

January 21, 2015

Governor Nathan Deal
Lieutenant Governor Casey Cagle
Senate President Pro Tempore David Shafer
Senator Joshua McKoon
House Speaker David Ralston
Representative Sam Teasley

Atlanta, Georgia

Re: Proposed HB 29, "Preventing Government Overreach on Religious Expression Act"

Dear Governor Deal, Lieutenant Governor Cagle, Senate President Pro Tempore Shafer, Senator McKoon, House Speaker Ralston, and Representative Teasley:

We understand that the Georgia General Assembly is now actively considering a religious freedom bill, House Bill 29, under the title of "Preventing Government Overreach on Religious Expression Act." The signatories of this letter are legal scholars, with expertise in matters of religious freedom, civil rights, and the interaction between those fields. We do not agree among ourselves on whether religious freedom legislation, which may vary in its terms, is generally good. For reasons we explain below, however, we all emphatically agree that HB 29, as currently drafted, should not be enacted without significant revision.

Here is our message, in simple terms -- the timing and broad content of the Bill will invite and legitimate discrimination. The Bill, if enacted, will send a powerful message that religiously-based refusals to provide equal treatment to particular classes of employees, customers, and persons seeking public service are legally superior to any legal prohibitions on invidious discrimination.

We see two obvious and easy ways for you to fix this problem and still retain the Bill's protections for those most vulnerable to religious discrimination. First, we urge you to amend the Bill to exclude all for-profit business entities, including corporations, from coverage as "persons" protected by the Bill. Second, we urge you to explicitly include a provision that the Bill does not apply to any laws -- federal, state or local -- that prohibit invidious discrimination by public officials, employers, business owners, and those involved in the sale or rental of residential housing. Those two changes will reassure the Georgia public that the Bill is not designed to promote discrimination by Georgia public servants or businesses.

The remainder of this letter explains our research and reasoning in detail.

Statutes designed to protect religious freedom, once viewed as politically even-handed responses to constitutional developments, have for the past 15-20 years been legitimately perceived as threats to civil rights laws.

Section 2 of HB 29 recites a history of religious freedom legislation in the U.S. over the past twenty-plus years, beginning with the federal Religious Freedom Restoration Act (“RFRA”) of 1993. The Federal RFRA, however, arose in a political context very different from the current one. The Federal RFRA responded directly to the U.S. Supreme Court’s decision in *Employment Division v. Smith* (1990), which many people perceived as a significant setback in constitutional protection for the religious liberty of vulnerable minority faith groups. The coalition that supported RFRA included Democrats and Republicans, people of all faiths, and groups that cared generally about civil liberties. The Federal RFRA originally applied to all levels of government – federal, state, and local. The supporters of RFRA had no specific religious or political agenda. They were interfaith and ecumenical, concerned about protecting religious freedom quite widely and generously.

We have been told that Senator McKoon, and perhaps others, have asked whether any RFRA has ever been interpreted to permit discrimination in a commercial setting. The short answer is YES – the *Hobby Lobby* decision, discussed in more detail below, does exactly that.

The longer answer requires a broader inquiry into religious freedom litigation in the United States. In 1999, the U.S. Court of Appeals for the 9th Circuit ruled in *Thomas v. Anchorage Equal Rights Commission*¹ that the federal constitution protected a landlord who refused to rent to an unmarried, opposite sex couple in violation of a fair housing ordinance in Anchorage, Alaska. Although the *Thomas* decision was later vacated on other grounds, the decision demonstrated that religious liberty claims would indeed be advanced against civil rights laws, and sometimes would succeed.

These developments significantly influenced the ongoing conversation about religious liberty legislation. After the U.S. Supreme Court ruled in *City of Boerne v. Archbishop Flores* (1997) that federal RFRA was unconstitutional as applied to state and local law, several groups introduced new federal legislation, entitled the Religious Liberty Protection Act (“RLPA”). By 1999, the decision in *Thomas v. Anchorage* led the civil rights community to oppose the proposed new federal law, out of a justifiable concern that it would provide a defense to those sued for discriminating against minorities, including gays and lesbians. RLPA thereafter died

¹ *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692 (9th Cir. 1999), vacated on other grounds, 220 F.3d 1134 (9th Cir. 2000). For other cases involving claims of religious freedom to discriminate in the rental of housing, see *Smith v. Fair Emp. & Housing Comm’n*, 913 P. 2d 909 (Ca. 1996); *Swanner v. Anchorage Equal Rights Commission*, 874 P. 2d 274 (Alaska, 1994); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994). The landlord was successful in *Desilets*.

in the Senate. But for the past fifteen years, the civil rights community has consistently expressed concern about the possibility that general religious liberty protections might be used by for-profit businesses to defend discriminatory actions, including discrimination based on sexual identity or orientation.

