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To: House Judiciary Committee
From: Christopher Dodson, Executive Director
Subject: House Bill 1410 - Protection of Religious Exercise in State Actions and Institutions
Date: February 2, 2021

The North Dakota Catholic Conference supports HB 1410 to ensure basic protections for religious exercise in state institutions and during emergency orders.

The nationwide pandemic has brought renewed attention to how government actions can, intentionally or not, restrict the exercise of religious freedom. For the most part, North Dakota has been spared the imposition of rules and policies unduly interfere with religious activity. Nevertheless, both the state and people of faith could benefit from established protections and parameters in the law.

Despite its length, HB 1410 is very simple. It applies what is known as the strict scrutiny standard and the principles set forth in the recent U.S. Supreme Court case of *Roman Catholic Diocese of Brooklyn v. Cuomo* to (1) state emergency orders and (2) government institutions. By doing so, HB 1410 sets forth standards in state law that are mostly already required under federal law or the Supreme Court.

Each of section applies the same three legal standards, but the language differs slightly because of their circumstances. For purposes of discussion, we can break these down to sections 3 and 5, concerning emergency orders, and sections 1, 2, and 4, concerning state institutions.¹

Emergency Orders

HB 1410 provides that an emergency order by the Governor or State Health Officer may not:

- (1) Substantially 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;
- (2) Treat 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
- (3) Treat religious conduct more restrictively than comparable secular conduct because of alleged economic need or benefit.

Subsection 1 is a restating of the "strict scrutiny" standard that applies to all federal laws and rules under the Religious Freedom Restoration Act (RFRA), and

all laws and policies in a majority of the states.² It does not apply, however, to North Dakota emergency orders unless the Legislative Assembly makes it applicable. The advantage of using the language from RFRA is that it sets forth clear parameters that courts have applied for decades. It provides strong protection for religious freedom while allowing the state to act if it has a legitimate and compelling interest and is using the least restrictive means.

Subsections 2 and 3 codifies the principle that the government cannot treat religious activity more severely than comparable secular activity unless it can show that the religious activity poses a greater risk. This principle is in line with the U.S. Supreme Court Case of *Church of Lukumi Babalu Aye, Inc. v. Hialeah*³ and the recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*. The constitutional requirements are clearly discussed in *Cuomo*. The Constitution requires “a minimum requirement of neutrality” to religion. Government cannot “single out” religious activity, treat comparable activity “less harshly,” or engage in “disparate treatment” of religion.

HB 1410 would codify these principles into the Century Code, clearly establishing religious protections and parameters for emergency orders by the Governor and the State Health Officer.

Government Institutions

Sections 1, 2, and 4 apply the same principles to when persons are in state institutional settings. Since it comes first in the bill, we will look at Section 1, concerning local jails. However, the three sections are substantially identical.

It states that a correction facility may not:

- (a) Substantially burden the exercise of religion by an offender in the custody of a correctional facility unless the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest;
- (b) Treat religious conduct more restrictively than any secular conduct of reasonably comparable risk, unless the correctional facility demonstrates through clear and convincing scientific evidence that a particular religious activity poses an extraordinary health risk; or
- (c) Deny clergy access to an offender in the custody of a correctional facility for the purpose of providing religious services unless the correctional facility demonstrates through clear and convincing scientific evidence that the provision of the religious service poses an extraordinary health risk and the denial of access is the least restrictive means of addressing the extraordinary health risk.

The subsection (a) is almost identical to the first section we discussed concerning emergency orders. However, rather than coming from RFRA, it comes from the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).⁴ RLUIPA applies the strict scrutiny standard to all prisons, jails, state hospitals, developmental centers, and the similar institutions at the federal, state, and local level. In other words, the local jails, DOCR, and DHS already have to comply with what is required by the first subsection. It requires nothing new from our state facilities. It merely codifies the practice into state law.

Like the sections dealing with emergency orders, the other two subsections codify the constitutional principles that the state cannot treat religious activity more harshly than comparable secular activities, including when it comes to visitation by clergy.

For many religions, essential religious activities can only be provided by a member of that religion's clergy. In the Catholic faith, for example, only a priest can hear confessions or say mass. HB 1410 is not saying that access to clergy can never be restricted. What it does say, in line with the court opinions and the respect for fundamental freedoms, is that patients, residents, and inmates should not be denied access to clergy unless there exists an extraordinary health risk and the denial of access is the least restrictive means of addressing the extraordinary health risk.

These subsections are not meant to interfere with the exercise of legitimate penological and security interests. It is only about preventing disparate treatment.⁵ The conference is open to discussing amendments, if necessary, to make that clear.

Finally, each section contains a provision allowing an aggrieved individual to seek judicial remedy, which, if it is given, is usually in the form of an injunction. This should not unleash a flood of frivolous litigation since RLUIPA already provides a judicial remedy.⁶ If RLUIPA has not resulted in a flood of frivolous litigation, there is no reason why HB 1410, which merely requires what is already in RLUIPA and *Cuomo*, would result in frivolous litigation.

Some persons may ask why, if what is required in HB 1410 is already required by RLUIPA or is done through existing internal policies, HB 1410 is needed. Firstly, federal law and internal policies can change. Codifying these important policies assures their continued existence. Secondly, the state legislature is the appropriate venue for establishing these protections and parameters for its residents and its facilities.

In conclusion, House Bill 1410 is not about what is happening now in North Dakota. It is, however, about protecting our religious freedom in the future. Religious freedom is one of our fundamental rights, built into who we are as human persons and our nation's founding principles. House Bill 1410 commits our state to protecting those principles during health emergencies and whenever we place a person in an institutionalized setting.

We urge a **Do Pass** recommendation.

¹ Section 1 concerns county and city jail facilities. Section 2 concerns Department of Corrections and Rehabilitation (DOCR) facilities. Section 3 concerns actions by the State Health Officer. Section 4 concerns facilities under the jurisdiction of the Department of Human Services (DHS). Section 5 concerns emergency orders by the Governor.

² RFRA states:

(a) *In general*

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) *Exception*

Government may substantially burden a person's exercise of religion only if it demonstrates that 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 compelling governmental interest.

(c) *Judicial relief*

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. ch. 21B § 2000bb et seq.

³ 508 U. S. 520, 537–538 (1993).

⁴ RLUIPA states:

(a) *General rule*

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S. Code § 2000cc–1

⁵ There is a mistaken belief by some opponents of HB 1410 that RLUIPA and the subsection (a) of the bill already protect against disparate treatment. They do not. Subsections (b) and (c) are needed to statutorily prevent the type of disparate treatment prohibited under *Lukumi* and *Cuomo*.

⁶ RLUIPA states:

(a) *Cause of action*

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

If RLUIPA has not resulted in a flood of frivolous litigation, there is no reason that HB 1410, which merely requires what is already in RLUIPA and required under Brooklyn Diocese would result in frivolous litigation.

42 U.S. Code § 2000cc–2.