



TO: Government, Veteran and Military Affairs
FROM: Tom Venzor
Nebraska Catholic Conference
DATE: January 19, 2022
RE: LB774 (Adopt the First Freedom Act) (Support)

The Nebraska Catholic Conference advocates for the public policy interests of the Catholic Church and advances the Gospel of Life through engaging, educating, and empowering public officials, Catholic laity, and the general public.

In 1990, the Supreme Court of the United States issued the unfortunate and problematic decision *Employment Division v. Smith*.¹ In that case, the Court held that “a valid and neutral law of general applicability,” even if it substantially burdens religious exercise, does not violate the Free Exercise Clause of the U.S. Constitution.² This holding was a departure from the prior, established standard that a law which substantially burdens religious conduct is unconstitutional, unless the government can demonstrate it had a compelling interest in burdening religion and did so in a narrowly tailored fashion.³

The absurdity of the *Smith* standard can be demonstrated through a simple hypothetical. Imagine a state that outlaws the sale and use of alcoholic wine—perhaps not a far-fetched idea for those who still advocate for 18th Amendment Prohibition. Such a law would result in Catholics being forbidden access to wine for the celebration of the Mass. Under case law *prior* to the *Smith* decision, the government would have been required to demonstrate a compelling interest in banning the use of alcohol by Catholics for religious purposes and that it was doing so in a narrowly tailored fashion—an unlikely feat given that the government could have crafted more narrowly tailored ways of banning alcohol without running roughshod over religious practice. However, in a post-*Smith* world, if such a law were found to be neutral and generally applicable, it would not be considered an unconstitutional burden on religious exercise.

Given the absurd outcomes possible under the *Smith* decision, it is no wonder that a nearly unanimous and bipartisan Congress quickly passed a bill into law, signed by President Bill Clinton, returning our country to the pre-*Smith* standard. This re-established standard requires the government to show a compelling interest that is narrowly tailored, if it wants to substantially burden the free exercise of religion. Unfortunately, this standard has been recognized to apply only to federal law and not to the states.⁴

¹ 494 U.S. 872 (1990).

² *Smith* at 889.

³ See *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁴ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Senator Brewer’s LB774 would make Nebraska law consistent with federal law and ensure that religious exercise is adequately protected in Nebraska. This bill protects all religions, whether mainline or minority, by providing a balancing test to ensure that religious liberty rights are not infringed by government.

When we talk about religious freedom, as the Second Vatican Council of the Catholic Church notes, we are talking about “immunity from coercion in civil society.”⁵ There is, then, a denial of basic human rights when the human person cannot give “external expression to his internal acts of religion” and when “the free exercise of religion is denied in society[.]”⁶

To put it in different terms: “We have to make sure that the state’s stance toward [free exercise of religion is] not hostile; that the state is not interfering with our rights to consider the deep existential questions, the question of meaning and value, and arrive at honest judgments about whether there are more than merely human sources or a more than merely human source of meaning and value; that the state is not interfering with our right to live with authenticity and integrity in view of our very best judgments.”⁷

LB774 ensures that the government’s actions are checked and balanced when they have the potential for substantially burdening religion. Such a rule has assisted the Native American, the Sikh, the Catholic, the Muslim, the Evangelical Christian, among many other devotees of faith. It has done this across the country, and can do the same in Nebraska with the passage of LB774.

For these reasons we support Senator Brewer’s LB774 which ensures that all faiths have an equal seat at the table so that government does not overstep its bounds and burden religious practice, unless truly necessary. This legislation is an important and fundamental contribution to religious freedom and we encourage this committee to advance LB774 to General File.

Thank you for your time and consideration.

⁵ *Dignitatis Humanae* (On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious), paragraph 1 (1965).

⁶ Id. at paragraph 3.

⁷ Robert George, “Understanding What the Constitution Says—and Doesn’t Say—about Religious Freedom,” George W. Bush Presidential Center, available at <https://www.bushcenter.org/publications/articles/2021/12/democracy-talks-religious-freedom-in-the-constitution.html?fbclid=IwAR15jhtjVvn0UZNmMILqEltMvSiptyYEC3i0C9eesFeZMVEiaumdlGCoy58> (last accessed on Jan. 18, 2022).