



FACT CHECK: ACLU MISREPRESENTATIONS REGARDING THE MICHIGAN RELIGIOUS FREEDOM RESTORATION ACT

The ACLU of Michigan recently analyzed the proposed Religious Freedom Restoration Act (RFRA) legislation. (See Appendix A) Rampant with misinformation, the ACLU analysis mischaracterizes and misleads. The following responds to the ACLU's claims:

ACLU CLAIM #1: RFRA “could allow individuals to decide that non-discrimination laws, child abuse laws, and domestic violence laws don't apply to them.”

THE TRUTH: The Michigan RFRA does not grant any new rights or immunities. Someone cannot simply say the magic word “RFRA” and do whatever they please. All RFRA does is require the government to have a compelling interest and use the least restrictive means when infringing upon a person's right to religious freedom.

We know the ACLU's allegations are not true because no cases exist allowing child abuse on the basis of a RFRA defense. Indeed, government has always had a compelling interest in protecting children from abuse. Further, the same compelling interest exists in domestic violence cases. Likewise, no cases exist allowing EMT workers to let people die. Moreover, federal law¹ requires EMTs and hospitals to provide emergency care to everyone.

ACLU CLAIM #2: RFRA “opens up local governments to expensive lawsuits from those who claim they have a religious right to ignore any municipal laws.”

THE TRUTH: Since when has the ACLU been concerned about clogging up a court's docket? Further, it is ironic that the American Civil Liberties Union is more concerned about the government's pocketbook than an individual's civil liberties. Again, RFRA only applies to government action, thus, the government has to act before RFRA can be utilized.

ACLU CLAIM #3: RFRA allows people to put their religious beliefs ahead of the “common good.”

THE TRUTH: Southern state governments justified their actions institutionalizing slavery as necessary to the “common good.” Thankfully the United States today is a nation that protects individual liberty against such government oppression. At least for the time being, citizens are free to say what they want, write what they want, and, thankfully, worship how they want. You would think the ACLU would support protecting these individual liberties against government actions, even those perpetuated in the name of the “common good.”

ACLU CLAIM #4: RFRA “allows individuals to use their religious beliefs as an excuse to harm others.”

THE TRUTH: RFRA only acts as a protection against government action substantially interfering with a citizen's religious conscience. It will have no effect on private business, schooling, or commerce. Ironically, all RFRA does is prevent the government from discriminating against people acting on their religious conscience.

For example, everyone has the right to self-defense. This does not give anyone the license to go out and murder people in the name of self-defense. In the same way, RFRA does not give anyone a license to discriminate, it is simply a defense against government action infringing on someone's religious conscience. It is nonsensical to assert that someone can simply say the magic word “RFRA” and harm anyone they please.

ACLU CLAIM #5: RFRA permits “any individual religious belief [to] determine which state and local laws a person chooses to honor.”

THE TRUTH: This is an outright falsehood and misrepresentation of RFRA. The language of RFRA does not allow individuals to “choose” which laws they want to honor. There is no “exemption” to any laws contained within RFRA.

¹ EMTALA, Emergency Medical Treatment and Labor Act.



It merely restores the same level of scrutiny courts used in this country for over 190 years to balance compelling government interests along with the First Amendment rights exercised by individuals with religious beliefs.

If the ACLU's claims were true, where is the avalanche of cases for the past 21 years under the federal RFRA allowing individuals to choose which federal laws they decide to honor? Such cases do not exist.

ACLU CLAIM #6: "Police officers across the country have used religious freedom as an excuse to refuse orders they claimed offended their personal religious views. A police officer in Oklahoma asserted a religious objection to his community policing duties at a mosque, claiming a "moral dilemma."

THE TRUTH: Contrary to the ACLU's portrayal of RFRA being used successfully in this manner, in this instance, the appeals court affirmed the lower court and held that RFRA could not succeed in that case.² A RFRA type law, therefore, was not successfully used in the manner as claimed by the ACLU.

ACLU CLAIM #7: "Pharmacists in many states, including Arizona, Montana, and Wisconsin, have used religious freedom as a defense for refusing to dispense daily birth control."

THE TRUTH: This is an attempt to make RFRA appear to have effects far beyond reality. It should be noted that of the three states listed here, neither Montana nor Wisconsin have ever passed a RFRA law, thus making the inference that pharmacists in those states have used RFRA in such a manner disingenuous and false. Again, RFRA only provides a defense for pharmacies or individuals against government action infringing on religious freedom.

ACLU CLAIM #8: "A pastor who helped kidnap a child in Virginia from her legal guardian cited religious freedom as his legal defense."

