TESTIMONY OF BRAD BERGFORD
COMMISSION FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS

Regarding House Bill 17-1013 Religious Freedom Restoration Act
January 25, 2017

My name is Brad Bergford. I am a Colorado attorney testifying on behalf of the Colorado chapter of National Lawyers Association and its Commission for the Protection of Constitutional Rights.

I. The Founders Protected Freedom of Religion First.

The Founding Fathers regarded as self-evident the concept that we are all endowed by our Creator with certain unalienable rights. When they framed and ratified the Bill of Rights, the very first right the Founders listed was the right of religious people to be free from government laws respecting an establishment of religion and to freely practice religion. The Bill of Rights begins as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[1] The freedom of religion is our first freedom.

II. Supreme Court Rulings Have Undermined Religious Freedom.

Over time, constitutional fidelity has fallen prey to various predators, prominent among which, ironically, is the Supreme Court. The Supreme Court has, in certain instances, stepped in and done precisely what Congress cannot. In a 1990 case called *Employment Div. v. Smith* [2], the Supreme Court held that "[t]he First Amendment, U.S. Const. amend. I, bars application of a neutral, generally applicable law to religiously motivated action *only* when they involve not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press [emphasis added]." In other words, *Smith* made our first freedom a second-rate liberty. The Free Exercise Clause was no longer viable on its own. This approach is logically indefensible, and it defies the intention of the Framers of the Bill of Rights. In 1993, Congress responded with, and President Clinton signed, the federal Religious Freedom Restoration Act (RFRA). RFRA was simple. It revived the test that the Supreme Court had successfully employed for decades that provided that if the federal government was to burden religion, it could do so only pursuant to a compelling government interest and that it must use the least restrictive means to do so. Not to be outdone, in 1997, the Supreme Court fired back in the *City of Boerne v. Flores*[3] decision. There, the Supreme Court held that federal RFRA does not apply to the states.

III. States Can Protect Religious Freedom Through RFRAs.

The obvious conundrum, then, is that the First Amendment applies to action by state governments (this by Supreme Court decision), but the traditional balancing test to resolve conflicts between state governments and citizens' free exercise was no longer available to state courts. The states now have a problem, and many state legislatures recognize the need to defend their citizens' First Amendment religious rights in light of *Smith* and *Boerne*. Accordingly, 21 states have enacted a Religious Freedom Restoration Act, and 10 others operate under binding court decisions that act as a RFRA equivalent.

The bill which we debate—HB17-1013—seeks to restore the balancing test offered by Supreme Court cases predating *Smith*. Those cases held that burdens of religion must satisfy a

compelling government interest and must use the least restrictive means to do so. Even this test was not perfect, but it was a workable way to address conflicts between the free exercise of religion and governmental encroachments upon that exercise. It is important to note that the other First Amendment freedoms—of speech, of the press, to peaceably assemble, and to petition the government for a redress of grievances—remain sacrosanct, as they should. Free exercise of religion should enjoy the same protection as its First Amendment companions.

IV. Religious Liberty Protection is the Legislature's Responsibility.

Some might think that the Legislature should not need to enact additional protection for the free exercise of religion, and they are correct. The problem is that the Supreme Court has eviscerated the Free Exercise Clause, which was intended to be absolute and has, for the better part of two hundred years, existed inviolate. It bears mentioning that the Free Exercise Clause is so plain that there was not a single Supreme Court case determining the extent of the Free Exercise Clause until 1878.[4] And, almost all the consequential cases involving the Free Exercise Clause occurred in the last half of the 20th century. Assaults on the Free Exercise Clause are increasingly frequent. This Legislature bears the responsibility to protect the constitutional rights of Colorado citizens. It does not take ironclad courage to stand up for the Constitution and its Bill of Rights. At a minimum, it takes a commitment to your oath of office. The Commission for the Protection of Constitutional Rights urges you to pass, HB 17-1013, which represents a reasonable and proven method to protect the constitutional rights of Colorado citizens while balancing them against government interests.

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[1] U.S. Const. amend. I

[2] *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990).

[3] *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

[4] *Reynolds v. United States*, 98 U.S. 145 (1878).