Lambda Legal
making the case for equality

**JENNIFER C. PIZER**
SENIOR COUNSEL and DIRECTOR,
LAW & POLICY PROJECT
jpizer@lambdalegal.org

March 12, 2013

By email to SenJUD@sen.state.nv.us

Dear Chairman Segerblom, Vice Chair Kihuen,
and Members of the Senate Judiciary Committee
Legislative Building, Room 2149
401 South Carson Street
Carson City, Nevada 89701

**Re: SB 192, Preservation of Religious Freedom Act – OPPOSE**

I write on behalf of Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and Gender Justice Nevada in opposition to SB 192. Lambda Legal is the oldest and largest nonprofit legal organization working nationally through policy advocacy, education, and impact litigation to achieve full civil rights for lesbian, gay, bisexual, and transgender ("LGBT") people and those living with HIV. Gender Justice Nevada champions justice, dignity, and respect for Nevada's diverse trans* and gender non-conforming persons through education, outreach, and health, legal and other direct service programs.

We urge you to oppose SB because it is **far too broad** and **would place a costly, impractical burden on government** to prove it has used precise legal drafting and is serving compelling public needs whenever a law governing conduct in the public sphere happens unintentionally to burden an individual's personal religious beliefs.

Reducing discrimination and making Nevada a safer, more inclusive place for all to live, work, attend school, run a business, or raise a family are core goals for both Lambda Legal and Gender Justice Nevada. From the requests for help we both have received from Nevadans, our educational work in the state, and litigation we have seen in other states, both organizations believe **SB 192 would undermine Nevada's laws against discrimination.** However unintended that consequence may be, the fact remains that **Nevada's laws against discrimination serve crucial interests of Nevada families, businesses, and government**. At a minimum, SB 192 should be amended to preclude its use as a defense to a claim of discrimination in violation of Nevada law.

## I. SB 192 Would Invite Religious Challenges To Any and All Nevada Laws, Imposing Unwarranted Administrative Burdens And Litigation Costs.

In 1990, Justice Scalia wrote for the United States Supreme Court a decision examining prior religious liberty case law. He concluded that our U.S. Constitution does not require government to satisfy the most rigorous of constitutional tests (the "strict scrutiny" test) in order to enforce laws regulating commerce, taxation, public safety, and other matters of public life even when such laws may happen to be inconsistent with the religious views of some people.[1] As long as a law applies to everyone alike and was not enacted to target a particular religious group or practice, the federal Constitution allows it to be enforced if it serves a legitimate public purpose in a rational manner.[2] This test has proved sensible and practical in the years since then.

Many members of Congress, however, wanted to establish a more protective standard for religious believers. They enacted the Religious Freedom Restoration Act ("RFRA") in 1993.[3] That law has many provisions similar to those of SB 192. The U.S. Supreme Court considered RFRA in 1997 in a case in which that law had been invoked as a defense against a local zoning ordinance, and determined that RFRA is unconstitutional for that purpose.[4] In his concurring opinion, Justice Scalia again emphasized that our nation's firm commitment to freedom of religious belief and worship does not mean freedom to disregard religiously neutral, general laws that regulate the public sphere for the safety and wellbeing of society as a whole.[5]

After the Supreme Court held RFRA unconstitutional, Congress passed a tailored law to give greater protection for religious exercise in two contexts. This law, called the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[6] has made it easier for prisoners to seek – and often obtain – accommodation of a wide range of religious practices, and for religious groups to obtain variances from local zoning

---

[1] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

[2] *Id*. at 885. *Compare Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law intentionally targeting a group's religious practice receives strict scrutiny even if generally applicable).

[3] 42 U.S.C. § 2000bb *et seq*.

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

[5] *Id*. at 537-44.

[6] 42 U.S.C. § 2000cc-1(a)(1)-(2).

rules. A quick search among federal decisions yields many cases.[7] Views certainly may vary as to what religious accommodations are appropriate in the contexts of zoning and prisons. Two things are clear from the decisions applying RLUIPA to date, however. First, the more demanding legal standard set by that law has made it harder for government to maintain uniform policies.[8] Second, there is great diversity among the individuals and groups who have used the stricter legal test to seek exemptions from standardized rules via sometimes-protracted litigation.

The undersigned therefore respectfully suggest that members of this committee seriously consider **the vast range of accommodations that probably will be requested, and the resulting administrative complications and potentially immense costs** for government and the general public, if the legal standard for religious claims is changed in the boundless manner proposed by SB 192.

## II. Because Discrimination Against LGBT People and Those With HIV Is a Pervasive Problem, Laws Must Be Clear That Even Sincere Religious Views Do Not Excuse Harassment Or Other Mistreatment Of Others.

### A. Discrimination Remains a Pervasive Problem

Nevada law contains important antidiscrimination protections concerning sexual orientation, gender identity, and HIV status. These laws should be publicized and

---

[7] *See, e.g.*, *Shakur v. Schriro*, 514 F.3d 878 (9th Cir. 2008) (reversing summary judgment for prison on Muslim prisoner's claim for special diet because factual record on which district court had ruled was too sparse and court should have done "a careful analysis of a fully developed record"); *Greene v. Solano County Jail*, 513 F.3d 982 (9th Cir. 2008) (reversing summary judgment for jail on claims by maximum security prisoner wanting to join group worship services, finding factual disputes existed and government had not carried its burden); *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978 (9th Cir 2006) (group was entitled to exemptions from agricultural and residential zoning restrictions to build temple).

