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LD 1428 – Ought not to Pass

An Act to Protect Religious Freedom

Submitted to the

JOINT STANDING COMMITTEE ON JUDICIARY

January 16, 2014

Senator Valentino, Representative Priest, and members of the Committee on Judiciary, greetings. My name is Oamshri Amarasingham, and I am Public Policy Counsel for the American Civil Liberties Union of Maine, which is devoted to protecting the constitutional rights of the people of Maine. On behalf of our members, I urge you to oppose LD 1428, which is unnecessary and harmful to Mainers.

For courts and legislatures, fulfilling the Constitution's obligations with regard to religion has always been a struggle. In part, this difficulty is attributable to the text of the First Amendment itself, which includes two critically important, yet seemingly contradictory statements regarding religion. First, the amendment says, "Congress shall make no law respecting an establishment of religion," suggesting that the promotion of religion by the government is something dangerous. The authors of the Bill of Rights were certainly cognizant of the problems of official government religion. But next, the amendment goes on to say that the government may not prohibit the "free exercise" of religion, suggesting that religion, and religious freedom, are important and are worthy of constitutional protection. For over 200 years, state legislatures, congress, and courts at all levels have struggled to reconcile these two directions and to give equal weight to both. My organization, the American Civil Liberties Union, has been an advocate in legislatures and courts for both the freedom from government-established religion, and the free exercise of religious individuals and groups.

We oppose LD 1428 because it goes beyond what the Constitution will tolerate. Contrary to the title of the bill, LD 1428 does not protect religious freedom – which is robustly protected by the federal and state constitutions,[1] federal and state statutes,[2] and two-hundred years of jurisprudence. This bill does not provide legal protection for religion, but rather it elevates religious law over all other forms of law. In a democratic society, committed to the rule of law, this principle cannot stand. LD 1428 would give every person – defined broadly to include any legal entity – veto power over any law, ordinance, or government policy.

Under LD 1428, every law and government policy is suspect, and if any religious person or group objects to that law or policy, the government will be required to justify it under the most searching scrutiny. Traditionally reserved for the most invidious types discrimination, the "strict scrutiny" standard contained in this bill would even apply to facially neutral laws that have only incidental burdens on religion. By requiring the government to justify every law that indirectly burdens religion, LD 1428 elevates religious conviction above all other protected classes. A facially neutral law that has a disparate racial impact, for example, is not reviewed under the strict scrutiny standard.

LD 1428 will flood the courts with litigants challenging everything from the bus stop in front of Planned Parenthood on a municipal bus route[3] to criminal penalties for sex crimes[4]. And, by design, the deck will be stacked against the government. The bill provides relief for a claimant so long as the claimant's religious belief is "sincerely held." This is a subjective standard. The government's ability to probe whether or not a belief is sincerely held is strictly limited, as well it should be – the United States government is not in the business of determining whose religious values are legitimate and whose are not. However, that tenet, combined with a bill that applies to even the most incidental

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[1] U.S. Const. amend. I; Me. Const. art. I, § 3.
[2] *See, e.g.,* 42 U.S.C. § 2000e-2 (Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment based on religion); 5 M.R.S.A. §§ 4571, 4581, 4591 (Maine Human Rights Act, prohibiting discrimination based on religion in employment, housing, and public accommodations); 20-A M.R.S.A. § 6335 (allows student to be enrolled in school without vaccinations if parents raise a religious objection); 36 M.R.S.A. § 652 (exempts religious facilities from taxation).
[3] *See Graning v. Capital Area Rural Transp. Sys.*, No. A10CA523 (W.D. Tex. filed July 14, 2010)
[4] *New Mexico v. Bent*, No. 29,227 (N.M. App. Ct. Aug. 15, 2013).

burdens and that requires the state to overcome the strictest judicial test, all but guarantees that each religious claimant will become a law unto herself.

LD 1428 is far afield from the test articulated in the *Sherbert* case[5] or any federal or state Religious Freedom Restoration Act (RFRA). Aside from the bill's expansive concept of what constitutes a burden, the bill governs not only state action, but disputes between private parties as well. Section 4805(2) creates a "claim or defense in a judicial proceeding, *regardless of whether the State or one of its political subdivisions is a party to the proceeding.*"[6] This provision is squarely aimed at creating a broad exemption to the Maine Human Rights Act, which protects Mainers from discrimination based on race, color, sex, sexual orientation, disability, religion, ancestry, and national origin.[7] The bill essentially creates a right to discriminate in the name of religion.

Indeed, LD 1428 would also pit religions against each other, leaving the state and courts in an impossible position. In a case where a storeowner of one faith refuses to serve a customer of a different faith, who would win? It is hard to imagine how a court would resolve such a dispute without running afoul of the First Amendment.

If religious individuals and groups were facing true burdens on the exercise of their constitutional rights, the ACLU would be leading the charge to make changes in the law, but that is not the case. We know—we bring legal cases here in Maine, and across the country, when religious groups or individuals face discrimination, or when their ability to exercise their religion is burdened. We have represented a Hasidic Rabbi who wanted to hold prayer meetings in his home, a group of Afghani immigrants who wanted to set up a mosque in a former television repair shop, and a young Christian woman who wanted to include a religious quote on her yearbook page. Nationally, we've represented a young girl who wanted to invite her classmates to a Christmas party at her church in

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[5] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[6] The provision appears to be in direct response to *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. App. Ct. 2012), a recent New Mexico case where a photographer refused to photograph a lesbian commitment ceremony. The couple filed a complaint with the state's human rights commission against the photographer. When the photographer attempted to use the state's RFRA to defend her actions, the court said that the statute was inapplicable in a proceeding in which the government is not a party.
[7] 5 M.R.S.A. § 4552.

Pennsylvania, a middle school student in Virginia who was prohibited from wearing rosary beads to class, and a Christian ministry in Florida that was banned from serving food to people living in a park. These cases were all brought under existing law, and—not to be immodest—we've generally done quite well. Religious freedom is critically important, and we are committed to defending religious people and groups from unlawful discrimination. But the Constitution does not allow anyone to impose their religion on others, and it does not allow everyone to pick and choose which laws they will follow and which they will ignore.

The proponents of the bill have yet to identify what, if any, problems will be solved by LD 1428. All of the examples that proponents have cited raise Establishment Clause concerns rather than burdens on the free exercise of religion. If the Establishment Clause prohibits a Christmas tree in the town square, LD 1428 cannot dictate a different conclusion.

Because LD 1428 creates many problems while solving none, we urge you to vote ought not to pass.