THE TRUTH: Once again, the ACLU's inference mischaracterizes the facts of this case. There is no indication of this pastor (Kenneth Miller) ever citing a RFRA statute as his defense.

Furthermore, he was properly found guilty on August 14, 2012, and sentenced to 27 months on March 4, 2014, for abetting an international parental kidnapping.³ He is currently appealing the decision but his appeal is only based on the grounds of improper venue. Even if someone like Miller tried to rely on a RFRA law, it would be unsuccessful since the government always has a compelling interest in protecting children from unlawful kidnapping.

ACLU CLAIM #9: "In New Mexico, a local religious leader cited the state RFRA when he appealed a conviction for sexually abusing two teenagers."

THE TRUTH: The local religious leader, Wayne Bent, was convicted by the district court of criminal sexual contact with a minor, and two counts of contributing to the delinquency of a minor.⁴ RFRA was never raised as a defense at trial. In the appeal, Bent's appellate counsel raised numerous issues, one being that his trial attorney was ineffective by failing to raise a defense under New Mexico's RFRA. The appeals court properly failed to see any error and affirmed the convictions. Further, the appeals court determined that even if RFRA had been raised as a defense in this case, Mr. Bent still would have lost, stating that the compelling governmental interest of protecting minors from sexual abuse and delinquency would override Mr. Bent's religious convictions. This case cited by the ACLU actually disproves their own contention that RFRA protects child abusers.

ACLU CLAIM #10: "A federal judge just held that the federal RFRA prevented the Department of Labor from fully investigating possible child labor law violations because the individual under investigation said that his religious beliefs forbade him from discussing those matters with the government."

THE TRUTH: This is yet another exaggeration. All the court ruled in this case was that one single witness did not have to testify.⁵ This hardly prevented the case from moving forward and did not prevent the government from investigating child labor law violations.

² *Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014)

³ *United States v. Miller*, 2:11-CR-161-1, United States District Court, District of Vermont (2012)

⁴ *State v. Bent*, 328 P.3d 677 (N.M. App. 2013)

⁵ *Perez v. Paragon Contractors, Corp.*, 2:13-CV-00281-DS, United States District Court, District of Utah, Central Division (2014)

Michigan House Bill 5958

MI Religious Freedom Restoration Act



A civil liberties briefing

QUICK FACTS

- Religious freedom is one of our country's fundamental values. That's why it's protected in the state and federal constitution. But that freedom does not give any of us the right to harm others.
- H.B. 5958 will allow people to take advantage and put their religious beliefs ahead on the common good.
- H.B. 5958 could allow individuals to decide that non-discrimination laws, child abuse laws, and domestic violence laws don't apply to them.
- H.B. 5958 opens up local governments to expensive lawsuits from those who claim they have a religious right to ignore any municipal laws.

Why the ACLU of Michigan Opposes H.B. 5958

The ACLU of Michigan firmly supports religious freedom, which is fundamental to personal liberty. We have the absolute right to believe whatever we want about God, faith, and religion, and we have a right to act on those beliefs, unless those actions harm others.

The ACLU has fought for decades to defend individual religious freedom. We oppose H.B. 5958—referred to as the Michigan Religious Freedom Restoration Act (RFRA)—because it allows individuals to use their religious beliefs as an excuse to harm others.

What H.B. 5958 Will Do

If passed, this bill would excuse any person from any state or local law that they claim "burdens" their exercise of religion. This includes beliefs that do not stem from any established religion. Thus, any individual religious belief can determine which state and local laws a person chooses to honor.

- The bill could be invoked to undermine local anti-discrimination laws that protect lesbian, gay, bisexual, and transgender people, allowing people or businesses to deny employment, housing, or services based on their religious views.

Other states with similar legislation have seen individuals and groups use religious freedom as a justification for all sorts of behavior, some of it criminal. Here are just a few examples:

- **Criminal Justice:** Police officers across the country have used religious freedom as an excuse to refuse orders they claimed offended their personal religious views. A police officer in Oklahoma asserted a religious objection to his community policing duties at a mosque, claiming a "moral dilemma."
- **Public Health:** Pharmacists in many states, including Arizona, Montana, and Wisconsin, have used religious freedom as a defense for refusing to dispense daily birth control.
- **Child Safety and Welfare:** A pastor who helped kidnap a child in Virginia from her legal guardian cited religious freedom as his legal defense. In New Mexico, a local religious leader cited the state RFRA when he appealed a conviction for sexually abusing two teenagers. A federal judge just held that the federal RFRA prevented the Department of Labor from fully investigating possible child labor law violations because the individual under investigation said that his religious beliefs forbade him from discussing those matters with the government.
- **Discrimination against gay and transgender people:** In Michigan, a school guidance counselor refused to help gay students because of the counselor's religious faith.
- **Municipal Burden:** The city of Dallas, Texas, is embroiled in an ongoing seven-year legal battle with a religious group that has used the Texas RFRA to claim that the city's health code and food safety standards burden their exercise of religion when serving food to the homeless.

