

*Testimony by Joel Oster, Senior Litigation Counsel for
the Alliance Defense Fund, in support of:*

**The Kansas
Preservation of
Religious Freedom
Act**



February 14, 2012

If the people do not enhance and further define the protection for religious freedom now, the government may eventually take it away.

WHY DO WE NEED A RELIGIOUS FREEDOM ACT?

The free exercise of religion is, in a literal sense, our first and most basic freedom as Americans. The Founders listed it first in the Bill of Rights because they understood religious freedom as the most fundamental and inalienable right of every human being. The right to worship in accordance with the dictates of our own conscience is a liberty given to us by our creator. No man, and no government, should have the authority to take it away.

But today, the right to freely exercise religious faith is under increasing attack by government, and religious discrimination, even against mainstream faiths, is becoming more and more common. Nurses are being fired and demoted for expressing religious objections to participating in abortions, religiously-motivated home schoolers are being harassed, the religious expression of college and university students is being silenced by draconian campus speech codes, landlords are being forced to violate their consciences and condone immoral behavior, and churches and private business owners are being penalized for trying to follow their faith at work.

Recently, the Michigan Department of Civil Rights filed a complaint against a single lady who posted an advertisement on her church's bulletin board seeking a Christian roommate. This single lady wanted to have a roommate of the same faith so the two of them could read the Bible and pray together, and generally encourage each other in their Christian walk. But the Department did not value this single lady's religious freedom, and filed this complaint against her for discrimination in housing.

Over the past two decades, the U.S. Supreme Court has significantly reduced the religious freedom guarantees of the First Amendment to the U.S. Constitution. However, the states can and should go further to protect their citizens, and many states now have. The time has come for Kansas to do the same.

DON'T WE HAVE AN EXISTING PROTECTION IN OUR STATE CONSTITUTION?

While both section seven of the bill of rights of the Kansas Constitution and the First Amendment to the United States Constitution protect religious freedom, those protections were seriously eroded in a 1990 decision by the United States Supreme Court in *Employment Division., Department of Human Resources v. Smith*, 494 U.S. 872 (1990), which has been cited favorably by the Kansas Supreme Court in *Lower v. Board of Directors of the Haskell County Cemetery District*, 274 Kan. 735 (2002).

Prior to the *Smith* decision, it was well understood that the government could not impose a burden or limitation upon the fundamental right to freely exercise religion *unless the government could show it had a compelling interest in doing so, and no less restrictive means*

were available to accomplish that compelling interest. See *Sherbert v. Verner*, 374 U.S. 398 (1963); *State v. Heritage Baptist Temple, Inc.*, 236 Kan. 544 (1985).

But in 1990, the U.S. Supreme Court tragically reduced the level of protection historically afforded religious freedom. *Smith*, a five-four decision of the United States Supreme Court held that if a person's religious beliefs have been burdened by a law that is neutral and generally applicable, it is only subjected to the lowest level of scrutiny. *Smith*, 494 U.S. at 872. The Court held that the compelling interest test can only be applied if a state action or law *directly targets religion*, and not where an action or law is *generally applicable* with only an "incidental" adverse effect on free exercise." In the latter scenario, the state is merely required to show a *rational basis* for its action. This is really no protection at all.

Consequently, post *Smith*, a generally applicable law¹ is valid, however frivolous the government's interest, and however great the interference with religious liberty.² For example, if a law against consumption of alcohol by minors is neutral and generally applicable, then the state can deprive minors of the sacrament of Holy Communion in Catholic, Episcopal, and other churches that use real wine for communion, and *a fortiori* the state can suppress First Communion, traditionally celebrated at about age seven. A dry county or precinct could entirely exclude the central religious ritual of these churches. Or, a single lady can be found guilty of housing discrimination for seeking a Christian roommate to live with her in her 900 square feet home because the law is neutral and generally applicable.

