



AMERICAN ATHEISTS

March 21, 2023

The Honorable Senator Diane Larson
Chair, Senate Judiciary Committee
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505

Re: OPPOSE HB 1136, Testimony from American Atheists in opposition to a bill that would undermine religious equality in North Dakota

Dear Chairperson Larson and Members of the Senate Judiciary Committee:

American Atheists, on behalf of its constituents in North Dakota, writes in opposition to HB 1136. This dangerous legislation would undermine religious equality in North Dakota, just as it has done in other states that have passed similar legislation. Because HB 1136 will interfere with the constitutional rights of all North Dakotans, we strongly urge you to oppose this bill.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. Religious liberty is an individual right guaranteed by the First Amendment, and American Atheists opposes efforts to misuse these constitutional protections to undermine the civil rights or religious freedom of others.

HB 1136 is an example of a RFRA (a common acronym for a “Religious Freedom Restoration Act”), a bill that provides that government action may only burden religious exercise if it meets a stringent legal test. In order to meet this test, the government must show that its action was intended to meet a compelling government interest and the action taken was narrowly tailored, meaning that no alternative method will be as effective to meet the government’s goal. This is the most difficult test that courts impose in constitutional law, and it is rarely met by the government.

While RFRA laws were originally introduced at the federal and state level to protect religious exercise, in recent years RFRA language has been used in ways its supporters and sponsors would never have imagined, including exemptions from nondiscrimination, public health, and safety laws.¹

¹ For example, in its decision in *Burwell v. Hobby Lobby*, 573 US 682 (2014), the Supreme Court relied upon the federal RFRA to both declare that certain types of businesses have religious freedom rights and that those rights may

Freedom of religion is important and that is why it is already protected by both the U.S. Constitution and the North Dakota Constitution. However, these protections do not create a special right for religious individuals and organizations to violate neutral laws or discriminate against groups they disfavor. HB1136 would, under the guise of religious freedom, create special exemptions to a range of neutral laws to privilege religious organizations at the expense of everyone else. This bill would potentially allow individuals and organizations to evade nondiscrimination laws. In Virginia, for example, there have already been efforts to use the state's RFRA to overturn the recently passed Virginia Values Act, a state LGBTQ nondiscrimination law.² The rule of law is important, and we cannot simply create sweeping exemptions that allow people to pick and choose which laws they wish to follow. We should all be held to and protected by the same laws.

We oppose this bill because it violates the principle of religious equality, an essential component of religious freedom. Religious equality stands for the guiding and governing principle that one's religious identity should neither directly nor indirectly affect their civil rights under the law. This principle helped to shape both the First Amendment and the North Dakota Constitution, which provides that "the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."³

Instead of religious equality, this bill would establish a new principle – that religious people and organizations (only) may claim exemption from laws and policies that conflict with their beliefs. As Justice Antonin Scalia pointed out in his landmark *Employment Division v. Smith* opinion, such a principle would be "a constitutional anomaly."⁴

In addition to the legal chaos created by this bill, HB 1136 would have both short- and long-term negative economic impacts. States like Indiana that have passed RFRAs in recent years have seen economic impacts of more than \$400 million due to lost opportunities.⁵

take priority over the right of employees to receive benefits, in this case depriving the employees of contraceptive coverage.

² *Updegrove v. Herring*, 1:20-cv-01141-CMH-JFA, Defendant's Combined Opposition to Preliminary Injunction and Memorandum in Support of Motion to Dismiss (E.D. Va. 2020). Available at <https://www.oag.state.va.us/files/2020/2020-11-16-Updegrove-Combined-Brief.pdf>.

³ *Article I Declaration of Rights - North Dakota Legislative Assembly*. Available at: <https://ndlegis.gov/constit/a01.pdf>.

⁴ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (internal citations omitted).

⁵ Bender, A. (2016, January 31). *Indiana's religious freedom act cost Indianapolis \$60 million in lost revenue*. Forbes. Retrieved January 13, 2023, available at: <https://www.forbes.com/sites/andrewbender/2016/01/31/indianas-religious-freedom-act-cost-indianapolis-60-million-in-lost-revenue/?sh=128b77742e2a> ; *Indiana PR contract to fix RFRA damage canceled*. Human Rights Campaign. (2015). Available at: <https://www.hrc.org/press-releases/indianas-expensive-public-relations-contract-to-fix-anti-lgbt-rfra-damage-c>.

This bill is both dangerous and unnecessary. North Dakota has existed for over 130 years without this provision, and there is no evidence that the religious freedom of North Dakota's citizens has been routinely violated. Instead, religious liberty has historically been protected both through the First Amendment and through the North Dakota Constitution. Instead, this bill would undermine those protections by compromising the very bedrock of religious freedom, the principles of religious equality and the separation of religion and government.

Religious freedom should be a shield that protects the rights of everyone to practice the faith or their choice or not to practice a faith at all. It should not be used as a sword to harm others, such as discrimination. No person's civil rights should be at the mercy of another's religious belief. This legislation threatens to radically rebalance state law to grant extraordinary privileges to organized religion. HB 1136 would establish an across-the-board exemption that allows for religious discrimination by making religious exercise a state-favored class of activity. We urge North Dakota lawmakers to hold to the principle of the North Dakota Constitution and to reject this harmful legislation. If you should have any questions regarding American Atheists' opposition to HB 1136, please contact me at bwilliams@atheists.org.

Sincerely,



Brittany Williams
State Policy Counsel
American Atheists

cc: All members of the Senate Judiciary Committee