By allowing someone who files a lawsuit to recoup damages, this bill could be an invitation for people to sue the government. The bill will increase congestion in Michigan courts and divert the already scarce resources of law enforcement agencies and governments at both the state and local level.

For more information, and to learn how you can help stop H.B. 5958, go to aclumich.org

ACLU CLAIM #11: “In Michigan, a school guidance counselor refused to help gay students because of the counselor’s religious faith.”

THE TRUTH: This is an outright misrepresentation of the facts of the *Eastern Michigan v. Julea Ward* case.⁶ This case has already been argued, reversed on appeal, and then settled between the parties. The issue was not a refusal on the part of Ward to help gay students, as the ACLU falsely claims. Rather, the University program required that in order for Ward to receive her degree, she would have to affirm gay relationships and counsel in their favor, in contradiction to her religious convictions. Even though the ACLU claims Ward supposedly was refusing to help gay students, the Court of Appeals stated, “Ward responded that she did not discriminate against anyone. She had no problem counseling gay and lesbian clients, so long as the university did not require her to affirm their sexual orientation.”

Even though the ACLU has attempted to give the impression that this was a case of malicious behavior towards gay students by Julea Ward, the court found that the behavior of numerous faculty members gave rise to a legitimate concern about religious discrimination against Julea Ward. The Court held that, “a reasonable jury could find that the university dismissed Ward from its counseling program because of her faith-based speech, not because of any legitimate pedagogical objective. A university cannot compel a student to alter or violate her belief systems based on a phantom policy as the price for obtaining a degree.” This was actually a case of discrimination against a person of faith, rather than discrimination against a gay student.

ACLU CLAIM #12: “The city of Dallas, Texas, is embroiled in an ongoing seven-year legal battle with a religious group that has used the Texas RFRA to claim that the city’s health code and food safety standards burden their exercise of religion when serving food to the homeless.”

THE TRUTH: This is the case of *Big Hart Ministries et al v. City of Dallas*.⁷ Big Hart Ministries and fellow plaintiffs had been engaging in feeding the homeless for many years prior to this suit being brought. It was the result

of the city deciding that by feeding the homeless on the streets, it would be tougher for the city to coerce and drive those same homeless individuals into organized shelters and treatment programs. The City of Dallas then moved forward with changes to its health code, and in a hollow and disingenuous act, included an exemption for groups that wanted to feed the homeless wherever they could be found. This exception, however, included onerous burdens such as requiring toilet facilities, wash basins, special wastewater disposal containers, etc. to be provided in the field at each and every location where a homeless person might be fed. These, and other equally burdensome requirements, effectively regulated out of existence the Christian ministries reaching out to the homeless. A federal district court highlighted the absurdity of these requirements in its opinion, and stated that the government was directly infringing on the exercise of these organizations’ religious beliefs in numerous instances without furthering a compelling government interest at all. Ironically, this case is yet another great example of why RFRA is needed. If a religious organization wants to feed the homeless, it should be able to do so in an effective and safe manner without unreasonable government requirements like requiring portable toilets at any location a homeless person might be served food.

CONCLUSION: In determining the real impact of RFRA, it is important to rely on the truth, not mischaracterizations and false claims. The above illustrates the absurd lengths to which the ACLU and others are willing to misconstrue the facts regarding the impact of RFRA. Such “sky is falling” arguments are baseless and totally without merit. One can only hope that the ACLU would return to its roots and support the Michigan RFRA, just as it supported the bipartisan federal RFRA in 1993.

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⁶ *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012)

⁷ *Big Hart Ministries Assn. Inc. v. City of Dallas*, 3:07-CV-0216-P, United States District Court, Northern District of Texas (2011).





STATE RELIGIOUS FREEDOM RESTORATION ACTS
FACT VS. FICTION

INTRODUCTION

Many states have, or are considering, passing a Religious Freedom Restoration Act (RFRA). For the first 200 years in our country, our Courts gave the highest level of constitutional protection to religious freedom. The United States Supreme Court stripped away this protection in the 1990 case of *Employment Division v. Smith*.¹ In response, a bi-partisan United States Congress passed the federal RFRA, signed into law by President Bill Clinton in 1993. At the time, the bi-partisan bill was supported by the ACLU. Despite fear mongering by opponents, in over twenty-one years, none of the alleged problems with RFRA ever materialized.

