



MEMORANDUM

TO: The Pennsylvania House of Representatives

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: September 14, 2020

RE: OPPOSITION TO HOUSE BILL 2530 P.N. 3782 (OWLETT)

[HB 2530](#) (PN 3782) would amend Pennsylvania's [Religious Freedom Protection Act](#) to prevent any order under a disaster declaration or control measure under the [Disease Prevention and Control Law](#) from restricting religious assembly, impeding travel to or from a place of worship, or authorizing related civil/criminal penalties.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 2530 for the following reasons:

HB 2530 is a solution in search of a problem

To stop the spread of COVID-19, Governor Wolf issued an [emergency disaster declaration](#) on March 6, 2020. By April 1, all counties were under a [statewide stay at home order](#), which closed schools and non-life sustaining businesses and limited people to leaving their residence only for critical individual activities and essential travel. HB 2530 appears to be a response to this order by prohibiting any restriction on religious assembly — but it is responding to a restriction that never existed. In fact, the order **explicitly exempted** religious institutions from its purview, stating that following operations are exempt:

- Life-sustaining business activities
- Health care or medical services providers
- Access to life-sustaining services for low-income residents, including food banks
- Access to child care services for employees of life-sustaining businesses (...)
- News media
- Law enforcement, emergency medical services personnel, firefighters
- The federal government
- **Religious institutions**

HB 2530 is likely unconstitutional

HB 2530 arguably violates both the U.S. and Pennsylvania Constitutions for two reasons:

1. Both the U.S. and Pennsylvania Constitutions prohibit the government from unilateral, absolute exceptions for religious institutions. Burdens placed on religious exercise by statute or through other types of executive action are still subject to the constitutionally-required "balancing test" (serve a compelling government interest and least restrictive way to accomplish that interest). Government may not grant religious exemptions that harm others. HB 2530 prohibits any burden on religion under the executive's emergency powers outright, effectively exempting religious exercise from any balancing test. In other words, the bill creates an absolute right to flout emergency and public health directives in the name of religion, but would still allow other laws to burden religion if the government shows it is necessary. Government currently infringes on some religious beliefs, such as requiring people to send their children to school or to show they meet homeschooling standards. But in a true emergency, all restrictions are lifted? This is an inversion of the balancing test.

2. HB 2530 would violate the U.S. and Pennsylvania Constitutions by establishing a preference for religious gatherings over non-religious gatherings. The Establishment Clause of the First Amendment and the PA Constitution ([Penn. Const. art. I § 3](#)) prohibit governments from taking actions that would endorse or grant preferential treatment to one religion over the other or endorsing religion over nonreligion. HB 2530 includes an unlimited, absolute prohibition against any "adverse action against a religious institution or members of a religious organization for exercising their religion." In other words, as long as someone is doing something in the name of religion, they can't be punished for a violation of an emergency order or disease prevention measure. This establishes a clear preference for/protection of religion and therefore runs contrary to the foundational principles of the Establishment Clause.

The ACLU-PA would not normally oppose a protection of religious exercise, but we always acknowledge that no right is absolute. There may be times, under very limited and narrowly tailored circumstances, when even religious exercise must give way to government infringement.

The strict scrutiny test built into the Religious Freedom Protection Act is the balance we accord all our most important rights — the government has a very heavy burden to show it is really necessary to infringe on religion. We would argue that a global pandemic is an extraordinary circumstance that may, in some instances, meet that heavy burden (although, again, even when the state was arguably at its zenith of justifiable infringement, religious institutions were exempt from the order). But HB 2530 turns the balancing test on its head and would make religion the one absolute right, but absolute in only in the event of a seldom-occurring emergency — which, in this instance, just happens to be a global pandemic that threatens the health of the entire community.

For these reasons, we urge you to oppose House Bill 2530.