[8] For example, under the prior "rational basis" test, a requirement to submit one's Social Security number to renew one's driver's license was enforced over an individual's religious objection (*Miller v. Reed*, 176 F.3d 1202 (9th Cir 1999)), and a prison policy against smoking inside was upheld where the inmate was permitted to perform a religious burning ritual of "smudging" outside three times per week (*Hills v. Stewart*, 1999 U.S. App. LEXIS 26896 (9th Cir. 1999)). Both rules might survive strict scrutiny review, but the government's litigation burden would be heavier.

enforced so they can succeed in reducing unfair treatment in employment and housing across the state.

We know that this goal has not yet been achieved from the calls for help that both undersigned organizations receive. A review of the Help Desk records Lambda Legal maintains reveals dozens of calls concerning workplace discrimination from Carson City, Henderson, Las Vegas, Mesquite, and Reno. We also received numerous calls about public accommodations discrimination from Lake Tahoe, Las Vegas, and Reno. Gender Justice Nevada similarly receives requests from all over the state for advice and assistance with discrimination problems.

This is consistent with the harsh national picture. Though more states, municipalities, and private businesses have adopted nondiscrimination rules, anti-LGBT bias and HIV discrimination remain persistent, under-reported problems.[9] Harassment and other forms of discrimination remain especially widespread and harsh toward transgender and gender non-confirming individuals.[10]

As this body has concluded when enacting clear anti-bias laws, discrimination is harmful and costly. Harassment and ostracism means skilled workers are driven from their jobs. Patients avoid medical care. Students are unable to learn.

The laws against discrimination are intended to reduce such unjust treatment, not merely offer victims a way to seek a remedy in court. However, at least as written, **SB 192 is likely to be taken by some as new permission to discriminate if one has a religious reason**. This may be an unintended consequence. And such religious claims ultimately may be rejected and the civil rights laws given proper effect, as has occurred in a range of cases.[11] But even if that happens eventually, **the impact of increased discrimination will be devastating for those most vulnerable** – a population simply wanting to avoid unfair treatment, most of whom have neither a desire nor the means to seek any remedy after the fact.

---

[9] *See generally* Pizer, *et al*., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012).

[10] *See generally* Grant, *et al*., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), *available at* http://www.thetaskforce.org/reports_and_research/ntds.

[11] See the cases cited in footnotes 12 and 13.

### B. Even Sincere Religious Beliefs Must Not Excuse Discrimination.

Our nation's history of staunch commitment to religious liberty includes a distressing record of discrimination based on marital status, sex, race, and other grounds prompted by the sincere religious beliefs of some about others who hold different views. The good news is that enforcement of nondiscrimination laws has dramatically reduced citation of religion to excuse these forms of discrimination, bringing increased harmony between religious freedom and fairness guarantees.[12]

Although they too need this same harmony, at present, **religiously motivated discrimination is a serious problem for LGBT people and those with HIV.** This is due in part to the fact that laws and policies forbidding discrimination based on sexual orientation, gender identity, or HIV status are newer and less familiar to many. Also, because religious disapproval of gender and sexual orientation minorities is more openly expressed, more people honestly believe they have a religious duty to urge others, for example, to change their sexual orientation or gender identity, or to agree that HIV infection is punishment for sin. Confusion about whether individual religious liberty rights permit disregard of antidiscrimination rules has led to discrimination in many contexts that can be instructive.[13] **Nevada's antidiscrimination rules serve an essential purpose. They should not be undermined even if good intentions support SB 192.**

---

[12] A sampling of cases includes: *Smith v. Fair Emp. & Housing Comm'n*, 12 Cal. 4th 1143 (1996) (despite fair housing laws, Christian landlord refused on religious grounds to rent to unmarried heterosexual couple); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska Sup. Ct., 1994) (same); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (despite federal nondiscrimination law, school offered unequal health benefits to female employees based on religious tenets); *Bollenbach v. Board of Ed.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (employer improperly refused to hire women drivers due to objection of Hasidic male students); *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships); *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967) (asserting religious objection to racial integration, restaurant refused service to non-white guests).

[13] *See, e.g., North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez),* 44 Cal. 4th 1145 (2008) (lesbian patient was improperly refused infertility care based on physician's religious objection to patient's same-sex relationship); *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (Christian supervisor wrongfully claimed a religious right to harass lesbian subordinate); *Chalmers v. Tulon*, 101 F.3d

## Conclusion

Despite the good intentions that surely prompted SB 192, this bill would change the legal standard in an unnecessary and impractical manner. It would make it harder and more expensive for Nevada to enforce important public safety and welfare laws, including laws against discrimination. Whatever the courts ultimately might require for various laws, the practical effect would be to invite new, problematic religious objections to rules that apply generally to everyone in the public sphere.

This would be a mistake. For years, it has been settled that, when anyone engages in business or other conduct regulated by law to protect others, they should comply with the principle that has served our country well: "'When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.'"[14]

Lambda Legal and Gender Justice Nevada urge you to oppose SB 192. Alternatively, a minimum, the bill should be amended to preclude its use as a defense to a claim of discrimination in violation of Nevada law.

Very truly yours,

*Jennifer C. Pizer*

Jennifer C. Pizer
Senior Counsel and
Director, Law and Policy Project

---

1012, 1021 (4th Cir. 1996) (employee claimed religious right to send letters to co-workers criticizing their private lives, despite warning that she might cause harassment complaints); *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995) (employee engaged in antigay proselytizing despite company nondiscrimination policy); *Knight v. State of Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (visiting nurse engaged in antigay proselytizing to home-bound AIDS patient); *Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352 (Ind. 1988) (lab technician claimed religious discrimination when fired for refusing to do tests on specimens labeled with HIV warning because he believed "AIDS is God's plague on man and performing the tests would go against God's will").

[14] *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 565 (2004) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).