



March 12, 2013

TO: SENATE JUDICIARY COMMITTEE  
FROM: AMERICAN CIVIL LIBERTIES UNION OF NEVADA  
RE: S.B. 192

Hearing Date/Time: March 3, 2013, 9:00 A.M.

AMERICAN CIVIL  
LIBERTIES UNION  
OF NEVADA

601 S. RANCHO DRIVE  
SUITE B11  
LAS VEGAS, NV 89106  
P/ 702.366.1536  
F/ 702.366.1331

1325 AIRMOTIVE WAY  
SUITE 202  
RENO, NV 89502  
P/ 775.786.1033  
F/ 775.786.0805

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Dear Chairman Segerblom, Vice Chair Kihuen and Members of the Senate Judiciary Committee:

I write to express ACLU's opposition to S.B. 192, concerning a proposed Religious Freedom Restoration Act, as written. The ACLU supports certain enhanced protection for religious exercise, and we have in fact relied on some state RFRA's in litigation to protect religious freedom. *See, e.g., A.A. v. Needville Ind. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (Texas RFRA protected schoolboy's right to wear long braids pursuant to his religion even though school policy required short hair). At the same time, we have seen aggressive attempts to use RFRA's to discriminate and have come to realize that we cannot always rely on the courts to protect our civil-rights laws.

In my testimony, I will discuss some of the unintended consequences of this bill, including the potential impact on civil rights legislation, public accommodations law, employment discrimination provisions, and the ability of women to access reproductive health. ACLU General Counsel Allen Lichtenstein will be available from Las Vegas to answer constitutional questions.

In order to provide the most succinct testimony possible, I write now to provide you with **specific examples** of these potential consequences for our state.

S.B. 192 May Permit Violations of Civil Rights Laws:

A New Jersey hospital denied HIV medication to a patient because of his sexual orientation. *Doctor with Gay Bias Denied Meds, Man Says*, Courthouse News, June 1, 2012.

Citing his religious beliefs, landlord refused to rent to unmarried couples. Court stated that "marital status" did not include unmarried cohabiting couples and a plurality of the court found no compelling interest in preventing marital status discrimination. *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990).



In 1966, three African-American customers brought a lawsuit against Piggie Park restaurants, and their owner, Maurice Bessinger, for refusal to serve them. Bessinger argued that enforcement of the Civil Rights Act, which prohibits such discrimination, violated his religious freedom “since his religious beliefs compel[ed] him to oppose any integration of the races whatever.”

In 1976, Roanoke Valley Christian Schools added a “head of household” supplement to their teachers’ salaries – which according to their beliefs meant married men, and not women. When sued under the Equal Pay Act, Roanoke Valley claimed a right to an exemption. According to the church pastor affiliated with the school, “[w]hen we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family.”

In the 1980s, Bob Jones University, a religiously affiliated school in South Carolina, wanted an exemption from a rule denying tax-exempt status to schools that practice racial discrimination. The “sponsors of the University genuinely believe[d] that the Bible forbids interracial dating and marriage,” and it was school policy that students engaged in interracial relationships, or advocacy thereof, would be expelled.

*Elane Photography v. Vanessa Willock*, 284 P.3d 428 (N.M.App. 2012) (ruling that RFRA cannot apply to claims between two private litigations and, as a result, was inapplicable to plaintiff’s claim that it protected her religiously motivated refusal to photograph lesbian wedding).

*North Coast Women’s Care Medical Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959 (Cal. 2008) (denying health care clinic’s claim that it has a religious right to defy state anti-discrimination laws and refuse artificial insemination procedure to lesbian couple).

*Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (remanding for further consideration of whether the governmental interest in eliminating discrimination based on marital status was compelling and whether uniform application of the state anti-discrimination law was the least restrictive means).

S.B. 192 May Limit Access to Contraception:

There are 23 cases by for-profit employers who are using the federal RFRA to claim that the contraception mandate violates their religious beliefs (list of cases):  
<http://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule#cases>.

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New Mexico (Walgreens): <http://www.aclu-nm.org/i-wont-fill-your-birth-control-prescription/2012/06/> “My name is Susanne Koestner, and I want to share something disturbing that happened to me earlier this month. On Sunday, June 10, I called in to the Walgreen’s Pharmacy at 10300 Central SE in Albuquerque to refill my birth control prescription. The pharmacist on duty told me that he couldn’t fill my prescription and said I would have to wait until the next day for another pharmacist to fill it. When I asked why, he said, “Because it’s against my religious beliefs.

I needed my medication immediately and couldn’t wait until the next day. I was forced to drive to a different part of town to get my prescription filled. Walgreens put the burden on me to find a pharmacist that had no personal objections to the medication my doctor prescribed me.”

