

2023 HOUSE JUDICIARY

HB 1136

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

HB 1136
1/17/2023

Relating to the exercise of religion.

Chairman Klemin opened the hearing on HB 1136 at 9:00 A.M.

Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, Rep. Vetter

Discussion Topics:

- Governmental interest test
- Religious freedom
- Religious conflicts

Christopher Dodson, Catholic Alliance: In support. Testimony (#13674)

Carole Two Eagles: In support. No written testimony.

Mark Jorritsma, ND Family Alliance: In support. (#13742)

Cody Schueler, ACLU: In opposition. Testimony (#13784)

Additional written testimony: Brittany Williams, American Atheists, in opposition (#13482)

Hearing closed at 9:29 AM.

Delores Shimek, Committee Clerk By: Leah Kuball

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

HB 1136
1/17/2023

Relating to the exercise of religion

2:29 PM Chairman Klemin opened discussion

Chairman Klemin opened the hearing on HB 1136 at 2:30 pm. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roes Jones, Rep. Satrom, , Rep. Schneider, Rep. VanWinkle, Rep. Vetter Absent: Rep. Cory

Discussion Topics:

- Religious freedoms
- Religious Freedom Restoration act
- Committee action

Representative Vetter made a motion to Do Pass

Seconded by Representative Christensen

Roll Call Vote:

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	Y
Representative Cole Christensen	Y
Representative Claire Cory	AB
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	N
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Motion: 11-1-1

Representative Christensen: Carrier

Closed the meeting at 2:38 pm.

Delores Shimek, Committee Clerk By: Leah Kuball

REPORT OF STANDING COMMITTEE

HB 1136: Judiciary Committee (Rep. Klemin, Chairman) recommends **DO PASS** (11 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1136 was placed on the Eleventh order on the calendar.

2023 SENATE JUDICIARY

HB 1136

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1136
3/22/2023

A bill relating to the exercise of religion.

2:51 PM Chairman Larson opened the meeting.

Chairman Larson and Senators Mydal, Luick, Estenson, Sickler, Paulson and Braunberger are present.

Discussion Topics:

- Personal rights
- Religious Freedom

2:51 PM Representative Klemin introduced the bill and provided written testimony #26122.

2:54 PM Christopher Dodson, Executive Director, North Dakota Catholic Conference, testified in favor of the bill and provided written testimony #26355.

3:04 Mark Jorritsman, North Dakota Family Alliance, Legislative Action, testified in favor of the bill and provided written testimony #26192.

3:09 PM Cody Schuler, Lobbyist, ACLU of North Dakota, testified opposed to the bill and provided written testimony #26365.

Additional written testimony:

Brittany Williams #26333

Aleda Arnegard #26034

3:17 PM Chairman Larson closed the public hearing.

3:17 PM Senator Myrdal moved to Do Pass the bill. Motion seconded by Senator Luick.

3:17 PM Roll call vote was taken.

Senators	Vote
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Jonathan Sickler	Y
Senator Ryan Braunberger	N
Senator Judy Estenson	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Senate Judiciary Committee

HB 1136

03/22/23

Page 2

Motion passed 6-1-0.

Senator Myrdal will carry the bill.

This bill does not affect workforce development.

3:17 PM Chairman Larson closed the meeting.

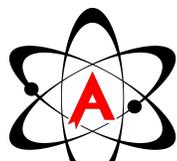
Rick Schuchard, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1136: Judiciary Committee (Sen. Larson, Chairman) recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1136 was placed on the Fourteenth order on the calendar. This bill does not affect workforce development.

TESTIMONY

HB 1136



AMERICAN ATHEISTS

January 13, 2023

The Honorable Rep. Kim Koppelman
Chair, House Judiciary Committee
State Capitol
327B
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 Koppelman and Members of the House 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 HB1136 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

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 RFRA in recent years have seen economic impacts of more than \$400 million due to lost opportunities.⁵

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 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*

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.

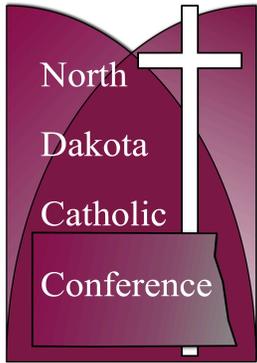
This legislation threatens to radically rebalance state law to grant extraordinary privileges to organized religion. HB1136 would establish an across-the-board exemption that allows for religious discrimination by making religious exercise a state-favored class of activity. We urge North Dakota lawmakers 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

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>.



Representing the Diocese of Fargo
and the Diocese of Bismarck

103 South Third Street
Suite 10
Bismarck ND 58501
701-223-2519
ndcatholic.org
ndcatholic@ndcatholic.org

To: House Judiciary Committee
From: Christopher Dodson, Executive Director
Subject: House Bill 1136
Date: January 17, 2023

The North Dakota Catholic Conference supports House Bill 1136 to establish a compelling interest test for the protection of religious freedom for all North Dakotans.

Twenty-three states have adopted this standard for religious liberty cases. State courts have adopted this standard in nine additional states. Congress has applied the compelling interest test to all federal laws, the District of Columbia, and all U.S. territories. North Dakota clearly falls short when it comes to protecting religious freedom compared to other states and the federal government. The absence of a compelling interest test is one reason North Dakota was recently ranked 37th among the states when it came to protecting religious liberty.¹

House Bill 1136 will rectify that deficiency by ensuring that government entities cannot substantially burden a person's sincerely held religious belief unless the government entity has a compelling governmental interest and is using the least restrictive means of furthering that interest.

This compelling interest test is set out on lines 7 through 11 of the bill.² This language is the same that is used for the federal Religious Freedom Restoration Act and most similar statutes.³

It is also the same language that this legislative body enacted in 2021 to protect the religious freedom of institutionalized individuals, such as inmates, and all persons during a health emergency. House Bill 1136, therefore, extends to all North Dakotans the same religious freedom protections that inmates in our correctional facilities already have.

The compelling interest test works like this:

1. Substantial Burden: Does the individual have a *sincere* religious belief that is being *substantially* burdened by government action?

No – Individual loses. Case closed.
Yes – Case moves forward.

2. Compelling Interest: Does the Government have a very good reason (e.g. health or safety) to interfere?

No – Individual wins. Case closed.
Yes – Case moves forward.

3. Least Restrictive Means: Is there a reasonable alternative the government could use to serve the public interest at issue, without interfering with the religious belief?

No – Individual loses. Case closed.

Yes – Individual wins. Case closed.

What would happen without HB 1136?

1. Substantial Burden: Does the individual have a *sincere* religious belief that is being *substantially* burdened by government action?

No – Individual loses. Case closed.

Yes – Individual likely loses. Case closed.⁴

The language on lines 12 through 15 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 several U.S. Supreme Court cases and is included more recently adopted state compelling interest test laws.

If it looks familiar, that is because it also was part of the 2021 law. Here again, HB 1136 merely extends the same religious freedom protections that the state already provides to inmates to all North Dakotans.

House Bill 1136 is about protecting religious freedom for all North Dakotans of all faiths, now and in the future. Religious freedom is one of our fundamental human rights, built into who we are as human persons. It is also one of our nation’s founding principles. The compelling interest test reflects these truths. The time has come for North Dakota to adopt it by passing HB 1136.

We urge a “Do Pass” recommendation on HB 1136.