Whether the legal source is the federal constitution, state constitutions, or religious liberty legislation, these concerns are longstanding and highly legitimate. They drove the uproar in Arizona last spring,² and in Michigan last month.³ We know that the same concerns have already been raised by a broad coalition of religious leaders in Georgia.⁴

The timing and content of HB 29 reinforces the perception that it is designed to strengthen the ability of businesses to avoid the restrictions of state and local civil rights laws. Why are religious freedom bills coming up in various state legislatures in 2014 and 2015? It is impossible to deny the connection between the looming constitutional decision on marriage equality in Georgia⁵ and indeed, in the entire United States,⁶ and the rise of religious freedom legislation in Arizona, Georgia, Idaho, Indiana, Kansas, Michigan, Mississippi, Missouri, and Oklahoma.

We recognize, of course, that these various religious liberty bills are not all the same. The Kansas bill, which failed in the state Senate, involved the explicit grant of an absolute right to discriminate based on sex or gender in the provision of goods or services. The Arizona Bill, which Governor Brewer vetoed after a substantial uproar from the business community as well as the civil rights community, also explicitly protected for-profit businesses, and went even further than Kansas by applying to private lawsuits for redress of invidious discrimination.

The current version of HB 29 protects the religious exercise of “persons.” The definitional provisions of the Georgia Code state explicitly that “[a]s used in this Code or in any other law of this state, the term . . . (14) “Person” includes a

² See Religion Clause Blog, “Arizona Legislature Passes RFRA Amendments To Allow Businesses To Refuse To Serve Gays On Religious Grounds,” (2/24/14), available at <http://religionclause.blogspot.com/2014/02/arizona-passes-rfra-amendments-to-allow.html>.

³ See Detroit Free Press, Dec. 17, 2014, Michigan Religious Freedom Bill Stalls in Lame Duck Session, available at <http://www.freep.com/story/news/local/michigan/2014/12/17/religious-freedom-bill-likely-dies-year/20561539/>.

⁴ See “Georgia Faith Leaders Unite Against Discrimination,” available at (<http://media.cmgdigital.com/shared/news/documents/2015/01/13/Georgia-Faith-Leaders-Unite-Against-Discrimination.pdf>) (62 faith leaders objecting to the proposed Act as “a bill that could result in discrimination and have many unintended consequences.”

⁵ We understand that a decision on marriage equality for same sex couples is now pending in *Inniss v. Aderhold*, a case filed in the federal district court for the Northern District of Georgia.

⁶ On January 16, 2015, the U.S. Supreme Court granted a writ of certiorari to the 6th Circuit to decide cases arising in Kentucky, Tennessee, Michigan, and Ohio on the issues of whether the Fourteenth Amendment requires all states to 1) license same sex couples to marry and 2) recognize same sex marriages validly contracted in other states. Decision is expected by the end of June 2015.

corporation.”⁷ Thus, unless HB 29 explicitly excludes for-profit entities from the definition of “person” whose religious exercise is protected, such corporations will be authorized to raise religious liberty claims under the law.

Moreover, as discussed in more detail below, HB 29’s provisions could supply a defense in any legal action against a business that is violating relevant civil rights laws of the State of Georgia, the City of Atlanta, or any other unit of government in Georgia. This concern would extend to all civil rights laws, now existing or enacted later.

The occasions for asserting religious freedom defenses to actions to enforce anti-discrimination laws will not be limited to provision of goods or services for weddings. Similar religious freedom defenses may be asserted in any situation where the objecting business is concerned about assisting or otherwise becoming involved in the personal choices of its employees or customers. HB 29 does not focus on weddings or the provision of goods and services to weddings or receptions. It is far more general than that. And thus its provisions might be invoked with respect to any commercial transaction that is now or in the future covered by a nondiscrimination law – provision of spousal benefits to employees; sale and rental of housing; goods and services to feed a family or furnish a home; or any other goods and services necessary to lead a humane life. The possibilities are as endless as the Bill is general.

