



Testimony of the ACLU of Kansas and Western Missouri

In Opposition to HB 2260

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Background

Thank you for this opportunity to address the House Judiciary Committee today in opposition to HB2260, the *Kansas Preservation of Religious Freedom Act* (KPRFA). The ACLU believes that religious freedom is a fundamental human right that is guaranteed by the First Amendment's Free Exercise and Establishment clauses[1] and § 7 of the Kansas Constitution Bill of Rights[2]. The First Amendment encompasses not only the right to believe (or not to believe), but also the right to express and to manifest religious beliefs. These rights are fundamental and should not be subject to political process and majority votes. Thus the ACLU, along with almost every religious and civil rights group in America that has taken a position on the subject, rejects the Supreme Court's notorious decision of *Employment Division v. Smith*. In *Smith*, Justice Scalia wrote that the accommodation of religion should be left "to the political process" where government officials and political majorities may abridge the rights of free exercise of religion.[3]

The national opposition to the *Smith* case was overwhelming. The ACLU joined with a broad coalition of religious and civil liberties groups, including People for the American Way, the National Association of Evangelicals, the Southern Baptists' Ethics Religious Liberty Commission, and by many other groups to urge Congress to reinstitute the rule that religious freedom could be constrained solely if the government had a "compelling interest" in doing so. Congress agreed with this position and adopted the Religious Freedom Restoration Act (RFRA) in 1993 to prevent the government from substantially burdening a person's free exercise rights unless the burden furthered a compelling government interest and was the least restrictive means of furthering that interest. Section 2000bb-2(1) declared the law applicable to any form of government—federal, state or otherwise. [4] Congress relied on its powers under Section 5 of the 14th Amendment in applying RFRA to the states. It is on this ground that the Supreme Court ruled RFRA unconstitutional as applied to state and local governments.

In *City of Boerne v. Flores*, the Court said RFRA exceeded Congress' authority under the 14th Amend and ruled RFRA was not a proper exercise of Congress's enforcement power under Section 5 of the amendment as it violated the separation of powers.[5] It should be noted that even if Congress' intent in creating RFRA had remained latent, the Court still would have invalidated the law because, again, Congress has no constitutional authority to tell state courts how an alleged violation of a person's religious liberty should be interpreted. Following the Court's ruling in *Boerne*, many states began to enact their own versions of RFRA.[6]

The ACLU believes is important that we are all free to practice our religious beliefs. Laws similar to HB 2260 exist in other states, and these can be useful tools for providing additional protection for religious freedom, again an important constitutional right. However, this bill is unnecessary because the Kansas Supreme Court has found that § 7 of the Kansas Constitution Bill of Rights provides even greater protection of the free exercise of religious beliefs than the First Amendment to the United States Constitution.

HB 2260 is unnecessary because protections exist within Section 7 of the Kansas Constitution Bill of Rights

Kansas has a very bold and powerful religious freedom provision in the state Bill of Rights providing more meaning to religious freedom than the Free Exercise Clause of the First Amendment. Section 7 of the Bill of Rights of the Kansas Constitution states, in pertinent part:

"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship."

In *State v. Smith*, 155 Kan. 588, 127 P.2d 518 (1942), the Kansas Supreme Court addressed the religious exercise rights protected by § 7 of the Kansas Constitution Bill of Rights. In analyzing the constitutional claims, the Court compared the relative religious exercise rights protected by § 7 of the Kansas Constitution Bill of Rights to those protected by the First

Amendment to United States Constitution and observed "that the wording of this section of our Bill of Rights is much more in detail respecting religious freedom than is the First Amendment to the federal constitution." [7]

In *Stinemetz v. KHPA*, (KS App., May 4, 2011), the Kansas Supreme Court applies the *Sherbert* test to claims under § 7 of the Kansas Constitution Bill of Rights. [8] In *Stinemetz*, the Kansas Supreme Court finds that in order to determine whether government action violates an individual's right to the free exercise of religious beliefs under the Kansas Constitution, a court must determine: (1) whether the individual's religious beliefs are sincerely held; (2) whether the state action burdens the individual's free exercise of religious beliefs; and the state must prove (3) whether the state interest is overriding or compelling; and (4) whether the State uses the least restrictive means of achieving its interest. [9]

The ACLU believes strong protections of religious freedom already exist with § 7 of the Kansas Constitution Bill of Rights and Kansas case law and HB 2260 is unnecessary.

