rather a form of protection so that religious individuals are not forced to act in ways that violate their beliefs.

**Q. Why have these laws suddenly become so controversial?**

**A.** In short — timing, context and substance.

Initially, these laws were described as a way to protect individuals from harm — to prevent the government from forcing people to violate their beliefs unless there was a sound reason and no good alternative. They continue to be invoked in this manner, often without great controversy: Just this year, the Supreme Court said that federal officials could not prevent a Muslim prisoner from wearing a short beard, since the ban did not serve any overriding governmental interest.

But over time, in the view of many civil rights advocates, the laws were used in lawsuits and court decisions that went beyond the original intent, allowing people to act in the name of religion in ways that impinged on the rights of others. In some cases in the 1990s, for example, landlords cited their Christian beliefs to justify refusing to rent a house to an unmarried heterosexual couple. So groups like the American Civil Liberties Union, which initially supported the laws, became far more wary and more recently have not supported the "religious freedom" proposals unless they include explicit antidiscrimination protections, an approach that was rejected by the Indiana legislature.

In last year's Hobby Lobby case, the Supreme Court also seemed to expand the notion of a "person" who could claim religious burdens, allowing a large, family-owned for-profit corporation to refuse to provide insurance coverage for certain contraceptives that was mandated under the Affordable Care Act.

Now, the rapid spread of same-sex marriage — and the possibility that the Supreme Court will make it the law of the land later this year — has given a new impetus to these laws. Religious conservatives say that if same-sex marriage must exist, those who find it sinful should not be forced to participate in any way. Under laws like the one in Indiana, they say, vendors such as florists, bakers and photographers should be able to refuse to sell their services for same-sex wedding celebrations.

And the latest legislative proposals, like those just passed in Indiana and likely to be adopted this week in Arkansas, incorporate language that seems clearly designed to strengthen the hand of religious businesses to refuse to serve same-sex weddings.

**Q. Is the Indiana law, as some critics have stated and Mr. Pence denies, a "license to discriminate"?**

**A.** Mr. Pence is right when he says there has been exaggeration of the likely effects of the law and misunderstanding of how it works. It does not create an unchecked new right for restaurant owners, for example, to refuse to serve gay men or lesbians. And those who invoke the law to avoid fines or lawsuits must go through a judicial process in which the burden on their beliefs is compared with the state's interest in carrying out a mandate or imposing a fine.

Many of those who pushed for Indiana's law have explicitly said that they hope it will protect vendors who refuse to participate in same-sex wedding ceremonies, helping them avoid actions that according to their beliefs are onerous and sinful. Less clear is how often that might occur, and how often those vendors might win in court.

To civil rights advocates, "religious freedom," in this case, is code for simple discrimination and would not only inconvenience gay and lesbian couples, but also would relegate them to a form of second-class status. Those selling to the public should not be able to turn away customers because of their own private beliefs, these advocates say; the vendor is, after all, selling flowers, and is not required to embrace the beliefs of the customers. These critics ask: How would the public respond if businesses offered religious reasons for refusing to serve interracial couples?

**Q. Are the new laws different from the original federal law and those in other states?**

**A.** Mr. Pence has said that the Indiana law is identical to earlier renditions supported by Mr. Clinton when he was president and Barack Obama when he was a state senator in Illinois.

On Tuesday, Josh Earnest, the White House spokesman, said that the Indiana law was a "significant expansion" of the religious protections in the federal law.

In fact, the bills in both Indiana and Arkansas include provisions that are not in the federal law or most other states' laws, and that could broaden the scope of protection for religious businesses. Both of them say that for-profit corporations that are substantially owned by members of a faith can claim protections under the law. And both of the versions broaden the definition of "state action," stating, in the Indiana legislation, for example, that a person who feels his religious rights are being violated may assert protection under the law "in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding."

This latter clause, a version of which is also in the Arkansas bill, appears to be a response to events in New Mexico in 2013, when a photographer said she would not photograph a same-sex wedding because of her Christian beliefs. The couple sued the photographer under a state antidiscrimination law.

The photographer sought protection under New Mexico's version of a religious protection act, but the State Supreme Court held that it did not apply because the lawsuit did not involve "state action."

So now, in the Indiana and Arkansas legislation, language is included to ensure that parties in private lawsuits or administrative actions can claim a religious basis for their questioned behavior. That is evidence, civil rights groups say, that the new push for "religious freedom" acts is very much about helping vendors discriminate against same-sex couples.

**Q. Is it true that Mr. Clinton and Mr. Obama supported laws like these, as Mr. Pence has claimed?**

**A.** Mr. Clinton signed the federal law in 1993 at a time when the concept had across-the-board support, and was seen as a way to prevent unjustified oppression of religious minorities.

Mr. Obama was among the Illinois state senators who voted, 56 to 0, to adopt a Religious Freedom Restoration Act in 1998.

Nevertheless, Mr. Pence was wrong when he said that the Indiana law was identical to those once supported by Mr. Clinton and Mr. Obama. As noted above, the Indiana law includes new provisions that could broaden its reach, possibly enabling corporations to deflect antidiscrimination rules and providing religious believers with a possible weapon in private suits.

The context is also different today. The role of these laws has been changed over time through lawsuits and court interpretations. The Indiana legislature already rejected a clause saying the new law could not be used to discriminate, and some of the law's supporters openly said they seek to permit denials of service to same-sex couples. In simple terms, the motivations for passing these laws — and their likely applications — have changed.