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Danielle Weatherby

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THE ARKANSAS “MINI-RFRA” IS BAD POLICY

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As SCOTUS prepares to hear oral arguments on the constitutionality of same-sex marriage later this month, the State of Arkansas braces itself for what could be a head-on collision between civil rights and religious freedom.<sup>1</sup> Against this backdrop, on the last day of March, the Arkansas Legislature passed House Bill 1228, an expansive religious freedom law that has been the topic of a heated public debate.<sup>2</sup> With several civil rights organizations, mega-corporations like Walmart and Target, and even his own son's signed petition urging him to veto 1228, Governor Asa Hutchinson sent it back to the Legislature to amend the bill to mirror its Federal counterpart.<sup>3</sup> On April 2, Arkansas dodged a bullet when Governor Hutchinson signed a new bill that mirrored its Federal parent.<sup>4</sup>

Although safeguarding the free speech and religious exercise guarantees inherent in the First Amendment are exceptionally important, the First Amendment was never intended to condone discrimination under the guise of religious freedom. The application of RFRA laws like HB 1228 might do just that.

This article submits two main arguments.<sup>5</sup> First, it posits that the passage of a State “mini-RFRA” bill intensifies the necessity for an amendment to the Arkansas Civil Rights Act to provide Statewide prohibitions against discrimination in housing, employment, and places of public accommodation on the bases of sexual orientation, gender identity, and gender expression. Without these much-needed protections, an Arkansas RFRA has the potential to become an omnipotent, unbridled legal tyrant, securing religious freedoms at the sacrifice of civil liberties. Second, this article argues that the passage of mini-RFRAs is bad policy from both a state and national perspective. While the “everyone else is doing it, so we should too” argument has a nice ring to it, Arkansas' mini-RFRA will add to a patchwork set of robust religious freedom laws.<sup>6</sup> Collectively, these laws threaten to produce a new wave of separate-but-equal - this time affecting a powerfully underrepresented class, the LGBT community.

The text of Arkansas' newly-enacted RFRA is not unconstitutional on its face.<sup>7</sup> In fact, insofar as it mimics the reinstatement of strict scrutiny review for challenges to government regulations that are alleged to substantially burden religious exercise, it is consistent with its Federal counterpart.<sup>8</sup> But, other state RFRAs have key provisions that extend far beyond their parent. For example, some significantly dilute the *substantial burden* requirement (requiring only that the challenged law “burdens” or “restricts” religious exercise).<sup>9</sup> Some mini-RFRAs permit suits between private parties.<sup>10</sup> Some envision the practice of religion to extend to any act or inaction that is tangentially related to a person's religious beliefs.<sup>11</sup> And some even add a “clear and convincing” evidence requirement to satisfy strict scrutiny, making the government's burden of justifying the challenged law even more onerous.<sup>12</sup> In Arkansas, there is one final troubling departure: Arkansas' mini-RFRA faces no opposing anti-discrimination law. While the Eureka Springs Non-Discrimination Ordinance<sup>13</sup> prohibits discrimination on the basis of sexual

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orientation, gender identity, and gender expression, the rest of the State is left exposed, with no law protecting the LGBT community from discrimination.

Perhaps not surprisingly, the tension between religious exercise and anti-discrimination laws often plays out in the courtroom. The New Mexico Supreme Court's 2006 decision in *Elane Photography v. Willock* provides a prime illustration.<sup>14</sup> When a New Mexico photography company refused to photograph a patron's same-sex commitment ceremony in the name of religious freedom, the patron sued, claiming that Elane Photography violated New Mexico Human Rights Law's prohibition against discrimination on the basis of sexual orientation. Ultimately, civil liberties prevailed, trumping Elane Photography's invocation of the First Amendment.<sup>15</sup>