¹ *Religious Liberty in the States 2022*; Center for Religion, Culture, and Democracy <https://religiouslibertyinthestates.com/>

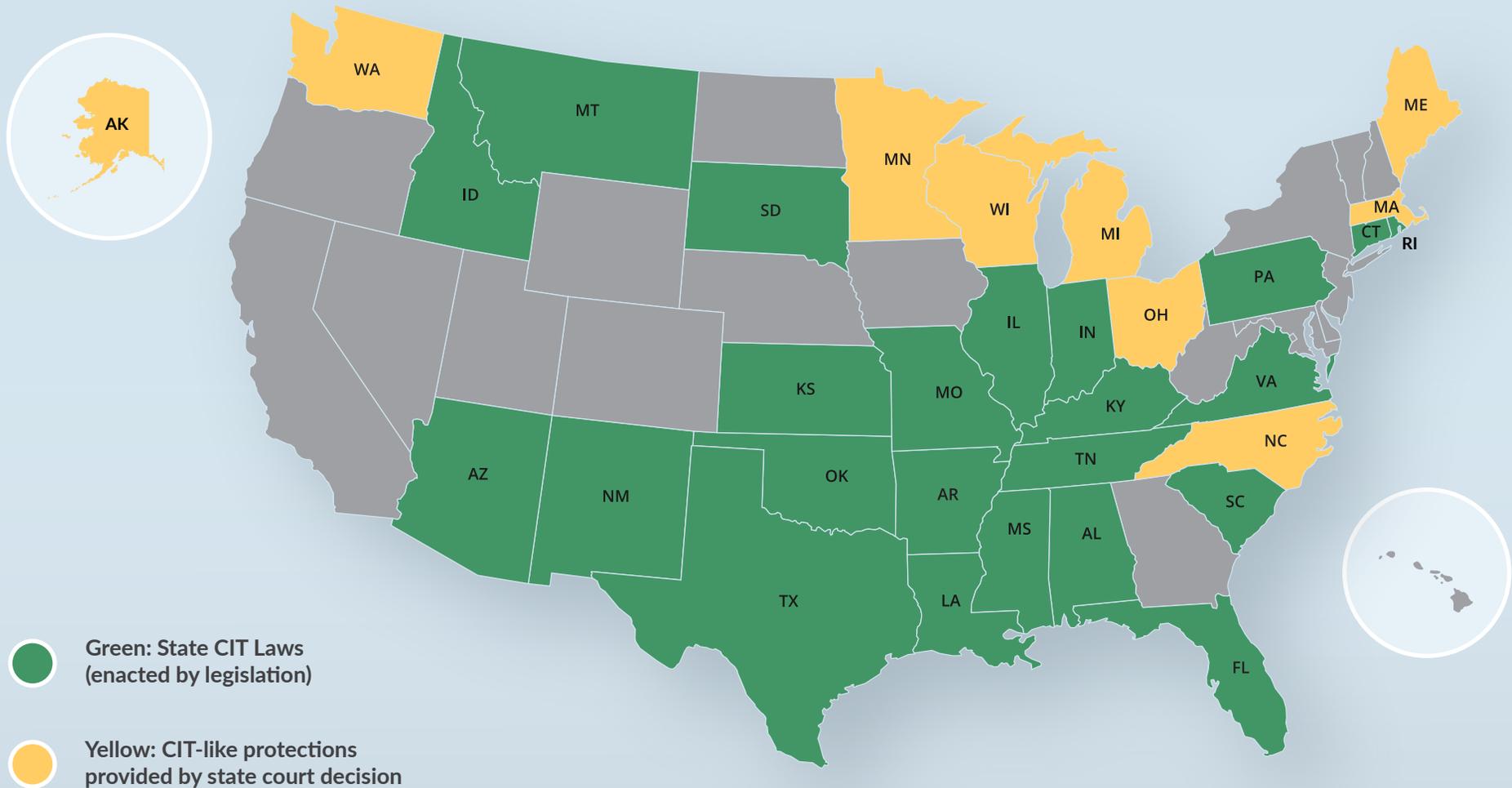
² “Compelling interest test” is also called the “strict scrutiny” standard.

³ See 42 U.S. Code § 2000bb et seq.

⁴ Without HB 1136, religious freedom is protected only if the law targets a specific religious practice or applies only to religion or religious practice, something which rarely, if ever, happens.

Contrary to some public opinion, religious freedom is not protected at the highest constitutional level as other First Amendment rights. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court held that if a law is facially neutral toward religion and applies to everyone, the lowest standard of review, known as the rational basis test, applies. For this reason, Congress and states began enacting “religious freedom restoration acts” to restore the compelling interest standard.

States with a Compelling Interest Test for Government Burdens on Religion (CIT)





NORTH DAKOTA

Family Alliance LEGISLATIVE ACTION

Testimony in Support of House Bill 1136

Mark Jorritsma, Executive Director
North Dakota Family Alliance Legislative Action
January 17, 2023

Dear Chairman Klemin and honorable members of the House Judiciary Committee. My name is Mark Jorritsma and I am the Executive Director of North Dakota Family Alliance Legislative Action. I am testifying in support of House Bill 1136 and respectfully request that you render a “DO PASS” on this bill

The Religious Freedom Restoration Act (RFRA) is a common-sense piece of legislation designed to ensure that the government cannot exclude certain beliefs from the public square. RFRA was introduced by Congressman Chuck Schumer and Senator Ted Kennedy, passed with bipartisan support and a unanimous voice vote in the House in 1993, and was signed into law by President Clinton.¹ It was written in reaction to the Supreme Court’s weakening of religious freedom protections in *Employment Division v. Smith*.²

RFRA reinstates the balancing test used in pre-*Smith* cases involving restrictions on religious freedom and permits the government to burden the free exercise of religion **only if** the government (1) shows that the burden is necessary to achieve a compelling government interest and (2) uses the least restrictive means of achieving that interest.

In other words, this law does not choose winners and losers. Instead, it protects Americans from the heavy hand of government interference with their religion, while also allowing government to restrict exercise of religious belief in necessary circumstances.

The Court determined the federal RFRA did not apply to state laws in 1997 and so in order for states to guarantee these protections for their citizens, state legislators began to pass RFRA’s.³

¹ H.R.1308 - Religious Freedom Restoration Act of 1993

² *Employment Div. v. Smith* 494 U.S. 872 (1990).

³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

1515 Burnt Boat Dr., Suite C-148, Bismarck, ND 58503

mark@Ndfamilyalliance.org

701-355-6425

www.ndfamilyalliance.org

Twenty-three states already employ this same legal balancing standard in interpreting their state constitutions, and they are working to protect a diverse number of Americans from government intrusion.⁴

RFRA creates an even playing field for all Americans and allows minority or disfavored faiths to have an equal footing before the law. It ensures diversity and plurality of thought, at least as far as the government is concerned. And in fact, the government still wins many cases where RFRA's are in place.

There are many examples of where RFRA has been used to protect diverse groups of believers. Several prominent examples are:

- Protected a closely held business, Hobby Lobby, by ensuring their right to operate their business without violating their faith. RFRA ensured Hobby Lobby received an exemption from the contraceptive mandate in the Patient Protection and Affordable Care Act (PPACA).⁵ The Court held that there were multiple other ways the government could provide contraception to Americans besides forcing a business to provide drugs that can cause abortions against its owners' religious belief.⁶
- Protected a group of nuns who provide charitable services to the elderly poor, the Little Sisters of the Poor, from being forced by the government to provide contraceptives under the PPACA mandate in violation of their strongly held religious beliefs.⁷ The Court concluded, and both parties agreed, that the government could provide contraceptive services another way without coopting the religious group's health plan.⁸

⁴ Ala. Const. Art. I, §3.01, Ariz. Rev. Stat. §41-1493.01, Ark. Code § 16-123-401, *et seq.*, Conn. Gen. Stat. §52-571b, Fla. Stat. §761.01, *et seq.*, Idaho Code §73-402, Ill. Rev. Stat. Ch. 775, §35/1, *et seq.*, Ind. Code Ann. § 34-13-9-0.7 *et seq.*, Kan. Stat. §60-5301, *et seq.*, Ky. Rev. Stat. §446.350, La. Rev. Stat. §13:5231, *et seq.*, Miss. Code §11-61-1, Mo. Rev. Stat. §1.302, Mont. Code Ann §27-33-105 Stat. §28-22-1, *et seq.*, Okla. Stat. tit. 51, §251, *et seq.*, Pa. Stat. tit. 71, §2403, R.I. Gen. Laws §42-80.1-1, *et seq.*, S.C. Code §1-32-10, *et seq.*, SD Cod. Law Ch. 3, § 1., Tenn. Code §4-1-407, Tex. Civ. Prac. & Remedies Code §110.001, *et seq.*, Va. Code §57-2.02.

⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding "The contraceptive mandate, as applied to closely held corporations, violates RFRA.")

⁶ *Id.* at 2782("HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections.")

⁷ *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

⁸ *Id.* at 1560.

