

Why Colorado needs Freedom of Conscience Protection legislation

(HB17-1013)

My name is Preston J. Branaugh, and although I am unable to be there with you today in person, I respectfully request that you consider this written testimony. As a Colorado attorney in private practice for 19 years, I am asking you to pass this bill. This legislation before you again today would establish a general legal standard, the "compelling interest" test for evaluating laws and governmental practices that impose substantial burdens on the exercise of religion. This same test already governs federal law under the federal Religious Freedom Restoration Act (RFRA), which was signed into law by President Bill Clinton (1993). And now 31 states have adopted the same standard, either under state-law RFRA's or as a matter of state constitutional law.

As pointed out by Law Professor Conkle of Indiana University in 2015 when Indiana was considering legislation substantially similar to ours: "Applying this test, a unanimous U.S. Supreme Court recently ruled that a Muslim prisoner was free to practice his faith by wearing a half-inch beard that posed no risk to prison security. Likewise, in a 2012 decision, a court ruled that the Pennsylvania RFRA protected a group of Philadelphia churches, ruling that the city could not bar them from feeding homeless individuals in the city parks."

If the Colorado Freedom of Conscience Protection Act (FCPA) is adopted, a similar general approach will govern religious freedom claims, thus protecting religious believers of all faiths by granting them precisely the same consideration. I personally think it is very important to note that the Federal RFRA was upheld in 2006 as constitutional, and that no state RFRA has been held unconstitutional. As a result, objections about a parade of horrible outcomes are overblown.

Granting religious believers legal consideration does not mean that their religious objections will always be upheld. And this brings us to the issue of same-sex marriage.

Under the Colorado FCPA, individuals of all faiths would be able to continue practicing their sincerely held religious beliefs in everyday life. This bill is not about targeting any group of people, but rather protection of religious beliefs and the Constitutional rights that protect that freedom. Accordingly, under the proposed legislation, those who provide creative services for weddings, such as photographers, florists or bakers, could claim that religious freedom protects them from local nondiscrimination laws. Like other religious objectors, they would have their day in court, as they should, permitting them to argue that the

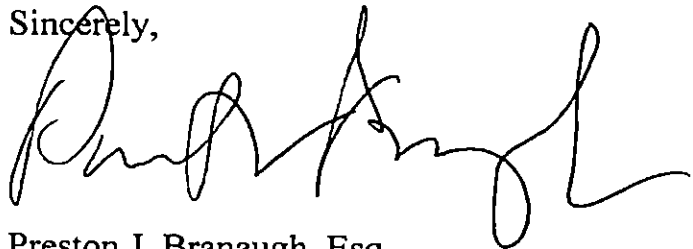
government is improperly requiring them to violate their religion by participating (in their view) in a celebration that their religion does not allow. The Colorado FCPA would protect these individual's rights to act or refuse to act in a manner motivated by their sincerely held religious beliefs (but not "based on race or ethnicity" as expressly prescribed in the legislation).

Courts generally have ruled that the government has a compelling interest in preventing discrimination and that this interest precludes the recognition of religious exceptions. Even in the narrow setting of wedding-service providers, claims for religious exemptions recently have been rejected in various states, including states that have adopted the RFRA test. A court could rule otherwise, protecting religious freedom in a distinctive context. But to date, none has. [*Please see attached List of Religious Freedom Restoration Act cases*]. The Colorado FCPA would lend statutory support at the state level to the proposition that "governments should not burden religious exercise without compelling justification." Without this legislation, it is unclear whether state actors must consider sincerely held religious beliefs in their determinations of potential discriminatory actions.

In any event, most religious freedom claims have nothing to do with same-sex marriage or discrimination. The proposed Colorado FCPA would provide valuable guidance to Colorado agencies and courts, directing them to balance religious freedom against competing interests under the same legal standard that applies throughout most of the land. It is anything but a "license to discriminate," and it should not be mischaracterized or dismissed on that basis.

I appreciate your careful consideration of this bill, and to enact what a majority of other states, and our federal government has done, namely holding actions that impede freedom of conscience to the highest level of judicial review. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Preston J. Branaugh". The signature is fluid and cursive, with a long horizontal stroke at the end.

Preston J. Branaugh, Esq.