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IN OPPOSITION OF
HB 3686
(RELIGIOUS DRESS OF PUBLIC SCHOOL TEACHERS)

BEFORE THE HOUSE COMMITTEE ON EDUCATION

FEBRUARY 5, 2010

The ACLU of Oregon appears today in opposition of HB 3686 which repeals ORS 342.650 and ORS 342.655 and amends ORS 659A.033. While proponents of this change are promoting action in the upcoming February 2010 supplemental session, with a proposed 17 month long delay before implementation, we urge the Legislature to postpone consideration until the next regular session in 2011, after a full opportunity for meaningful deliberation. We believe that the one month supplemental session in February does not provide the necessary public and legislative participation and deliberation on such an important issue to Oregonians. We recognize that the issues raised by ORS 342.650 and ORS 342.655 are difficult and real people are affected. However, we believe that repealing this law will affect the religious neutrality of our public schools and before considering this action it is essential to fully understand all of the legal ramifications, many of which are unique to Oregon jurisprudence.

While ORS 342.650 and ORS 342.655 were first passed in 1923 in an atmosphere of anti-Catholic bigotry that is not the complete legislative history of this law. Those laws have been amended a few times since. First, in 1965, although part of a large package of legislative changes, many of which include outright repeals of educational laws, these provisions were re-written, passed and signed into law by then-Governor Mark O. Hatfield.

In 1987 in *response* to the Oregon Supreme Court decision in *Cooper v. Eugene School District,* upholding the law in 1986, the legislature amended ORS 342.655 removing the mandatory revocation of license requirement (a change supported by ACLU). In revisiting the law *immediately* after the Oregon Supreme Court decision, the legislature had a modern day understanding of the law's application and could have easily chosen to repeal, not amend.

The Oregon Supreme Court in *Cooper* in 1986 recognized that the motivations of the 1965 legislature were not the same as the 1923 legislature:

> There is no reason to believe that when the Legislative Assembly enacted ORS 342.650 in its present form in 1965, it had any aim other than to maintain the religious neutrality of the public schools, to avoid giving children or their parents the impression that the school, through its teacher, approves and shares the religious commitment of one group and perhaps finds that of others less worthy. *Cooper v. Eugene School District No. 4J*, 301 Or 358, 373, 723 P2d 298 (1986).

The ACLU recognizes the importance of the religious liberty rights of individuals and their ability to practice their faith. Indeed, we have acted in support of these rights here in Oregon and across the country and we will continue to do so. But public schools have a special obligation and a unique role to ensure an atmosphere that is welcoming to all students and their families regardless of their religious beliefs.

The ACLU of Oregon was founded in 1955 and, at least as far back as we can determine, our organization has always supported this law because it helps to ensure the religious neutrality of Oregon public schools. In the mid 1980s, the ACLU of Oregon Board of Directors, after extensive debate, reiterated its support of the law and we filed an *amicus* brief in the *Cooper* case. Our Board did so because it felt strongly that the rights of students and their families to have access to a religiously neutral public school education must take precedence over the interest of individual teachers to wear religious dress.

As the Court in *Cooper* stated:

> Parents and lawmakers may and do assume that the hours, days, and years spent in school are the time and the place when a young person is most impressionable by the expressed and implicit orthodoxies of the adult community and most sensitive to being perceived as different from the majority of his or her peers; famous constitutional cases have involved this socializing rather than intellectual function of the schools. **In excluding teachers whose dress is a constant and inescapable visual reminder of their religious commitment, laws like ORS 342.650 respect and contribute to the child's right to the free exercise and enjoyment of its religious opinions or heritage, untroubled by being out of step with those of the teacher.** *Cooper*, 301 Or at 376 (emphasis added).

During the school day, public school teachers are representatives of the government. Their appearance and their actions are taken on behalf of the government and, in this context, the government and teachers need to ensure religious neutrality during school hours. In this capacity, teachers do set aside their individual interests in their role as public school educators when they are teaching in the classroom. The government restricts their free speech rights, particularly with regards to political speech, which is also a core guarantee of the First Amendment. The same principle should apply when it

comes to religion and religious activity that would compromise the educational process and interfere with the religious freedom rights of students and their families. The government has a duty to ensure that all children are safe and respected in the public school system, regardless of their political or religious upbringing.

> [The] concern is that the teacher's appearance in religious garb may leave a conscious or unconscious impression among young people and their parents that the school endorses the particular religious commitment of the person to whom it has assigned the public role of teacher. This is what makes the otherwise privileged display of a teacher's religious commitment by her dress incompatible with the atmosphere of religious neutrality that ORS 342.650 aims to preserve. *Cooper,* 301 Or at 380-381.

If this law is repealed, school districts will not be able to easily regulate the religious dress of school teachers. The Constitution does not allow the government (nor, we suspect, would school districts want the responsibility at the local level) to challenge or question the religious beliefs of any teacher. If a teacher states that her or his dress is necessary to comply with her or his particular religious beliefs, the courts have made it clear that the government is prohibited from questioning that faith or treating that individual differently depending on how that faith is perceived.

