**Religious Freedom Restoration Act: Legislative Hearing**

**BACKGROUND**  
When it comes to religion, many people are just plain wrong about what protections they have and what the U.S. Constitution actually says about church and state. For example, many people erroneously believe that the phrase separation of church and state is enshrined in either the Declaration of Independence and/or the US Constitution. It is found in neither. Instead, the phrase was included in a letter to the Danbury Baptists in which Thomas Jefferson advocated for “a wall of separation between Church & State.” This letter is not a legal document nor did it express the wishes of all the Founders- many of whom did not want to see a wall, let alone a high wall of separation between church and state. The U.S. Constitution, however, does include an establishment clause, which reads: “Congress shall make no law respecting an establishment of religion…” that has been interpreted by the Supreme Court to mean that government cannot prefer one religion over another or religion over nonreligion.

Conversely, many religious persons believe they have free reign to practice their religion without restriction. This again is a misconception. The other clause in the First Amendment, the free exercise clause, states that “Congress shall make no law… prohibiting the free exercise thereof.” Although no right is absolute-saying fire in a crowded theatre as an example when free speech is limited-the Supreme Court has limited the free exercise of religion more than most other rights. The Court sees a distinction between faith and practice and while protecting the former, is willing to limit the latter. For example, the Court has upheld bans on polygamy and mandatory vaccinations to attend public school. In the case of *Oregon v. Smith (1988),* two Native Americans who worked as counselors for a private drug rehabilitation organization, ingested peyote, a powerful hallucinogen, as part of the religious ceremonies as member of their Native American church. As a result of this conduct, they were fired as counselors. The fired counselors sued, claiming Oregon’s state drug laws that prohibited the consumption of illegal drugs for sacramental religious uses violated the Free Exercise Clause of the US Constitution. The Supreme Court observed that the Court has never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that government is free to regulate. They elaborated that allowing exceptions to every state law or regulation affecting religion “would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind.” Justice Scalia cited examples of compulsory military service, payment of taxes, vaccination requirements, and child-neglect laws. The Court once again saw a distinction between belief and practice.

Religious people felt like their rights and religious beliefs were under attack (see attached article by Jordan Hall) and pushed for protections of the faith. Consequently, a campaign was begun to protect religious practice culminating in the enacting of the Religious Freedom Restoration Act (RFRA) which was passed by a Republican Congress and signed by the a Democratic President (Bill Clinton). This piece of bipartisan legislation’s aim was protecting religious practices from unnecessary intrusion by the government. Although uncontroversial when enacted, it quickly became a lightning rod when Hobby Lobby successfully sued the federal government arguing that the Affordable Care Act’s (Obamacare) mandate of employer health coverage that included contraceptives and birth control violated the religious conscience of the owners and constituted an undue burden. In essence, the Supreme Court said business owners could apply their beliefs to their business practices.

This culture war debate was amplified as states began legalizing gay marriage, the Supreme Court decided in *Obergefell v. Hodges* (2015) that required states to license and recognize same-sex marriage, and states revised their civil rights and public accommodation laws that extended anti-discrimination protections from traditional race and gender to also include sexual orientation. These public accommodation protections require private businesses to serve gays and lesbians and have been used to force religious bakeries, photographers, and florists to provide their services for gay weddings.

Although the United States Congress passed the RFRA, under our federal system it only applies to federal laws, not state civil rights acts. Therefore, a handful of states including Indiana has begun to pass RFRAs that protect business and individuals from state laws that violate their religious conscience. It is highly probably that if Colorado had a RFRA that the Masterpiece Bakery owner would win his case.

When does tolerance become intolerance? How do we adhere to the will of the majority but ensure protections of minority rights? In an age of divisive politics, how do we achieve the proper balance between religious freedom and a protected class?

***Facebook Messenger Response From Conservative Lawyer Regarding if Montana has passed RFRA:***

* The short answer is no. There was an attempt in 2015 to place on the ballot a measure that would require a "compelling government interest" standard before a person's religious freedom could be burdened. That measure failed in committee. However, current Montana court precedent uses that standard for first amendment cases - not limited to just religion, but also speech and press. So the measure would in some ways simply codify existing practice
* Finally, the current trend in RFRA cases is reconciling religious freedom with other issues such as non-discrimination - well really, forcing private actors to suspend their views to ensure others can engage them in commerce - as well as the odd contraception case. The non-discrimination does not fully apply in Montana since our non-discrimination statute does not cover orientation and identity, so bakers in Montana can refuse to make a cake.
* Of course, in absence of a statute this is all up to the whims of our supreme court, which as my research at MPI has shown does not acknowledge its own prior rulings and is more likely than any other jurisdiction in the country to reach an outcome based on politics not the law. (Even if we had a statute, or constitutional provision, I am skeptical our court would follow such things because they are granted divine wisdom from the almighty church of the plaintiff's bar).