The Federal RFRA restored the protections of religious freedom, but only as it applies to federal government actions. The Federal RFRA does not apply to state government action infringing upon religious freedom. Therefore, each state must pass its own RFRA.

This Fact Sheet responds to the numerous misrepresentations by opponents regarding a proposed RFRA.

1. RFRA IS NOT A “LICENSE TO DISCRIMINATE”

RFRA only provides a defense against government action infringing upon religious conscience. It does not apply to private actions by one citizen against another.

To claim RFRA is a license to discriminate is the same as saying the right to self-defense is a “license to murder.” Illogical arguments like this are thinly veiled attempts to bully and silence RFRA supporters.

2. RFRA WILL NOT PROTECT CHILD ABUSERS, WILL NOT ALLOW EMT WORKERS TO REFUSE TREATMENT, AND WILL NOT PROTECT TAX CHEATERS, ETC.

The RFRA does not grant any new rights or immunities. People cannot simply say the magic word “RFRA” and do whatever they please. All RFRA does is require the government to have a compelling interest and use the least restrictive means when infringing upon a person’s right to religious freedom.

RFRA simply restores the standard used by all 50 states and the federal government before the *Smith* decision. We know opponent’s allegations are not true because no cases exist allowing child abuse on the basis of a RFRA defense. Indeed, government has always had a compelling interest in protecting children from abuse. Likewise, no cases exist allowing EMT workers to let people die. Federal law requires EMTs and hospitals to provide emergency care to everyone.

In all the years when the greater protection for religious freedom was in place prior to the 1990 *Smith* decision, child abusers were not permitted to abuse children, EMT workers had to provide emergency care, DMV employees had to provide drivers licenses, tax cheaters were not allowed to proliferate, etc. To claim that restoring the original protection of religious freedom through RFRA will permit this to occur is disingenuous and false.

3. RELIGION IS NO LONGER FULLY PROTECTED BY THE FIRST AMENDMENT

The *Smith* decision weakened religious freedoms to the lowest level of protection permitted by law. RFRA simply restores the protection of religious conscience to the same level of protection as freedom of speech and freedom of the press.

4. RFRA DOES NOT ALLOW LANDLORDS TO EVICT GAY PEOPLE.

Again, RFRA only protects people from government action. It cannot be used in any way by a private landlord attempting to evict someone. RFRA is not a license to do anything; it can only be used as a shield to government action infringing on a person’s sincerely held religious conscience.

5. RFRA IS NOT AN EXTREME LAW.

State RFRA’s almost exactly duplicate the federal RFRA, now in place for over 21 years. The extreme doomsday claims made by opponents have not come to fruition under the federal RFRA, so there is no reason to believe these problems will occur under a state RFRA.

In conclusion, the wild accusations by opponents of RFRA are simply untrue. Those who support restoring protection for the free exercise of religious conscience must fully inform themselves of the truth, then stand up and be heard.

¹ *Employment Division v. Smith*, 494 U.S. 872 (1990)





A STATE RELIGIOUS FREEDOM RESTORATION ACT WHY IS IT NEEDED?

Increasingly, state and private entities use the power of the courts and government to substantially infringe upon the religious conscience rights of citizens. The need for state legislation protecting the free exercise of religious conscience can no longer be denied. The exponential expansion of court actions interfering with an individual's exercise of religious conscience is especially prevalent in cases involving small and family-owned business, including, for example, recent cases against bakers, printers, and bed and breakfast proprietors. Similarly, actions by state government universities against students exercising their sincerely held religious conscience also support the need for a state RFRA.

Most ominously, government authorities in Houston, Texas recently issued subpoenas to Christian pastors. The subpoenas ordered the pastors to give copies of their speeches and sermons related to "homosexuality, or gender identity" to the government for their review. The subpoenas further demanded the pastors produce their e-mails, instant messages, text messages, and diaries, as well as communications to members of their congregation and legal counsel. Soon after Houston subpoenaed the pastors, a city in Idaho threatened criminal prosecution of other pastors for not performing same sex weddings in violation of their sincerely held religious conscience.

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law ... prohibiting the free exercise" of religion. American

citizens traditionally understand this First Amendment freedom to be one of our most inviolable of the unalienable rights. Indeed, the Framers of the American Constitution viewed protecting the free exercise of religious conscience as essential. Given the deeply rooted cultural and legal traditions of the nation, a majority of the Supreme Court agreed. Thus, in a number of cases the Court expressly recognized the free exercise of religious conscience as a fundamental right. For example, in *Sherbert v Verner*,¹ the court struck down government action denying unemployment benefits to a person who lost her job when she did not work on her Sabbath day. Similarly, in *Wisconsin v. Yoder*,² the Court overturned convictions for violations of state compulsory school attendance laws that conflicted with defendants' sincerely held religious beliefs.

