Testimony on HB 2260
to
The House Judiciary Committee

By Ray Roberts
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The Department of Corrections appreciates the role that religion holds in the life of persons in the department’s custody and seeks to accommodate the diverse religious beliefs and practices of inmates and paroled offenders within the parameters of the department’s responsibility to protect the safety and security of incarcerated persons, staff, and visitors; and maintain good order and discipline within correctional facilities and protect public safety through the supervision of released offenders. The department, however, has a concern regarding HB 2260. A proposed balloon amendment addressing that concern is attached.

HB 2260 provides for a two part test regarding whether a governmental entity’s action that burdens a religious practice would be lawful under HB 2260. First, the action must be related to a “compelling governmental interest” and secondly, the government’s action must achieve that interest in the “least restrictive manner”. While HB 2260 defines rules pertaining to correctional institutions as constituting a “compelling governmental interest”, HB 2260 does not include the supervision of released offenders as per se constituting a compelling governmental interest. Most troubling to the department however, is that even though HB 2260 designates matters involving correctional institutions as compelling interest, the bill nonetheless subjects the department and its operational rules to a “least restrictive manner” test.

Unfortunately, it is the “least restrictive manner” prong of the test that gives rise to litigation and the substitution of judicial opinions for those of correctional officials. The least restrictive manner test has resulted in differing opinions being issued by federal district courts, federal courts of appeal and ultimately the United States Supreme Court as to whether a correctional official’s action was the least restrictive method to accomplish a compelling interest. As pointed out in the department’s testimony on this bill last session, the United States Supreme Court reject the “least restrictive manner” test for analyzing the relationship between religious practices and correctional operations due to its being unworkable. See O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) which is discussed in the testimony of last session.

The Department urges that HB 2260 be amended to provide an exception for the operation and management of correctional facilities and persons under release supervision from the least restrictive manner test.
HOUSE BILL No. 2260

By Committee on Judiciary

AN ACT concerning civil procedure; relating to exercise of religion.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in the Kansas preservation of religious freedom
act:
(a) "Burden" means any government action that directly or
indirectly constrains, inhibits, curtails or denies the exercise of religion by
any person or compels any action contrary to a person's exercise of
religion, and includes, but is not limited to, withholding benefits,
assessing criminal, civil or administrative penalties, or exclusion from
government programs or access to government facilities.
(b) (1) "Compelling governmental interest" includes, but is not
limited to:

(2) "Compelling governmental interest" shall not include prohibition
of a practice or policy of discrimination against individuals in
employment relations, in access to free and public accommodations or in
housing, except as set forth in K.S.A. 44-1001 et seq., and amendments
thereto, and the laws and constitution of the United States.
(c) "Exercise of religion" means the practice or observance of
religion under section 7 of the bill of rights of the constitution of the state
of Kansas and the first amendment to the constitution of the United States
and includes the right to act or refuse to act in a manner substantially
motivated by a sincerely-held religious tenant or belief, whether or not
the exercise is compulsory or a central part or requirement of the person's
religious tenants or beliefs.
(d) "Fraudulent claim" means a claim that is dishonest in fact or that
is made principally for a patently improper purpose, such as to harass the
opposing party.
(e) "Government" includes the executive, legislative and judicial
branches and any and all agencies, boards, commissions, departments,
districts, authorities or other entities, subdivision or parts whatsoever of
state and local government as well as any person acting under color of
law.

(f) "Person" means any legal person or entity under the laws of the
state of Kansas and the laws of the United States.

Sec. 2. (a) Government shall not substantially burden a person's
exercice of religion even if the burden results from a rule of general
applicability, unless such government demonstrates, by clear and
convincing evidence, that application of the burden to the person:

(1) Is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling
governmental interest.

(b) A person whose exercise of religion has been burdened, or is
substantially likely to be burdened, in violation of this act, may assert
such violation as a claim or defense in a judicial proceeding. A court may
grant appropriate relief as may be necessary including:

(1) Injunctive relief;

(2) protective order;

(3) writ of mandamus or prohibition;

(4) declaratory relief;

(5) actual damages; or

(6) costs and attorney fees determined by the court.

(c) Any person found by a court of competent jurisdiction to have
abused the protection of this act by making a fraudulent claim may be
enjoined from filing further claims under this act without leave of court.

Sec. 3. (a) Nothing in this act shall be construed to:

(1) Impair the fundamental right of every parent to control the care
and custody of such parent's minor children, including, but not limited to,
control over education, discipline, religious and moral instruction, health,
medical care, welfare, place of habitation, counseling and psychological
and emotional well-being of such minor children;

(2) authorize any relationship, marital or otherwise, that would
violate section 15 of article 15 of the constitution of the state of Kansas;

(3) authorize the application or enforcement, in the courts of the
state of Kansas, of any law, rule, code or legal system other than the laws
of the state of Kansas and of the United States;

(4) limit any religious organization from receiving any funding or
other assistance from a government, or of any person to receive
government funding for a religious activity to the extent permitted by the
laws and constitution of the state of Kansas and of the United States; or

(5) protect actions or decisions to end the life of any child, born or
unborn.

(b) This act applies to all government action including, but not
Provided, however, this act shall not apply to government action including but not limited to penological rules, regulations, conditions or policies which are established by a jail, correctional institution, juvenile detention facility or an entity supervising offenders in the community that are reasonably related to the safety and security of incarcerated persons, staff, visitors, supervised offenders or the public; or to maintain good order and discipline in any jail, correctional institution or juvenile detention facility.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.