This new requirement in federal cases has been rejected by Congress and nearly half the states. Eight state courts have expressly rejected it as an interpretation of their own constitutions;³

¹ A law is not generally applicable if it applies to religious conduct but not to similar secular conduct, or if it has secular exceptions but not religious exceptions, or if the state permits secular activity that undermines the same interests as the forbidden religious activity. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537, 543 (1993); see also cases cited in note 11. For application of that standard to this case, see Br. of Appellants 57-63 (in the Eleventh Circuit); Reply Br. 28-29.

² Whether a law is neutral and generally applicable under these standards often requires a difficult and complex inquiry into arguably analogous secular behavior See *Lukumi*, 508 U.S. at 531-46 (comparing challenged ordinances to full range of state and local law on activities affecting animals and to regulation of restaurants and garbage disposal); see also *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999); *Rader v. Johnston*, 924 F. Supp. 1540, 1546-56 (D. Neb. 1996); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 884-86 (D. Md. 1996).

³ See *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-82 (Alaska 1994) ("substantial threat to public safety, peace or order or where there are competing state interests of the highest order"); *Attorney Gen'l v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994) (state "interest sufficiently compelling to justify" burden on religious exercise); *State v. Hershberger*, 462 N.W.2d 393, 397-99 (Minn. 1990) (compelling interest and least restrictive means); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) (compelling interest and least restrictive means); *Hunt v. Hunt*, 648 A.2d 843, 852-53 (Vt. 1994) ("Vermont Constitution protects religious liberty to the same extent that the Religious Freedom Restoration Act restricts governmental interference with free exercise"); *Munns v. Martin*, 930 P.2d 318, 321-22 (Wash. 1997) (compelling interest and least restrictive means); *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996) (compelling interest and least restrictive alternative); see also *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998) (compelling interest), *vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999). The first *McCready* opinion found a compelling interest. The religious claimant sought rehearing on the basis of new authority elsewhere holding that a similar state interest was not compelling. See *id.* at 546 (Cavanagh, J., dissenting) (describing the petition's reliance on

six other state courts have rendered decisions inconsistent with it.⁴ Congress passed first the Religious Freedom Restoration Act, 42 U.S.C. '2000bb *et seq.* (1994 and U.S.C.A. Supp. 2001), and more recently the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. '2000cc *et seq.* (Supp. 2001). Twelve state legislatures, including Missouri, passed state Religious Freedom Restoration Acts,⁵ and the voters of Alabama rejected *Smith* by constitutional amendment, Ala. Const. amend. 622. The *Smith* opinion has also been subjected to intense scholarly criticism.⁶

The new federal rule has been so widely rejected because it does not serve the American tradition of religious liberty. It does not serve the purposes either of the constitutional guarantee or of the state's occasional need to override the constitutional guarantee, because it disregards the relative importance of each interest.

In light of the ever-increasing threats to religious freedom—and in order to provide Kansas citizens an opportunity to clarify and restore the heightened protection for our “first liberty”—the time has now come to amend Kansas law.

RECENT EXAMPLES OF GOVERNMENT INFRINGEMENT OF RELIGIOUS FREEDOM⁷

1) In September 2010, the Michigan Department of Civil Rights filed a housing discrimination complaint against a single, 31 year old lady in Grand Rapids, Michigan for seeking a Christian roommate. The single lady wanted a Christian roommate so she could read the Bible with her roommate, pray together, and generally encourage each other in their faith. Most assuredly, she did not want to share her house with a person who would try to convert her to another faith or would denigrate her faith. But when she posted an advertisement on her church's bulletin board seeking a “Christian female roommate,” the Michigan Department of

Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 714-17 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. en banc 2000), *cert. denied*, 121 S.Ct. 1078 (2001).

⁴ *Matter of Dubreuil*, 629 So.2d 819 (Fla. 1993) (ignoring *Smith* and applying pre-*Smith* law); *State v. Evans*, 796 P.2d 178 (Kan. App. 1990) (same); *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979) (pre-*Smith*, expressly interpreting state constitution); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992) (applying pre-*Smith* law but reserving issue of whether to change in light of *Smith*); *In re Brown*, 478 So.2d 1033, 1037-39 & n.5 (Miss. 1985) (pre-*Smith*, expressly interpreting state constitution); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107, 111 (Tenn. 1975) (same).

