

HB 542 - AS AMENDED BY THE HOUSE

9Apr2021... 0623h

2021 SESSION

21-0726

05/08

HOUSE BILL 542

AN ACT relative to the protection of religious liberty.

SPONSORS: Rep. Ammon, Hills. 40; Rep. Kofalt, Hills. 4; Rep. O'Hara, Belk. 9

COMMITTEE: Judiciary

AMENDED ANALYSIS

This bill provides that any prohibition on in-person gatherings during a declared state of emergency shall not apply to houses of worship and provides that the state shall not substantially burden a person's right to the free exercise of religion unless doing so is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struck through~~].

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE*In the Year of Our Lord Two Thousand Twenty One*

AN ACT relative to the protection of religious liberty.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Title. This act may be known and cited as the New Hampshire religious liberty act.

2 Legislative Findings. The general court finds that:

I. The framers of our federal and state constitutions made the value judgment that religion warrants distinct protections. "In matters of Religion, no mans right is abridged by the institution of Civil Society... Religion is wholly exempt from its cognizance." James Madison, Memorial and Remonstrance Against Religious Assessments.

II. The right to the free exercise of religion, in both the federal and New Hampshire constitutions, was not meant to be a vague sentiment. Nor was it meant to protect mere private opinion or thought. It was intended to be just as concrete as the right of free speech, the right to be free from unreasonable searches, or any other enumerated right. It is "held by the same tenure with all our other rights... it is enumerated with equal solemnity, or rather studied emphasis." *Id.*

III. The general court understands the protections afforded to religious exercise under the New Hampshire Bill of Rights to be even stronger than those provided by the federal Bill of Rights. New Hampshire Constitution, Part 1, Articles 5; 6.

IV. Governments have trampled on religious exercise by crafting generally applicable laws which do not explicitly target a religion or religious activity. The fact that a law is generally applicable does not mean that it complies with the federal or state free exercise clauses. As the United States Supreme Court has said, the "constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 111 (1943).

V. Protecting free exercise rights is especially important when it comes to the exercise of controversial or unpopular religious beliefs. “[M]any people hold beliefs alien to the majority of our society -- beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of ‘police’ or ‘health’ regulations reflecting the majority’s views.” *Sherbert v. Verner*, 374 U.S. 398 at 411 (Douglas, J., concurring in the judgment).

VI. The United States Supreme Court has observed that forcing people to abandon the precepts of their religion “puts the same kind of burden upon the free exercise of religion as would a fine imposed” for a worship service. *Sherbert*, 374 U.S. 398 at 404 (1963).

VII. Although the state may legitimately burden religious exercise, it may only do so if there exists “some compelling state interest... [which] justifies the substantial infringement of [a person’s] First Amendment right.” *Sherbert*, 374 U.S. 398 at 406. The government must have a “paramount interest” in burdening free exercise. *Id.*

VIII. In response to the common argument that religious liberty protections will result in confusion and anarchy, allowing individuals to capriciously nullify ordinary laws, the Supreme Court in 1963 found that “there is no proof whatever to warrant such fears of malingering or deceit... it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties.” *Sherbert*, 374 U.S. 398 at 407.

IX. The free exercise of religion is currently under threat from many sides. As four justices of the United States Supreme Court have observed, the Court’s 1990 decision in *Employment Division v. Smith* has “drastically cut back on the protection provided by the Free Exercise Clause.” *Kennedy v. Bremerton Sch. Dist.*, cert. denied, 139 S. Ct. 634, 635 (2019) (Alito, J., concurring.). In the wake of the Covid-19 pandemic, many governors’ emergency orders have treated churches far more restrictively than comparable secular entities. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614, (2020) (“The [Governor of Kentucky’s] orders also likely ‘prohibit[] the free exercise’ of ‘religion’ in violation of the First and Fourteenth Amendments... Discriminatory laws come in many forms.”). At the same time, federal politicians are currently introducing bills intended to roll back statutory protections for the free exercise of religion.

X. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), indicates that legislative bodies may enact statutory law requiring that laws and other state action burdening the free exercise of religion be justified by a compelling governmental interest. Many states have done so, passing laws similar to this act.

XI. The compelling interest test, set forth in pre-1990 Supreme Court rulings and this act, is a workable test for striking sensible balances between religious liberty and competing governmental interests.

3 Purpose. The purposes of this act are:

I. To adopt the compelling interest test as articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963) and to guarantee its application in all cases where the free exercise of religion is substantially burdened by state action;

II. To provide a claim or defense to a person or persons whose exercise of religion is substantially burdened by state action;

III. To provide a claim or defense to any religious organization whose religious services are, in a state of emergency, treated more restrictively than any other essential service; and

IV. To adopt this act as the general court’s construction of the relevant provisions in the New Hampshire Bill of Rights, so that New Hampshire courts may consider as persuasive this act, including the general court’s legislative findings, in any future cases interpreting the New Hampshire Bill of Rights.

4 New Chapter; Protection of Religious Liberty. Amend RSA by inserting after chapter 546-B the following new chapter:

CHAPTER 546-C

PROTECTION OF RELIGIOUS LIBERTY

546-C:1 Definitions. In this chapter:

I. “Person” means any individual, association, partnership, corporation, church, religious institution, estate, trust, foundation, or other legal entity.

