



February 10, 2016

Delegate Tim Armstead
Speaker of the House of Delegates
Room 228M, Building 1
State Capitol Complex
Charleston, WV 25305

Re: Oppose HB 4012, a harmful RFRA bill that would allow discrimination in West Virginia.

Dear Delegates:

On behalf of its West Virginia members and supporters, Americans United for Separation of Church and State writes to express our opposition to HB 4012, the West Virginia Religious Freedom Restoration Act (RFRA).

Freedom of religion is a fundamental American value. It means that we are all free to believe or not as we see fit, but it does not mean that individuals or businesses can use religion as a justification for denying the rights of others. Unfortunately, HB 4012 could allow individuals—and even for-profit corporations—to discriminate, deny women healthcare, and otherwise harm others in the name of religion. Accordingly, we urge you to oppose this bill.

HB 4012 Would Apply to Every Current and Future Law in West Virginia

HB 4012 would create a potential religious exception to *every single existing and future state and local law* in West Virginia, including criminal laws, such as laws against child abuse and domestic violence; laws protecting public health; and nondiscrimination laws, including local LGBT-inclusive nondiscrimination ordinances already in place in cities like Charleston, Huntington, and Morgantown, West Virginia. HB 4012 would introduce uncertainty into and invite abuse of all of our laws. And it would open the door to costly lawsuits challenging all of our laws.

HB 4012 Could Allow Religion to Be Used to Discriminate and Otherwise Harm Others

HB 4012 is similar to—though even more extreme than—the federal RFRA, and passage of the bill would introduce the same, if not greater, dangers in West Virginia as the federal RFRA has created on the federal level.

Although both progressives and conservatives supported the federal RFRA when it was enacted in 1993, much has changed in the ensuing two decades. In the 1990s, the broad coalition supporting RFRA saw it as a way to protect religious liberty after the Supreme Court weakened constitutional

protections in *Employment Division v. Smith*.¹ Since then, RFRA has been exploited to justify discrimination and other harms to third parties, and courts have interpreted the law in ways that its sponsors never intended.² RFRA has been misused and misinterpreted so often that many of RFRA's original supporters—including us—now oppose enactment of these laws in the states without significant modifications.

On the federal level, RFRA is currently being used to allow religious organizations to ignore federal employment discrimination laws³ and deny women health insurance coverage.⁴ We have also seen efforts to use RFRA to refuse counseling to patients in same-sex relationships;⁵ avoid ethics investigations;⁶ obstruct criminal investigations;⁷ shield religious organizations from bankruptcy and financial laws, in the process denying compensation to victims of sexual abuse;⁸ and thwart access to health clinics.⁹

In states that have RFRA similar to HB 4012, individuals and corporations have also invoked the laws to trump nondiscrimination laws,¹⁰ and have attempted to use it to avoid licensing requirements¹¹ and resist lawsuits over sexual abuse by clergy members.¹²

¹ 494 U.S. 872 (1990).

² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that a large, for-profit corporation could use RFRA to deny its employees insurance coverage for contraception).

³ Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007), <http://www.usdog.gov/fbci/effect-rfra.pdf> (The policy allows religious organizations to take federal contracts but ignore the statutorily adopted hiring discrimination protections that would otherwise attach to those funds).

⁴ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785.

⁵ *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012) (arguing that offering counseling to individuals in a same-sex relationship burdened a counselor's religious exercise).

⁶ *Doe v. La. Psychiatric Med. Ass'n*, No. 96-30232, 1996 WL 670414 (5th Cir. Oct. 28, 1996) (using federal RFRA to challenge an ethics investigation by the Louisiana Psychiatric Medical Association).

⁷ *In re Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (claiming that RFRA prohibits government from compelling grand jury witness to testify against rabbi); *United States v. Town of Colo. City*, No. 3:12-CV-8123-HRH, 2014 WL 5465104 (D. Ariz. Oct. 28, 2014) (arguing that RFRA prohibited U.S. Department of Justice from compelling witness testimony in civil-rights lawsuit against city); *Perez v. Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572 (D. Utah Sept. 11, 2014) (holding that RFRA prohibited court from compelling witness testimony in child-labor case).

⁸ *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015) (arguing that RFRA should shield Archdiocese from bankruptcy laws that would make more funds available to pay victims of sexual abuse).

⁹ *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (challenging Freedom of Access to Clinic Entrances Act under RFRA); *Am. Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995) (same); *United States v. Weslin*, 964 F. Supp. 83 (W.D. Pa. 1997) (same); *Planned Parenthood Ass'n of Se. Pa., Inc. v. Walton*, 949 F. Supp. 29 (E.D. Pa. 1996) (same).

¹⁰ *See, e.g., Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) *cert. denied*, 134 S. Ct. 1787 (Apr. 7, 2014); *Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (Colo. Civil Rights Comm'n June 2, 2014) (final agency order) available at https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf.

¹¹ *Youngblood v. Fla. Dep't of Health*, No. 06-11523, 2007 WL 914239 (11th Cir. Mar. 28, 2007) (claiming health inspection of school operated by church violated Florida RFRA); *McGlade v. State*, 982 So. 2d 736 (Fla. Dist. Ct. App. 2008) (claiming that law requiring midwifery license burdened religious exercise).

¹² *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHDX07CV125036425S, 2013 WL 3871430 (Conn. Super. Ct. July 8, 2013) (arguing that Connecticut RFRA precludes claims against Church for negligent supervision and retention of alleged abuser); *Givens v. St. Adalbert Church*, No. HHDCV126032459S, 2013 WL 4420776 (Conn.

Unfortunately, many of those who are pushing RFRA bills on the state level want to use RFRA to discriminate or otherwise use the bill in these troubling ways.

West Virginia Should Heed the Warnings of Justice Scalia

Perhaps we should heed Justice Scalia's warning in *Smith*, in which he warned that applying the test used in RFRA bills could lead to troubling results: It could trump "compulsory military service," "manslaughter and child neglect laws," "compulsory vaccination laws," "drug laws," "traffic laws," "minimum wage laws," "child labor laws," "animal cruelty laws," "environmental protection laws," and "nondiscrimination laws."¹³

Indeed, under HB 4012:

- a religious employer could try to trump employment discrimination laws, like those found in the West Virginia Human Rights Act,¹⁴ and fire a woman who remarried after a divorce or who was pregnant and unmarried;
- a healthcare worker could try to refuse a woman a doctor-prescribed medication;
- a mental health counselor could be exempted from state required licensing requirements;
- The owner of a sandwich shop could refuse to serve a gay customer; or
- a public hospital employee, whether the doctor, nurse, or the intake coordinator, could refuse to serve patients for procedures such as blood transfusions, in vitro fertilization, and mental health care.

Conclusion

Passage of HB 4012 would create a potential religious exemption in each and every one of West Virginia's laws that could be used to trump nondiscrimination, healthcare, and other laws that protect West Virginians. Yet, this bill is not supported by any imminent threat to religious liberty in the state. Accordingly, this bill should be rejected and we urge you to **oppose HB 4012**.

Sincerely,

Chuck Smith
Board of Trustees,
Americans United for Separation of Church and State

Super. Ct. July 25, 2013) (same); *Noll v. Hartford Roman Catholic Diocesan Corp.*, No. HHDX04CV024034702S, 2008 WL 4853361 (Conn. Super. Ct. Oct. 20, 2008) (same).

¹³ *Smith*, 494 U.S. at 889 (emphasis added).

¹⁴ W. VA. CODE §5-11-1 (West 2015).