NATIONAL CENTER FOR LESBIAN RIGHTS

May 16, 2013

By email to **AsmJUD@asm.state.nv.us**

The Honorable Marilyn K. Kirkpatrick
The Honorable William C. Horne
The Honorable Jason Frierson
Members of the Assembly Judiciary Committee
Legislative Building, Room 3138
401 South Carson Street
Carson City, Nevada 89701

Re: SB 192, "Preservation of Religious Freedom Act" – OPPOSE

Dear Assembly Speaker Kirkpatrick, Assembly Majority Leader Horne, Judiciary Committee Chair Jason Frierson and Members of the Assembly Judiciary Committee,

The undersigned are nonprofit legal and community advocacy organizations working nationally to protect vulnerable minority populations, including those facing discrimination based on sexual orientation, gender, gender identity, national origin, race, ethnicity, immigration status, HIV status, or a combination of these characteristics. On behalf of our many thousands of members in Nevada, we urge you to reject SB 192. Despite having been amended by the Senate not to defend civil rights violations, it remains **far too broad** and **would place a costly, impractical burden on government** to prove it has used precise legal drafting and is serving compelling public needs whenever an individual claims a religious reason for wishing to violate a law governing conduct in the public sphere. In addition, it shifts the burden of justification with respect to professional standards of care and other laws and policies that require licensed professionals to attend to the varied needs of

diverse populations, and instead **facilitates religious objections to professional standards to the detriment of patients, foster children, homeless families, students and many others** who depend on licensed professionals to provide culturally competent services.

I. SB 192 Would Invite Religious Challenges To Any and All Nevada Laws, Imposing Unwarranted Administrative Burdens And Litigation Costs.

In 1990, Justice Scalia wrote for the United States Supreme Court a decision examining prior religious liberty case law. He concluded that our U.S. Constitution does not require government to satisfy the most rigorous of constitutional tests (the "strict scrutiny" test) in order to enforce laws regulating commerce, taxation, public safety, and other matters of public life even when such laws may happen to be inconsistent with the religious views of some people.[1] As long as a law applies to everyone alike and was not enacted to target a particular religious group or practice, the federal Constitution allows it to be enforced if it serves a legitimate public purpose in a rational manner.[2] This test provides strong protection for believers against laws that improperly target religious belief and has proved sensible and practical since then.

After the Supreme Court's 1990 decision, Congress passed the Religious Freedom Restoration Act ("RFRA"), which was intended to give individuals greater freedom to violate laws of general applicability for religious reasons. The U.S. Supreme Court considered RFRA in 1997 in a local zoning case and determined that RFRA is unconstitutional as a defense against state and local laws.[3] In his concurring opinion, Justice Scalia again emphasized that a firm commitment to freedom of religious belief and worship does not mean freedom to disregard general laws that regulate the public sphere in a religiously neutral manner for the safety and wellbeing of everyone.[4]

After the U.S. Supreme Court held RFRA unconstitutional, Congress passed a tailored law to give greater protection for religious exercise in two contexts where religious believers had identified specific problems. This law, called the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[5] has made it easier for prisoners to seek – and often obtain – accommodation of a wide range of religious practices, and for religious groups to obtain variances from zoning rules. A quick

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[1] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

[2] *Id*. at 885. *Compare Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law intentionally targeting a group's religious practice receives strict scrutiny even if generally applicable).

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

[4] *Id*. at 537-44.

[5] 42 U.S.C. § 2000cc-1(a)(1)-(2).

search among federal decisions yields many cases.[6] Views vary about what religious accommodations are appropriate in prisons and zoning. Two things are clear from the decisions applying RLUIPA to date, however. First, the more demanding legal standard set by that law makes it harder for government to maintain uniform policies.[7] Second, there is great diversity among the individuals and groups who have used the strict legal test in sometimes-protracted litigation to seek exemptions from standard rules.[8] As our American society grows ever more diverse, **this means a potentially very broad spectrum of accommodation requests.**

SB 192 would present a significantly greater challenge for Nevada law enforcement than RLUIPA because **SB 192 is not limited to particular contexts** (such as zoning or prisons). Instead, it aims to permit individuals to refuse to comply with general laws in any and all contexts – from health and safety laws, to wage and hour laws, to child welfare laws, to tax laws, to rules of contract and fair business practices, to environmental protection laws, to public nuisance laws – unless government proves the law serves a compelling public interest and is narrowly drawn. It might require accommodation of religious objections to common job duties and workplace policies in public employment to an extent far beyond what Title VII requires.[9] For example, without attempting to predict

