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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

In re Ballot Title and Submission Clause for 2011-2012 Initiative # 92 ("Religious Practices")

MOTION FOR REHEARING

COME NOW the Objectors Tom Minnery and Michael J. Norton, registered electors of the state of Colorado, by and through Michael J. Norton of the Alliance Defense Fund, and, pursuant to C.R.S. § 1-40-107, state that they are not satisfied with the April 18, 2012 decisions of the Ballot Title Setting Board (herein the "Title Board") that 2011-2012 Initiative # 92, as proposed and preliminarily approved by the Title Board, comprises a single subject and/or that the title set by the Title Board is fair and accurately expresses the true meaning and intent of this measure. In support hereof, Objectors state:

1. As proposed, 2011-2012 Initiative # 92 appears to violate the single subject requirement of Colo. Const., art. V, § 1(5.5), including, but not limited to, the fact that 2011-2012 Initiative # 92 and particularly the phrases "right to act" and "refusal to act", as defined in 2011-2012 Initiative # 92, are so indefinite as to lack a single subject.

2. In violation of C.R.S. § 1-40-106(3)(b), the Title Board did not provide a fair or accurate ballot title for 2011-2012 Initiative # 92; rather, the ballot title is misleading, inaccurate, and not representative of the true intent of the Proponents.

   A. The title as designated and fixed by the Title Board at its April 18, 2012 hearing is as follows:
      An amendment to the Colorado constitution defining the terms "right to act" and "refusal to act" in the context of limiting the government's ability to burden a person's or religious organization's freedom of religion, but taking effect only if the voters of the state approve the 2012 ballot initiative limiting the government's ability to burden freedom of religion.

   B. 2011-2012 Initiative # 92 defines "right to act" and "refusal to act" as the ability to engage in one or more religious practices or reject one or more religious practices "in the privacy of a person's home" or "in the privacy of a religious organization's established place of worship."

   C. When questioned by the members of the Title Board about what was meant by the phrases "in the privacy of a person's home" or "in the privacy of a religious organization's established place of worship", the attorney and only witness for the Proponents of 2011-2012 Initiative # 92 testified that, for a faithful Jew wearing a yarmulke, the Jewish worldview instructed that the place of worship for a faithful Jew, with regard to "right to act" and/or "refusal to act", meant the specific physical location, whether public or private,

where the faithful Jew happened to be at the moment. The attorney and only witness for the Proponents of 2011-2012 Initiative # 92 further testified that a faithful Jew wearing a yarmulke in a public park would, if motivated by a sincerely held religious belief, be engaged in religious activity in "an established place of worship" and thus would have, pursuant to 2011-2012 Initiative # 92, the "right to act" and/or "refusal to act" in any such physical location, whether such location is public or private.

D. Clearly, the definition propounded by the attorney and only witness for the Proponents of 2011-2012 Initiative # 92 during his testimony conflicts with the plain language of 2011-2012 Initiative # 92 as a result of which Title Board did not provide a fair or accurate ballot title for 2011-2012 Initiative # 92 and the ballot title is misleading, inaccurate, and not representative of the true intent of the Proponents.

E. By way of additional example, the Christian worldview is similar to what, according to the testimony of the attorney and only witness for the Proponents of 2011-2012 Initiative # 92, constitutes the Jewish worldview's "established place of worship". It is probable that all other worldviews, secular or sectarian, agree. In this regard, to followers of Jesus, one's "established place of worship" is the entire world, not the confines of one's own home or church.

F. Jesus instructs His faithful followers to carry out His commands not in the confines of one's own home or in the confines of a church building, but throughout the world, as, for example, where:
   a. In Matthew 28:18-20, called The Great Commission, Jesus said: **"All authority has been given to Me in heaven and on earth. Go therefore and make disciples of all the nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all things that I have commanded you; and lo, I am with you always, even to the end of the age"**
   b. In Mark 16:15, Jesus said: **"Go into all the world and preach the gospel to every creature."**

G. If "established place of worship" as set forth in 2011-2012 Initiative # 92, means the world, as the attorney and only witness for the Proponents of 2011-2012 Initiative # 92 testified to the Title Board that it meant, the ballot title is either misleading, inaccurate, and/or not representative of the true intent of the Proponents in violation of C.R.S. § 1-40-106(3)(b) for it limits "the right to act" and the "refusal to act" as the ability to engage in religious practices or reject practices "in the privacy of a person's home" or "in the privacy of a religious organization's established place of worship."

3. 2011-2012 Initiative # 92, proposed according to the witness for the Proponents of 2011-2012 Initiative # 92 in response to 2011-2012 Initiative # 78, would result in governmental conduct

that would conflict with and be in violation of the First Amendment to the United States Constitution and Title 42 U.S.C. § 1883 et seq.