Because the Court considered this unalienable right fundamental, it required government to provide a compelling interest to justify governmental interference with an individual's free exercise of religion. The Court, while applying this strict scrutiny to government action, further required the government to show it used the least restrictive means available to accomplish its interest. In other words, the Supreme Court treated these unalienable rights as a limit on government action.

The U.S. Supreme Court drifted away from this Constitutional absolute in connection with its treatment of the freedom of religious conscience. In *Employment Division v. Smith*³ the Court upheld as

¹ *Sherbert v Verner*, 374 US 398 (1963)

² *Wisconsin v. Yoder*, 406 US 205 (1972)

³ *Employment Division v. Smith*, 494 US 872 (1990)



constitutional a law substantially infringing upon the free exercise of religious conscience. In *Smith*, the Court employed notions of neutrality, characterizing the government action at issue as a neutral law of general applicability. Because the government action was neutral and generally applicable, the Court required no justification by the government for its action—even though the action substantially infringed upon the free exercise of religious liberty. Thus, the Court concluded that in such situations government action is constitutional if rationally related to a legitimate government interest. This is the lowest level of scrutiny an American court can apply when reviewing a law to determine whether it is constitutional.⁴

In response to the *Smith* decision, a provoked citizenry called their representatives in Congress. Congress listened, enacting laws that attempted to restore the free exercise of religious conscience to full-fundamental right status under the Constitution. Congress responded to the Supreme Court by passing, in a bipartisan way, the Religious Freedom Restoration Act (RFRA).⁵

When Congress passed the Religious Freedom Restoration Act it expressed its dissatisfaction with the *Smith* decision. Here Congress established:

1. The framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
2. Laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

3. Governments should not substantially burden religious exercise without compelling justification;

4. In [*Smith*], the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

5. The compelling interest test ... is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

As enacted by Congress, the Federal RFRA expressly provided that:

Government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, [unless] ... it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

In promulgating the RFRA, Congress stated the purpose of the legislation was:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government. 42 U.S.C. Section 2000bb(b)

⁴ Compare, *Church of Lukumi Babalu Aye v Hialeah* (1993) (holding that the Court will apply strict scrutiny to a law substantially infringing upon religious liberty when the law is not a neutral law of general applicability).

⁵ Title 42 United States Code § 2000bb.

As passed by Congress, the Federal RFRA applied to “all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA’s enactment].” Id. Section 2000bb-3(a).

The Congressional response to the Supreme Court’s *Smith* decision was not limited to passage of the Religious Freedom Restoration Act. Congress also enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁶ This act required state and federal courts to apply strict scrutiny to any government actions substantially infringing on the free exercise of religion in cases involving land use or institutionalized persons.

In *Gonzales v O Centro Espirita A Beneficente Uniao Do*, 546 US 418 (2006), the Supreme Court upheld the Federal RFRA requirements as applied to *federal government actions*. Likewise, in *Cutter v Wilkinson*, 544 US 709 (2005), the Court upheld RLUIPA, finding that the Commerce Power and the Spending Power constitutionally authorized Congress to enact the relevant provisions of the statute.

In *City of Boerne v Flores*, 521 US 507 (1997), however, the Court held that Congress acted outside the scope of its constitutional authority when enacting the Federal RFRA as applied to the states. The practical impact of this holding currently allows actions by state government authorities to substantially infringe upon the liberty protected under the First Amendment Free Exercise Clause – as long as the state characterizes its action as neutral and generally applicable. Unlike the federal government in such cases, a state government is not required to provide any justification for its action—even if the action substantially

infringes upon the free exercise of religious liberty.

It is left to each state, therefore, to enact state versions of the RFRA to ensure the First Amendment freedom of religious conscience is protected fully at every level of government. Exercises of government power against the free exercise of religious conscience are the natural outgrowth of new laws purporting to address “discrimination.” Such laws inevitably, and often by design, compel citizens of a state to act against their sincerely held religious conscience.

A number of states responded to the Supreme Court’s *Boerne* decision by enacting state versions of the RFRA.⁷ Many states are currently considering whether to join these other states in protecting the free exercise of religious conscience. For example, the proposed State RFRA in Michigan provides:

Sec. 5. (1) Except as provided in subsection (2), government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.

(2) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to that person's exercise of religion in that particular instance is both of the following:

(a) In furtherance of a compelling governmental interest.