***Relevant Law at Issue:***

* **Summarized Version of the 1993 Federal Religious Freedom Restoration Act**
* State Religious Freedom Restoration Act of 1993 - Prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.
* Declares that: (1) nothing in this Act shall be construed to interpret the clause of the First Amendment to the Constitution prohibiting the establishment of religion; (2) the granting of government funding, benefits, or exemptions, to the extent permissible under that clause, shall not constitute a violation of this Act; and (3) as used in this Act, "granting" does not include the denial of government funding, benefits, or exemptions.
* **Colorado’s Public Accommodation Law**
* no “business engaged in any sales to the public” may “refuse...to an individual or a group, because of sexual orientation” the “full and equal enjoyment” of their goods and services.

***Procedure and Purpose:***

* The following simulation will be a quasi-state legislative committee hearing. The procedures we will be following are modified from what one would see if at the state legislature in Helena and attending a state senate committee hearing.
* The purpose of this specific state senate committee hearing will be to solicit public comment about whether or not Montana ought to adopt a Religious Freedom Restoration Act proposed in 2015 (in the state House of Representatives) which was similar to the federal version adopted in 1993.

***Task:***

* Provide public comment on what to do with aforementioned proposed law of 2015 (keep as is, modify, or eliminate) or ask clarifying questions to determine what action is to be taken.

SENATE BILL NO. 15

INTRODUCED BY J. Allen

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO THE FREE EXERCISE OF RELIGION; RECOGNIZING THE FREE EXERCISE OF RELIGION AS A FUNDAMENTAL RIGHT; RESTORING THE USE OF THE COMPELLING GOVERNMENTAL INTEREST TEST TO DECISIONS IN LEGAL CASES REGARDING THE FREE EXERCISE OF RELIGION; PROVIDING THAT THE PROPOSED ACT BE SUBMITTED TO THE QUALIFIED ELECTORS OF MONTANA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

     WHEREAS, in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court significantly curtailed the requirement that laws and other state action burdening the free exercise of religion be justified by a compelling interest; and

     WHEREAS, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), interprets the Religious Freedom Restoration Act of 1993, which requires that federal laws and other actions by the federal government burdening the free exercise of religion must be justified by a compelling governmental interest; and

     WHEREAS, the Religious Freedom Restoration Act of 1993 was passed in response to the Employment Division v. Smith decision and only applies to federal laws; and

     WHEREAS, following the Gonzales decision favorably applying the Religious Freedom Restoration Act of 1993, many states have responded by passing laws similar to this act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

      NEW SECTION.  **Section 1.  Short title.** [This act] may be cited as the "Montana Religious Freedom Restoration Act".

      NEW SECTION.  **Section 2.  Legislative findings.** The legislature finds that:

     (1) the framers of the United States constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the first amendment to the United States constitution;

     (2) the framers of the Montana constitution, recognizing free exercise of religion as a fundamental right, secured its protection in the Montana constitution;

     (3) laws and other state action that are neutral toward religion may burden the exercise of religion as surely as laws intended to interfere with religious exercise;

     (4) state action should not burden exercise of religion without compelling justification;

     (5) prior to 1990, laws and other state action burdening exercise of religion had to be justified by a compelling interest; and

     (6) the compelling interest test set forth in prior federal court rulings and [sections 1 through 5] is a workable test and strikes a sensible balance between religious liberty and competing governmental interests.

      NEW SECTION.  **Section 3.  Purpose.** The purpose of [sections 1 through 5] is:

     (1) to restore the compelling interest test and to guarantee its application in all cases where the exercise of religion is burdened by state action; and

     (2) to provide a claim or defense to a person or persons whose exercise of religion is burdened by state action.

      NEW SECTION.  **Section 4.  Definitions.** As used in [sections 1 through 5], the following definitions apply:

     (1) "Burden" means any action that directly or indirectly constrains, inhibits, curtails, or denies the exercise of religion by any person or compels any action contrary to a person's exercise of religion and includes but is not limited to withholding of benefits, assessment of criminal, civil, or administrative penalties, or exclusion from governmental programs or access to governmental facilities.

     (2) "Compelling governmental interest" means a governmental interest of the highest order that cannot otherwise be achieved without burdening the exercise of religion.