1515 Burnt Boat Dr., Suite C-148, Bismarck, ND 58503

mark@Ndfamilyalliance.org

701-355-6425

www.ndfamilyalliance.org

- Protected a devout Sikh’s ability to practice his religion, which required him to wear a turban and a beard, and to serve his country.⁹ The Court held that the government had no good reason to keep the man from practicing his religion, especially when the military gave exception to this rule to many others for both religious and other purposes.
- Protected a Native American kindergartener’s ability to wear his hair long at school in keeping with his faith. A boy wearing long hair violated the school’s dress code, but the government said that the school did not have a compelling reason to force the boy to violate his faith.¹⁰
- Protected government employees countless times from discriminatory dress codes.
- Protected local houses of worship and ministries that serve the needy from discriminatory zoning laws.

There is often a concern that RFRA drive businesses away. However, there is no proof of this actually happening, despite threats. For instance, Amazon chose to move parts of their HQ2 to states, Tennessee and Virginia, that have some of the oldest, most entrenched religious liberty laws. Texas and North Carolina have also passed strong religious freedom protection laws, some far stronger than a RFRA, and those states consistently rank in the top five in the nation for business.¹¹

However, based upon empirical data, do RFRA have an impact on state GDP or business startups? As Attachments A and B clearly show, even a simple graph plot reveals that there is no impact to a state’s GDP growth or number of business startups from implementation of a RFRA. Scary stories and media bias aside, the data provides verifiable proof that this economic hobgoblin is unfounded.

In the end, RFRA is a commonplace fix that protects the freedom to think, believe, and live out those beliefs that most of us take for granted every day. It simply ensures the government cannot take away our ability to do this without justifying their imposition.

For these reasons, North Dakota Family Alliance Legislative Action asks that you please vote House Bill 1136 out of committee with a “DO PASS” recommendation.

Thank you for the opportunity to testify today, and I’d be happy to stand for any questions you might have.

⁹ *Singh v. Carter*, 168 F. Supp. 3d 216 (D.C. Cir. 2016).

¹⁰ *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

¹¹ See, e.g., Forbes’ “Best States for Business 2017”: <https://www.forbes.com/best-states-for-business/list/#tab:overall>

1515 Burnt Boat Dr., Suite C-148, Bismarck, ND 58503

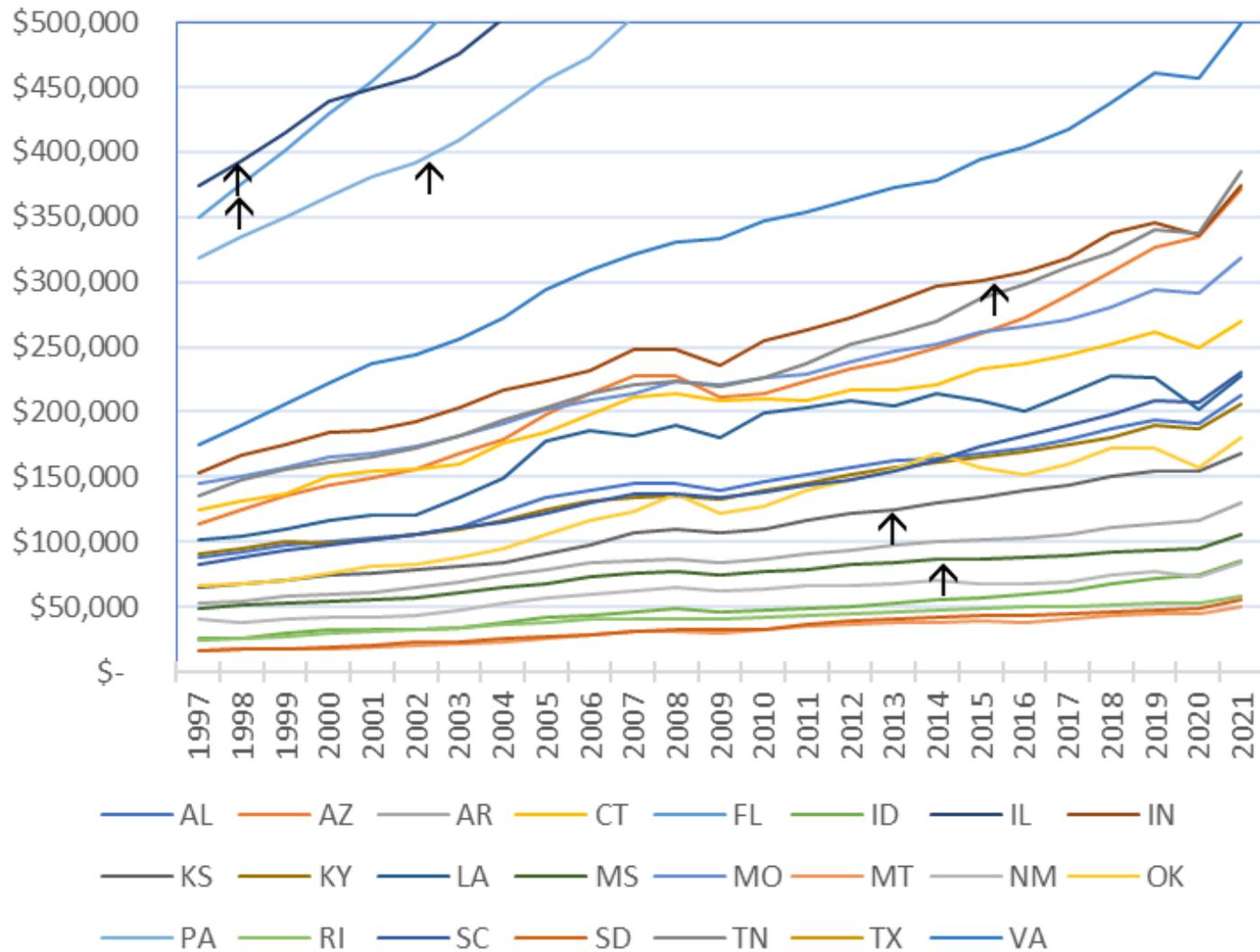
mark@Ndfamilyalliance.org

701-355-6425

www.ndfamilyalliance.org

Attachment A

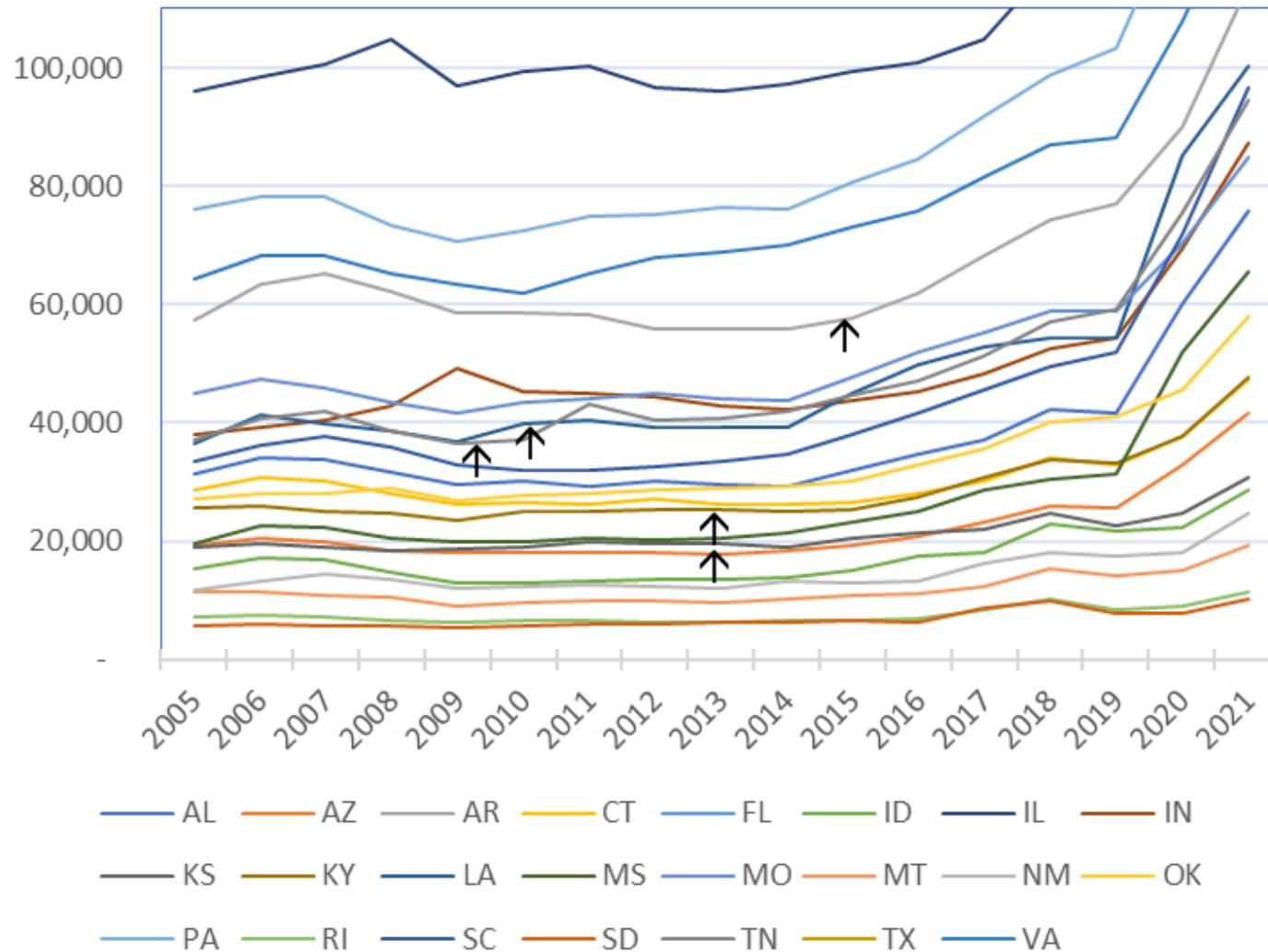
State Private Industry Annual GDP (millions of current dollars)