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[6] *See, e.g.*, *Shakur v. Schriro*, 514 F.3d 878 (9th Cir. 2008) (reversing summary judgment for prison on Muslim prisoner's claim for special diet because factual record on which district court had ruled was too sparse and court should have done "a careful analysis of a fully developed record"); *Greene v. Solano County Jail*, 513 F.3d 982 (9th Cir. 2008) (reversing summary judgment for jail on claims by maximum security prisoner wanting to join group worship services, finding factual disputes existed and government had not carried its burden); *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978 (9th Cir 2006) (group was entitled to exemptions from agricultural and residential zoning restrictions to build temple).

[7] For example, under the prior "rational basis" test, a requirement to submit one's Social Security number to renew one's driver's license was enforced over an individual's religious objection (*Miller v. Reed*, 176 F.3d 1202 (9th Cir 1999)), and a prison policy against smoking inside was upheld where the inmate was permitted to perform a religious burning ritual of "smudging" outside three times per week (*Hills v. Stewart*, 1999 U.S. App. LEXIS 26896 (9th Cir. 1999)). Both rules might survive strict scrutiny review, but the government's litigation burden would be heavier.

[8] For example, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), adherents of the Satanist, Wicca, and Asatru religions and the Church of Jesus Christ Christian sought accommodations from Ohio prisons.

[9] Title VII requires accommodation of employees' religious beliefs unless doing so imposes an undue burden on the employer. Past cases illustrate the range of employee demands for accommodation of what generally would be considered unprofessional or uncooperative conduct, at the expense of co-workers or productivity, that courts have concluded *do* impose undue burdens. *See, e.g., Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (employer entitled under Title VII to fire supervisor who claimed a religious right to harass subordinate); *Knight v. State of Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (public employer entitled to fire visiting nurse who engaged in proselytizing to home-bound AIDS patient); *Chalmers v. Tulon*, 101 F.3d 1012, 1021 (4th Cir. 1996) (employer entitled under Title VII to fire employee who claimed religious right to send letters to co-workers criticizing their private lives); *Bollenbach v. Board of Ed.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (public school employer not entitled to refuse to hire women drivers due to objection of Hasidic male students). *See also Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352

litigation outcomes, it is reasonable to anticipate refusals by health care workers who object to certain medical procedures, food preparers who follow religious dietary rules, teachers who object to material in a standard curriculum, and many others. Absent a showing of particularized need for greater accommodation of religious exercise (as led Congress to pass RLUIPA), imposing on state and local government a duty to fashion special individual exemptions to rules governing society generally – and imposing litigation as well as other costs on government for the process – is unwarranted and unwise.

II. The Amendment of SB 192 Regarding Civil Rights Claims Does Not Eliminate the Problem of Religious Objections to Laws and Policies that Require Professionally Appropriate Services for Diverse Populations.

The Senate alleviated one great concern about SB 192 by amending it to preclude use of religious liberty rights as a defense to civil rights claims. But that amendment does not eliminate the problem posed by religious objections to laws and policies that address the needs of diverse populations. For example, laws and policies often require licensed professionals providing medical care, foster care, education, and other social services to be culturally competent, that is, to recognize that needs can vary along cultural and group lines. Providers who object on religious grounds to meeting the standard of care, complying with inclusion protocols, and treating everyone according to their individual or cultural needs may not be violating a civil rights law. But such **refusals to comply with applicable standards harm others** – especially members of vulnerable populations – and **should not be accommodated in a professional setting as a form of protected exercise of religion.**

Conclusion

Despite the good intentions behind SB 192, this bill would change the legal standard in an unnecessary and impractical manner. It would make it harder and more expensive for Nevada and its political subdivisions to enforce important public safety and social welfare laws. Whatever the courts ultimately might require for various laws, **the practical effect would be to invite new, problematic religious objections to rules that apply generally to everyone in the public sphere.**

This would be a mistake. It is long settled that, when anyone engages in business or other conduct regulated by law to protect others, they should comply with the principle that has served our country well: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their

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(Ind. 1988) (employer entitled to end employment of lab technician who refused to test specimens bearing HIV warning because he believed "AIDS is God's plague on man and performing the tests would go against God's will").

own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[10]

For these reasons, the undersigned groups respectfully urge you to reject SB 192.

Very truly yours,

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[10] *United States v. Lee*, 455 U.S. 252, 261 (1982).