Additional examples of pharmacy refusals (from National Women’s Law Center: <http://www.nwlc.org/resource/pharmacy-refusals-101>):

- These refusals to dispense prescription contraceptives or provide EC are based on personal beliefs, not on legitimate medical or professional concerns. The same pharmacists who refuse to dispense contraceptives because of their personal beliefs often refuse to transfer a woman’s prescription to another pharmacist or to refer her to another pharmacy. These refusals can have devastating consequences for women’s health.
- November 2010: Adam Drake attempted to purchase non-prescription EC at a Walgreens in Houston, Texas and was turned away, despite the fact that the federal Food and Drug Administration (FDA) has approved that brand of EC for sale to men and women aged seventeen and older.
- March 2010: A pro-life pharmacy refusing to stock or dispense contraceptives in Chantilly, Virginia closed due to lack of business. When it opened in October 2008, staff at the pharmacy refused to provide referrals or help individuals find contraception elsewhere.
- January 2010: A mother of two in Montclair, California went to her local CVS to purchase EC after she and her fiancé experienced a birth control failure. The pharmacist refused to dispense EC to her, even though it was in stock, and told her to “come back in two and a half days,” at which point it would no longer be effective.
- May 2007: In Great Falls, Montana, a 49-year-old woman who used birth control to treat a medical condition went to her local pharmacy to fill her latest prescription. She was given a slip of paper informing her that the pharmacy would no longer fill any prescriptions for birth control. When she called back to inquire about the policy change, the owner of the pharmacy told her that birth control was “dangerous” for women.
- January 2007: In Columbus, Ohio, a 23-year-old mother went to her local Wal-Mart for EC. The pharmacist on staff “shook his head and laughed.” She was

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told that even though the store stocked EC, no one on staff would sell it to her. She had to drive 45 miles to find another pharmacy that would provide her with EC.

- December 2006: In Seattle, Washington, a 25-year-old woman went to her local Rite-Aid to get non-prescription EC after she and her fiancé experienced a birth control failure. The pharmacist told her that although EC was in stock, he would not give it to her because he thought it was wrong. The woman had to repeatedly insist that the pharmacist find her another pharmacy in the area that would provide her with EC.
- January 2006: In Northern California, a married mother of a newborn baby experienced a birth control failure with her husband. Her physician called in a prescription for EC to her regular pharmacy, but when she went to pick it up, the pharmacist on duty not only refused to dispense the drug, which was in stock, but also refused to enter the prescription into the pharmacy's computer so that it could be transferred elsewhere.
- January 2005: In Milwaukee, Wisconsin, a mother of six went to her local Walgreens with a prescription for emergency contraception. The pharmacist refused to fill the prescription and berated the mother in the pharmacy's crowded waiting area, shouting "You're a murderer! I will not help you kill this baby. I will not have the blood on my hands." The mother left the pharmacy mortified and never had her prescription filled. She subsequently became pregnant and had an abortion.
- April 2004: In North Richland Hills, Texas, a 32-year-old mother of two went to her local CVS for her regular birth control prescription refill. The pharmacist refused to refill her prescription because of his personal beliefs. The pharmacist said he would not fill the prescription because oral contraceptives are "not right" and "cause cancer."
- January 2004: In Denton, Texas, a rape survivor seeking EC was turned away from an Eckerd pharmacy by three pharmacists, who refused to fill the time-sensitive prescription due to their religious beliefs. The pharmacists' refusal put the survivor in danger of becoming pregnant due to the rape.

#### S.B. 192 May Permit Justification of Criminal Conduct:

A Virginia-based pastor who helped a mother in a same-sex relationship kidnap her child defended his conduct on religious grounds. During the trial proceedings, he was held in contempt of court for claiming that his religious beliefs prevented him from revealing his co-conspirators. *Virginia Pastor Sentenced for Aiding Parental Kidnapping*, New York Times, March 4, 2013.

Recently, Colorado City, Arizona, police officers refused to help locate Warren Jeffs, the leader of the FLDS Church. They claimed that their protection of Jeffs was a

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religious practice. This bill could potentially shield those officers or others who jeopardize public safety.

Conclusion:

We understand that the main goal of this legislation is to ensure that Nevada laws that burden the free exercise of religion have to meet the standard that applied under the U.S. Constitution's Free Exercise Clause before the Supreme Court diluted the standard in *Smith*. We agree with that goal but do not think the current language accurately captures the pre-*Smith* standard. Without some critical changes, the language in the proposed bill could be construed far more broadly than the pre-*Smith* free exercise case law and undermine longstanding civil-rights protections that have never been thought to violate the free exercise of religion.

Sincerely,

/s Vanessa Spinazola  
Legislative and Advocacy Director  
American Civil Liberties Union of Nevada

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