Source: U.S. Bureau of Economic Analysis, Regional Economic Accounts. An arrow indicates the year RFRA was implemented in some example states.

Attachment B

Annual Seasonally Adjusted Business Applications



Source: U.S. Census Bureau, Business & Industry Time Series. An arrow indicates the year RFRAs was implemented in some example states.

House Judiciary Committee

HB1136

January 17, 2023

Chair Klemin, Vice Chair Karls, and members of the Committee:

On behalf of the ACLU of North Dakota, I submit testimony in opposition to HB1136.

Freedom of religion is one of our most fundamental rights as Americans. It is protected in the state and federal constitutions. The Constitution protects not only the right to believe (or not to believe), but also the right to express religious beliefs. In this country, we have the absolute right to believe whatever we want about God, faith, and religion, and we have the right to act on our beliefs, but we do not have the right to harm others or impose our beliefs on others. The ACLU has been protecting religious freedom since its founding in 1920. We have a long history¹ of protecting religious believers of all backgrounds and faiths, whether it is defending a student's right to read his Bible during free reading periods at his school² or the right of a Muslim man to wear religious headwear in a courtroom.³

Unfortunately, HB1136 is broadly written and there may be unforeseen and harmful consequences to our state. If passed, this bill could excuse any person from any state or local law that they claim "burdens" their exercise of religion. This includes beliefs that do not stem from any established religion. Thus, any individual religious belief can determine which state and local laws a person chooses to honor.

In other states, we have seen individuals and groups use religious freedom as a justification for a wide range of behavior, some of it potentially criminal. Here are just a few examples:

- Police officers have used religious freedom as an excuse to refuse orders they claimed ran contrary to their personal religious views. For instance, a police officer in Oklahoma asserted a religious objection to his attending a community relations event held at a mosque, claiming a "moral dilemma."⁴
- Pharmacists in many states, including Ohio, Texas, and Wisconsin, have used religious freedom as a defense for refusing to dispense contraception.⁵
- In New Mexico, a local religious leader cited religious protection when he appealed a conviction for sexually abusing two teenagers.⁶
- The Department of Labor was barred from fully investigating possible child labor law violations because the individual being investigated said that his religious beliefs forbade him from discussing such matters with the government.⁷
- In Georgia, a graduate student training to be a school guidance counselor refused to work with a LGBTQ+ client because of the counselor's religious beliefs, and sued her university when they asked her to work with all clients.⁸

¹ For more information on the ACLU's work to defend the rights of religious believers, consult "The ACLU Defends Religious Practice and Expression", <https://www.aclu.org/aclu-defense-religious-practice-and-expression>.

² <https://www.aclu.org/religion-belief/aclu-tn-protects-students-right-read-bible-school>

³ <http://acluofnc.org/blog/report-man-removed-from-lenoir-courthouse-for-wearing-religious-attire.html>

⁴ *Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014).

⁵ Rob Stein, Pharmacists' Rights at Front Of New Debate, Washington Post (Mar. 28, 2005), available at <http://www.washingtonpost.com/wp-dyn/articles/A5490-2005Mar27.html>.

⁶ *Religious Group Leader's Conviction For Sexual Contact With Minor Upheld*, Religion Clause (Sept. 18, 2013), available at <http://religionclause.blogspot.com/2013/08/religious-group-leaders-conviction-for.html>.

⁷ *Perez v. Paragon Contractors, Corp.* (Dist. Utah, Sept. 11, 2014).

⁸ *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

ACLU

AMERICAN CIVIL LIBERTIES UNION

North Dakota

P.O. Box 1190

Fargo, ND 58107

701-404-7269

northdakota@aclu.org

aclund.org

- Parents sued their child’s school district and two principals for requiring all students to use a “Smart ID” card, claiming that requiring their daughter or permitting other students to use the ID card violated their religious beliefs.⁹
- By allowing someone who files a lawsuit to recoup damages, this bill could be an invitation for people to sue the government. The bill may increase congestion in our state courts and divert the already scarce resources of law enforcement agencies and governments at both the state and local level.

Similar legislation in Arizona was vetoed by Governor Jan Brewer after opposition from the general public and business community including Arizona Cardinals and the National Football League; major corporations representing a wide range of industries, including airlines, technology, and hospitality, to name just a few; and, politicians from both sides of the aisle, including Senators John McCain and Jeff Flake.



AMERICAN CIVIL LIBERTIES UNION

North Dakota

P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

Similarly, the people of North Dakota have already spoken their opposition to this kind of legislation: a 2012 proposed state constitutional amendment with very similar language and sentiment to HB1136 was resoundingly defeated by 64% when put on the ballot. North Dakotans know their religious freedom is sufficiently protected in this state and this country without this unnecessary legislation which comes with a host of potential unintended consequences.

For the reasons we have stated here, we urge you to reject HB1136.

Cody J. Schuler
Advocacy Manager
ACLU of North Dakota
cschuler@aclu.org

⁹ *A.H. ex rel. Hernandez v. Northside Ind. Sch. Dist.*, 916 F. Supp. 2d 757, 765 (W.D. Tex. 2013).

Dear Senate Judiciary Committee Member,

My name is Alida Arnegard and I reside in District 26. I would like to urge you to please make an amendment to the first part of HB 1136. The wording in this bill, although it is modeled directly after the Religious Freedom Reformation Act language (RFRA) which is already used at the Federal level, the term substantially burden is quite vague and it could be open to loose interpretation in future religious freedom court cases in our state.

Notwithstanding any other provision of law, a state or local government may not (OMIT the word SUBSTANTIALLY) burden a persons exercise of religion unless.

I stand for religious freedom and have given this great thought. Clarification of the wording here will make it easier to apply this bill to religious freedom cases in ND in the future. This small change will make a huge impact on the usefulness of HB 1136.

Thank you for your tireless service on behalf of our great state. I would deeply appreciate your consideration regarding this important clarification and I would request that you would render a Do Pass to HB 1136 with the omission of the word substantially.

Thank you so much,

Alida Arnegard

37-17.1-05. The governor and disasters or emergencies — Penalty.

1. The governor is responsible to minimize or avert the adverse effects of a disaster or emergency.

2. Under this chapter, the governor may issue executive orders and proclamations, and amend or rescind them. Executive orders, proclamations, and regulations have the force of law.

