Children's Healthcare Is a Legal Duty, Inc.

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Governor Asa Hutchinson
Capitol Building Room 250
Little Rock AR 72201

Dear Governor Hutchinson:

Our organization, Children's Healthcare Is a Legal Duty, urges you to veto HB1228, the Religious Freedom Restoration Act.

The bill gives everyone a cause of action who believes anyone has "substantially burdened" his religious practice. In lawsuits challenging the government, the state is required to prove that its challenged action serves a compelling state interest and uses the least restriction on religion to achieve its interest.

While many would agree that the state must have a compelling interest in restricting a religious practice, the least restrictive means test can be very difficult for the state to meet and generate long legal battles. When the U.S. Supreme Court ruled on the federal Religious Freedom Restoration Act (RFRA), Justice Sandra Day O'Connor wrote, "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. . . . [The test] would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind."

Furthermore, HB1228 gives plaintiffs a cause of action not only against the state but also private parties. All the plaintiff has to do is show that his religion was substantially burdened by someone else, and the bill defines religion broadly. The government does not have a compelling interest in the outcome of a dispute between private parties, so the compelling interest/restrictive means standards are irrelevant to such lawsuits.

Pharmacists who refuse to sell contraceptives to women, landlords who refuse to rent to groups their religion disapproves of, parents who don't want their child taught about disease or exposed to curriculum depicting professional women, people who don't want their photo taken for a driver's license, people with religious beliefs against shaving, people who give all their money to their church instead of paying their creditors —all these folks will have a powerful new argument to raise in court if HB1228 is enacted.

The bill's definition of a substantial burden "includes without limitation withholding benefits, assessing penalties, or an exclusion from programs or access to facilities." It appears to give rights for the believer to government funds and inclusion in government programs. It may be used to claim that the government must fund parochial schools and give them identical payments in all government programs. A parent who pays for his child to attend parochial school can claim a substantial burden in having to pay for two school systems.

It looks so cynical and heartless of the bill sponsors to include among the "persons" who automatically have a cause of action claiming a burden on their religious beliefs partnerships, corporations, religious institutions, trusts, foundations, etc., and yet the bill prohibits employees from sueing their employers.

We are most concerned about HB1228's impact on child welfare. Arkansas has enacted a comprehensive scheme to deal with the problems of child endangerment, abuse, neglect, and nonsupport, including criminal penalties, civil tort liability, mandatory reporting, and social service intervention. The state should not be confined to a single least restrictive remedy to protect children.

HB1228 calls into question criminal child abuse laws. Churches with religious beliefs against medical care, for example, have argued that parents who withhold lifesaving medical care from children on religious grounds should be immune from criminal charges on grounds that criminal prosecution is not the least restrictive means to achieve the state's compelling interest in the welfare of children. The Christian Science church claimed before Congress that prayer is "excellent health care" and that under the federal RFRA the government had the burden of proving that medical care was better than prayer.

This church also argued that RFRA obligated states to enact religious exemptions to all preventive and diagnostic measures, such as immunizations, metabolic testing, hearing tests, and prophylactic eye drops, and that the state had a compelling interest in requiring health care over parents' religious objections only when the child was seriously ill.

During the three years that the federal RFRA applied to the states, it forced some court cases detrimental to the interests of children. Despite a weapons ban in schools, a court ruled that Sikh children had the right to attend school wearing six-inch ceremonial knives in scabbards as a religious practice. *Cheema v. Thompson*, 67 F.3d 883 (9th Circuit 1995).

In *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994), the Vermont Supreme Court held that where the non-supporting father was a member of a church that prohibited support of children who lived outside of the closed religious community, the contempt citation must be dismissed because RFRA required that the state confine its means for collecting support to the lowest restriction on religious practice.

In 1998 a Minnesota Appeals Court reversed a child support award because the Minnesota Constitution has been interpreted to include a provision like RFRA. The Court held that the father could not have income imputed to him for purposes of calculating a child support award, as in all other cases of voluntary underemployment, because he belonged to a church that required its members to live in a commune and work full-time for it. *Murphy v. Murphy*, 574 N.W.2d 77 (Mn. App. 1998).

Last year the U.S. Supreme Court used RFRA to rule in *Burwell v. Hobby Lobby*, 723 F.3d 1114, that some for-profit corporations have religious beliefs and religious rights that cannot be burdened by state policy. In September a federal judge in Utah cited the Supreme Court's ruling on RFRA in the *Hobby Lobby* case for his ruling that the state cannot compel a Fundamentalist Church of Latter Day Saints leader to testify about alleged violations of child labor laws. *Perez v. Paragon Contractors Corp.*, #2:13CV00281-DS, DS, 2014 WL 4628572 (D. Utah Sept. 11, 2014). Reportedly, many FLDS children are subjected to severe abuse and neglect and are

exploited as a cheap labor force, but the state is greatly hamstrung in protecting them if the FLDS members cannot be required to testify.

HB1228 has the potential to cause a floodgate of litigation and to harm minorities and children. Its unintended consequences cannot be eliminated by giving civil rights protections to the LGBT community. We urge you to veto the bill.

Sincerely,

Rita Swan

Rita Swan, President
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