



AMERICAN ATHEISTS

March 15, 2021

The Honorable Rep. Lawrence R. Klemin
Chairperson, House Judiciary Committee
600 E Boulevard Ave., Room JW327B
Bismarck, North Dakota 58505

Re: AMEND SB 2181, Testimony from American Atheists regarding legislation concerning protection for religious freedom

Dear Chairperson Klemin and Members of the House Judiciary Committee:

American Atheists, on behalf of its constituents in North Dakota, writes in opposition to SB 2181, a bill that seeks to protect religious freedom by placing limits on public health restrictions to allow in-person religious activities during a public health crisis. Although North Dakota does not have a Religious Freedom Restoration Act (RFRA), this bill introduces RFRA-like language into the law that may have unforeseeable consequences. Nevertheless, there is much in this bill to be admired. Therefore, we recommend that you remove the harmful, RFRA-like provisions of this bill and continue consideration of the measure.

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. As advocates for the health, safety, and well-being of all Americans, American Atheists objects to efforts to subordinate the health and safety of all to the religious beliefs of a few.

To contain outbreaks of COVID-19, governors and health departments across the country have issued public health restrictions to prevent in-person gatherings that may spread this disease. No one likes these restrictions, but most reasonable Americans realize they are necessary both to protect immune-compromised citizens and to hasten the end of the pandemic. Unfortunately, the Centers for Disease Control and Prevention (CDC) has shown that, despite good intentions and safety precautions taken, church services can serve as a vector for the spread of this deadly disease.¹ Throughout the pandemic, many thousands of religious organizations and places of worship have adapted to these conditions by meeting safely through virtual gatherings.

¹ James A., Eagle L., Phillips C., Hedges D.S., Bodenhamer C., Brown R., Wheeler G., and Kirking H. (2020). High COVID-19 Attack Rate Among Attendees at Events at a Church – Arkansas, March 2020. *CDC Morbidity and*

SB 2181 attempts to prevent government overreach of public health restrictions during the COVID-19 pandemic by establishing clear safeguards in North Dakota law. The limits this bill places on public health emergency orders are fair and appropriate. Specifically, this language clarifies that the state may not, “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.” This provision has well-established support in First Amendment law, and it protects religious activity by comparing it to like secular activity.

However, the bill overreaches where it prohibits the government from “substantially burden[ing] 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.” This language is similar to a RFRA, and it is likely to have unintended consequences. Moreover, the language is unnecessary because the aforementioned provisions already fulfil the goal of the legislature to protect religious exercise.

RFRA is a common acronym for a Religious Freedom Restoration Act, a state law 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 alternative methods will not be as effective to meet the government’s goal. 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, such as trumping nondiscrimination, public health, and safety laws.

Especially when it comes to public health, the state government requires the flexibility to respond to emergencies appropriately, and the introduction of such a stringent test will hamper efforts to stop the spread of disease and deal with other emergencies.

Further, although the RFRA language in this bill applies in limited circumstances, it is likely to permeate to other areas of the law. Once this compelling interest standard for religious exercise in public health matters is introduced to the law, courts will apply it in other areas not foreseen by this legislation. In some circumstances, RFRA language has been used to prevent people from accessing healthcare, such as emergency services, contraception, fertility treatments, and mental health counseling. When religion is used as a justification to deny healthcare, it puts patients’ health and well-being in jeopardy.

Mortality Weekly Report, 69(20); 632-635, May 22, 2020. Available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6920e2.htm>; Hamner L., Dubbel P., Capron I., Ross A., Jordan A., Lee J., Lynn J., Ball A., Narwal S., Russell S., Patrick D., and Leibrand H. (2020). High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice – Skagit County, Washington, March 2020. *CDC Morbidity and Mortality Weekly Report*, 69(19); 606-610, May 15, 2020. Available at https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm?s_cid=mm6919e6_w.

Aside from the RFRA-like provisions, SB 2181 strikes a good balance by treating religious organizations the same as similarly situated secular ones. Therefore, we urge you to amend this legislation to remove the RFRA-like provisions. If you should have any questions regarding American Atheists' position regarding SB 2181, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Very truly yours,

A handwritten signature in black ink, appearing to read 'AGill', with a long horizontal flourish extending to the right.

Alison Gill, Esq.
Vice President, Legal & Policy
American Atheists