



Amrita Singh
State Legislative Counsel

(202) 466-3234
(202) 898-0955 (fax)
singh@au.org

1901 L Street, NW
Suite 400
Washington, DC 20036

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Representative Brent Steele
Chair, Senate Judiciary Committee
200 W. Washington St
Indianapolis, IN 46204-2785

Re: We oppose passage of SB 66, the new RFRA bill

Dear Senator Steele:

On behalf of Americans United for Separation of Church and State its Indiana members, I write to urge you to reject SB 66. This bill is an attempt to revisit the Indiana Religious Freedom Restoration Act (RFRA), which the legislature passed last year amid state—and even national—controversy and backlash over its potential to sanction discrimination. We oppose SB 66, in part, because it would serve to eliminate the already insufficient nondiscrimination protections that the legislature added shortly after the Governor signed the original RFRA bill last year. Indeed, we are surprised and disappointed that the legislature would even consider such legislation this year, after the people of Indiana made clear last year that they do not want the state to allow religion to be used to discriminate.

Freedom of Religion Does Not Mean Freedom to Discriminate

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 others. Unfortunately, SB 66 fails to contain language that would prevent individuals and corporations from harming other Hoosiers in the name of religion. This failure is made even more obvious by the fact that the current law does contain a provision, though insufficient, that prohibits the use of the bill to trump nondiscrimination laws. If the bill's supporters were not interested in allowing discrimination, this bill would contain such a provision.

Concerns About Using SB 66 to Harm Others Are Real

The bill sponsor has asserted that SB 66 is not a RFRA. Yet, his bill would adopt a test similar to, yet more expansive than, that in the federal and Indiana RFRAAs. Indeed, SB 66 is the Indiana RFRA repackaged and without the nondiscrimination provision. And, unfortunately, RFRA supporters are pushing this RFRA and RFRAAs across the country as a means to discriminate and otherwise harm others in the name of religion.

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.

On the federal level, RFRA is currently being used to allow religious organizations to ignore federal employment discrimination laws.³ We have also seen efforts to use RFRA to refuse counseling to patients in same-sex relationships;⁴ avoid ethics investigations;⁵ obstruct criminal investigations;⁶ shield religious organizations from bankruptcy and financial laws, in the process denying compensation to victims of sexual abuse;⁷ and thwart access to health clinics.⁸ In states whose RFRAAs mirror the federal RFRA, the statutes have been invoked to avoid licensing requirements⁹ and resist lawsuits over sexual abuse by clergy members.¹⁰ Indiana should not adopt a bill that would invite similar claims.

Consideration and Passage of this Bill Hurts the State

Passage of SB 66 would harm the reputation and the revenues of the state, as well as the daily lives of Hoosiers. Consideration of this bill rightfully thrusts Indiana back into the national spotlight as many wonder why the state would pass a bill that would invite discrimination—again. Last year's debate already did significant damage to Indiana's reputation as a welcoming state¹¹ and this bill will only increase the damage. And it send the message that Indiana is unwelcoming. In addition, consideration of this bill will further drive people away from doing business with the state: A recent study shows passage

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.usdoj.gov/fbcj/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 *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).

⁵ *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).

⁶ *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).

⁷ *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).

⁸ *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).

⁹ *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).

¹⁰ *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. 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).

¹¹ Andy Ober, *Post-RFRA Perception Study Yields 'Striking' Results*, INSIDE IND. BUS. (Jan. 20, 2016), <http://www.insideindianabusiness.com/story/31006829/post-rfra-perception-study-yields-striking-results>.

of the current RFRA may have cost the state as much as \$60 million in revenue.¹² And, of course, passage of this bill could sanction discrimination and other harm against people in the state. Another unacceptable result.

Conclusion

Americans United supports religious freedom; however, for all of the above reasons and more, we urge members of the committee to vote against SB 66.

Sincerely,



Amrita Singh
State Legislative Counsel

¹² Brian Slodysko, *Survey: Religious Objections Law Cost Millions*, THE ASSOCIATED PRESS (Jan. 25, 2015), http://m.apnews.com/ap/db_268748/contentdetail.htm?contentguid=KNkdeVv9.