Although New Mexico did not have a RFRA on the books at the time, the conflict in *Elane Photography* foreshadows the potential real-life impact of an overly protective RFRA like 1228. With all of the cards stacked in favor of religious freedom and no express anti-discrimination protections for same-sex patrons, a court considering the same case under an overly-expansive mini-RFRA may very well have found in favor of Elane Photography. *Elane Photography* and other cases like it forecast a dismal outcome for civil rights when those rights become entangled with religious exercise claims in states armed with unbridled RFRA's like 1228. In Arkansas, the only way to strike an appropriate balance between religious exercise and civil rights, and to keep RFRA in check, is to expressly prohibit discrimination on the bases of sexual orientation, gender identity and gender expression. Otherwise, Arkansas' mini-RFRA could provide a pernicious shield in discrimination suits.

Second, the passage of these overly-robust mini-RFRAs is bad policy because they add to the increasing patchwork of State RFRA laws that, when taken in the aggregate, could lead to a nationwide system of condoned discrimination under the guise of religious freedom. Arkansas is the twenty-first state to pass a mini-RFRA law.<sup>16</sup> As courts continue to invalidate bans on same-sex marriage and municipalities adopt LGBT-protective anti-discrimination laws, states continue to push back with the adoption of robust religious freedom laws.

With the rapid proliferation of these expansive RFRA's, we have begun to see anecdotal evidence of the tension between religious freedom and civil rights. Last year, a Michigan pediatrician refused to treat a newborn baby of a same-sex couple, claiming that she prayed on it and felt that, due to her religious objections to the parents' marriage, she would be unable to provide competent treatment to the child.<sup>17</sup> Pharmacists are refusing to provide the ““morning after” pill to patients, claiming that the pill is adverse to their religious beliefs about abortion.<sup>18</sup> Even Alabama Chief Justice Roy S. Moore (the same judge who refused to remove the Ten Commandments from the courthouse) has defied precedent declaring Alabama's ban on same-sex marriage unconstitutional.<sup>19</sup> Judge Moore's order prohibiting clerks from providing marriage certificates to same-sex couples is reminiscent of Governor Orval Faubus' infamous defiance of the Supreme Court's unanimous decision dictating desegregation in the Little Rock School District. These episodes forecast a narrative of RFRA-protected discrimination, culminating in what could look like a new wave of separate-but-equal for the LGBT community.

So, as individuals and businesses refuse service in the name of religious freedom, we regress. After all, a wedding photographer's refusal to serve a patron simply because of her sexual orientation is not unlike a restaurant's refusal to serve lunch to African-American college students in 1960.<sup>20</sup> While religious freedom is indeed important, we cannot lose sight of a critical legal distinction: offensiveness to another's personal lifestyle choices does not amount to a true restriction or burden on an individual's right to practice his or her own religion. With a RFRA now on the books, Arkansas must tread cautiously, as important civil rights are hanging in the balance.