HB 2260 Fails to Protect Existing Civil Rights Laws in Kansas.

HB 2260 lacks language to protect existing civil rights laws in Kansas. In its current form, HB 2260 could allow individuals to argue that their religious beliefs exempt them from complying with laws that prohibit discrimination on the basis of religion, gender, marital status, national origin and sexual orientation. For example, based on religious objections:

- Employers could argue that the KPRFA allows them to refuse to hire women, LGBT people, or people of a particular religion or race.
- An employer who believes that pregnancy outside of marriage is a sin could cite the KPRFA as a defense for firing an unmarried pregnant female employee, even though such an action is prohibited by state law.
- A wedding photographer, flower shop owner, or caterer could claim that the RLRA affords a right to refuse services to interracial, interfaith, or same-sex couples.
- A restaurant could argue that the RLRA protects a policy requiring that all blacks, non-Christians, or LGBT people only be served food outside.
- A police officer could argue that requiring her to take reports of hate-motivated assaults against gays violates her religious beliefs.
- A bus driver for a public transportation system could maintain that the RLRA confers the right to refuse transport to blacks and Latinos based on his religious beliefs that they are inferior.
- A Muslim firefighter could argue that, per the KPRFA, she could not be required to respond to a church fire, while a Christian firefighter could claim that the KPRFA sanctions his refusal to respond to a fire at a mosque.
- Landlords could claim a right to refuse to rent to LGBT people, single parents, single pregnant women, or those of other faiths or races.

HB 2260 fails to protect against government-sponsored religious discrimination.

HB 2260 lacks language reaffirming the constitutional prohibition against governmental sponsorship of religion and defines a "burden" on religious liberty as including the denial of benefits. This bill could endanger existing protections that prevent the government from sponsoring or financing religious indoctrination and discrimination. For example, based on religious objections:

- A ministry operating a soup kitchen or senior center with government funds could argue that, under the HB 2260, it may preach to clients or provide benefits only to those willing to attend a religious service.
- A religious organization seeking a government grant to provide marital counseling to low-income couples or drug treatment to youth could claim that, HB 2260, it is entitled to proselytize participants in these programs.
- Religious groups could argue that this bill permits them to discriminate in hiring for programs operated with government funds.
- A public school biology teacher could argue that HB 2260 grants him the right to refuse to teach evolution.
- A county social worker could argue that she has a right under the HB 2260 to proselytize clients.
- A state judge could claim that the KPRFA authorizes him to open judicial proceedings with prayer.

A Better Way to Protect Religious Freedom

It is no secret that many religious groups do not support state religious freedom laws that provide exemptions for certain groups of people or for certain actions. Exemptions can include prisoners, land use claims, and civil rights claims. These religious groups have called exemptions dangerous as they are designed to torpedo state-level religious protection.[10] The ACLU could not disagree more and believes there is a better way to protect religious liberty in Kansas.

Lessons can be learned from other states that have previously passed state religious freedom laws, faced legal challenges to that, and succeeded. The Texas RFRA is a product of compromise. The success behind the Texas law, which was signed into law by then Governor George W. Bush, was a result of cooperative efforts of a diverse coalition, drawn together by a shared commitment to protecting religious freedom in our state.

The Texas RFRA coalition, which drew support from various faith communities and spanned the political spectrum from the conservative Christian Legal Society to the liberal Texas Freedom Network. The Texas law is comprehensive in nature and ensures protections for the health, safety, and fundamental rights of all citizens. The Texas law is provided below.[11]

Endnotes

[1] The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." Article VI of the Constitution contains another provision that also is of particular importance: that there shall be no religious test for public office.