     (3) "Exercise of religion" means the practice or observance of religion. The term includes but is not limited to the ability to act or refuse to act in a manner substantially motivated by one's sincerely held religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief.

     (4) "Person" means any individual, association, partnership, corporation, church, religious institution, estate, trust, foundation, or other legal entity.

     (5) "State action" means the implementation or application of any law, including but not limited to state and local laws, ordinances, rules, regulations, and policies, whether statutory or otherwise, or other action by the state or a political subdivision and a local government, municipality, instrumentality, or public official authorized by law in the state of Montana.

      NEW SECTION.  **Section 5.  Free exercise of religion protected.** (1) State action may not burden a person's right to the exercise of religion, even if the burden results from a rule of general applicability, unless it is demonstrated that applying the burden to that person's exercise of religion:

     (a) is essential to further a compelling governmental interest; and

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

     (2) A person whose exercise of religion has been burdened or is likely to be burdened in violation of [sections 1 through 5] may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state of Montana or one of its political subdivisions is a party to the proceeding. The person asserting such a claim or defense may obtain appropriate relief, including relief against the state of Montana or its political subdivisions. Appropriate relief includes but is not limited to injunctive relief, declaratory relief, compensatory damages, and costs and attorney fees.

      NEW SECTION.  **Section 6.  Codification instruction.** [Sections 1 through 5] are intended to be codified as an integral part of Title 27, and the provisions of Title 27 apply to [sections 1 through 5].

      NEW SECTION.  **Section 7.  Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.  
  
  
**How the hearing will work:**

1. You will be sign up to represent a “stakeholder” (interest group, public interest institute, etc,) or to play the role of a state senator.

2. The hearing will be opened by the committee chair (**each Senator must have a placard announcing who they are and what political party they represent**) who will announce an introduction such as:

**“Welcome. The Montana Senate public comment hearing on the Religious Freedom Restoration Act will come to order. Today we will hear public comment on the proposed Religious Freedom Restoration law.**

3. The chair will then introduce the bill’s sponsor who will give a brief overview and description of the proposed law **and** outlining its necessity.

4. After the bill is discussed the chair will open the floor for testimony and explain the time constraints each witness will be obligated to follow:

**“Each person testifying will have a maximum of six minutes for a statement followed by questions from this committee. Please introduce yourself, first and last name for the minutes, who you represent and what your organization does, and whether you are a proponent or opponent of the proposed policy.**

**Anyone that wishes to speak on this policy please make a line behind the podium or go to the podium when it is open  
  
You may begin... ”**

5. Statements/Testimony from proponents and opponents will ensure. Each testifier will be a “stakeholder” that is vested in the outcome of the proposed law.

* Each speaker will need to introduce themselves and a brief description of the interest group, public interest institute, etc they represent
* Each speaker will have up to 5 minutes to deliver a statement. The statement should work to convince the U.S. Senators to vote keep as is, modify, or eliminate the school policy by stating reasons for or against the current policy, using personal experience or factual evidence pertaining to United States.
* The first 4 minutes will be under a civility rule (uninterrupted talk)

**caveat: If speech is done prior to the 4-minute rule; the speaker can announce:**

**“that concludes my prepared statements, I welcome any questions regarding my testimony**

* After the 4 minutes of uninterrupted talk or whatever remaining of that time is not utilized during the statement period, committee members will pepper the speakers with questions clarifying statements and getting the requisite information to make an informed vote.

**caveat: If state senators**

6. After the first stakeholder presents his/her statement and is questioned, all other stakeholders will present.

7. After all interest group lobbyists from the class have presented, the committee will open up to the **audience** to make statements themselves regarding their feelings concerning the policy.

8. The chairperson calls discussion of the members to express their opinion for and/or against the testimony presented to encourage fellow members to vote a specific way. After five minutes (maximum) the chair should call for a motion to adopt, eliminate or alter the proposed policy. The committee votes on recommendations and decides the fate of the policy by passing the policy out of committee to the full board with the aforementioned recommendation and for final approval or to keep the policy in committee for further discussion/work.

