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February 11, 2015

Hon. Wendell Willard, Chair
House Judiciary Committee
132 State Capitol
Atlanta, GA 30334

RE: HB 218
Preventing Government Overreach
on Religious Expression Act

Dear Chairman Willard and Members of the Committee,

We write in support of H.B. 218, the Preventing Government Overreach on Religious Expression Act. We heartily endorse this bill, based on many years of teaching and scholarship on the law of religious freedom.

As § 2 of the bill recites, HB 218 is part of a nationwide response to a 1990 Supreme Court decision that contracted constitutional protection for religious liberty. *Employment Division v. Smith*, 494 U.S. 872 (1990), held that any religious practice, even a worship service, can be prohibited if the law is “neutral and generally applicable,” and whether or not there is any good reason for the prohibition or for refusing a religious exception. But religious liberty is not a mere right to believe a religion with no right to practice that religion. Laws such as HB 218 provide that religious practice is protected, even if a law is neutral and generally applicable, unless the state has a compelling reason to interfere.

HB 218 is a version of the Religious Freedom Restoration Acts that have been enacted at both the federal level (to govern federal law) and, as the bill recites in § 2(b)(4), in nineteen states: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. At least eleven more states—Alaska, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin—have interpreted their state constitutions to provide similar protection. All in all, the federal government and thirty of the fifty states have provided, in one form or another, versions of the protections for religious liberty that would be provided by H.B. 218. Moreover, the standard the bill would codify was the constitutional standard for the entire country from 1963 to 1990.

Opponents of these bills often make absurd claims about the extreme results they would allegedly produce, but they have no examples of judicial *decisions* actually reaching such results. In the places where this standard applies, it has not been interpreted in crazy ways

that have caused problems for those jurisdictions; if anything, these laws have been enforced too cautiously. Litigants can argue anything, but the general experience with Religious Freedom Restoration Acts has been under enforcement, not over enforcement.

Some opponents of the Georgia bill have reportedly argued that it is unnecessary, because the Georgia Constitution protects religious freedom in Article I, section 1, paragraphs 3 and 4. It is true that these provisions protect religious freedom. But they speak in quite general terms. The First Amendment to the federal Constitution also protects religious freedom in quite general terms, and the Supreme Court took away much of that protection by hostile interpretation in *Employment Division v. Smith*.

The religious liberty provisions of the Georgia Constitution do not appear to have been interpreted in a significant decision of the Georgia Supreme Court since World War II. There is no decision of the Georgia Supreme Court clearly protecting religious practices. Any state agency or local government in Georgia could urge the Georgia courts to read the unprotective new federal rule into the Georgia Constitution. The opponents of HB 218 obviously plan to urge the Georgia courts to refuse protection for religious practices under the state constitution; otherwise, they would gain nothing by killing this bill. The state constitution can be interpreted in many ways, but the more specific language of HB 218 would explicitly instruct judges that religiously motivated conduct is legally protected, subject to the compelling-interest test.

The message that some government officials take from *Employment Division v. Smith* is that they have no obligation to make any religious exceptions, and that they don't even have to talk to religious groups or individuals seeking exceptions. As a federal court in Illinois accurately summarized the meaning of the new federal rule, government "need not make, *or even try to make*, a reasonable accommodation" for a citizen's religious practice. *Filnovich v. Claar*, 2006 WL 1994580, *5 (N.D. Ill. 2006) (emphasis added). By clearly telling state officials that they have to consider burdens on the exercise of religion, a state RFRA opens the door for discussion. These issues can often be worked out informally if people will just talk to each other in good faith. HB 218 would help make that happen.

Some critics oppose state RFRAs by pointing to the *Hobby Lobby* case, decided this past summer by the United States Supreme Court. The case has been misunderstood by people on both sides, but it ultimately reinforces the conclusion that these laws have been very cautiously enforced. The issue in *Hobby Lobby* was whether the federal RFRA protected the religious owners of closely held for-profit businesses who objected to a regulation under the Affordable Care Act. That regulation required large employers to pay for and contract for certain forms of contraception that sometimes, in the view of religious owners of these businesses, caused abortions. The Court concluded that RFRA entitled the owners to an exemption from the regulation.

But the key to the Court's decision was that the owners could be exempted from the regulation *without* affecting their female employees' access to contraception. The Court, in other words, found a win-win solution. The owners got to follow their religious beliefs; their female employees got the contraception they needed. The Court did this by copying the solution that the government had already put into effect for religious non-profits. Instead of the companies providing contraceptive coverage themselves, their insurers or third-party plan administrators would do so instead, with segregated funds not derived from

the employer. The insurers would recoup their costs from the savings from the reduced costs of pregnancy and childbearing or from rebates on fees otherwise payable to the health-care exchanges.