[2] Section 7 of the Bill of Rights of the Kansas Constitution states, in pertinent part: "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship."

[3] *Employment Division v. Smith*, 494 U.S. 872, 890 (1990).

[4] The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

[5] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[6] The following is a list of cites to 16 states that have RFRA's (current as of Nov. 2010):

Alabama (Ala. Const. Amend. 622); Arizona (Ariz. Rev. Stat. Ann. § 41-1493); Connecticut (Conn. Gen. Stat. Ann. § 52-571b); Florida (Fla. Stat. Ann. § 761.01); Idaho (Idaho Code. § 73-40); Illinois (775 Ill. Comp. Stat. Ann. 35/1-35/99); Louisiana (recently enacted SB 606 (Act No. 793)); Missouri (Mo. Ann. Stat. §§ 1.302 & 1.307); New Mexico (N.M. Stat. Ann. § 28-22-1); Oklahoma (Okla. Stat. Ann. tit. 51, § 251); Pennsylvania (71 Pa. Cons. Stat. Ann. § 2401); Rhode Island (R.I. Gen. Laws § 42-80.1-1); South Carolina (S.C. Code Ann. § 1-32-10); Tennessee (Tenn. Code Ann. §4-1-407); Texas (Tex. Civ. Prac. & Rem. Code Ann. § 110.001); Virginia (Va. Code Ann. § 57-2.02).

[7] *State v. Smith*, 155 Kan. 588, 127 P.2d 518 (1942). 155 Kan. at 594.

[8] *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

[9] *Stinemetz v. KHPA*, (KS App., May 4, 2011 at 40).

[10] <http://www.freedomforum.org/packages/first/keepingfaith/part2.htm>

[11] Tex. Civ. Prac. & Rem. Code Ann. §§110.001-110.012 (1999)

§ 110.001. Definitions

(a) In this chapter:

nbsp; (1) "Free exercise of religion" means an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief.

nbsp; (2) "Government agency" means:

(A) this state or a municipality or other political subdivision of this state; and

(B) any agency of this state or a municipality or other political subdivision of this state, including a department, bureau, board, commission, office, agency, council, or public institution of higher education.

(b) In determining whether an interest is a compelling governmental interest under Section 110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution.

§ 110.002. Application

(a) This chapter applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority.

(b) This chapter applies to an act of a government agency, in the exercise of governmental authority, granting or refusing to grant a government benefit to an individual.

(c) This chapter applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter.

§ 110.003. Religious Freedom Protected

(a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.

(b) Subsection (a) does not apply if the government agency demonstrates that the 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 interest.

(c) A government agency that makes the demonstration required by Subsection (b) is not required to separately prove that the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.

§ 110.004. Defense

A person whose free exercise of religion has been substantially burdened in violation of Section 110.003 may assert that violation as a defense in a judicial or administrative proceeding without regard to whether the proceeding is brought in the name of the state or by any other person.

§ 110.005. Remedies

(a) Any person, other than a government agency, who successfully asserts a claim or defense under this chapter is entitled to recover:

- (1) declaratory relief under Chapter 37;
- (2) injunctive relief to prevent the threatened violation or continued violation;
- (3) compensatory damages for pecuniary and nonpecuniary losses; and
- (4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action.

(b) Compensatory damages awarded under Subsection (a)(3) may not exceed \$ 10,000 for each entire, distinct controversy, without regard to the number of members or other persons within a religious group who claim injury as a result of the government agency's exercise of governmental authority. A claimant is not entitled to recover exemplary damages under this chapter.

(c) An action under this section must be brought in district court.

(d) A person may not bring an action for damages or declaratory or injunctive relief against an individual, other than an action brought against an individual acting in the individual's official capacity as an officer of a government agency.