A. By way of background, 2011-2012 Initiative # 78 would assure that the so-called compelling state interest test, codified as to federal government actions in the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb, et seq., would apply to Colorado state and local government actions.
    a. For decades, beginning with the principal cases of *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205 (1972), and their progeny, First Amendment free exercise of religion jurisprudence was well-settled: no law that burdened the free exercise of religion would be upheld unless a compelling state interest justified the substantial infringement of free exercise rights. *See Sherbert,* 374 U.S. at 406; *Yoder,* 406 U.S. at 214.
    b. Under these cases, courts applied what is called "strict scrutiny" to assure that federal and state/local government action that negatively impacted or burdened a person's sincerely held religious belief was justified by a compelling state interest achieved by the least restrictive means available. *See,* e.g., *Fraternal Order of Police v. City of Newark,* 170 F.3d 359 (3rd Cir. 1999); *United States v. Lee,* 455 U.S. 252 (1982). This high level of protection is appropriate for what has been called our "first freedom." *See,* e.g., *Diaz v. Collins,* 872 F.Supp. 353, 357 (E.D. Tex. 1994). *See also* Michael W. McConnell, *Why is Religious Liberty the 'First Freedom'?,* 21 Cardozo L. Rev. 1243 (2000).
    c. In 1990, the United States Supreme Court modified this well-settled body of law when it decided *Employment Division v. Smith,* 494 U.S. 872 (1990). In *Smith* and its progeny, the Court held that, with some exceptions, challenges to the constitutionality of laws on free exercise of religion grounds that are facially neutral toward religion and generally applicable are not subject to this "compelling interest" test.
    d. After *Smith,* the only time a law would be struck down as in violation of the First Amendment Religion Clauses was if the law specifically targeted religion for discriminatory treatment or if the violation of religious liberty is combined with a violation of another right, usually a violation of a free speech right.
    e. Thus, after *Smith,* so-called "neutral" laws, i.e., those that do not directly mention or target religion, such as: employment non-discrimination laws, accommodation laws, professional licensing laws, abortion-producing drug mandates, zoning laws, etc., would usually be upheld, if such laws were: (a) generally applicable, i.e., applied to everyone; and (b) neutral in its application, i.e., applied to everyone the same.
    f. When the *Smith* decision was announced in 1990, the reaction was overwhelmingly negative. Congress and many states moved to enact legislation to restore the pre-*Smith* balance that protected free exercise of religion by requiring both a compelling interest and that the law be narrowly tailored, and that the courts subject such infringements to the exacting "strict scrutiny" standard. Congress correctly saw the

Smith decision as a dramatic departure from the Supreme Court's long history of jurisprudence in the field of free exercise claims. In direct response to the Court's *Smith* decision, congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb, et seq. The bill, passed in 1993, was signed into law by President Clinton.

g. RFRA was a deliberate and conscious expression of Congress' will that religious freedoms only be overcome by "those interests of the highest order and those not otherwise served." *Rader v. Johnston,* 924 F.Supp. 1540, 1556 (D. Neb. 1996). RFRA, originally applicable to both federal government and state government action, prohibits governments from substantially burdening a person's exercise of religion, unless the government "demonstrates that the application of the burden to the person" represents the least restrictive means of advancing a compelling interest. 42 U.S.C. Section 2000bb-1(b); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 423 (2006).

h. Under RFRA, the party alleging that a law violates its rights must first demonstrate that its exercise of religion has been substantially burdened. If it does so, the government is then required to demonstrate that it has a compelling interest and that the law is the least restrictive means of furthering that interest. Moreover, where a facially neutral statute is enacted to target the activities of a religion, the law is subject to strict scrutiny. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993).[1]

i. In *City of Boerne v. Flores,* 521 U.S. 507 (1997), the U. S. Supreme Court, ruling that the law exceeded Congress' authority under the Section 5 enforcement provisions of the Fourteenth Amendment to the Constitution, held that the Federal RFRA could not be applied to the states. In response, individual states began to enact their own RFRAs to restore the protection of strict scrutiny in evaluating laws that burden the exercise of religion. At least fifteen states have enacted state RFRAs or constitutional amendments that reject the *Smith* standard.[2]

j. In addition to those states that have enacted RFRAs, several states have interpreted their state constitutions to require the pre-*Smith* compelling interest standard. Eleven state supreme courts have interpreted their states' constitutions to require

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[1] In *Church of Lukumi Babalu Aye, Inc.,* the Court unanimously struck down a municipal regulatory scheme that created exemptions for non-religious slaughter of animals while prohibiting the same conduct done for religious purposes. The Court determined that the law was not neutral and generally applicable and, therefore, it must meet the "compelling interest/least restrictive means" test despite *Smith. Church of Lukumi Babalu Aye, Inc.,* 508 U.S. at 531-537. In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* 132 S.Ct. 694, 706-707 (2012), the Court again unanimously limited *Smith's* scope and exempted religious employers from generally applicable nondiscrimination laws in hiring decisions regarding ministerial employees.

[2] Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Texas.

strict scrutiny of laws that place a substantial burden on the free exercise of religion, effectively incorporating the pre-*Smith* standard into their state constitutions.[3]

k. The Colorado Religious Freedom Amendment would assure that the pre-*Smith* "compelling interest" standard applies of state and local governments that negatively impact how we believe and the way that belief plays out in our daily lives. Colorado courts have applied essentially this same "compelling interest" test. It would assure that the case of *Engraff v. Indus. Comm'n,* 678 P.2d 564 (Colo. App. 1983) remains the law in Colorado. *Engraff* held that "if the state burdens the free exercise of religion, it must do so in the least restrictive manner and to achieve a compelling government interest. 678 P.2d at 567.

B. 2011-2012 Initiative # 78 would enshrine and protect Coloradans' original and unalienable religious freedoms set forth in the U.S. Constitution and in our State Constitution from being further diminished by governmental actions.

C. 2011-2012 Initiative # 92 would result in governmental conduct that would conflict with and be in violation of the First Amendment to the United States Constitution and Title 42 U.S.C. § 1883 et seq.

WHEREFORE, through counsel, the Objectors plead as aforesaid and respectfully request that this matter be set for rehearing pursuant to C.R.C. § 1-40-107(1).

DATED this 24th day of April, 2012.

ALLIANCE DEFENSE FUND

Michael J. Norton, Senior Counsel

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[3] Alaska, Hawaii, Indiana, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Washington, and Wisconsin.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2012, a copy of this Motion for Rehearing was sent to the designated representatives and their counsel by U.S. Mail, first class, postage prepaid, as follows:

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