

# ACLU of Virginia

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February 27, 2007

The Honorable Tim Kaine  
Governor of Virginia  
Patrick Henry Building, 3rd Floor  
1111 East Broad Street  
Richmond, Virginia 23219

**RE: Request to Amend HB 3082, Religious Freedom**

Dear Governor Kaine,

For many years, the ACLU of Virginia has supported legislation requiring the government to demonstrate a compelling state interest before burdening an individual's free exercise of religion. The ACLU believes, however, that any such legislation should be applicable to all persons in Virginia, including those who are incarcerated, and that it must also include a provision that prohibits the use of religious beliefs as a pretext for violating civil rights laws.

The Senate came close to amending the bill in a manner supported by the ACLU, but these amendments, proposed by Senator John Edwards, narrowly failed on a 16-22 vote.

Because HB 3082 excludes incarcerated persons and does not contain a safeguard against discriminatory applications of the law, the ACLU asks you to amend this bill.

*Background of Religious Freedom Restoration Laws*

Prior to 1990, it was generally accepted that in most situations the government could not burden the free exercise of religion without demonstrating a compelling state interest. In 1990, however, in *Smith v. Employment Division*, the U.S. Supreme Court held that almost any legitimately adopted government policy that restricts religious practices is permissible if it is applied equally to all people.

In 1993, Congress reacted to *Smith* by passing the Religious Freedom Restoration Act, which restored the compelling state interest test for burdening religious practices. In 1996, the Supreme Court nullified this federal law on grounds that Congress did not have the authority to impose it on the states. However, the Court made it clear in its ruling that states were free to pass their own versions of the statute.

Since then, many states, including Virginia, have grappled with legislative initiatives intended to restore the proper balance between government authority and religious freedom.

*Without Amendment, HB 3082 Would Allow Discrimination in the Name of Religion*

Under HB 3082, a person claiming that his religious beliefs compel him to discriminate in housing or employment on the basis of race or religion could hide behind the law by asserting that the state burdens his free exercise of religion if it does not allow the discriminatory practices. At the very least, tension is created between the state's guarantee of the right of an individual to practice his religious beliefs and the state's civil rights laws. The proposed language, found below, makes it clear that the law cannot be used for discriminatory purposes, while recognizing that under some limited situations religious institutions may discriminate.

**Recommendation: Non-Discrimination Amendment to HB 3082:**

**Except as provided in Subsection (b), this chapter does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law.**

**(b) This chapter is fully applicable to claims regarding the employment, education, or volunteering of those who perform duties, such as spreading or teaching faith, performing devotional services, or internal governance, for a religious organization. For the purposes of this subsection, an organization is a religious organization if:**

- (1) the organization's primary purpose and function are religious, it is a religious school organized primarily for religious and educational purposes, or it is a religious charity organized primarily for religious and charitable purposes; and**
- (2) it does not engage in activities that would disqualify it from tax exempt status under Section 501(c)(3), Internal Revenue Code.**

*Without Amendment, Some Incarcerated Persons in Virginia Would Not Be Protected*

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), a law that extends rights similar to those enumerated in HB 3082 to persons incarcerated in facilities that receive federal support. RLUIPA applies to all state facilities in Virginia, but does not apply to local jails or other institutions that do not receive federal funds, leaving the religious rights of individuals in these facilities without adequate protections. Any law passed in Virginia to broaden religious rights ought to apply to all persons, including those who are incarcerated.

Although most local jails in Virginia receive some federal funds, each year over the last three years between seven and thirteen have not.\*

**Recommendation: Delete Prisoner Exclusion from HB 3082:**

~~*G. The provisions of this section shall not apply to persons who are incarcerated in a state, local or federal correctional facility, whether or not such facility is (i) located in the Commonwealth or (ii) operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.).*~~

*Amend HB 3082*

The ACLU of Virginia asks you to amend HB 3082. If you have any questions or would like more information about state religious freedom laws, please feel free to contact me at 804/644-8080 or [kwillis@acluva.org](mailto:kwillis@acluva.org).

I thank you for your attention.

Sincerely,

Kent Willis  
Executive Director

\* FY 05 Jail Cost Report, State Compensation Board, pp37-38