3. A disaster or emergency must be declared by executive order or proclamation of the governor if the governor determines a disaster has occurred or a state of emergency exists.

a. Except as provided in subdivision b, the state of disaster or emergency continues until the governor determines the threat of an emergency has passed or the governor determines the disaster has been dealt with to the extent emergency conditions no longer exist, whichever occurs first.

b. If a state of disaster or emergency relating to public health is declared and in effect and the legislative assembly is not in session, the legislative management may meet to vote on whether the legislative management should request the governor call a special session of the legislative assembly. If the governor does not call a special session within seven days after the legislative management sends a request to the governor, the declared state of disaster or emergency relating to public health terminates thirty days after the request from the legislative management was sent to the governor. If the governor calls a special session within seven days after the request from the legislative management was sent, the special session must be held within fifteen days of the governor's call for a special session. If the legislative assembly meets to address a declared state of disaster or emergency, the legislative assembly by concurrent resolution may terminate, extend, or modify the state of disaster or emergency.

c. The legislative assembly by concurrent resolution may terminate a state of disaster or emergency at any time.

d. All executive orders or proclamations issued under this subsection must indicate the nature of the disaster or emergency, the area or areas threatened, the conditions that have brought it about or which make possible termination of the state of disaster or emergency. An executive order or proclamation must be disseminated promptly by means calculated to bring its contents to the attention of the general public, unless the circumstances attendant upon the disaster or emergency prevent or impede such dissemination, and it must be filed promptly with the department of emergency services, the legislative council, the secretary of state, and the county or city auditor of the jurisdictions affected.

4. An executive order or proclamation of a state of disaster or emergency shall activate the state and local operational plans applicable to the political subdivision or area in question and be authority for the deployment and use of any forces to which the plan or plans apply and for use or distribution of any supplies, equipment, and materials and facilities assembled, stockpiled, or

arranged to be made available pursuant to this chapter or any other provision of law relating to a disaster or emergency.

5. During the continuance of any state of disaster or emergency declared by the governor, the governor is commander in chief of the emergency management organization and of all other forces available for emergency duty. To the greatest extent practicable, the governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or emergency operational plans, but nothing herein restricts the governor's authority to do so by orders issued at the time of the disaster or emergency.

6. In addition to any other powers conferred upon the governor by law, the governor may:

a. Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency.

b. Utilize all available resources of the state government as reasonably necessary to manage the disaster or emergency and of each political subdivision of the state.

c. Transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency management activities.

d. Subject to any applicable requirements for compensation under section 37-17.1-12, commandeer or utilize any private property if the governor finds this necessary to manage the disaster or emergency.

e. Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster or emergency mitigation, response, or recovery.

f. Prescribe routes, modes of transportation, and destinations in connection with an evacuation.

g. Control ingress and egress in a designated disaster or emergency area, the movement of persons within the area, and the occupancy of premises therein.

h. Suspend or limit the sale, dispensing, or transportation of explosives, and combustibles, not including ammunition.

i. Make provision for the availability and use of temporary emergency housing.

j. Make provisions for the control, allocation, and the use of quotas for critical shortages of fuel or other life and property sustaining commodities.

k. Designate members of the highway patrol, North Dakota national guard, or others trained in law enforcement, as peace officers.

7. Notwithstanding subsection 3, if a state of disaster or emergency relating to public health is declared and in effect, the governor may not issue an executive order under this section unless the executive order specifically addresses the mitigation of the declared state of disaster or emergency relating to public health.

8. Any person who willfully violates any provision of an executive order or proclamation issued by the governor pursuant to this chapter is guilty of an infraction.

9. The governor may authorize the adjutant general to recall to state active duty, on a volunteer basis, former members of the North Dakota national guard. Those recalled must possess the qualifications required by the disaster or emergency. Recall under this subsection is effective only for the duration of the disaster or emergency and recalled personnel will be released from state active duty upon competent authority that the requirement of their service under this subsection has passed. Compensation for personnel recalled under this subsection will be based upon section 37-07-05.

10. Notwithstanding any other provision of law, an order, proclamation, rule, or regulation issued pursuant to this section may not:

a. 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;

b. Treat religious conduct more restrictively than any secular conduct of reasonably comparable risk, unless the government demonstrates through clear and convincing evidence that a particular religious activity poses an extraordinary health risk; or

c. Treat religious conduct more restrictively than comparable secular conduct because of alleged economic need or benefit.

11. A person claiming to be aggrieved by a violation of subsection 10 may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief, including costs and reasonable attorney's fees.

Source:

S.L. 1973, ch. 281, § 5; 1983, ch. 392, § 1; 1983, ch. 393, § 1; 1985, ch. 398, § 5; 2005, ch. 16, § 14; 2011, ch. 258, § 1; 2013, ch. 272, § 2; 2021, ch. 92, § 5, effective August 1, 2021; 2021, ch. 191, §§ 2, 3, effective April 22, 2021; 2021, ch. 192, § 2, effective August 1, 2021; 2021, ch. 272, § 1, effective August 1, 2021.

Effective Date.

The 2013 amendment of this section by section 2 of chapter 272, S.L. 2013 became effective August 1, 2013.

Law Reviews.

Emergency Powers of the Governor in North Dakota, 50 N.D. L. Rev. 45 (1973).

Note.

Section 37-17.1-05 was amended 5 times by the 2021 Legislative Assembly. Pursuant to Section 1-02-09.1, the section is printed above to harmonize and give effect to the changes made in Section 5 of Chapter 92, Session Laws 2021, House Bill 1410; Section 2 of Chapter 191, Session Laws 2021, House Bill 1118; Section 3 of Chapter 191, Session Laws 2021, House Bill 1118; Section 1 of Chapter 272, Session Laws 2021, House Bill 1180; and Section 2 of Chapter 192, Session Laws 2021, Senate Bill 2181.

Notes to Decisions

Constitutionality.

In an action concerning an executive order which ordered the closure of salons and licensed cosmetologists to cease operations due to COVID-19, the governor did not exceed the statutory authority delegated to him through N.D.C.C. ch. 37-17.1 and plaintiff failed to adequately support her challenge that Executive Order 2020-06.2 was unconstitutional because it restricted her right to conduct business and failed to adequately support her contention the executive order and the criminal penalties imposed were unconstitutionally vague and overbroad. *State v. Riggins*, 2021 ND 87, 959 N.W.2d 855, 2021 N.D. LEXIS 88 (N.D. 2021), cert. denied, — U.S. —, 142 S. Ct. 763, 211 L. Ed. 2d 477, 2022 U.S. LEXIS 170 (U.S. 2022).



NORTH DAKOTA

Family Alliance LEGISLATIVE ACTION

Testimony in Support of House Bill 1136

Mark Jorritsma, Executive Director
North Dakota Family Alliance Legislative Action
March 22, 2023

Good afternoon Madam Chair Larson and members of the Senate Judiciary Committee. My name is Mark Jorritsma and I am the Executive Director of North Dakota Family Alliance Legislative Action. I am testifying in support of House Bill 1136 and respectfully request that you render a “DO PASS” on this bill.

The Religious Freedom Restoration Act (RFRA) is a common-sense piece of legislation designed to ensure that the government cannot exclude certain beliefs from the public square. RFRA was introduced by Congressman Chuck Schumer and Senator Ted Kennedy, passed with bipartisan support and a unanimous voice vote in the House in 1993, and was signed into law by President Clinton.¹ It was written in reaction to the Supreme Court’s weakening of religious freedom protections in *Employment Division v. Smith*.²

RFRA reinstates the balancing test used in pre-*Smith* cases involving restrictions on religious freedom and permits the government to burden the free exercise of religion **only if** the government (1) shows that the burden is necessary to achieve a compelling government interest and (2) uses the least restrictive means of achieving that interest.

In other words, this law does not choose winners and losers. Instead, it protects Americans from the heavy hand of government interference with their religion, while also allowing the government to restrict exercise of religious belief in necessary circumstances.

The Court determined the federal RFRA did not apply to state laws in 1997 and so in order for states to guarantee these protections for their citizens, state legislators began to pass RFRA’s.³

¹ H.R.1308 - Religious Freedom Restoration Act of 1993

² *Employment Div. v. Smith* 494 U.S. 872 (1990).

³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

1515 Burnt Boat Dr., Suite C-148, Bismarck, ND 58503

mark@Ndfamilyalliance.org

701-355-6425

www.ndfamilyalliance.org

Twenty-three states already employ this same legal balancing standard in interpreting their state constitutions, and they are working to protect a diverse number of Americans from government intrusion.⁴

RFRA creates an even playing field for all Americans and allows minority or disfavored faiths to have an equal footing before the law. It ensures diversity and plurality of thought, at least as far as the government is concerned. And in fact, the government still sometimes wins cases where RFRA's are in place.