(b) The least restrictive means of furthering that compelling governmental interest.

⁶ Title 42, United States Code—Chapter 21C.

⁷ See, e.g., Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas



Under Sec. 5(3) of the proposed law, aggrieved persons may assert violations of their religious conscience “as a claim or defense in any judicial or administrative proceeding and obtain ... relief, against government.” Sec. 5(4) of the proposed law further provides that a “court or tribunal may award all or a portion of the costs of litigation, including reasonable attorney fees, to a person who prevails against the government under this section.”

It must be noted that the proposed Michigan RFRA legislation provides no specific protection for individuals, businesses, churches, or ministries from any action brought by a private party. It only offers protection from government action. For example, the SOGI (sexual orientation gender identity) categories have been added to over 30 local civil rights ordinances. The proposed Michigan RFRA will not provide a defense against any case pursued by a non-government SOGI plaintiff under those local ordinances, or under the state civil rights law if it is ultimately amended to add the SOGI categories.

Sec. 4(c) of the proposed State RFRA defines "Government" to mean “any branch, department, agency, division, bureau, board, commission, council, authority, instrumentality, employee, official, or other entity of this state or a political subdivision of this state, or a person acting under color of law.” Some proponents of the new law claim that the last phrase, “or a person acting under color of law” does protect defendants from private causes of action. That is clearly not the intent of the RFRA as it repeatedly states it only applies to government action. Sec. 3(a) and (b) both state unequivocally that the purpose of the act is to protect against government action alone. There is no mention of private causes of action.

Moreover, case after case in Michigan makes it clear that when the phrase “person acting under color of law” is used it is

generally referring to government officials or employees (i.e., a person) acting improperly in their government positions under the “color of law” and thereby violating the defendant’s civil rights. See *Hamed v Wayne County*, 490 Mich 1, 803 NW2d 237 (2011); *In re Servaas*, 484 Mich 634, 774 NW2d 46 (2009); *Walsh v Taylor*, 263 Mich App 618, 689 NW2d 506 (2004).

Therefore, if a private party were to bring a civil rights action against an individual, business, church or ministry, this proposed RFRA law may not be available as a defense. In conclusion, it is necessary, therefore, for state legislatures to add full protection for private individuals and entities to any proposed state RFRA.

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APPENDIX

SENATE BILL 4. January 20, 2015, Introduced by Senator Shirkey and referred to the Committee on Judiciary.

A bill to limit governmental action that substantially burdens a person's exercise of religion; to set forth legislative findings; to provide for asserting a burden on exercise of religion as a claim or defense in any judicial or administrative proceeding; and to provide remedies.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "Michigan religious freedom restoration act".

Sec. 2. The legislature finds and declares all of the following:

(a) The free exercise of religion is an inherent, fundamental, and unalienable right secured by article 1 of the state constitution of 1963 and the first amendment to the United States constitution.

(b) Laws neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.

(c) Government should not substantially burden religious exercise without compelling justification.

(d) In 1993, the congress of the United States enacted the religious freedom restoration act to address burdens placed on the exercise of religion in response to the United States supreme court's decision in *Employment Division v Smith*, 494 US 872 (1990), which virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.

(e) In *City of Boerne v P.F. Flores*, 521 US 507 (1997), the United States supreme court held that the religious freedom restoration act of 1993 infringed on the legislative powers reserved to the states under the United States constitution.

(f) The compelling interest test set forth in prior court rulings, including *Porth v Roman Catholic Diocese of Kalamazoo*, 209 Mich App 630 (1995), is a workable test for striking sensible balances between religious liberty and competing governmental interests in this state.

Sec. 3. The purposes of this act are the following:

(a) To guarantee application of the compelling interest test, as recognized by the United States supreme court in *Sherbert v Verner*, 374 US 398 (1963); *Wisconsin v Yoder*, 406 US 205 (1972); and *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418 (2006), to all cases where free exercise of religion is substantially burdened by government.

(b) To provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Sec. 4. As used in this act:

(a) "Demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(b) "Exercise of religion" means the practice or observance of religion, including an act or refusal to act, that is substantially motivated by a sincerely held religious belief,

whether or not compelled by or central to a system of religious belief.

(c) "Government" means any branch, department, agency, division, bureau, board, commission, council, authority, instrumentality, employee, official, or other entity of this state or a political subdivision of this state, or a person acting under color of law.

Sec. 5. (1) Except as provided in subsection (2), government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.

(2) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to that person's exercise of religion in that particular instance is both of the following:

(a) In furtherance of a compelling governmental interest.

