Why Colorado needs Freedom of Conscience Protection legislation

(HB 15-1171)

My name is Preston Branaugh; I am a Colorado attorney in private practice for 17 years, and work with clients in First Amendment and Civil Rights matters. I am here today asking for you to pass this bill. In preparation for my comments, I located an article by Law Professor Conkle of Indiana University, who has graciously allowed me to include his comments alongside mine, albeit there are some variations between the Colorado and Indiana versions of the bill.

The bill before you today would establish a general legal standard, the "compelling interest" test, for evaluating laws and governmental practices that impose substantial burdens on the exercise of religion. This same test already governs federal law under the federal Religious Freedom Restoration Act (RFRA), which was signed into law by President Bill Clinton. And some 30 states have adopted the same standard, either under state-law RFRAs or as a matter of state constitutional law.

Applying this test, a unanimous U.S. Supreme Court recently ruled that a Muslim prisoner was free to practice his faith by wearing a half-inch beard that posed no risk to prison security. Likewise, in a 2012 decision, a court ruled that the Pennsylvania RFRA protected a group of Philadelphia churches, ruling that the city could not bar them from feeding homeless individuals in the city parks.

If the Colorado Freedom of Conscience Protection Act (FCPA) is adopted, a similar general approach will govern religious freedom claims of all sorts, thus protecting religious believers of all faiths by granting them precisely the same consideration. I personally think it is very important to note that the Federal RFRA was upheld in 2006 as constitutional, and that no state RFRA has been held unconstitutional. As a result, objections about a parade of horrible outcomes are overblown.

Granting religious believers legal consideration does not mean that their religious objections will always be upheld. And this brings us to the issue of same-sex marriage.

Under the Colorado FCPA, those who provide creative services for weddings, such as photographers, florists or bakers, could claim that religious freedom protects them from local nondiscrimination laws. Like other religious objectors, they would have their day in court, as they should, permitting them to argue that the

government is improperly requiring them to violate their religion by participating (in their view) in a celebration that their religion does not allow.

But courts generally have ruled that the government has a compelling interest in preventing discrimination and that this interest precludes the recognition of religious exceptions. Even in the narrow setting of wedding-service providers, claims for religious exemptions recently have been rejected in various states, including states that have adopted the RFRA test. A court could rule otherwise, protecting religious freedom in a distinctive context. But to date, none has. [Please see attached List of RFRA cases]

In any event, most religious freedom claims have nothing to do with same-sex marriage or discrimination. The proposed Colorado FCPA would provide valuable guidance to Colorado courts, directing them to balance religious freedom against competing interests under the same legal standard that applies throughout most of the land. It is anything but a "license to discriminate," and it should not be mischaracterized or dismissed on that basis.

I appreciate your careful consideration of this bill, and to enact what a majority of other states, and our federal government has done, namely holding actions that impede freedom of conscience to the highest level of judicial review. Thank you.

List of Religious Freedom Restoration Act (RFRA) cases

1. ***Elane Photography v. Willock***, 309 P.3d 53 (N.M. 2013), cert. denied (June 17, 2014). This case was from New Mexico, which has a state RFRA law, but was not found to give rise to a defense from discrimination. The U.S. Supreme Court denied hearing the case.
2. ***State of Washington v. Arlene's Flowers***. This case is from Washington, where the state constitutional religious freedom provision is interpreted to require strict scrutiny. However, to this point, the Courts have ruled that it did not give protection to those claims of discrimination.
3. ***Craig and Mullins v. Masterpiece Cakeshop, Inc. and Jack Phillips***. This case is still pending here in the Colorado Court of Appeals. Colorado is currently one of only eleven states with no decision yet under state constitution and no state RFRA. Thus far the Colorado Civil Rights Commission has decided that the baker violated the public accommodation laws here in CO.
4. ***Baker, for Gay and Lesbian Services Organization v. Hands On Originals***. This case involved a printing company from Kentucky, which also has a state RFRA law, but was also not found to give rise to a defense from discrimination.
5. ***Cervelli v. Aloha Bed & Breakfast***, No. 11-1-3103-12 ECN (Haw. Ct. of App. Filed May 9, 2013). Hawaii is one of just four states where Courts have explicitly noted uncertainty, but declined to resolve what level of protection is afforded to these claims. However, the trial Court has ruled that letting of nights in the defendant's own home is not protected from discrimination claims.
6. ***Sweet Cakes By Melissa***. This case, pending in Oregon where no RFRA law exists, also involves a baker and wedding cake. It was before the Oregon Bureau of Labor and Industries at last check.
7. ***Erwin v. Gifford and Liberty Ridge Farm***. This case was pending in New York, the lone state that recognizes state constitutional religious freedom provisions interpreted to require only a weaker intermediate scrutiny. The dispute involved a same-sex wedding at the event property.
8. ***Katherine Baker and Ming-Lien Linsley, and Vermont Human Rights Commission v. Wildflower Inn***, Docket No. 183-11. Vermont (like Hawaii) is also one of just four states whose Courts have explicitly noted uncertainty, but declined to resolve what level of protection is afforded to these claims. However, despite the uncertainty, the defendant's decided to forgo further litigation and pay a civil penalty of $20,000 into a charitable trust set up by the plaintiffs.
9. ***Bernstein v. Ocean Grove Camp Meeting Association***. This case was from New Jersey, a state (like Colorado) that is currently one of only eleven states with no decision yet under state constitution and no state RFRA. The Court ruled that
10. ***Ward v. Wilbanks***. This case was from Michigan which has a state RFRA law. It is the lone case in this list in which the Courts found that the defendant did not violate the discrimination laws. Interestingly, it noted that "[t]olerance is a two-way street," for if it were otherwise, nondiscrimination measures would have "mandated orthodoxy, not anti-discrimination." Wise words.