⁵ Ariz. Rev. Stat. Ann. '41-1493 *et seq.* (Supp. 2000); Conn. Gen. Stat. Ann. '52-571b (Supp. 2001); '761.01 *et seq.*, Fla. Stat. (2001); Idaho Code '73-401 *et seq.* (Supp. 2001); 775 Ill. Comp. Stat. Ann., Act 35 (2001); L.S.A.-R.S. 13:5231 (2010); Mo. Rev. Stat. § 1.302 (2009); N.M. Stat. Ann. art. 28-22 (Supp. 2000); Okla. Stat. '51-251 *et seq.* (Supp. 2001); R.I. Gen. Laws ch. 42-80.1 (1999); S.C. Stat. ch. 1-32 (Supp. 2000); Tex. Civ. Prac. & Rem. Code ch. 110 (Supp. 2001).

⁶ See James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990).

⁷ These examples are from cases and situations in which the Alliance Defense Fund was involved. These are just a sampling of the many cases of religious discrimination going on in America, both reported and unreported.

Civil Rights filed a complaint against her. The Department defended its actions by claiming that the law prohibiting discrimination in housing was a neutral law that applied to everyone.

2) In August of 2010, the City of Mission, Kansas passed a law that charged a tax to churches based on the number of persons who attend their service, referred to in the media as “the driveway tax.” The City has hinted that it can increase this tax in the future and has refused to exempt churches.

3) In May 2009, the Louisiana Supreme Court ruled that summary judgment was not warranted for the state hospital defendants who demoted and penalized a nurse for stating a religious objection to dispensing the “morning after” abortion pill. The case is proceeding to trial.

4) On February 11, 2011, a letter was sent to Secretary of Health and Human Services Kathleen Sebelius, signed by 46 members of the U.S. House of Representatives, asking her to explain why her department is seeking to repeal conscience protections for health care workers in light of known attacks on such workers. The letter cited as examples a nurse in New York who alleged she was forced by Mt. Sinai Hospital to participate in the abortion of an unborn child, despite her moral and religious objections to assisting in the termination of human life. Similarly, two nursing students filed complaint with the HHS Office of Civil Rights because Vanderbilt University Medical Center’s nurse residency program application required all applicants to labor and delivery, obstetrical and gynecological care, newborn nursery, and postpartum care programs to acknowledge in writing that they may be required to assist in abortions.

5) At Southeastern Louisiana University, campus police prohibited four students from sharing their faith on open areas of campus without applying for a speech permit, and perhaps paying a fee, at least one week in advance.

6) Students in public secondary and elementary schools are commonly prohibited from starting pro-life student organizations, and sometimes bible clubs, on the same basis as all other student organizations. Student-organized and initiated See You at the Pole and National Day of Prayer events are routinely proscribed.

7) In Ocean Grove, New Jersey, a United Methodist Association lost its property tax exemption and was subjected to a state investigation for declining to rent its private facility as a location for a same-sex “civil commitment” ceremony.

8) In Albuquerque, New Mexico, a young couple who owned and operated a photography studio were fined \$6,000 by a state commission for discrimination because their Christian faith required that they decline a couple’s request to hire them to photograph their ceremony.

9) In Norfolk, Virginia, Christians were prohibited from engaging in some forms of public speech during the annual Harborfest event, including wearing sandwich boards and the distributing religious literature.

10) In Pensacola, Florida, police recently halted Thursday night fellowships at a local Catholic church because the picnics were attracting too many "undesirables" (i.e., local homeless people).

11) In Mt. Juliet, Illinois, students and their parents were ordered to cover up references to God and prayer and any Scripture passages on the posters they made or else they could not be posted. Each year, students and parents have placed posters in the hallways of the school informing students of the "See You at the Pole" event on the National Day of Prayer.

