February 2, 2021

Dear Chairman Klemin and Members of the House Judiciary Committee:

On behalf of the ACLU of North Dakota, we write to express our concern regarding Section 5-9(a) of HB 1410, which would amend Section 37-17.1-05 of the North Dakota Century Code to allow for certain religious exemptions from orders, proclamations, rules, and regulations issued by the Governor during emergencies or disasters. The right to exercise one's faith is among our most fundamental rights. But religious freedom does not entitle religious institutions or individuals to receive special exemptions from the law if it would pose a grave risk to the health and lives of others.[1] Section 5-9(a) of HB 1410 could lead to just that.

ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota

P.O. Box 1190
Fargo, ND 58107
aclund.org

Under section 5-9(a) of the proposed bill, proclamations, rules, and regulations issued pursuant to the governor's powers to address emergencies and disasters may not "[s]ubstantially burden a person's exercise of religion unless the order is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest[.]" In other words, any person or religious organization could attempt to claim a special exemption—in the midst of a crisis—from any otherwise neutral, generally applicable order issued by the Governor if the order affects their religious exercise.

For example, under the stringent "strict scrutiny" legal standard set forth in Section 5-9(a), parents could claim that they need not comply with an order to evacuate their home due to a flood or fire because it would conflict with their religious conviction to trust God to protect them and their children. Or, although hospitals and funeral homes are overrun due to a deadly pandemic, a religious college could claim the right

---

[1] *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."). The U.S Supreme Court has made clear that religious exemptions or accommodations may be granted only when they do not harm others. *See, e.g.*, *Estate of Thornton v. Caldor*, *Inc.*, 472 U.S. 703, 709 (1985) (striking down a statute that gave Sabbath observers an unqualified right not to work on their Sabbath because "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (noting that in analyzing religious exemptions, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (invalidating sales-tax exemption for religious periodicals in part because exemption would have "burden[ed] nonbeneficiaries by increasing their tax bills"); *United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting employer's requested religious exemption from paying social-security taxes because exemption would have "operate[d] to impose the employer's religious faith on the employees"); *Burwell v. Hobby Lobby*, 573 U.S. 682, 739 (2014) (Kennedy, J., concurring) (explaining that religious exercise cannot "unduly restrict other persons . . . in protecting their own interests"); *id.* at 745 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, J., dissenting) ("Accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties."); *cf.*, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (exempting claimant from state unemployment benefits policy but noting that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."); *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (excusing students from reciting Pledge of Allegiance, but noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so").

to continue holding in-person classes, despite emergency rules prohibiting large gatherings of any sort. Similarly, a church could claim the right to hold a large wedding and reception in its hall afterward, even as non-religious wedding venues and other similar spaces remain closed by the Governor due to the extraordinary risk such events pose. To be sure, the state might—indeed, it should—ultimately win out under the proposed legal analysis, but by then the harm the state sought to prevent is likely to have already occurred, or the state will have been forced to divert critical resources from dealing with the emergency or disaster to instead demonstrating why there should be no special religious exemption for certain individuals or groups.

State officials most need flexibility when it comes to dealing with the type of disasters and emergencies that fall under the scope of Section 37-17.1-05. That does not, of course, mean that state officials are never subject to constitutional limitations, even in a crisis. But authorizing religious exemptions from neutral and generally applicable rules in these harrowing situations will hamstring efforts to protect the public from grievous harm, rendering the enforceability of even basic emergency orders uncertain merely because they have an incidental effect on religious exercise.

ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota

P.O. Box 1190
Fargo, ND 58107
aclund.org

The law does not require this,[2] and the proposed amendment is not necessary to protect religious freedom. The U.S. Constitution already prohibits the government from singling out individuals or groups for disfavorable treatment based on their religious status or identity.[3] And Sections 9(b) and 9(c) of HB 1410—though redundant of federal constitutional protections—affirm this principle, providing that emergency and disaster orders may not (1) "[t]reat religious conduct more restrictively than any secular conduct of reasonably comparable risk, unless the government demonstrates through clear and convincing scientific evidence that a particular religious activity poses an extraordinary health risk"; or (2) "[t]reat religious conduct more restrictively than comparable secular conduct because of alleged economic need or benefit." Thus, for instance, the government could not ban worship services under an emergency order while allowing non-religious gatherings of comparable risk, *e.g.*, concerts or lectures, to proceed. This ensures that religion is not singled out for disfavored treatment, while at the same time, allowing government officials to take steps that are neutral towards religion to protect us all during an emergency.

Because Section 9(a) of HB 1410 is unnecessary and because allowing religious exemptions of this nature could open a pandora's box during times of crisis, we urge you either to strike this provision of the proposed amendment to Section 37-17.1-05 of the North Dakota Century Code or to oppose the amendment in its entirety.

Sincerely,

Elizabeth Skarin
Campaigns Director
ACLU of North Dakota
northdakota@aclu.org

---

[2] *See generally Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that strict scrutiny need not be applied in free-exercise challenges to laws that are neutral and generally applicable).

[3] *See generally Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017).