The details of the accommodation are intricate, but the basic point is simple. *Hobby Lobby* was decided the way it was because the religious accommodation would not require any of the female employees to do without. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) (“The effect of the accommodation on the women employed by Hobby Lobby and the other companies involved in these cases *would be precisely zero.*”) (emphasis added). Justice Kennedy, concurring and providing the fifth vote, emphasized that “there is an existing, recognized, workable, and already-implemented framework to provide coverage.” *Id.* at 2786.

Not all the signers of this letter agree with the decision in *Hobby Lobby*. But we all agree that given the comparatively narrow contours of the decision and the likely judicial reaction to any claim by a for-profit business that is *not* closely held by a small group of religiously united owners, *Hobby Lobby* does not create a license for businesses to engage in conduct that undermines important public interests. Nor does it guarantee victories to all or even most claimants who petition courts for exemptions from neutral laws of general applicability.

The most common charge opponents make against RFRA bills is that they are a “license to discriminate.” They are no such thing. Protecting Americans from discrimination is generally a compelling interest, and few claims to exemption from anti-discrimination laws are likely to succeed. But some claims to exemption from anti-discrimination laws should succeed, especially when the anti-discrimination laws reach into religiously sensitive contexts.

Consider what should be an easy example. Georgia law forbids discrimination in employment without making any exception for religious organizations. Georgia even forbids *religious* discrimination in employment without making any exception for religious organizations. See Ga. Code Ann. § 45-19-218. Among other things, this appears to mean that churches, religious schools, and other religious institutions generally have to hire and promote on a religion-neutral basis. We find it hard to believe that any legislator intended this, but that is what the statute says.

Christian schools, for example, should not have to hire teachers who believe and do things inconsistent with Christian teaching. They should not have to hire people who reject Christianity as patriarchal and oppressive, or who flout Christian moral teachings, or even people who are lukewarm or ambivalent about Christianity. But Georgia law appears to require Christian schools and churches to hire and promote such people without regard to religion.

This issue is not hypothetical. It does not appear to have arisen in Georgia, but it did arise in Michigan, which has similar discrimination laws. A Catholic school was sued by a Protestant teacher for alleged religious discrimination. *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195 (Mich. Ct. App. 1995). The Catholic school won this case under the federal RFRA, but the federal RFRA no longer applies to state law. *City of Boerne v. Flores*, 521 U.S. 507 (1997). So if such a case were to arise now, the school would have to defend under the state constitution, and the plaintiff would no doubt urge

the state courts to adopt the federal test of *Employment Division v. Smith* and refuse any protection for religiously motivated conduct.¹

Much of the opposition to HB 218 appears to center on the fear that religious owners of for-profit businesses might use the state RFRA as a shield against discrimination claims. The only prominent case involved a Christian wedding photographer who was sued after refusing to photograph a same-sex commitment ceremony, believing she would thereby be promoting an immoral act deeply at odds with her religious understanding of the meaning of marriage and of weddings. See *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013). For many religious believers, weddings are inherently religious events in which their participation must conform to religious obligations. There are serious arguments for exempting religious individuals who personally provide creative services to assist with weddings. But whatever one thinks of those arguments, it is far from clear that HB 218 would lead courts to recognize such an exemption.

The religious claim in *Elane Photography* lost even though New Mexico had a state RFRA. In fact, the religious claim in *Elane Photography* never got a single vote from any of the twelve judges that heard the case.² The New Mexico Supreme Court held that its state RFRA does not even apply when a religious organization or religiously motivated individual is sued by a private citizen. That was almost certainly a mistake.³ But even had RFRA applied, the court — which appeared to be unsympathetic to the religious claim — would likely have held that enforcement of the anti-discrimination laws served a compelling interest by the least restrictive means.

Apart from specific services directly relevant to sex or weddings, the specter of religious business owners claiming a right to refuse service to gays and lesbians is a myth. We are aware of only one case, nearly thirty years ago, involving employment rather than customers. And of course the religious claimant lost — under the standard to be codified in HB 218. *State ex rel. McClure v. Sports and Health Club*, 370 N.W.2d 844 (Minn. 1985). Courts generally believe that anti-discrimination laws serve compelling government interests, and nothing in HB 218 would change that.