12) In Balch Springs, Texas, a senior center used its facility for social programs and recreational events. A group of Christian seniors had also gathered at the center to sing gospel songs and to hear the Word of God from a retired pastor. These seniors quietly said a word of thanks to the Lord when they received their meals at the center. In August 2003, the city of Balch Springs enacted a new policy demanding that all mealtime prayers, gospel music, and "religious messages" cease immediately. No other group was silenced, only Christians.

13) While distributing literature on several occasions at the City College of San Francisco's Ocean Campus in 2007 and 2008, a Jews for Jesus employee was approached by campus security officers who told him he couldn't distribute literature without a permit. Police arrested and handcuffed him, searched him and detained him for more than three hours. The charges were dropped the next day.

14) Local authorities in the Village of Fife Lake, near Grand Rapids, Michigan, have graciously made the town's Municipal Building meeting room available for free to local community organizations. However, Forest Area Bible Church was required to pay rent. With the public room now closed to them, and no other suitable alternative, the church has stopped meeting.

15) On March 3, 2005, an FAA's civil service supervisor received a letter of reprimand from his regional manager. The document accused the supervisor of engaging in "unbecoming conduct" for several friendly conversations he had with un-offended co-workers regarding his Christian beliefs. For his actions, the supervisor was punished with a seven-day suspension without pay and a forced relocation from his position in Louisville, Ky. to Birmingham, Ala. A settlement agreement cleared the supervisor's record and required the government to pay attorneys' fees and costs.

16) A Christian man reached a favorable settlement with the New York Department of Transportation, which agreed to allow his trailer donning a gospel message to remain on his private business property along a public highway. The trailer had previously been cited as a "public nuisance," and NYDOT warned the man that it would be forcibly removed if the Christian message remained visible from the highway.

17) Spokane Falls Community College officials threatened a young female student and members of a Christian student group with disciplinary measures, including expulsion, if

they chose to hold a pro-life event on campus to share information with other students because the message was "discriminatory" and did not include a pro-abortion viewpoint.

18) In November 2004, a Montana Baptist church hosted a pro-marriage simulcast and allowed volunteers to circulate petitions to place a marriage amendment on the state ballot. Opponents filed a complaint with the state's commissioner of political practices, accusing the church of violating state law by acting as an "incidental political committee." A Montana federal district court ruled against the church. The 9th Circuit reversed the district court calling the law's application to the church unconstitutionally vague and a violation of the church's First Amendment rights.

19) American Atheists sued the Utah Highway Patrol and the Utah Transportation Department seeking a court order to remove roadside cross memorials placed to honor fallen state highway patrol officers.

WHAT QUESTIONS SHOULD SUPPORTERS OF THIS ACT ANTICIPATE?

QUESTION #1:

Won't this Act open a Pandora's Box, and allow a new cause of action for fringe groups or individuals to challenge the state's limitation on their "religiously motivated" antics?

ANSWER: No. This Act does not create any new or additional rights for any religious activity or potential litigant. It merely restores the former, heightened standard of review of religious liberty claims that served our country and our people well for so many years. That standard requires courts to always weigh legitimate free exercise claims against compelling state interests.

No problems have been created or abuses noted since the passage of the federal RFRA or RLUIPA laws, nor in any of the numerous states where the "compelling interest test" has already been restored over the last decade. Prior to the passage of many of those laws, detractors warned the legislation would spark waves of subversive litigation. Those abuses simply never materialized.

QUESTION #2:

Since Kansas citizens have not yet seen the high volume of direct threats to religious liberty that is occurring in other states, shouldn't we just wait until we get a substantial number of outrageous cases here before we act to amend the constitution?

ANSWER: No. As this document shows, recent and shocking cases of persons being compelled to act in violation of their deeply held religious beliefs or penalized for not violating their faith are becoming all too common. While Kansas may not yet have compiled the same number of examples as some other states, this Act is no doubt a necessary measure *right now* to prevent the further erosion of religious freedom.