AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

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Representative Su Ryden
Chair, House State, Veterans, & Military Affairs
200 E Colfax
Denver, CO 80203

Representative Susan Lontine
Vice- Chair, House State, Veterans, & Military Affairs
200 E Colfax
Denver, CO 80203

Re: Oppose HB 1180, a harmful RFRA bill that would allow discrimination in Colorado.

Dear Chair Ryden and Vice-Chair Lontine:

On behalf of its Colorado members and supporters, Americans United for Separation of Church and State writes to express our opposition to HB 1180, the "Colorado Freedom of Conscience Protection Act." HB 1180 would create a potential religious exception to *every single existing and future state and local law* in Colorado, including criminal laws, such as laws against child abuse and domestic violence; laws protecting public health; and state and local nondiscrimination laws.

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 1180 is incredibly broad and could allow individuals—and even for-profit corporations—to discriminate, deny women healthcare, and otherwise harm others in the name of religion. It also would introduce uncertainty into and invite abuse of all Colorado state and local laws, and open the door to costly lawsuits. Accordingly, we urge you to oppose this bill.

HB 1180 is Extremely Broad and Could Lead to Discrimination and Harm Against Others

HB1180 appears to be based on a federal law, the Religious Freedom Restoration Act (RFRA). While the federal law has significant flaws, this bill is even more extreme and more likely to be used to trump non-discrimination laws.

HB 1180 Only Requires a "Burden" Rather than a "Substantial Burden"

The federal law is triggered when a person has suffered a "substantial burden" on their religion. HB 1180, however, significantly lowers that standard by merely requiring that state action "burden" religion, even if indirectly. Under this bill, the government would have to justify almost every law—even if the law creates only an insubstantial, *de minimus* burden that only remotely affects religion—with a "compelling interest."

Even with the higher "substantial burden" standard, the federal RFRA is currently being used to allow religious organizations to ignore federal employment discrimination laws[1] and deny women health insurance coverage.[2] We have also seen efforts to use RFRA to refuse counseling to patients in same-sex relationships;[3] avoid ethics investigations;[4] obstruct criminal investigations;[5] shield religious organizations from bankruptcy and financial laws, in the process denying compensation to victims of sexual abuse;[6] and thwart access to health clinics.[7]

And in states that have RFRAs similar to HB 1180, individuals and corporations have also invoked the laws to trump nondiscrimination laws,[8] and have attempted to use it to avoid licensing requirements[9] and resist lawsuits over sexual abuse by clergy members.[10]

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. Lessening the standard to require a mere indirect burden will help them do that.

HB 1180 Applies to Lawsuits Between Private Parties

The language in HB 1180 would allow a person to assert a claim or defense under RFRA even if the government is not a party to the proceeding. This would allow the law to be used in litigation between private parties, expanding the reach of this law beyond what is allowed by the federal RFRA.

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[1] 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).

[2] *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785.

[3] *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).

[4] *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).

[5] *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).

[6] *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).

[7] *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).

[8] *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.

[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).

Allowing the use of RFRA in cases with private parties invites several problems. Most important, it would vastly increase the number of cases brought under RFRA. In addition, it requires private parties to defend a law as a compelling government interest when that role is clearly more suited for the government.

Colorado 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."[11]

Indeed, under HB 1180:

- a religious employer could try to trump employment discrimination laws 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 1180 would create an even more broad and extreme RFRA than the federal law, making it even more likely that it will be used to trump nondiscrimination, healthcare, and other laws that protect Coloradoans. Accordingly, this bill should be rejected and we urge you to **oppose HB 1180.**

Sincerely,

Amrita Singh
State Legislative Counsel

[11] *Smith*, 494 U.S. at 889 (emphasis added).