Testimony of the ACLU of Kansas and Western Missouri

In Opposition to HB 2203 on March 18, 2013

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Thank you for this opportunity to address the Senate Judiciary Committee in opposition to HB2203, the *Kansas Preservation of Religious Freedom Act* (KPRFA). The ACLU believes that religious freedom is a fundamental human right that is guaranteed by the First Amendment's Free Exercise and Establishment clauses[1] and § 7 of the Kansas Constitution Bill of Rights[2]. The First Amendment encompasses not only the right to believe (or not to believe), but also the right to express and to manifest religious beliefs. These rights are fundamental and should not be subject to political process and majority votes. Thus the ACLU, along with almost every religious and civil rights group in America that has taken a position on the subject, rejects the Supreme Court's notorious decision of *Employment Division v. Smith*.[3]

The ACLU believes it is important that we are all free to practice our religious beliefs. Laws similar to HB 2203 exist in other states, and these can be useful tools for providing additional protection for religious freedom. However, the ACLU remains concerned with the KPRFA for the following reasons:

HB 2203 Compromises the Enforcement of Other State and Local Laws.

HB 2203, unlike federal law and other state religious freedom laws, establishes the lowest bar for when a person may assert a violation of their religious freedom, extending a claim or defense to those "substantially *likely* to be burdened." As a result, many state and local laws could be open to challenge under the KPRFA.

HB 2203 is unnecessary because stronger protections exist within Section 7 of the Kansas Constitution Bill of Rights

Kansas has a very bold and powerful religious freedom provision in the state Bill of Rights providing more meaning to religious freedom than the Free Exercise Clause of the First Amendment. Section 7 of the Bill of Rights of the Kansas Constitution states, in pertinent part:

"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship."

In *State v. Smith*, 155 Kan. 588, 127 P.2d 518 (1942), the Kansas Supreme Court addressed the religious exercise rights protected by § 7 of the Kansas Constitution Bill of Rights. In analyzing the constitutional claims, the Court compared the relative religious exercise rights protected by § 7 of the Kansas Constitution Bill of Rights to those protected by the First Amendment to United States Constitution and observed "that the wording of this section of our Bill of Rights is much more in detail respecting religious freedom than is the First Amendment to the federal constitution."[4]

In *Stinemetz v. KHPA*, (KS App., May 4, 2011), the Kansas Supreme Court applies the *Sherbert* test to claims under § 7 of the Kansas Constitution Bill of Rights. [5] In *Stinemetz*, the Kansas Supreme Court finds that in order to determine whether government action violates an individual's right to the free exercise of religious beliefs under the Kansas Constitution, a court must determine: (1) whether the individual's religious beliefs are sincerely held; (2) whether the state action burdens the individual's free exercise of religious beliefs; and the state must prove(3) whether the state interest is overriding or compelling; and (4) whether the State uses the least restrictive means of achieving its interest.[6]

The ACLU believes strong protections of religious freedom already exist with § 7 of the Kansas Constitution Bill of Rights and Kansas case law making additional statutory protections found in HB2203 unnecessary.

HB 2203 Fails to Protect Existing Civil Rights Laws in Kansas.

Because HB 2203 lacks language to protect existing civil rights laws in Kansas, it could allow people to argue that their religious beliefs exempt them from complying with laws that prohibit discrimination on the basis of religion, gender, marital status, national origin and sexual orientation. For example, based on religious objections:

• Employers could argue that the KPRFA allows them to refuse to hire women, LGBT people, or people of a particular religion or race.

• An employer who believes that pregnancy outside of marriage is a sin could cite the KPRFA as a defense for firing an unmarried pregnant female employee, even though such an action is prohibited by state law.

• A police officer could argue that requiring her to take reports of hate-motivated assaults against gays violates her religious beliefs.

• A Muslim firefighter could argue that, per the KPRFA, she could not be required to respond to a church fire, while a Christian firefighter could claim that the KPRFA sanctions his refusal to respond to a fire at a mosque.

• Landlords could claim a right to refuse to rent to LGBT people, unmarried couples, single pregnant women, or those of other faiths or races.

HB 2203 fails to protect against government-sponsored religious discrimination.

HB 2203 lacks language reaffirming the constitutional prohibition against governmental sponsorship of religion and defines a "burden" on religious liberty as including the denial of benefits. This bill could endanger existing protections that prevent the government from sponsoring or financing religious indoctrination and discrimination. For example, based on religious objections:

• A ministry operating a soup kitchen or senior center with government funds could argue that, under the HB 2203, it may preach to clients or provide benefits only to those willing to attend a religious service.

• A religious organization seeking a government grant to provide marital counseling to low-income couples or drug treatment to youth could claim that, HB 2203, it is entitled to proselytize participants in these programs.

• A public school biology teacher could argue that HB 2203 grants him the right to refuse to teach evolution.

• A county social worker could argue that she has a right under the HB 2203 to proselytize clients.

• A state judge could claim that the KPRFA authorizes him to open judicial proceedings with prayer.

A Better Way to Protect Religious Freedom

Lessons can be learned from other states that have previously passed state religious freedom laws, faced legal challenges to that, and succeeded. The Texas Religious Freedom Restoration Act is a product of compromise. The success behind the Texas law, which was signed into law by then Governor George W. Bush, was a result of cooperative efforts of a diverse coalition, drawn together by a shared commitment to protecting religious freedom. The Texas law is comprehensive in nature and ensures protections for the health, safety, and fundamental rights of all citizens.[7]

Endnotes

[1] The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…." Article VI of the Constitution contains another provision that also is of particular importance: that there shall be no religious test for public office.

[2] Section 7 of the Bill of Rights of the Kansas Constitution states, in pertinent part:"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship."

[3] Employment Division v. Smith, 494 U.S. 872, 890 (1990).

[4] *State v. Smith*, 155 Kan. 588, 127 P.2d 518 (1942). 155 Kan. at 594.

[5] *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

[6] *Stinemetz v. KHPA*, (KS App., May 4, 2011 at 40).

[7] Tex. Civ. Prac. & Rem. Code Ann. §§110.001-110.012 (1999).