

CARDOZO

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SUBMITTED VIA EMAIL

February 22, 2012

Hon. Speaker Richard Thompson
Hon. Majority Leader Brent Boggs
Room 228M, Building 1
State Capitol Complex
Charleston, WV 25305

RE: H. B. 2657, A Bill to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §5-11B-1, §5-11B-2 and §5-11B-3, all relating to establishing the West Virginia Religious Freedom Restoration Act

Dear Honorable Speaker, Leader &
Members of the West Virginia House of Delegates:

Thank you for considering my views regarding H.B. 2657. By way of introduction, I hold the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in church/state relations and constitutional law. I have published and lectured extensively in the field, as well as successfully litigated cutting-edge First Amendment issues. Before joining the faculty at Cardozo Law School, I clerked for both Justice Sandra Day O'Connor at the United States Supreme Court and Judge Edward Becker of the United States Court of Appeals for the Third Circuit.

I represented the City of Boerne, Texas, before the United States Supreme Court, where Boerne succeeded in persuading the Court that the federal Religious Freedom Restoration Act violated states' rights and the separation of powers. Boerne v. Flores, 521 U.S. 507, 534-35 (1997). This bill is also unconstitutional under this State's Constitution, which guarantees that it should be subject to persistent litigation, costing the state and local governments.

H.B. 2657 would create a state "Religious Freedom and Restoration Act," prohibiting any government entity from enacting and enforcing laws or regulations

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pursuant to a rule of general applicability unless it can demonstrate that application does not “substantially burden a person’s free exercise of religion unless that regulation is “(1) Essential to further a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest.” I write to ask that you recommit, and further, reconsider the contours of H.B. 2657. To pass H.B. 2657 as currently written would be sadly misguided, as its passage and enactment would hand religious groups the power to trump every law in the state of West Virginia. H.B. 2657’s breadth is extraordinary – it could be applied to nearly every law in the state, from any source. It is nearly impossible to comprehend the infinite number of religious claims that might be brought under its banner.

State RFRAs are dangerous to children. H.B. 2657, despite your good intentions, is a recipe for rolling back the laws protecting West Virginia’s children. While I believe that passage of state RFRA is bad for all citizens of the state of West Virginia, at the very least, any bill should remove from its ambit laws that affect children, in any way. That is because state RFRAs, including but not limited to H.B. 2657—for which the religious groups have heavily lobbied nationwide & for years—will, wherever they are (or have been) enacted, make it easier for churches and their clergy to “win” sex abuse cases. It will aid the religious groups in refusing to report abuse, to cooperate in investigations of abuse, and to provide discovery in civil suits alleging abuse. The same is true with respect to the medical neglect of children, which is why the American Academy of Pediatrics has been in opposition to such laws. Simply stated, being religious is no defense to abusing or otherwise harming children, and no law that increases the likelihood of protecting anyone, including the religious, who harms children should be rejected.

H.B. 2657 has an exception which allows any “governmental institution or facility” as to “maintaining health, safety, security or discipline.” It appears from the statutory text that this clause might apply to prisons, juvenile detention centers, or state run foster care facilities. But if the governmental interests of health, safety, and security are going to trump religious freedom in prisons or public facilities, shouldn’t they also take precedence in all areas of child welfare? As the law is currently drafted, it will open the door to a myriad of religious defenses enabling perpetuation and the cover-up of child sex abuse, child neglect and child welfare issues, including denial of life-saving medical treatment. For example, West Virginia currently does not have a religious exception to vaccination requirements for school-aged children. H.B. 2657 as currently drafted will create one—endangering the lives of children across the state. For these many reasons, states such as Pennsylvania have chosen to except laws protecting children from their own version of RFRA. See, 71 Pa. Cons. Stat. Ann. §§2401-2407 (enacted in 2002).

H.B. 2657 will also make civil rights laws currently on the books much harder to enforce. Churches, religious groups and landlords who wish to discriminate against ethnic minorities, homosexuals, or single mothers on the basis of their religious beliefs, will have a new argument in court.

Finally, from the taxpayers' perspective, H.B 2657 is an invitation to litigation—particularly at the local level—**it will cost state and local governments millions in legal defenses for cases that could not have been brought under the Constitution.** In this economy, why would a legislature enact a law that is so obviously going to be heavily litigated, particularly with the bill's focus on laws that merely regulate religiously-motivated conduct, and not religious beliefs—which are already protected fully by the free exercise clause of the First Amendment and Art. III, Sec. 15 of West Virginia's state Constitution?

The only limits to RFRA's application come from the boundaries of lawyers' creativity in representing religious individuals and institutions. I urge you to reconsider the passage, and at the very least the contours, of this bill. H.B. 2657, particularly as currently drafted, is unnecessary and a danger to the children of West Virginia. Thank you for your time and consideration. Please do not hesitate to contact me with questions or concerns.

Sincerely,

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