Most RFRA cases do not involve anti-discrimination laws or disputes that arise

¹ This footnote explains the boundaries of two other doctrines that apply in very narrow circumstances. The United States Supreme Court has held that employment discrimination laws cannot constitutionally be applied to the clergy or others in positions of religious leadership. Under this rule, commonly known as “the ministerial exception,” clergy cannot bring any kind of discrimination claim. *Hosanna-Tabor Evangelical Church and School v. EEOC*, 132 S. Ct. 694 (2012). Most cases have held that teachers in religious schools are not within the ministerial exception unless they teach a religion class or lead worship.

Georgia also has a *bona fide* occupational qualification exception (BFOQ), see Ga. Code Ann. § 45-19-34, which does not appear to have been interpreted by the Georgia courts. These BFOQ provisions have been narrowly interpreted in federal law and in other states, and the opponents of this bill would undoubtedly argue that the BFOQ exception does not apply any more broadly than the ministerial exception.

² Including both the initial case before the state human rights commission and the various appeals, the claim was heard by three Human Rights Commission judges, one state district judge, three state court-of-appeals judges, and five state Supreme Court Justices.

³ For an excellent student note explaining why this interpretation was wrong, see Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343 (2013).

between private parties. Rather, they involve disputes between the government and a religious individual or organization, and they arise when one of our vast array of government regulations turns out to burden one of the diverse religious practices of the American people.. In a case just decided under the federal RFRA standard, for example, a unanimous Supreme Court protected the right of a Muslim prisoner to wear a half-inch beard that posed no risk to prison security. *See Holt v. Hobbs*, 135 S. Ct. 853 (2015).⁴ This decision will also protect Orthodox Jews and some forms of Christianity.

In a case under the Pennsylvania RFRA, the city permitted outdoor sales of food in the park but would not permit a group of churches to distribute *free* food in the park. The churches, represented by the ACLU, won that case and were able to continue feeding the hungry. *Chosen 300 Ministries, Inc. v. City of Philadelphia*, 2012 WL 3235317 (E.D. Pa. 2012). Cases like these are difficult to anticipate in advance; the regulation is arbitrary and idiosyncratic. Sometimes the religious practice is idiosyncratic. General protection for religious liberty is important precisely because it is impossible to legislate in advance for all the ways in which government might burden the free exercise of religion.

State RFRA's have been important to the practice of religion in this country, and especially to the practice of minority faiths. State RFRA's do not usually wind up applying to large numbers of litigated cases. But they encourage government officials and religious minorities to talk to each other and work out mutually agreeable solutions. And the few cases that go to court are often of intense importance to the people affected. We should not punish a person for practicing his religion unless we have a very good reason. These cases are about whether people pay fines, or go to jail — or in the worst case, die — for practicing their religion, in America, in the 21st century.

The possibility of dying for your faith because of government intransigence came to pass in a real case from Kansas. Mary Stinemetz needed a liver transplant. And because she was a Jehovah's Witness, the surgery had to be done without blood transfusions. A bloodless liver transplant was available in Omaha, and it was cheaper than the liver transplant with blood transfusions that was available in Kansas. But Kansas Medicaid had a rule: No out-of-state medical treatment except for medical necessity. And the state said that religious obligations did not create a medical necessity.

Kansas had not yet enacted its state RFRA, so the case had to be argued under the state and federal constitutions. And Kansas argued that its courts should adopt the federal rule of *Employment Division v. Smith*, refuse to protect religious practices, and reject Mrs. Stinemetz's claim. The Kansas Court of Appeals eventually interpreted the state constitution to incorporate the RFRA standard, and it held that she was entitled to an out-of-state transplant. *Stinemetz v. Kansas Health Policy Authority*, 252 P.3d 141 (Kan. Ct. App. 2011). But by the time the litigation ended, her health had deteriorated to the point that she was no longer medically eligible for a transplant; she died in 2012.⁵ If a state RFRA

⁴The Supreme Court's decision was based on a federal statute that is a companion to the federal RFRA. This companion statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), adopts the same test as the federal RFRA. *See* RLUIPA, 42 U.S.C. §2000cc–1(a).

⁵ Brad Cooper, *Jehovah's Witness Who Needed Bloodless Transplant Dies*, Kansas City Star (Oct. 25, 2012), <http://www.kansascity.com/news/local/article310218/Jehovahs-Witness-who-needed-bloodless-transplant-dies.html>.

had been in effect, so that the legal standard were clear from the beginning, Kansas might not even have resisted her claim. If it had resisted, the litigation could have proceeded directly to the merits of her claim, the court would probably have found the case rather easy, and she would have had a much better chance to live.

We urge you to pass HB 218 and better secure religious liberty in Georgia. If we can be of further assistance, please feel free to call on any of us. Institutional affiliations are for identification only; none of our universities take any position on this bill.

Respectfully,

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