***Participants:***

* **U.S. Senators on the Judiciary Committee**
* Nicolas Trevino, Committee Chair
* Will Steinbeisser, Committee Member (Democrat)
* James Allen, Committee Member (Republican/Sponsor)
* **Proponents**
* Hannah Evans, Representing:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Cooper McGlothlin, Representing:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Ashlynn Kessel, Representing:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* **Opponents**
* Ximena Rosas, Representing:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Shea Roberts, Representing:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Autumn Davidson, Representing:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**U.S. Senator Group Preparation:**

* Read the proposal carefully and discuss it amongst yourselves.
* Choose the party and state each Senator will represent.
* Choose a committee chairperson from the majority party who will run the hearing
* Research the policy. Be fluent in its merits and criticism. Recognize other alternatives to the policy proposal. In essence, gain some understanding of what the various positions on the policy proposal might be.
* Look to what the courts have said regarding the law or cases that regard issues that would pertain to the law
* Create questions for the stakeholders and other speakers through questions that are: purely informative, designed to point out strengths and weakness in the arguments presented, or to show support for or against a particular position.
* ***Remember, your job should not to be adversarial but to ask clarifying and hypothetical questions to make an informed decision and justifying it to your constituents***

**Stakeholders Preparation:**

* Consider the following when researching on what to present regarding the proposed law:
* Who the members of your interest group are, what experience your members might have with healthcare, and how they might feel about the Medicare for all proposal.
* Discuss the policy proposal from the group’s perspective- how do they think and feel about this policy?
* Does the group have any concerns about the policy proposal-whether it’s strong enough, or overreaching, or effective, or unconstitutional?
* Perform the following
* Decide what your interest group, public interest institute, etc wants the U.S. Senators to do-pass the policy proposal, reject the proposal, or rewrite the proposal. First, you should list the primary arguments in favor of their position and draft a short statement and list key points to be made during this time.
* State reasons for or against the current policy, using personal experience or factual evidence pertaining to United States.
* Generate a list of questions the senators might ask, and consider responses to those questions.

**RFRA State Senate Public Hearing Grading Rubric  
  
DIRECTIONS: Read through each category and its criteria***. Complete either or both columns to give yourself an accurate grade.*   
  
In the LEFT column: Place a check plus next to those you completed in an exceptional manner, a check plus/check mark if it was only completed well, a check mark next to the criteria in which you completed okay, a check mark/check minus if it was completed okay but not great, a and a check minus that you completed but not very well, and place an X next to the criteria not completed at all.   
  
In the RIGHT column: Place the appropriate grade in the space to the immediate left of EACH criteria required by determining those areas you performed or were lacking and based upon the point value listed. Place a N/A or “not applicable next to any criterion not required for your specific role. Average the points together in place that score in the “your estimate” blank.   
 ***\*\*\*Remember, a perfect grade should reflect perfect work and only be used when the work done had no deficiencies & could not have been performed any better***.\*\*

**YOUR GRADE**

* **PREPARATION AND RESEARCH**  **\_\_\_\_\_\_\_\_\_/20**

\_\_\_\_\_ \_\_\_\_\_Fulfilled role as outlined in “preparation” section

\_\_\_\_\_ \_\_\_\_\_Researched information on topic to be successful in assigned role

\_\_\_\_\_ \_\_\_\_\_Gathered necessary information to be knowledgeable in proposed law

\_\_\_\_\_ \_\_\_\_\_Properly used class time to complete project

\_\_\_\_\_ \_\_\_\_\_Put in multiple hours outside of class

\_\_\_\_\_ \_\_\_\_\_Spent necessary time on project to be effective in assigned role

* **RESPONSIBLE DRESS AND BEHAVIOR DURING SIMULATION \_\_\_\_\_\_\_\_\_/10**

\_\_\_\_\_ \_\_\_\_\_Professional, and Attentively followed proceedings (taking notes if a Senator)

\_\_\_\_\_ \_\_\_\_\_Looked and Acted like a Senator, Lobbyist, or person testifying in front of the US Congress

\_\_\_\_\_ \_\_\_\_\_Giggling kept to a minimum and did not use inappropriate language

\_\_\_\_\_ \_\_\_\_\_Was Respectful to Peers

\_\_\_\_\_ \_\_\_\_\_Dressed up for a business presentation or interview not for a night on the town

\_\_\_\_\_ \_\_\_\_\_No tights or yoga pants, Uggs, boots, Doc Martins, tennis shoes, etc.