II. “Exercise of religion” means the practice or observance of religion. It includes, but is not limited to, any action that is motivated by a sincerely held religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief.

III. “Religious organization” means:

(a) A house of worship, including but not limited to churches, synagogues, mosques, shrines, and temples;

(b) A religious group, corporation, association, educational institution, ministry, order, society, or similar entity, regardless of whether it is integrated or affiliated with a church or other house of worship; or

(c) An officer, owner, employee, manager, religious leader, clergy, or minister of an entity or organization described in this paragraph.

IV. “Religious service” means a meeting, gathering, or assembly of 2 or more persons organized by a religious organization for the purpose of worship, teaching, training, providing educational services, conducting religious rituals, or other activities that are deemed necessary by the religious organization for the exercise of religion.

V. "State action" means the implementation or application of any law, including, but not limited to, state and local laws, ordinances, rules, regulations, and policies, whether statutory or otherwise, or other action by any governmental entity including but not limited to any subdivision of the state and any local government, municipality, instrumentality, or public official authorized by law.

VI. "State government" means:

- (a) The state or a political subdivision of the state;
- (b) Any agency of the state or of a political subdivision of the state, including a department, bureau, board, commission, council, court, or public institution of higher education;
- (c) Any person acting under color of state law; and
- (d) Any private person suing under or attempting to enforce a law, rule, or regulation adopted by the state or a political subdivision of the state.

VII. "Substantial burden" means any action that directly or indirectly constrains, inhibits, curtails, or denies the exercise of religion by any person or compels any action contrary to a person's exercise of religion. It includes, but is not limited to, withholding benefits, assessing criminal, civil, or administrative penalties or damages, or exclusion from governmental programs or access to governmental facilities.

546-C:2 Free Exercise of Religion Protected.

I. State action shall not substantially burden a person's right to exercise of religion, even if the burden results from a rule of general applicability, unless it is demonstrated that applying the burden to that person's exercise of religion in this particular instance:

- (a) Is essential to further a compelling governmental interest; and
- (b) Is the least restrictive means of furthering that compelling governmental interest.

II. A person whose exercise of religion has been burdened, or is likely to be burdened, in violation of this section may assert such violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or one of its political subdivisions is a party to the proceeding. The person asserting such a claim or defense may obtain appropriate relief, including relief against the state or its political subdivisions. Appropriate relief includes, but is not limited to, injunctive relief, declaratory relief, compensatory damages, and costs and attorney fees.

III. This section applies to all laws, and the implementation of laws, whether statutory or otherwise, and whether adopted before or after the effective date of this chapter.

546-C:3 State of Emergency Protections.

I. To guarantee the free exercise of religion and right of the people to peaceably assemble, as required by the First Amendment of the United States Constitution and Part I, Article 5 of the New Hampshire constitution, any powers activated pursuant to a state of emergency, as defined in RSA 21-P:35, VIII, shall not prohibit in-person gatherings at established houses of worship, such as churches, monasteries, mosques, shrines, synagogues, or temples.

II. Notwithstanding RSA 4:45 or any other provision of law to the contrary, during a state of emergency, the state government shall permit a religious organization to continue operating and to engage in religious services to the same or greater extent that other organizations or businesses that provide essential services that are necessary and vital to the health and welfare of the public are permitted to operate.

III. Nothing in this section shall prohibit the state government from requiring religious organizations to comply with neutral health, safety, or occupancy requirements issued by the state or federal government that are applicable to all organizations and businesses that provide essential services. Provided, however, that the state government shall not enforce any health, safety, or occupancy requirement that imposes a substantial burden on a religious service unless the state government demonstrates that applying the burden to the religious service in this particular instance is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

IV. A religious organization may assert a violation of this section as a claim against the state government in any judicial or administrative proceeding or as a defense in any judicial or administrative proceeding without regard to whether the proceeding is brought by or in the name of the state government, any private person, or any other party.

V. Any religious organization that successfully asserts a claim or defense under this section may recover appropriate relief including, but not limited to, injunctive relief, declaratory relief, compensatory damages, and costs and attorney fees.

546-C:4 Immunity Waived. Sovereign, governmental, and qualified immunities to suit and from liability are waived and abolished to the extent of liability created by this chapter.

546-C:5 Rules of Construction.

I. This chapter shall be construed in favor of substantive and broad protections for the free exercise of religion.

- II. The protection of free exercise of religion afforded by this chapter are in addition to any further protections provided under federal law, state law, and the state and federal constitutions.
- III. Nothing in this chapter shall be construed to preempt or invalidate any state law or local ordinance that is equally or more protective of free exercise of religion. Nothing in this chapter shall be construed to narrow the meaning or application of any state or local law protecting free exercise of religion.
- IV. This chapter applies to, and in cases of conflict supersedes, each statute that impinges upon the free exercise of religion protected by this chapter, unless a conflicting state statute is expressly made exempt from the application of this chapter. This chapter also applies to, and in cases of conflict supersedes, any ordinance, rule, regulation, order, opinion, decision, practice, or other law that impinges upon the free exercise of religion protected by this chapter.
- V. If any provision of this chapter or any application of such provision to any particular person or circumstance is held to be invalid under law, the remainder of this chapter and the application of its provisions to any other person or circumstance shall not be affected.
- 5 Effective Date. This act shall take effect 60 days after its passage.