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North Carolina – Why Isn't the State Constitution Enough?

At first glance, North Carolina's Constitution seems to provide strong protection for religion and faith, as follows:

> All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience.

N.C. Const. art. I, § 13. Constitutional protections, however, are only as good as the courts interpreting them. And there are indications from North Carolina's courts that, despite this apparent strong protection for religious freedom, the reality may be significantly different.

Because of a U.S. Supreme Court Decision, It Is Not Clear How North Carolina Courts Will Interpret the State Constitution

North Carolina's courts used to say that their state Constitution gives the same protection for religious freedom that the First Amendment to the United States Constitution does. *See*, *e.g.*, *In re Williams*, 269 N.C. 68, 78, 152 S.E.2d 317, 325 (1967) ("[T]he freedom protected by [Article I, Section 26] of the State Constitution is *no more extensive* than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States") (emphasis added).

Prior to 1990, this meant that religious freedom received strong protection in North Carolina, precisely because the First Amendment provided strong protection. But in 1990, that changed. The United States Supreme Court significantly curtailed the religious-liberty protection available under the First Amendment by declaring that it does not guard against burdens on religion imposed by neutral and generally applicable laws. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (hereinafter *Smith*). Thus, if the government enacts a law that applies to everyone, and the law doesn't specifically target religion, the First Amendment offers no protection if the law happens to infringe on religious freedom.

Because the North Carolina Supreme Court held in *In re Williams* that the state Constitution provides the exact same protection for religious freedom that the federal Constitution provides, North Carolina's strong constitutional language may not be all that helpful. Indeed, a state appellate court has already expressed uncertainty as to how strong the state constitutional protection really is after *Smith*. In *State v. Carignan*, 178 N.C. App. 562, 2006 WL 1984426 (N.C. Ct. App. July, 18, 2006), the appellate court noted that the state supreme court had ruled that North Carolina's protection for religious freedom was exactly the same as the federal First Amendment's protection. *Id.* at *3. It then noted, however, that the *In re Williams* case was decided before the U.S. Supreme Court, in *Smith*, changed the amount of protection the First Amendment provides. *Id.* The appellate court noted its

uncertainty as to whether North Carolina's Constitution still provides the extremely strong protection for religious freedom that its language suggests. *Id.*

Someday, the question of how much protection the North Carolina Constitution provides for religious freedom is going to have to be decided by the courts. Perhaps the North Carolina Supreme Court will rule that, since *Smith* weakened the protection the First Amendment provides for religious freedom, North Carolina's Constitution provides *greater* protection than the federal one. But it does not have to do so. Instead, it very well may proclaim that it meant what it said in *In re Williams*: the freedom protected by the state Constitution *is no more extensive* than the freedom provided by the federal Constitution. If the court rules that way, there will no longer be broad protection for religious freedom in North Carolina.

The reality is no one knows how much protection North Carolina's Constitution provides for religious freedom today. In fact, no one can know how much protection is provided post-*Smith* until the state courts decide the question. Enacting RFRA avoids this uncertainty. Rather, RFRA proclaims through statute exactly how much protection is provided for religious freedom in North Carolina. RFRA clarifies that the protection for religious freedom is exactly what it used to be in North Carolina and in all other states before *Smith* was decided.

With RFRA, strong protection for religious freedom in North Carolina will be sure. Without it, the amount of protection afforded by the state Constitution will remain in question. Similar language in other states' Constitutions illustrates the problem and underscores the importance of enacting RFRA.

Unfortunate Interpretations by Courts of Other States Underscore the Importance of Enacting RFRA

We need look no further than to the decisions of courts in other states, which interpreted language similar to that found in North Carolina's Constitution, to understand that North Carolina can no longer rely on its strong constitutional language. These courts in other states interpreted strong language in their state Constitutions in a very weak manner, lending little protection to religious freedom and rights of conscience. Compare the constitutional language from the following states with the treatment accorded it by the courts.

Maryland

In Maryland, the Constitution includes an express affirmation of religious freedom. It reads:

> That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief, provided, he believes in the existence of

> God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

Md. Const., Decl. of Rights, art. 36. Yet, in 1994, the Maryland Attorney General said that "[d]espite the variant wording of the Maryland guarantee, the analysis of claims under it appears to be no different than of claims under the Free Exercise Clause." 79 Md. Op. Atty. Gen. 56, 1994 WL 394980, *2 n.3 (July 21, 1994). Then, in 2001, the Maryland Court of Appeals adopted the *Smith* standard. *See Montrose Christian Sch. Corp. v. Walsh*, 770 A.2d 111, 123 (Md. 2001).

New Jersey

The New Jersey Constitution addresses freedom of religion and conscience as follows:

> No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

N.J. Const. art. 1, ¶ 3. In 1997, however, the New Jersey Supreme Court adopted the *Smith* standard, calling its own Constitution "less pervasive than the First Amendment." *See S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 715 (N.J. 1997).

Nebraska

Nebraska, like many states, has strong constitutional language protecting religious freedom and rights of conscience, to wit:

> All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious beliefs; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Neb. Const. art. 1, § 4. But in 2008, the Nebraska Supreme Court adopted the *Smith* standard, concluding that "the free exercise provisions of the Nebraska Constitution protect the same rights as the Free Exercise Clause of the federal Constitution." *See In re Interest of Anaya*, 758 N.W.2d 10, 19 (Neb. 2008).

Oregon

Oregon has two separate constitutional provisions designed to protect both the consciences and the religious scruples of its citizens.

> All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
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> No law shall in any case whatever control the free exercise, and enjoyment of religeous (sic) opinions, or interfere with the rights of conscience.

Or. Const. art. 1, §§ 2, 3. But in 1995, the Oregon Supreme Court affirmed the *Smith* test. *See Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351, 361 (Or. 1995).

New Hampshire

New Hampshire makes an express point to protect both the exercise of religion and freedom of conscience in its Constitution:

> Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.

N.H. Const. Part 1, art. 5. In 2010, however, the New Hampshire Supreme Court adopted the *Smith* standard. *See State v. Perfetto*, 7 A.3d 1179, 1182-83 (N.H. 2010).

Vermont

> The Vermont Constitution is arguably the most pro-religion state Constitution. It provides:
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> That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Vt. Const. Ch. 1, art. 3. But in 2006, the Vermont Supreme Court said that "the stringent [constitutional] test has not applied to generally-applicable state laws since 1997," implicitly

suggesting that the *Smith* standard may now apply in its state. *See Office of Child Support, ex rel. Stanzione v. Stanzione*, 910 A.2d 882, 887 n.1 (Vt. 2006).

Indiana

In Indiana, the Constitution provides as follows:

> No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.

Ind. Const. art. 1, § 3. Yet, in 2000, the Indiana Court of Appeals interpreted this language to follow the standard from *Smith*. *See Cosby v. State*, 738 N.E.2d 709, 711 (Ind. Ct. App. 2000). Thus, notwithstanding strong constitutional language, the Indiana courts do not protect religious conscience against generally applicable laws.

Conclusion

As these other state court decisions indicate, North Carolina cannot rely on the language provided by its Constitution. The U.S. Supreme Court's *Smith* decision has simply cast too much doubt on how that language will be interpreted going forward.

RFRA removes that doubt, and ensures that religious liberty receives strong protection in North Carolina. The People of North Carolina can hope that the state courts will reach the right decision about religious freedom when they consider the meaning of the state Constitution in light of *Smith*. Or the legislature can ensure broad religious freedom by enacting RFRA. That is why the state Constitution isn't enough: North Carolina needs RFRA.