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Footnotes

- 1 Laura Meckler & Ana Campoy, “Arkansas Governor Calls for Changes to ‘Religious Freedom’ Bill,” (April 1, 2015), <http://www.wsj.com/articles/arkansas-governor-calls-for-changes-to-religiousfreedom-bill-1427904740>.
- 2 HB 1228, 90th Gen. Assemb., Reg. Sess. (AR. 2015); *see also* Mark Berman, “Arkansas Lawmakers Approve Religious Liberty Bill Despite Firestorm Over Indiana Law,” (March 31, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/03/31/after-firestorm-over-indianas-religious-law-is-arkansas-next/>.
- 3 *Supra*, note 1.
- 4 Ana Campoy, “Arkansas Gov. Signs Narrower Religious-Liberty Bill After Outcry,” (April 2, 2015), <http://www.wsj.com/articles/arkansas-lawmakerspass-narrower-religious-liberty-bill-after-outcry-1428006065>.
- 5 While it is extremely important that the legal scholarship engages in a robust discourse about the interaction between state RFRAs and Title VII, the way in which state RFRAs mimic or depart from the Federal RFRA, and the way in which RFRAs safeguard important First Amendment rights, I will save these discussions for another day.
- 6 *See* Ala. Const. Amend. No. 622, [Ariz. Rev. Stat. §§ 41-1493 to - 1493.02](#), Conn. Gen. State § 52-571b, [Fla. Stat. Ann. §§ 761.01-761.05](#), 2015 GA S.B. 129, [Idaho Code §§ 73-401 - 73-404](#), 775 Ill. Comp. Stat. 35/1-99, 2015 IN S.B. 101, [K.S.A. 60-5301](#), LA. R.S. § 5231-5242, 2015 MI S.B. 4, [Miss. Code Ann. § 11-61-1](#), [Mo. Ann. Stat. §§ 1.302 -1.307](#), [N.M. Stat. Ann. § 28-22-1 - 28-22-5](#), [51 Okla. Stat. § § 251 - 258](#), 71 P.S. §§ 2401 - 2407, [R.I. Gen. Laws §§ 42-80.1-1 through 42-80.4](#), [S.C. Code Ann. §§ 1-32-10 through 1-32-60](#), T.C.A. § 4-21-1101, [Tex. Civ. Prac. & Rem. Code Ann. § 110.001](#), [Va. Code Ann. § 57-2.02](#). 2015 WY H.B. 83.
- 7 2015 AR S.B. 975.
- 8 [42 U.S. Code § 2000bb-1](#).
- 9 Ala. Const. Amend. No. 622; CO H.B. 15-1171; [N.M. Stat. Ann. §§ 28-22-1 through 28-22-5](#); [R.I. Gen. Laws §§ 42-80.1-1 through 42-80.1-4](#).
- 10 2015 Ind. S.B. 101.
- 11 *See, e.g.*, 2015 IN S.B. 101.
- 12 2015 IN S.B. 101; [K.S.A. 60-5301](#); [KRS § 446.350](#); [51 Okla. Stat. § § 251 to 258](#); 71 P.S. §§ 2401 to -2407 (requiring proof by a preponderance of the evidence); T.C.A. § 4-21-1101; [Va. Code Ann. § 57-2.02](#).
- 13 Eureka Springs City Ordinance 2223 (Feb. 9, 2015).
- 14 [309 P.3d 53 \(2013\)](#).
- 15 *Id.*
- 16 *See* <http://blog.constitutioncenter.org/2015/04/explaining-the-indianarfra-controversy-in-five-minutes/>.
- 17 Tresa Baldas, “Pediatrician Won’t Treat Baby with 2 Moms,” Detroit Free Press, (February 19, 2015), <http://www.usatoday.com/story/news/nation/2015/02/18/doctor-discriminationbaby/23642091/>.
- 18 Mary Wisniewski, “Court: Illinois can’t force pharmacists to give ‘morning after’ pill,” (September 22, 2012), [http://usnews.nbcnews.com/\\_news/2012/09/22/14026790-court-illinois-cantforce-pharmacists-to-give-morning-after-pill?lite](http://usnews.nbcnews.com/_news/2012/09/22/14026790-court-illinois-cantforce-pharmacists-to-give-morning-after-pill?lite); *see also* “Federal Court Rules Pharmacists Cannot Be Forced to Sell ‘Morning After’ Pill,” (February 23, 2012), <http://www.outsidethebeltway.com/federal-court-rules-pharmacists-cannot-be-forced-to-sell-morning-after-pill/>.

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- 19 Alan Blinder, “Alabama Judge Defies Gay Marriage Law” (February 8, 2015), <http://www.nytimes.com/2015/02/09/us/gay-marriage-set-to-begin-in-alabama-amid-protest.html>.
- 20 See “Freedom Struggle, Sitting for Justice: Woolworth’s Lunch Counter” Smithsonian National Museum of American History, <http://americanhistory.si.edu/brown/history/6-legacy/freedom-struggle-2.html>.

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