There are many examples of where RFRA has been used to protect diverse groups of believers. Several prominent examples are:

- Protected a closely held business, Hobby Lobby, by ensuring their right to operate their business without violating their faith. RFRA ensured Hobby Lobby received an exemption from the contraceptive mandate in the Patient Protection and Affordable Care Act (PPACA).⁵ The Court held that there were multiple other ways the government could provide contraception to Americans besides forcing a business to provide drugs that can cause abortions, against its owners' religious belief.⁶
- Protected a group of nuns who provide charitable services to the elderly poor, the Little Sisters of the Poor, from being forced by the government to provide contraceptives under the PPACA mandate in violation of their strongly held religious beliefs.⁷ The Court concluded, and both parties agreed, that the government could provide contraceptive services another way without coopting the religious group's health plan.⁸

⁴ Ala. Const. Art. I, §3.01, Ariz. Rev. Stat. §41-1493.01, Ark. Code § 16-123-401, *et seq.*, Conn. Gen. Stat. §52-571b, Fla. Stat. §761.01, *et seq.*, Idaho Code §73-402, Ill. Rev. Stat. Ch. 775, §35/1, *et seq.*, Ind. Code Ann. § 34-13-9-0.7 *et seq.*, Kan. Stat. §60-5301, *et seq.*, Ky. Rev. Stat. §446.350, La. Rev. Stat. §13:5231, *et seq.*, Miss. Code §11-61-1, Mo. Rev. Stat. §1.302, Mont. Code Ann §27-33-105 Stat. §28-22-1, *et seq.*, Okla. Stat. tit. 51, §251, *et seq.*, Pa. Stat. tit. 71, §2403, R.I. Gen. Laws §42-80.1-1, *et seq.*, S.C. Code §1-32-10, *et seq.*, SD Cod. Law Ch. 3, § 1., Tenn. Code §4-1-407, Tex. Civ. Prac. & Remedies Code §110.001, *et seq.*, Va. Code §57-2.02.

⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding "The contraceptive mandate, as applied to closely held corporations, violates RFRA.")

⁶ *Id.* at 2782("HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections.")

⁷ *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

⁸ *Id.* at 1560.

1515 Burnt Boat Dr., Suite C-148, Bismarck, ND 58503

mark@Ndfamilyalliance.org

701-355-6425

www.ndfamilyalliance.org

- Protected a devout Sikh’s ability to practice his religion, which required him to wear a turban and a beard, and to serve his country.⁹ The Court held that the government had no good reason to keep the man from practicing his religion, especially when the military gave exception to this rule to many others for both religious and other purposes.
- Protected a Native American kindergartener’s ability to wear his hair long at school in keeping with his faith. A boy wearing long hair violated the school’s dress code, but the government said that the school did not have a compelling reason to force the boy to violate his faith.¹⁰
- Protected government employees countless times from discriminatory dress codes.
- Protected local houses of worship and ministries that serve the needy from discriminatory zoning laws.

There is often a concern that state RFRA drive businesses away. However, there is no proof of this actually happening, despite threats. For instance, Amazon chose to move parts of their HQ2 to states, Tennessee and Virginia, that have some of the oldest and most entrenched religious liberty laws. Texas and North Carolina have also passed strong religious freedom protection laws, some far stronger than a RFRA, and those states consistently rank in the top five in the nation for business.¹¹

However, based upon empirical data, do RFRA have an impact on state GDP or business startups? As Attachments A and B clearly show, even a simple graph plot reveals that there is no discernable impact to a state’s GDP growth or number of business startups from implementation of a RFRA. Scary stories and media bias aside, the data provides verifiable proof that this economic hobgoblin is unfounded.

In the end, RFRA is a commonplace fix that protects the freedom to think, believe, and live out those beliefs that most of us take for granted every day. It simply ensures that the government cannot take away our ability to do this without justifying their imposition.

For these reasons, North Dakota Family Alliance Legislative Action asks that you please vote House Bill 1136 out of committee with a “DO PASS” recommendation.

Thank you for the opportunity to testify today, and I’d be happy to stand for any questions you might have.

⁹ *Singh v. Carter*, 168 F. Supp. 3d 216 (D.C. Cir. 2016).

¹⁰ *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

¹¹ See, e.g., Forbes’ “Best States for Business 2017”: <https://www.forbes.com/best-states-for-business/list/#tab:overall>