(e) This chapter does not affect the application of Section 498.0045 or 501.008, Government Code, or Chapter 14 of this code.

§ 110.006. Notice; Right to Accommodate

(a) A person may not bring an action to assert a claim under this chapter unless, 60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested:

- (1) that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority;
- (2) of the particular act or refusal to act that is burdened; and
- (3) of the manner in which the exercise of governmental authority burdens the act or refusal to act.

(b) Notwithstanding Subsection (a), a claimant may, within the 60-day period established by Subsection (a), bring an action for declaratory or injunctive relief and associated attorney's fees, court costs, and other reasonable expenses, if:

- (1) the exercise of governmental authority that threatens to substantially burden the person's free exercise of religion is imminent; and
- (2) the person was not informed and did not otherwise have knowledge of the exercise of the governmental authority in time to reasonably provide the notice.

(c) A government agency that receives a notice under Subsection (a) may remedy the substantial burden on the person's free exercise of religion.

(d) A remedy implemented by a government agency under this section:

(1) may be designed to reasonably remove the substantial burden on the person's free exercise of religion;

(2) need not be implemented in a manner that results in an exercise of governmental authority that is the least restrictive means of furthering the governmental interest, notwithstanding any other provision of this chapter; and

(3) must be narrowly tailored to remove the particular burden for which the remedy is implemented.

(e) A person with respect to whom a substantial burden on the person's free exercise of religion has been cured by a remedy implemented under this section may not bring an action under Section 110.005.

(f) A person who complies with an inmate grievance system as required under Section 501.008, Government Code, is not required to provide a separate written notice under Subsection (a). In conjunction with the inmate grievance system, the government agency may remedy a substantial burden on the person's free exercise of religion in the manner described by, and subject to, Subsections (c), (d), and (e).

(g) In dealing with a claim that a person's free exercise of religion has been substantially burdened in violation of this chapter, an inmate grievance system, including an inmate grievance system required under Section 501.008, Government Code, must provide to the person making the claim a statement of the government agency's rationale for imposing the burden, if any exists, in connection with any adverse determination made in connection with the claim.

§ 110.007. One-Year Limitations Period

(a) A person must bring an action to assert a claim for damages under this chapter not later than one year after the date the person knew or should have known of the substantial burden on the person's free exercise of religion.

(b) Mailing notice under Section 110.006 tolls the limitations period established under this section until the 75th day after the date on which the notice was mailed.

§ 110.008. Sovereign Immunity Waived

(a) Subject to Section 110.006, sovereign immunity to suit and from liability is waived and abolished to the extent of liability created by Section 110.005, and a claimant may sue a government agency for damages allowed by that section.

(b) Notwithstanding Subsection (a), this chapter does not waive or abolish sovereign immunity to suit and from liability under the Eleventh Amendment to the United States Constitution.

§ 110.009. Effect on Rights

(a) This chapter does not authorize a government agency to burden a person's free exercise of religion.

(b) The protection of religious freedom afforded by this chapter is in addition to the protections provided under federal law and the constitutions of this state and the United States. This chapter may not be construed to affect or interpret Section 4, 5, 6, or 7, Article I, Texas Constitution.

§ 110.010. Application to Certain Cases

Notwithstanding any other provision of this chapter, a municipality has no less authority to adopt or apply laws and regulations concerning zoning, land use planning, traffic management, urban nuisance, or historic preservation than the authority of the

municipality that existed under the law as interpreted by the federal courts before April 17, 1990. This chapter does not affect the authority of a municipality to adopt or apply laws and regulations as that authority has been interpreted by any court in cases that do not involve the free exercise of religion.

§ 110.011. Civil Rights

(a) 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 of 1986, as it existed on August 30, 1999.

§ 110.012. Grant to Religious Organization Not Affected

Notwithstanding Section 110.002(b), this chapter does not affect the grant or denial of an appropriation or other grant of money or benefits to a religious organization, nor does it affect the grant or denial of a tax exemption to a religious organization