(b) The least restrictive means of furthering that compelling governmental interest.

(3) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in any judicial or administrative proceeding and obtain appropriate relief, including equitable relief, against government.

(4) A court or tribunal may award all or a portion of the costs of litigation, including reasonable attorney fees, to a person who prevails against government under this section.

Sec. 6. (1) Section 5 applies to all laws of this state and of a political subdivision of this state, and the implementation of those laws, whether statutory or otherwise and whether adopted before or after the effective date of this act, unless the law explicitly excludes application by reference to this act.

(2) This act shall be construed in favor of broad protection of religious exercise to the maximum extent permitted by the terms of this act, the state constitution of 1963, and the United States constitution.

(3) Nothing in this act shall be construed to authorize any burden on any religious belief.

(4) Nothing in this act shall be construed to preempt or repeal any law that is equally or more protective of religious exercise than this act.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address those portions of the United States constitution or the state constitution of 1963 that prohibit laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under those constitutional provisions, is not a violation of this act. As used in this subsection, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Sec. 7. If any provision of this act or any application of 2 such a provision to any person or circumstance is held to be 3 unconstitutional, the remainder of this act and the application of 4 the provision to any other person or circumstance is not affected.



GREAT LAKES

— JUSTICE CENTER —



DEFENDING TRUTH. PROTECTING LIBERTY.

Standing for Truth is difficult.

We can help.

The Problem:

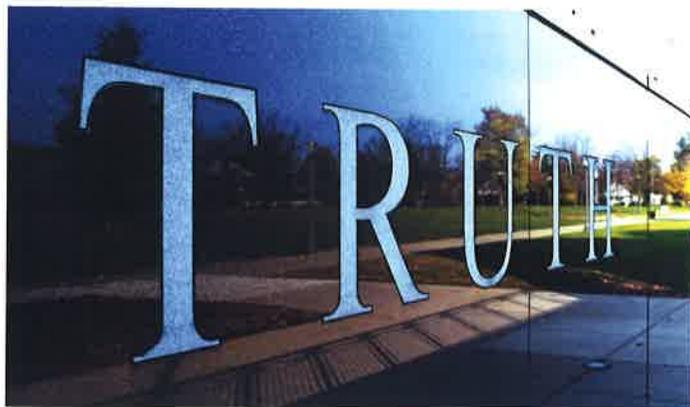
Brokenness fills our world. Truth and justice are under assault. While many know the Truth, they are not equipped to fight for it. Overwhelmed by the sheer magnitude of the problem lying before us, we often stop before we start, deciding that one person, one family, one church, or one community cannot make a difference. This crisis demands a response.

Timeless moral Truths form the fundamental foundation for constitutional good governance and the preservation of liberty. These self-evident Truths, endowed by our Creator, provide moral points of reference against which a culture measures right from wrong. Chipping away at these unalienable moral foundations, government increasingly forbids morality from informing the policy-making process or even being part of the constitutional marketplace of ideas. Ironically, as government prohibits moral truth from informing its governance, liberty is attacked, freedom is restricted, and government power grows exponentially.

What We Do:

From a local township board, to the United States Supreme Court, to the United Nations, the Great Lakes Justice Center speaks truth on behalf of the persecuted and most vulnerable. We champion the cause of the defenseless and oppressed through:

- *Litigation and Legal Representation*
- *Appellate and Supreme Court Practice*
- *Expert Policy and Issue Analysis*
- *Watchdog Fact-checking*



AS CULTURE STRAYS FURTHER FROM
THE TRUTH, IT INCREASINGLY
ATTACKS THOSE WHO **DEFEND IT**.

Call to Action:

The blessings of liberty and prosperity come with responsibility. To whom much is given, much is required. Each generation inherits a special trust and calling to ensure the preservation of liberty and the moral administration of justice.

When government acts without constitutional authority or infringes upon God-given unalienable rights, the Great Lakes Justice Center holds government accountable and works to ensure that freedom endures. Proclaiming and defending truth, we help restore cultural foundations, one person, one family, one church, and one community at a time.



KEY ISSUES

Protecting Freedom of Religion

Because the free exercise of religious beliefs improves society.

Defending Freedom of Speech

Because no one should be afraid to express their views.

Fighting for the Sanctity of Life

Because all human life is worthy of protection.