1515 Burnt Boat Dr., Suite C-148, Bismarck, ND 58503

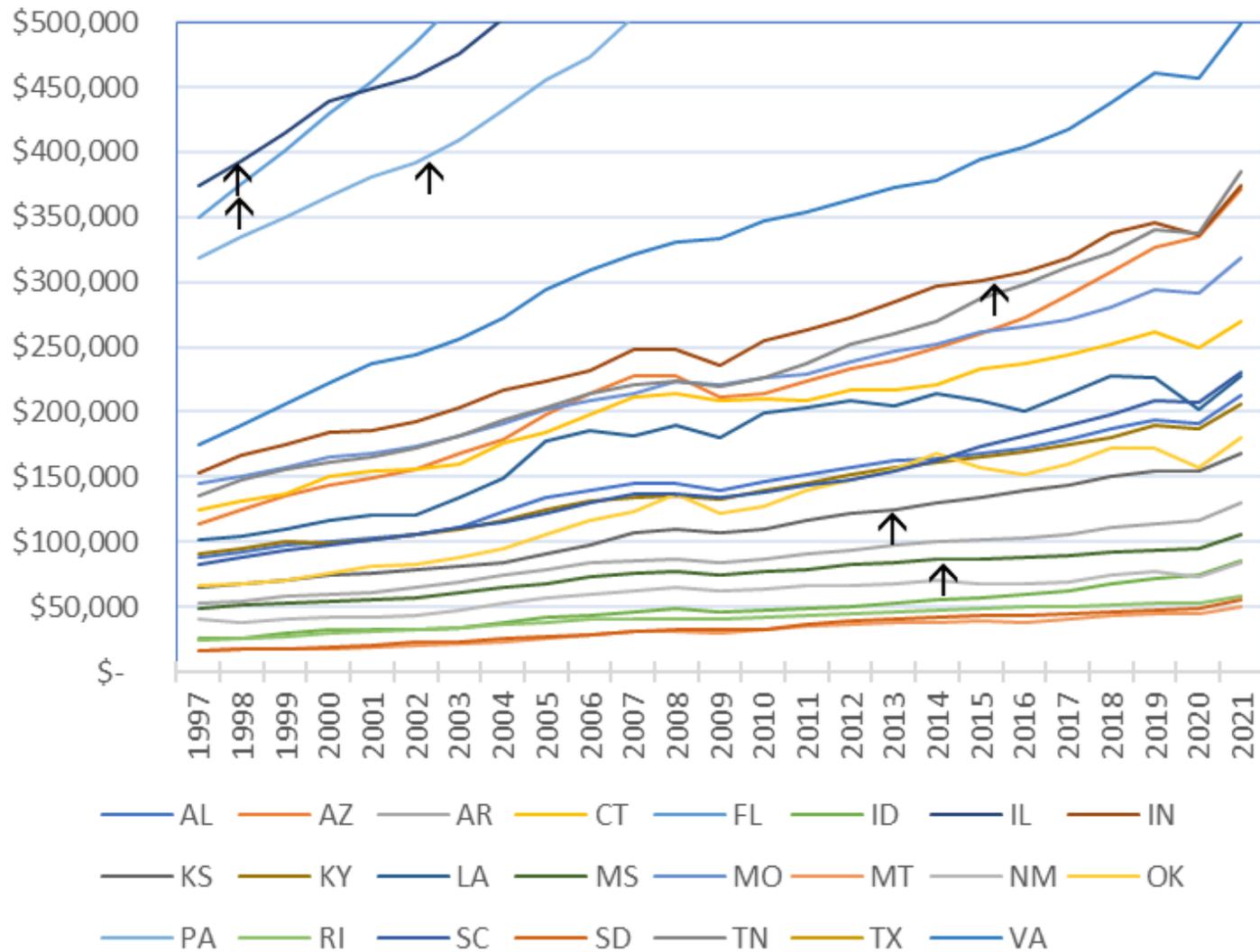
mark@Ndfamilyalliance.org

701-355-6425

www.ndfamilyalliance.org

Attachment A

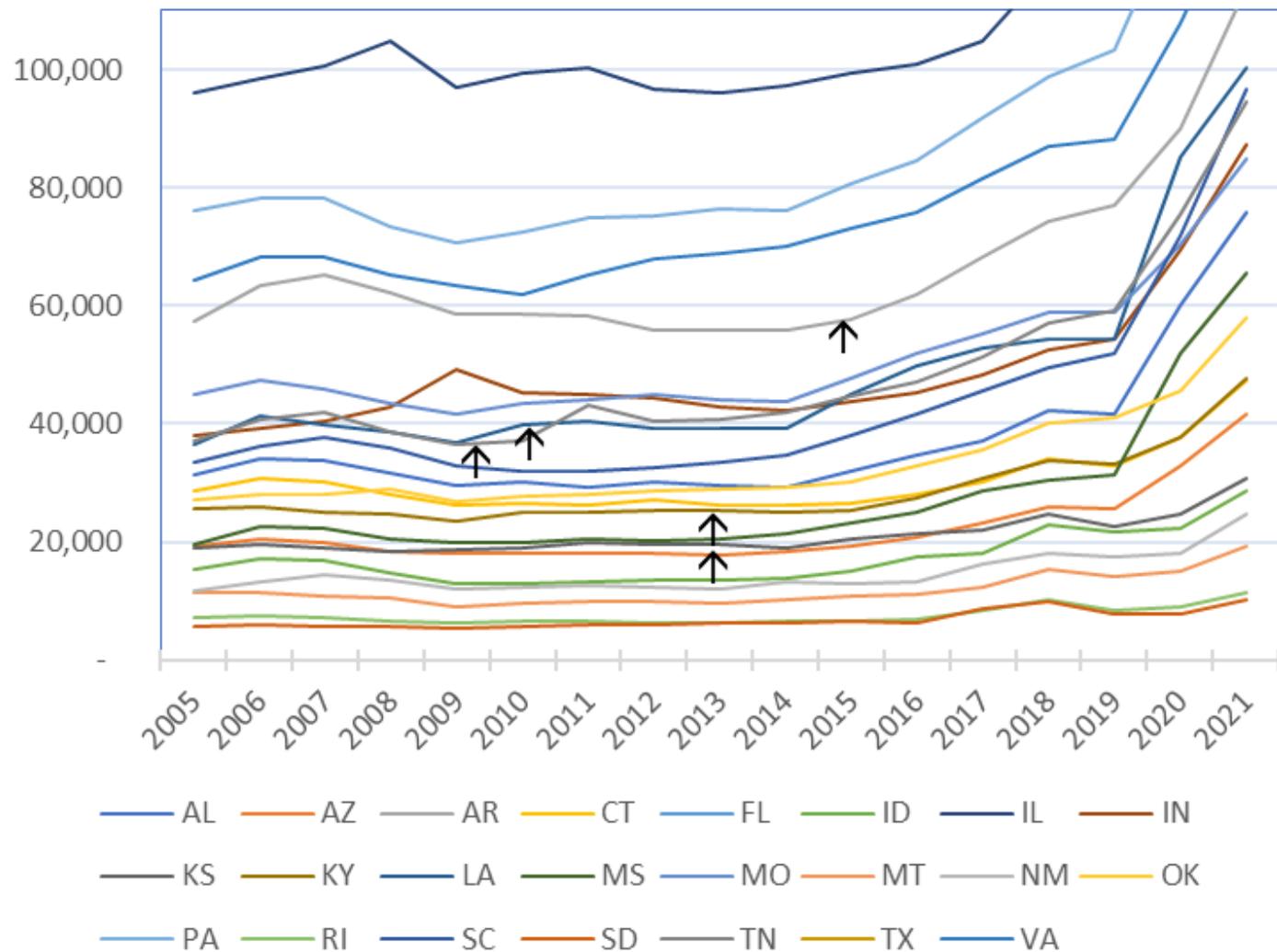
State Private Industry Annual GDP (millions of current dollars)



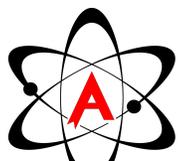
Source: U.S. Bureau of Economic Analysis, Regional Economic Accounts. An arrow indicates the year RFRA was implemented in some example states.

Attachment B

Annual Seasonally Adjusted Business Applications



Source: U.S. Census Bureau, Business & Industry Time Series. An arrow indicates the year RFRAs were implemented in some example states.



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 RFRA 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



Representing the Diocese of Fargo
and the Diocese of Bismarck

103 South Third Street
Suite 10
Bismarck ND 58501
701-223-2519
ndcatholic.org
ndcatholic@ndcatholic.org

To: Senate Judiciary Committee
From: Christopher Dodson, Executive Director
Subject: House Bill 1136
Date: March 22, 2023

The North Dakota Catholic Conference supports House Bill 1136 to establish a compelling interest test for the protection of religious freedom for all North Dakotans.

Twenty-four states have adopted this standard for religious liberty cases. State courts have adopted this standard in nine additional states. Congress has applied the compelling interest test to all federal laws, the District of Columbia, and all U.S. territories. North Dakota clearly falls short when it comes to protecting religious freedom compared to other states and the federal government. The absence of a compelling interest test is one reason North Dakota was recently ranked 37th among the states when it came to protecting religious liberty.¹

House Bill 1136 will rectify that deficiency by ensuring that government entities cannot substantially burden a person's exercise of religion unless the government entity has a compelling governmental interest and uses the least restrictive means of furthering that interest.

This compelling interest test is set out on lines 7 through 11 of the bill.² This language is the same that is used for the federal Religious Freedom Restoration Act and most similar statutes.³

It is also the same language that this legislative body enacted in 2021 to protect the religious freedom of institutionalized individuals, such as inmates, and all persons during a health emergency. House Bill 1136, therefore, extends to all North Dakotans the same religious freedom protections that inmates in our correctional facilities already have.

The compelling interest test works like this:

1. Substantial Burden: Does the individual have a sincere religious belief that is being *substantially* burdened by government action?

No – Individual loses. Case closed.
Yes – The case moves forward.

2. Compelling Interest: Does the Government have a very good reason (e.g. health or safety) to interfere?

No – Individual wins. Case closed.
Yes – The case moves forward.

3. Least Restrictive Means: Is there a reasonable alternative the government could use to serve the public interest at issue, without interfering with the religious belief?

No – Individual loses. Case closed.

Yes – Individual wins. Case closed.

What would happen without HB 1136?

1. Substantial Burden: Does the individual have a *sincere* religious belief that is being *substantially* burdened by government action?

No – Individual loses. Case closed.

Yes – Individual likely loses. Case closed.

The individual loses because without the compelling interest test religious freedom is protected only if the law targets a specific religious practice or applies only to religion or religious practice, something that rarely happens.⁴

The language on lines 12 through 15 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 several U.S. Supreme Court cases and is included more recently adopted state compelling interest test laws.

If it looks familiar, that is because it also was part of the 2021 law. Here again, HB 1136 merely extends the same religious freedom protections that the state already provides to inmates to all North Dakotans.

House Bill 1136 is about protecting religious freedom for all North Dakotans of all faiths, now and in the future. Religious freedom is one of our fundamental human rights, built into who we are as human persons. It is also one of our nation's founding principles. The compelling interest test reflects these truths. The time has come for North Dakota to adopt it by passing HB 1136.

We urge a **Do Pass** recommendation on HB 1136.

