

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

May 22, 2015

Re: Legislative Considerations for the Therapeutic Fraud Prevention Act

Dear Representative Lieu and Esteemed Co-Sponsors of HR 2450:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) to thank you for your role in promoting the Therapeutic Fraud Prevention Act and to alert you to a statutory loophole that, if not addressed, would undermine the Act's efficacy. FFRF is a nationwide nonprofit organization with over 22,500 members across the country. Our purpose is to protect the constitutional separation between church and state and to represent the views of atheists, agnostics, and other freethinkers.

It's no secret that much of the misinformation and fraudulent "treatments" targeted at LGBT people are fueled by religion. Religious leaders have created a market of consumers who mistakenly believe that sexual orientation is a choice that can and should be changed. HR 2450 would provide much needed regulation in this area, but only if it successfully prevents conversion therapy advocates from practicing these "treatments" in the name of religion.

As currently drafted, HR 2450 is subject to the federal Religious Freedom Restoration Act (RFRA), which allows religious people and corporations to violate generally applicable laws by claiming that the laws conflict with their religious beliefs.¹ RFRA creates a loophole that will allow advocates of conversion therapy to continue to harm LGBT persons, despite HR 2450, by simply challenging the law in court under the guise of "religious freedom."

The threat of legal challenges to HR 2450 based on the free exercise of religion is not just hypothetical. In April, the Third Circuit Court of Appeals rejected challenges to a New Jersey statute (N.J. Stat. Ann. § 45:1-55) that prohibits therapists and other professional counselors from engaging "in sexual orientation change efforts with a person under 18 years of age."² The plaintiffs were parents of a minor who claimed, among other things, that New Jersey's ban on conversion therapy abridged their free exercise rights. The Court of Appeals ruled that the ban on gay therapy was a neutral, generally applicable law and was rationally related to legitimate government objective. An incidental burden on the free exercise of religion was thus permissible.

¹ RFRA reads, "Government may substantially burden a person's exercise of religion only if 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." 42 U.S.C. § 2000bb-1 (2014).

² Doe v. Governor of the State of New Jersey, No. 3-13-cv-06629 (3d Cir. Apr. 13, 2015).

If New Jersey had a state RFRA, it likely would have dictated the opposite outcome in the case. Under RFRA, New Jersey would have had to demonstrate that its law was the *least restrictive means* of furthering its interest in prohibiting harmful treatments, a much more exacting standard to meet. Thankfully, New Jersey has not adopted a state RFRA. California also does not have a state RFRA, which is probably why legal challenges to its ban on sexual orientation change efforts only briefly argued religious discrimination.³ But if HR 2450 passes as currently drafted, the federal RFRA likely will render the bill ineffective.

Fortunately, the solution to avoiding RFRA problems is simple. Though RFRA has the feel of a constitutional amendment, it is only a statute. Congress is free to exempt any bill from RFRA by adding an explicit exemption provision.⁴ In this case, exempting HR 2450 from RFRA is the only way to ensure that it will achieve its goal of protecting LGBT people from the significant psychological and physical harms of sexual orientation conversion therapy.

As a general matter, RFRA is toxic legislation that has allowed the interests of religious individuals and corporations to trump laws meant to apply to everyone. RFRA is directly responsible for the Supreme Court's *Hobby Lobby* debacle, which allowed for-profit corporations to exercise their so-called "religious conscience" in order to restrict employees' access to contraceptives. And nearly identical state laws are being used around the country to justify discrimination against LGBT people, religious minorities and the nonreligious, and other groups that warrant protection under civil rights laws.

It's become clear in the wake of *Hobby Lobby* that RFRA is not being used as a shield to protect the religious from persecution. It is being used as a sword to allow religious people and corporations to impose their personal religious beliefs onto others. In addition to exempting HR 2450 from RFRA, please consider supporting efforts to repeal RFRA.

RFRA elevates one individual's personal religious beliefs above the law, effectively allowing "every citizen to become a law unto himself."⁵ Do not allow practitioners of conversion therapy to easily circumvent the protections in HR 2450. Exempt the bill from RFRA. Thank you for your time and for your support of this crucial piece of legislation.

Respectfully,



Sam Grover
Staff Attorney

³ See *Pickup v. Brown*, 740 F.3d 1208, 1224 n. 3 (9th Cir. 2013) (noting that plaintiffs spent only a single paragraph "asserting that SB 1172 violates the religion clauses of the First Amendment").

⁴ The exemption provision could read simply: "SEC. 6 INAPPLICABILITY OF RFRA - The provisions of this Act are not subject to 42 U.S.C. §§ 2000bb et. seq., the Religious Freedom Restoration Act of 1993."

⁵ *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990).