\_\_\_\_\_ \_\_\_\_\_Wore a tie and colored socks if a guy/Dress pants or a business type dress/skirt if female

* **CONTENT COVERED** **\_\_\_\_\_\_\_\_\_/15**

\_\_\_\_\_ \_\_\_\_\_Explained the bill’s background and/or effect of bill as you/your interest group sees it

\_\_\_\_\_ \_\_\_\_Clearly outlined why this bill is necessary/unnecessary & what problem it purports to solve/problems it causes

\_\_\_\_\_ \_\_\_\_\_Included criticism and attributes of proposal

\_\_\_\_\_ \_\_\_\_\_Arguments generated employed insight of the issue and differing perspectives

\_\_\_\_\_ \_\_\_\_\_Cited verifiable facts and included citation of where they came from

\_\_\_\_\_ \_\_\_\_\_Got material across in a way that was informative and easily understood

* **POISE AND PRESENTATION** **\_\_\_\_\_\_\_\_\_/10**

\_\_\_\_\_ \_\_\_\_\_Made eye contact

\_\_\_\_\_ \_\_\_\_\_Loud enough for everyone to hear, even the old lady in the back of the room  
 \_\_\_\_\_ \_\_\_\_\_Used inflection of voice during presentation/questioning

\_\_\_\_\_ \_\_\_\_\_Had pleasant and audible tone of voice

\_\_\_\_\_ \_\_\_\_\_Avoided reading as much as possible

\_\_\_\_\_ \_\_\_\_\_Used time effectively/**NO** **DEAD TIME**

* **PERSUASIVENESS AND PERFORMANCE** **\_\_\_\_\_\_\_\_\_/20**

\_\_\_\_\_ \_\_\_\_\_Presentation was dynamic and had interesting elements to draw attention and wasn’t boring, dull, or blah

\_\_\_\_\_ \_\_\_\_\_Clear arguments and position on the bill presented

\_\_\_\_\_ \_\_\_\_\_Arguments Utilized Logos, Pathos and-if necessary-Anecdotes

\_\_\_\_\_ \_\_\_\_\_Arguments AVOIDED *ad hominem* Attacks

\_\_\_\_\_ \_\_\_\_\_Performed to the best of your abilities

* **ASKING/ANSWERING QUESTIONS** **\_\_\_\_\_\_\_\_\_/15**

\_\_\_\_\_ \_\_\_\_\_Showed ability to think on feet by using questions to your advantage and weaving questions into arguments \_\_\_\_\_ \_\_\_\_\_Cited history, discussed facts or data, and used that knowledge to your advantage

\_\_\_\_\_ \_\_\_\_\_Had clear main arguments that showed a strong grasp of principles involved

***OR***

\_\_\_\_\_ \_\_\_\_\_Questions demonstrated a strong grasp of the RFRA, its history and its significance

\_\_\_\_\_ \_\_\_\_\_Questions concerned the meaning and application of the RFRA

\_\_\_\_\_ \_\_\_\_\_Utilized ***clarification*** questions to gain information decide the case and **hypotheticals** for long-term effect of policy

\_\_\_\_\_ \_\_\_\_\_Was a Frequent Participant and Didn’t simply echo the thoughts of others or make irrelevant comments

* **REVIEW/REFLECTION \_\_\_\_\_\_\_\_\_/10**

\_\_\_\_\_ \_\_\_\_\_Had a positive Attitude during Simulation and Played Well with Others

\_\_\_\_\_ \_\_\_\_\_Was an attribute, not detriment to this Simulation

\_\_\_\_\_ \_\_\_\_\_Did not just give yourself 100% in each section; used ½ points \_\_\_\_\_ \_\_\_\_\_Read and followed direction When Completing Rubric: Placed the appropriate mark next to EACH category  
 \_\_\_\_\_ \_\_\_\_\_People had positive comments about my performance  
 \_\_\_\_\_ \_\_\_\_\_Spent necessary time filling out Notecard and Reflection Responses   
 \_\_\_\_\_ \_\_\_\_\_Was an avid participant in post-simulation roundtable

**TOTAL\_\_\_\_\_\_\_\_\_\_\_/100  
REFLECTION QUESTIONS**

**QUESTION #1.** OVERALL PERFORMANCE:How would you rate your preparation, knowledge and understanding of the issue, and performance in regards to your prior performances and your peers? Did the rubric give you the correct grade? Explain. If the overall score determined through the rubric is different from the grade you believe you deserve explain why and the grade you believe is warranted.

**QUESTION #2.** What were the best arguments made on both sides and who made the arguments? Why did you find those arguments persuasive?

**QUESTION #3.** When you heard about Medicare For All, were you for or against its adoption? Did those opinions change? If so, how and by whom (maybe not even a participant in this simulation)? What are your thoughts regarding the policy now-for it, against it, or for it with alterations such as...?

**QUESTION #4.** What were the 3 most important concepts or ideas learned through this simulation (either in your research or through the deliberation). List and describe those concepts.

**QUESTION #5.** How would you rate the simulation (1-10)? What can be done to improve the process to make it more meaningful? What can be done to make the rubric better (for example, is point value/score for this activity, criterion required, were the point values in each section reasonable)? What questions do you still have regarding the focus issue or essential questions?