

February 1, 2021

The Honorable Lawrence Klemm  
Chair  
Judiciary Committee  
North Dakota House of Representatives  
600 East Boulevard  
Bismarck, ND 58505

The Honorable Karen Karls  
Vice Chair  
Judiciary Committee  
North Dakota House of Representatives  
600 East Boulevard  
Bismarck, ND 58505

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

Dear Chair Klemm and Vice Chair Karls:

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. Religious freedom is a fundamental American value that gives all of us the right to believe or not as we see fit; but it does not give us the right to risk people’s lives. This bill should be rejected because it is unnecessary, would adopt uncertain legal standards, and would put the public health at risk.

**Sections 1, 2, and 4 Are Unnecessary and Would Create New Vague and Uncertain Legal Standards**

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 provisions are unnecessary, as the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) already applies to those institutions.<sup>1</sup> 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. There is no need for a new state law.

Moreover, HB 1410 would create uncertainty by adding new and confusing legal standards to the Century Code. In addition to adopting the RLUIPA standard, the bill would prohibit state penitentiaries, other correctional facilities, and institutions managed by the department of human services from regulating religion “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.” The bill, however, does not define what constitutes an “extraordinary health risk,” and the term does not apply anywhere else in North Dakota

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<sup>1</sup> 42 U.S.C. § 2000cc et seq.

law. Nor has this standard been used in religious freedom cases elsewhere. Furthermore, this standard seems to be related to the pandemic, but the bill fails to limit its use to the pandemic or other health-related circumstances. For example, a state institution could limit religious exercise for legitimate safety concerns, but this bill would require the state to allow the practice unless it posed “an extraordinary health risk.” Diverting from the RLUIPA standard could cause unintended consequences.

### **Sections 3 and 5 of HB 1410 Would Put the Public Health at Risk**

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 Sections 3 and 5 of the bill would apply inappropriate legal standards to orders by the state health officer to control disease and emergency orders issued by the governor, making it harder to protect public health.

In November, the Supreme Court made clear in *Roman Catholic Diocese of Brooklyn v. Cuomo* that the government can place limits on religious activities when those limitations are neutral and generally applicable or if they are “narrowly tailored” to serve a “compelling” state interest.<sup>2</sup> The tests created by this bill go far beyond the restrictions required by the Court and would make it significantly more difficult for the state to implement public health orders, putting the public health at risk.

For example, the bill would prohibit the governor and public health officials from treating “religious conduct more restrictively than comparable secular conduct because of alleged economic need or benefit” when issuing disease control measures or emergency orders. It is unclear how this new untested standard would apply in practice as it exists nowhere else and could result in unforeseen and unintended consequences.

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.<sup>3</sup> That is because, like any virus, COVID-19 is just as likely to spread at religious gatherings as at other gatherings.<sup>4</sup> Indeed, numerous outbreaks of COVID-19 have been connected to houses of worship.<sup>5</sup> As

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<sup>2</sup> 141 S.Ct. 63, 66-67 (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.”); see also *S. Bay United Pentecostal Church v. Newsom*, 590 U.S. \_\_ (2020) (California’s “restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings.”).

<sup>3</sup> 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).

<sup>4</sup> 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, available at <https://bit.ly/3a7drsd>.

<sup>5</sup> 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, available at <https://bit.ly/2LQjHYM>. 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*

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 bill's restrictions apply in non-pandemic scenarios as well. 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.

We understand that in difficult times, many people look to their faith for comfort and guidance, but by exempting religious activity from restrictions during an emergency, the legislature puts the health of all North Dakotans at risk.

### **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

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*COVID-19 Infects 91 Others as State Struggles to Contain Spread of Virus, WKYC, Aug. 4, 2020, available at <https://bit.ly/2DR6mQd>. 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.<sup>5</sup> [Joseph Spector & Jon Campbell](#). *Coronavirus Quarantine Lifted in New Rochelle as N.Y. Changes Statewide Policy*, *Lohud*, Mar. 28, 2020, available at <https://bit.ly/2Wtnl07>.*