



TESTIMONY OF MICHAEL J. NORTON
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Regarding House Bill 15-1171 Concerning a State Freedom of Conscience Protection Act

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My name is Michael J. Norton. I am an attorney with Alliance Defending Freedom (ADF), an alliance-building, non-profit legal organization that promotes religious liberty, sanctity of life, marriage and the family.

Much of my work with ADF is to advocate for the right of people to freely live out their faith. I am currently involved in a number of lawsuits in federal courts concerning the conscience rights of private business owners and religious organizations to be free from being forced by the government to violate their sincerely held religious beliefs.

I am privileged to testify today on House Bill 15-1171 on behalf of Colorado Family Action (CFA). The mission of CFA is to strengthen families by applying founding principles and faith to policy and culture. CFA seeks enactment of laws which will ensure that Colorado is a safe, prosperous, and wholesome place for families to live, work, and play. CFA's public policy positions are based on the principles of life, marriage, parental authority, constitutional government, and religious liberty.

CFA urges the adoption of House Bill 15-1171 which will **protect religious liberty for all Coloradans**.

House Bill 15-1171 is similar to the federal Religious Freedom Restoration Act (RFRA).¹ The constitutionality of RFRA as applied to the federal government is well-settled.² House Bill

¹ 42 U.S.C. §§ 2000bb *et seq.*

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15-1171 provides that no State action may burden a person's exercise of religion, even if that burden results from a generally applicable rule, unless it is demonstrated that applying the burden to a person's exercise of religion is essential to further a *compelling governmental interest* and is the *least restrictive means* of furthering that compelling interest.

The federal RFRA was signed into law by then-President Clinton in 1993. It was a *bipartisan* effort to protect religious liberties across America. Not only did RFRA receive a near-unanimous vote in Congress from *both* sides of the aisle, it had overwhelming support from policy organizations on both the left and the right. Those calling for its passage included the ACLU,³ National Association of Evangelicals, People for the American Way, and Concerned Women for America. In a refreshing moment of unity, Congress, the President, and virtually all Americans overwhelmingly agreed that religious freedom was as critical to America today as it was to our Founders when they adopted the First Amendment and must be protected.

As President Clinton explained, "[T]his law basically says [] that the government should be held to a very high level of proof before it interferes with someone's freedom of religion." In legal terms, the federal RFRA (as would House Bill 15-1171) requires that if a law burdens someone's free exercise rights, the government must demonstrate that the law serves a compelling governmental interest,⁴ and is the least restrictive means for achieving that interest. In other words, the law must impose on the protected freedom no more than absolutely necessary to accomplish the compelling governmental interest.⁵

The federal RFRA was passed in response to the United States Supreme Court's 1990 decision (5-4) in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990). Prior to the *Smith* decision, it was well-settled that the government could not impose a burden on a person's fundamental right to freely exercise religion unless the government could show it had a compelling interest in doing so and no less restrictive means were available to accomplish that compelling interest.⁶ This analysis is known as "strict scrutiny."

² See, e.g., *Holt v. Hobbs*, 134 S.Ct. 1512 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Kikumura v. Hurley*, 242 F.3d 950, 959-60 (10th Cir. 2001).

³ See two 1993 ACLU Press Releases urging the passage of RFRA, both attached hereto. The testimony of Nadine Strossen (then-President of the ACLU) and Robert S. Peck (then-legislative counsel for the ACLU) strongly supporting RFRA and urging its adoption can be found at www.justice.gov. Ms. Strossen agreed with the characterization of the *Smith* decision as the "Dred Scott of first amendment law." Nadine Strossen, S.Hrg. 102-1076, Hearing Before the Committee on the Judiciary, United States Senate, September 18, 1992, at 171.

⁴ As the U.S. Supreme Court has articulated, this requires the government to have an "interest[] of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

⁵ *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 476 (1989).

⁶ See *Sherbert v. Verner*, 374 U.S. 398 (1963).

In *Smith*, the Supreme Court reduced the “strict scrutiny” level of protection afforded to religious freedom by determining that, if religious beliefs were burdened by a law that is neutral on its face and generally applicable, it is subjected to a lower level of scrutiny.

The American people rightly rejected this departure from historic legal protections afforded to our First Liberty. The federal RFRA was quickly drafted and passed into law. Although RFRA was intended to apply to both State action as well as the federal government action, the United States Supreme Court subsequently held that Congress did not have the constitutional authority to impose the federal RFRA on the States.⁷ Consequently, the level of protection afforded to religious freedom at the State level was left uncertain.

In response to this uncertainty, 19 States and the District of Columbia have passed State versions of RFRA in order to ensure adequate protection of religious liberty.⁸ Additionally, many other States have ensured this same protection through judicial opinions confirming these liberties.⁹ Consequently, this is the standard that applies throughout the majority of the country.

While Article II, Section 4 of the Colorado Constitution and the First Amendment to the United States both protect the religious freedom rights of Coloradans, these protections have been jeopardized by the *Smith* decision. The law in Colorado remains unclear as to the level of protection afforded our religious freedom. Indeed no statutes or case law have directly addressed this issue so there is no real guidance in Colorado. House Bill 15-1171 provides that much needed guidance and protects the religious freedom of all Coloradans.

While this bill protects religious freedom, it is critical to recognize what this bill does *not* do. This bill does not create any new or additional rights for any religious activity or for people of faith. It does not create a “religion” trump card. It merely confirms that, in Colorado—as is true across the country at the federal level, and in 19 other States and Washington, D.C.—we have unequivocally restored the heightened standard of review for religious liberty claims that have served us well for so many years. That standard requires a court to weigh legitimate free exercise claims against compelling governmental interests. There are no pre-determined

⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁸ Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia and Washington, D.C.

⁹ *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005); *Larson v. Cooper*, 90 P.3d 125, 131 (Ala. 2004); *Valley Christian School v. Mont. High School Ass’n*, 86 P.3d 554 (Mont. 2004); *Odenhal v. Minnesota Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002); *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443, 445-51 (Ind. 2001); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 39 (Wa. 2000); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998); *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996); *Attorney General v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994).

outcomes. *It does not mean that religious exercise always wins, it simply means that religious exercise claims will receive a fair hearing in court.*

Ironically, as is illustrated in the United States Supreme Court's decision last month in *Holt v. Hobbs*, 134 S.Ct. 1512 (2014), wherein a Muslim federal inmate's religious liberty was rightfully protected, federal inmates incarcerated at the penitentiary ("Supermax") in Florence, are afforded *more* protection of their religious liberty exercise than are Colorado citizens. That is unacceptable. This country was founded on sacred and fundamental principles, including religious liberty. A failure to protect that fundamental principle is an assault on the very foundation of this country.

House Bill 15-1171 is well-conceived and is drafted pursuant to sound constitutional authorities and principles. It also represents the State's best tradition in its commitment to religious liberty for all Coloradans.

On behalf of Colorado Family Action, I urge the adoption of House Bill 15-1171.