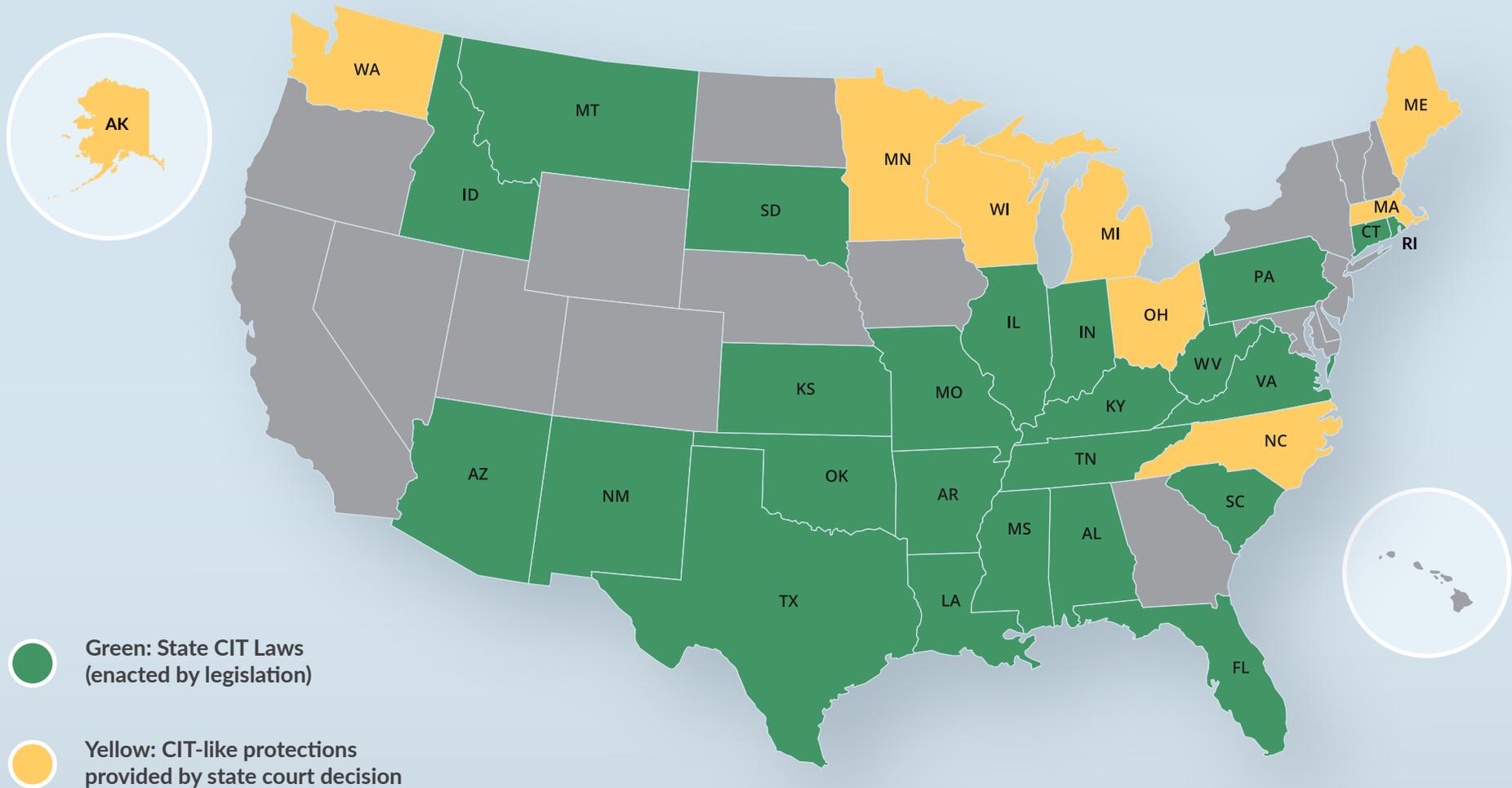
¹ *Religious Liberty in the States 2022*; Center for Religion, Culture, and Democracy <https://religiouslibertyinthestates.com/>

² "Compelling interest test" is also called the "strict scrutiny" standard.

³ See 42 U.S. Code § 2000bb et seq.

⁴ Contrary to some public opinion, religious freedom is not protected at the highest constitutional level as other First Amendment rights. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court held that if a law is facially neutral toward religion and applies to everyone, the lowest standard of review, known as the rational basis test, applies. For this reason, Congress and states began enacting “religious freedom restoration acts” to restore the compelling interest standard.

States with a Compelling Interest Test for Government Burdens on Religion (CIT)



Senate Judiciary Committee

HB1136

March 22, 2023

Chair Larson, Vice Chair Paulson, and members of the Committee:

On behalf of the ACLU of North Dakota, I submit testimony in opposition to HB1136.

Freedom of religion is one of our most fundamental rights as Americans. It is protected in the state and federal constitutions. The Constitution protects not only the right to believe (or not to believe), but also the right to express religious beliefs. In this country, we have the absolute right to believe whatever we want about God, faith, and religion, and we have the right to act on our beliefs, but we do not have the right to harm others or impose our beliefs on others. The ACLU has been protecting religious freedom since its founding in 1920. We have a long history¹ of protecting religious believers of all backgrounds and faiths, whether it is defending a student's right to read his Bible during free reading periods at his school² or the right of a Muslim man to wear religious headwear in a courtroom.³

Unfortunately, HB1136 is broadly written and there may be unforeseen and harmful consequences to our state. If passed, this bill could excuse any person from any state or local law that they claim "burdens" their exercise of religion. This includes beliefs that do not stem from any established religion. Thus, any individual religious belief can determine which state and local laws a person chooses to honor.

In other states, we have seen individuals and groups use religious freedom as a justification for a wide range of behavior, some of it potentially criminal. Here are just a few examples:

- Police officers have used religious freedom as an excuse to refuse orders they claimed ran contrary to their personal religious views. For instance, a police officer in Oklahoma asserted a religious objection to his attending a community relations event held at a mosque, claiming a "moral dilemma."⁴
- Pharmacists in many states, including Ohio, Texas, and Wisconsin, have used religious freedom as a defense for refusing to dispense contraception.⁵
- In New Mexico, a local religious leader cited religious protection when he appealed a conviction for sexually abusing two teenagers.⁶
- The Department of Labor was barred from fully investigating possible child labor law violations because the individual being investigated said that his religious beliefs forbade him from discussing such matters with the government.⁷
- In Georgia, a graduate student training to be a school guidance counselor refused to work with a LGBTQ+ client because of the counselor's religious beliefs, and sued her university when they asked her to work with all clients.⁸

¹ For more information on the ACLU's work to defend the rights of religious believers, consult "The ACLU Defends Religious Practice and Expression", <https://www.aclu.org/aclu-defense-religious-practice-and-expression>.

² <https://www.aclu.org/religion-belief/aclu-tn-protects-students-right-read-bible-school>

³ <http://acluofnc.org/blog/report-man-removed-from-lenoir-courthouse-for-wearing-religious-attire.html>

⁴ *Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014).

⁵ Rob Stein, Pharmacists' Rights at Front Of New Debate, *Washington Post* (Mar. 28, 2005), available at <http://www.washingtonpost.com/wp-dyn/articles/A5490-2005Mar27.html>.

⁶ *Religious Group Leader's Conviction For Sexual Contact With Minor Upheld*, Religion Clause (Sept. 18, 2013), available at <http://religionclause.blogspot.com/2013/08/religious-group-leaders-conviction-for.html>.

⁷ *Perez v. Paragon Contractors, Corp.* (Dist. Utah, Sept. 11, 2014).

⁸ *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

ACLU

AMERICAN CIVIL LIBERTIES UNION

North Dakota

P.O. Box 1190

Fargo, ND 58107

701-404-7269

northdakota@aclu.org

aclund.org

- Parents sued their child’s school district and two principals for requiring all students to use a “Smart ID” card, claiming that requiring their daughter or permitting other students to use the ID card violated their religious beliefs.⁹
- By allowing someone who files a lawsuit to recoup damages, this bill could be an invitation for people to sue the government. The bill may increase congestion in our state courts and divert the already scarce resources of law enforcement agencies and governments at both the state and local level.

Similar legislation in Arizona was vetoed by Governor Jan Brewer after opposition from the general public and business community including Arizona Cardinals and the National Football League; major corporations representing a wide range of industries, including airlines, technology, and hospitality, to name just a few; and, politicians from both sides of the aisle, including Senators John McCain and Jeff Flake.



AMERICAN CIVIL LIBERTIES UNION

North Dakota

P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

Similarly, the people of North Dakota have already spoken their opposition to this kind of legislation: a 2012 proposed state constitutional amendment with very similar language and sentiment to HB1136 was resoundingly defeated by 64% when on the ballot. North Dakotans know their religious freedom is sufficiently protected in this state and nation without this unnecessary legislation which comes with a host of potential unintended consequences.

We urge you to place a “do not pass” on HB1136.

Cody J. Schuler
Advocacy Manager
ACLU of North Dakota
cschuler@aclu.org

⁹ *A.H. ex rel. Hernandez v. Northside Ind. Sch. Dist.*, 916 F. Supp. 2d 757, 765 (W.D. Tex. 2013).