



Nikolas Nartowicz
State Policy Counsel

(202) 466-3234
(202) 898-0955 (fax)
americansunited@au.org

1310 L Street NW
Suite 200
Washington, DC 20005

March 28, 2021

The Honorable Diane Larson
Chair
Judiciary Committee
North Dakota Senate
600 East Boulevard
Bismarck, ND 58505

The Honorable Michael Dwyer
Vice Chair
Judiciary Committee
North Dakota Senate
600 East Boulevard
Bismarck, ND 58505

Re: Oppose HB 1410–Government Must Be Able to Protect Public Health

Dear Chair Larson and Vice Chair Dwyer:

On behalf of the North Dakota members and supporters of Americans United for Separation of Church and State, I write to express our opposition to HB 1410, which would limit the ability of government officials to adopt measures that restrict the religious exercise. We understand that in difficult times, many people look to their faith for comfort and guidance, but that does not mean religious activities cannot or should not be regulated during an emergency. This bill should be rejected because it is unnecessary, would adopt uncertain legal standards, and, unfortunately, would put the public health at risk.

This Bill is Unnecessary

Sections 1, 2, and 4 create a new state cause of action that would apply to free exercise claims in the state penitentiary, other correctional facilities, and institutions managed by the department of human services. These new provisions are unnecessary, as the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) already applies to those institutions.¹ RLUIPA prohibits the government from imposing a substantial burden on the religious exercise of a person in a state hospital or confined to prison unless the burden is in furtherance of a compelling interest and is the least restrictive means of furthering that interest. RLUIPA has been used by people who are in these institutions to obtain access to spiritual advisors, religious literature, and a religious diet, as well as the ability to wear facial hair according to religious custom.

Sections 3 and 5 of the bill would limit the ability of the state health officer and governor to issue emergency orders that substantially burden any person's exercise of religion. But the United States Constitution already protects the free exercise of religion. Recently, the U.S. Supreme Court issued several decisions holding that government can place limits on

¹ 42 U.S.C. § 2000cc et seq.

religious activities in emergency situations² so long as such limitations are neutral and generally applicable or “narrowly tailored” to serve a “compelling” state interest.³

Religious exercise is also protected by the North Dakota Constitution, which says that the “free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state.”⁴ The North Dakota Supreme Court has held that the “resolution of a conflict between the free exercise of religious beliefs and the state's interest in the health, safety, and welfare of its citizens requires a delicate balance to accommodate these interests.”⁵ Because these religious freedom protections already exist, there is no need for a new state law that would make it harder for government to protect the public health.

Sections 3 and 5 Would Create New Vague and Uncertain Legal Standards

It is a fundamental responsibility of the government to protect the public during an emergency, including a pandemic, and limiting its ability to do so could cost lives. Yet the bill would subject emergency orders to new and uncertain legal standards, making it harder to protect public health.

For example, the bill would prohibit the governor and public health officials from regulating religion “more restrictively than any secular conduct of reasonably comparable risk, unless . . . a particular religious activity poses an extraordinary health risk.” The bill, however, does not define what constitutes an “extraordinary health risk,” and the term does not apply anywhere else in North Dakota law. The governor and public health officials would also be prohibited from treating “religious conduct more restrictively than comparable secular conduct because of alleged economic need or benefit.” But neither of these standards have been used in religious freedom cases elsewhere and could be interpreted broadly, significantly tying the hands of state officials in the future.

Furthermore, this language is designed to apply in the pandemic, but the bill fails to limit the use of this provision to the pandemic or other health-related scenarios. This could result in unforeseen and unintended consequences.

This Bill Would Put the Public Health and Safety at Risk

Over the course of the pandemic, nearly two-thirds of the states temporarily suspended or limited all mass gatherings, including those at houses of worship.⁶ That is because, like any

² *S. Bay United Pentecostal Church v. Newsom*, 592 U.S. __ (2021) (striking down a prohibition on indoor worship services); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) (striking down numerical limits on in-person worship where “the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.”).

³ *Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 66-67.

⁴ N.D. Const. art. I, § 3.

⁵ *State v. Rivinius*, 328 N.W. 2d 220, 224 (N.D. 1982).

⁶ See e.g. [Ga. Exec. Order 04.02.20.01](#) (Mar. 23, 2020); [Ill. Exec. Order 2020-10](#) (Mar. 20, 2020); [Ky. Cabinet for Health and Family Services Order](#) (Mar. 19, 2020); [La. Proclamation No. 41 JBE 2020](#) (Apr. 2, 2020); [Me. Exe. Order 14 FY19/20](#) (Mar. 18, 2020); [Md. Exec. Order 20-03-30-01](#) (Mar. 30, 2020); [Mass. COVID-19 Order No. 13](#) (Mar. 23, 2020); [Okla. Exec. Order 2020-13](#) (Apr. 8, 2020).

virus, COVID-19 is just as likely to spread at religious gatherings as at other gatherings.⁷ Indeed, numerous outbreaks of COVID-19 have been connected to houses of worship.⁸ As cases rise and fall, public health restrictions will likely need to change as well. Under HB 1410, however, the state health officer might not be able to effectively respond to changing circumstances and instate gathering limits if needed to stop the spread of disease.

The danger that the bill would create in non-pandemic scenarios is equally troubling. For example, in a worst-case scenario, if an accident caused an explosion at a chemical plant, the governor might have to close all schools, including religious schools, in an area that is highly hazardous. Or if the state were hit by tornadoes or flooding, the governor would need to enforce orders that keep all buildings in certain areas, including houses of worship, off limits because of damage. HB 1410 could prohibit government officials from issuing such orders, and as a result, North Dakotans could get sick, injured, or worse.

Conclusion

Many faiths teach that in emergency circumstances, protecting people's lives comes first, and that it is an act of charity, justice, and love to stay home and to worship through alternative means. To protect people who attend religious worship services, as well as those who don't, we should encourage these efforts, not create confusing legal standards or exempt religious activities from emergency restrictions. Thank you for your consideration on this important matter.

Sincerely,



Nikolas Nartowicz
State Policy Counsel

cc: Members of the Senate Judiciary Committee

⁷ According to the Center for Disease Control, "[t]he more people an individual interacts with at a gathering and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19." Center for Disease Control and Prevention, [Considerations for Events and Gatherings](#), Jan. 8, 2021.

⁸ At least twelve people died and 213 people tested positive after a North Carolina church event. Mecklenburg County Government, [COVID-19 Update on United House of Prayer for All People Convocation Events](#), Nov. 19, 2020. After an Ohio man attended church service while infected, COVID-19 "spread like wildfire," and 91 people from five counties developed symptoms. [Ohio Churchgoer with COVID-19 Infects 91 Others as State Struggles to Contain Spread of Virus](#), WKYC, Aug. 4, 2020. And in New Rochelle, New York, 100 people, most of whom were members of the same synagogue, were forced into quarantine after a man who was carrying the virus attended events at the synagogue. Joseph Spector & Jon Campbell, [Coronavirus Quarantine Lifted in New Rochelle as N.Y. Changes Statewide Policy](#), Lohud, Mar. 28, 2020.