

**Testimony of Vickie Sandell Stangl, President of the Great Plains Chapter
of Americans United for Separation of Church and State
Before the Kansas House of Representatives Judiciary Committee
February 14, 2012**

My name is Vickie Sandell Stangl and I am the president of the Great Plains chapter of Americans United for Separation of Church and State. I am speaking on behalf of the Great Plains chapter and all of Americans United's members and supporters in Kansas. Thank you for allowing me to explain why Americans United is greatly concerned that this proposed legislation, as drafted, is too broad. We are also concerned that without protecting civil rights laws, this bill could be used to jeopardize Kansas citizens' civil rights and healthcare protections.

Americans United works to preserve religious liberty to the fullest extent possible in our society. The purpose of HB 2260 – to provide stronger protection of religious exercise than currently provided for under the U.S. Constitution – is one that Americans United generally supports. The specific language of HB 2260, however, causes us concern.

In *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court ruled that strict scrutiny need not be applied to a law that substantially burdens religion as long as that law is neutral and generally applicable. Many viewed this as a step backwards, as previously, the Court had applied "strict scrutiny": The government could not substantially burden religion unless the government had a compelling interest and the law was narrowly tailored. In response, the federal government and many states passed laws to reinstate the pre-*Smith* standard. Americans United has supported many of these efforts, and opposed others that failed to strike the appropriate balance. Unfortunately, this bill is one we must oppose.

First, despite the legislation’s wording, which states: “Government shall not *substantially burden* a person’s exercise of religion even if the burden results from a rule of general applicability,” the proposed bill would not return Kansas to the traditional pre-*Smith* standard. Instead, it would create an entirely new standard altogether. The proposed amendment defines “burden” in a markedly different way than pre-*Smith* caselaw: It does not actually require that the burden be substantial at all. Instead, it states that a burden “means any government action that directly or indirectly constrains, inhibits, curtails, or denies the exercise of religion by any person or compels any action contrary to a person’s exercise of religion...” The bill’s choice of language is misleading, and the definition could easily be interpreted to mean that nearly any regulation, even if it creates on an insubstantial, *de minimus* burden that remotely affects free exercise, would have to satisfy “strict scrutiny.” This bill would not be restoring a known and effective legal protection; it would establish an uncertain standard. Kansas would be the **only state** to approve such sweeping and overbroad legislation.¹

Second, the proposed amendments could be interpreted to allow an unfettered, officially sanctioned loophole to Kansas’s civil rights laws. Experience at the federal level demonstrates that our concern about how this bill would harm civil rights laws is not speculative. The Bush Administration took the position that the Religious Freedom Restoration Act (RFRA) (signed in 1993 by then-President Bill Clinton, and supported by Americans United and many other organizations and which reestablishes the pre-*Smith* strict scrutiny standard) may be invoked to circumvent federal statutory civil rights provisions.² As a consequence, those invoking RFRA

¹ To date, only three other states have attempted – and failed thus far – to pass such sweeping and overbroad language. Those states are Colorado, Louisiana, and North Dakota.

² Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007). < <http://www.usdog.gov/fbci/effect-rfra.pdf>.>

are permitted to discriminate in hiring against those who are not co-religionists or those who do not adhere to the same religious teachings and tenets.

Without adding language to HB 2260 to protect the existing, statutory civil rights of Kansas citizens, these civil rights may be vulnerable to the claim that they are a burden on another individual's free exercise of religion. Moreover, if this bill were enacted, its provisions could be used to deny Kansas citizens access to critical healthcare and safety services. Examples from cases explicate this potential problem: Based on their religious beliefs, a maternity ward nurse refused to scrub for an emergency caesarian section and left a woman "standing in a pool of blood," a nurse insisted on telling an AIDS patient and his partner about her views on salvation and that God "doesn't like the homosexual lifestyle," and a police officer refused to guard an abortion clinic. **Expansion of religious freedom should not come at the expense of Kansas's existing civil rights protections.**

Americans United strongly supports efforts to provide stronger protection of religious exercise. For the reasons discussed, we urge you to **oppose HB 2260**.

Thank you for the opportunity to provide testimony on this important matter.