In a case arising out of Oregon, the U.S. Supreme Court stated this long-standing principle:

> Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims," ***As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creed,' *** **Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.**" *Employment Div. v. Smith,* 494 US 827, 886-87, 110 SCt 1595, 108 LEd2d 876 (1990) (emphasis added).

HB 3686 adds new language to ORS 659A.033, the Oregon Religious Workplace Freedom Act just passed in 2009. It proposes adding to Section 4 of that law a new factor that can be considered when an employer (school district) considers whether or not it can make an accommodation. That language states: "(f) The degree to which an accommodation may constrain the obligation of a school district, education service district, or public charter school to maintain a religiously neutral work environment."

Arguably, that duty *already exists* – indeed the new language refers not to a new but current *obligation* of a school to maintain a religiously neutral "work environment." In addition, this language provides no clear guidance to school districts as to what religious dress accommodation would or would not constrain the school's obligation to

retain a religiously neutral work environment. This leaves local school districts to decide. Even with guidance from a state agency, whatever "boundaries" are established will be challenged and with so little guidance, the risk of unintended results if very high. Either teachers will challenge denial of accommodation or parents and children will challenge the approval of accommodation.

These are difficult issues that merit significant consideration *prior* to enactment. Indeed, one can infer from a 17 month delay for implementation that such challenges exist. yet rather than a considered determination, there is a rush to act first and evaluate later.

Finally, it seems ironic to use "work environment" for school. The focus should be on the classroom and the environment for children, not the work environment for teachers.

The proponents have argued that the law is vague because it does not define religious dress. However, the Oregon Supreme Court addressed that issue and set forth a test to apply:

> "[R]eligious dress" must be judged from the perspective both of the wearer and of the observer, that it is dress which is worn by reason of its religious importance to the teacher and also conveys to children of the age, background, and sophistication typical of students in the teacher's class a degree of religious commitment. *Cooper,* 301 Or at 380.

While many proponents of repeal recognize the need to ensure against proselytizing in the public schools, the problem is that despite even the best intentions, it is not easy to draw the line on what is and is not "proselytizing" especially when dealing with a captive audience of young children for hours a day, week after week.

> A distinction between privileged personal expression and forbidden "indoctrination" or "proselytizing" is easier to assert than to apply; one teacher's personal views and acts can carry more unintended persuasion than another's most determined teaching efforts. *Cooper,* 301 Or at 379.

Little needs to be "said" to convey a message. What an adult may understand is being conveyed, may not be the same as a young person, particularly one from a minority faith who feels as if they are already different in their classroom or school. Indeed to the degree that the proponents argue that rights of free speech are being denied under this law, they recognize that clothing and other items convey a message, or many messages. Communicating ideas is not restricted to words alone; symbols and dress can speak more loudly – and far longer – than words.

Because the Court in *Cooper* determined that the religious "dress" statute does not prohibit the wearing of small jewelry, some have argued the law therefore permits some religious expression by teachers, while prohibiting others. That flaw could easily be cured by prohibiting all public school teachers from wearing visible religious symbols. Likewise, there is concern that the law is too limited because it only applies to teachers. That issue, too, could be addressed.

There is also the argument that children, particularly those of minority faiths, need to see teachers who look or dress like them, because they serve as positive role models. However, if teachers are going to be permitted to "wear" their religion on their clothing, you should expect that teachers of all faiths will do so. We do not think the public schools should be a place to find religious role models – for every student who finds a positive role model because of shared religion with their teacher, another, particularly a child of a minority religion whose teacher shares the majority faith of the community – may feel excluded. The primary role of the teacher is to provide an education, a safe learning environment and to act as a positive role model to all students. Providing religious role models should be left to parents, and their religious community, outside of the public school arena. Indeed, for some families, religious beliefs and the need to have their children taught by those who share the same religious beliefs are of such central importance that they send their children to private religious schools.

When the ACLU of Oregon Board of Directors met on November 14, 2009, to consider its long-standing support of the religious dress law, it deliberated at length. It instructed staff to gather more information in the coming months so that the Board can more fully understand the legal and practical ramifications of any proposed change in the law.

We cannot rely on the line of cases under the federal First Amendment nor the experience of other states to analyze the complex and unique legal issues raised when considering repealing this law. That is because many provisions of the Bill of Rights in the Oregon Constitution are significantly different from those of the federal Constitution and Oregon courts have interpreted even similar provisions independently from federal provisions.

We want to emphasize that the ACLU of Oregon is committed to continued analysis and discussions in the coming months. However, the Board of Directors instructed staff to oppose any efforts to repeal ORS 342.650 and ORS 342.655 during the supplemental February session because of both the procedural and policy concerns expressed above.