Preserving the Family

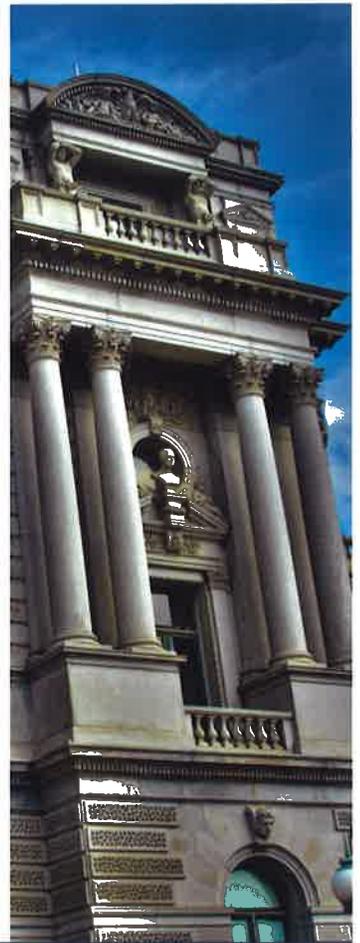
Because the traditional family is the cornerstone of a free nation.

Safeguarding Education

Because parents have the right to control the education of their children.

Holding Government Accountable

Because abuse of power leads to tyranny.



OUR FOUNDERS

WILLIAM R. WAGNER, J.D.

Professor Wagner serves as Professor of Law at Trinity International University. Before joining full-time academia, he served as United States Magistrate Judge for the Northern District of Florida. Prior to his service on the Federal Bench, he served as an American diplomat in Africa and as a senior Federal prosecutor, litigating hundreds of cases and serving as chief of appellate litigation for the Office of the United States Attorney. He began his legal career as a legal counsel in the United States Senate.

DAVID A. KALLMAN, J.D.

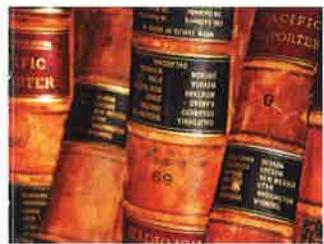
Attorney Kallman founded his law practice, now known as Kallman Legal Group, PLLC, in 1982 and built a successful litigation practice in many areas, including: church/state, constitutional law, educational law, and family law. He handles cases at every level of State and Federal Courts. He has argued cases in front of the Michigan and Idaho Supreme Courts and the United States Court of Appeals.

JOHN S. KANE, J.D.

Professor Kane served as a tenured professor of law teaching many courses including advanced constitutional law. He graduated Magna Cum Laude from the University of Michigan Law School, where he served as Executive Editor for the Michigan Journal of Law Reform. He thereafter held a federal judicial clerkship with the United States Court of Appeals. His professional legal experience includes an extensive appellate practice in one of the largest law firms in the nation.

STEPHEN P. KALLMAN, J.D.

Attorney Kallman joined Kallman Legal Group, PLLC in 2011, following in his grandfather and father's footsteps as a third generation attorney. A Cum Laude graduate of the Thomas M. Cooley Law School, he is a published author, writing on the value of human life, including an article published in the Liberty University Law Review regarding assisted suicide.





GREAT LAKES — JUSTICE CENTER —



Once to every man and nation,
Comes the moment to decide;
In the strife of Truth with Falsehood,
For the good or evil side;
Then it is the brave man chooses,
While the coward stands aside.

- **James Russell Lowell**

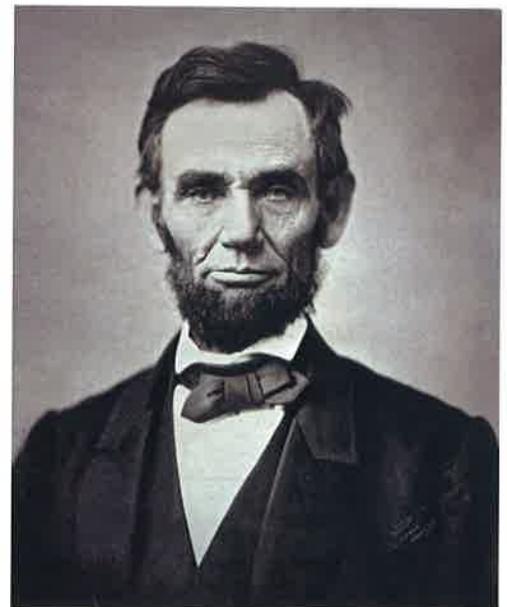
American Poet and Abolitionist

The Great Lakes Justice Center is part of Salt & Light Global, a non-profit 501(c)(3) organization. Stand with us in defending Truth and protecting liberty:

- Pray for the GLJC
- Schedule a Presentation
- Report Government Abuses of Power
- Report Threats to Liberty
- Make a Tax-Deductible Donation

“I am a firm believer in the people. If given the truth, they can be depended upon to meet any national crisis.”

— **Abraham Lincoln**



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