The laws that may be opposed in the name of religious freedom include protections against discrimination based on race, religion, sex, national origin, sexual orientation, and gender identity. HB 29 does not make explicit reference to race, sex, gender, national origin, sexual orientation, or gender identity. But neither is it limited in any way to specific kinds of religious practices. Some business owners, or other persons, might object to intimate same-sex relationships, marriage or otherwise; other business owners might object to inter-racial or inter-faith marriages; still others might have religious objections to out of wedlock pregnancy or unmarried parenthood, or to the practice of Islam or other minority faiths. Perhaps these complaints would prevail in a matter involving state or local law in Georgia, or perhaps not. That depends on the Bill’s terms, analyzed below. But the language of the Bill invites this very broad range of possibilities.

Current law in Georgia offers abundant opportunities for claims of religious freedom to discriminate based on race, religion, sex, national origin, sexual orientation, or gender identity. Georgia’s fair housing law is designed to prevent discrimination in the “sale, rental, or financing of dwellings [based on an] individual’s race, color, religion, sex, disability or handicap, familial status, or

⁷ O.C.G.A. sec. 1-3-3 (14). See also *Eckles v. Atlanta Technology Group, Inc.*, 485 S.E.2d 22 (Ga. 1997) (stating that “[a] corporation is a ‘person’” and citing 1-3-3 to support that proposition); *Wilbros, LLC v. State*, 755 S.E.2d 145 (Ga. 2014) (citing and discussing *Eckles*).

national origin.”⁸ It is hardly difficult to imagine a dwelling house owner’s refusal on religious grounds to rent to an inter-racial or Muslim couple. Georgia’s Fair Employment Law protects public employees against discrimination based on race, color, religion, national origin, sex, disability and age.⁹ Suppose an official supervisor refuses, on religious grounds, to authorize payment of spousal benefits to a same sex spouse of one of the public employees under his supervision. These cases would have to be decided under the uncertain terms of HB 29.

Atlanta’s municipal code contains additional laws that forbid discrimination based on race, religion, national origin, sex, gender identity, and sexual orientation.¹⁰ These laws cover activities in the fields of employment, housing, and public accommodations, which include the retail provision of all goods and services. Vendors of wedding-related services in Atlanta would be in direct violation of these Atlanta code provisions if they refused to provide goods or services to a wedding because of the race, religion, or sex of either participant in the wedding. Employers who refused to pay spousal benefits to a same sex spouse would likewise be in direct violation. These cases too would fall under the vague terms of HB 29.

In addition to state and municipal laws against discrimination, the U.S. Constitution guarantees all persons equal protection of the laws. That guarantee includes the right to be free from invidious discrimination by employees of state, county, and local government. Public employees – police officers, fire fighters, and county license clerks, among others – have a duty to serve all members of the public. A public employee might cite HB 29 as a reason to refuse to serve a same-sex couple, or any other person seeking public services of any kind, if the public employee had religious objections to the required service. The employee would insist that providing that service is a “substantial burden” on her religious exercise, and thus would refuse orders to serve all without discrimination.¹¹

The relevance of the *Hobby Lobby* decision. The U.S. Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*¹² has intensified the concerns about commercial enterprises relying on religious beliefs to harm employees or customers. The *Hobby Lobby* case involved the federal RFRA, which has operative terms that are identical to HB 29.¹³ One of the principal contested questions in

⁸ O.C.G.A. 8-3-200 (b)(2) et seq..

⁹ O.C.G.A. 45-19-20 et seq.

¹⁰ Atlanta Code of Ordinances, chapter 94, section 94-10 to 94-114.

¹¹ For full development of the constitutional duty of public officials and employees to respect the equality of all persons, see Memorandum, dated Nov. 5, 2014, from Public Rights/Private Conscience Project on Proposed Conscience or Religion-Based Exemption for Public Officials Authorized to Solemnize Marriages, available here:

http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_marriage_exemptions_memo_nov_5.pdf

¹² 573 U.S. __ (2014).

¹³ We recognize that HB 29 is entitled “Preventing Government Overreach on Religious Expression Act.” What would be the central and operative provision of HB 29, however, found in Section 3, 50-15A-2 (a) – (c), is identical to the central provision of federal RFRA and to most state RFRA’s. We are

Hobby Lobby was whether closely held for-profit corporations are “persons” within the meaning of RFRA. Because the Court ruled that such corporations are included among the persons protected by the federal RFRA, state courts, including those in Georgia, might well interpret the word “person” in state religious liberty legislation to include such corporations, unless the legislation explicitly said otherwise.¹⁴

In addition, the *Hobby Lobby* decision itself upheld a religious objection that is sex discriminatory. The company refused to include certain contraceptives, which it viewed as having abortifacient properties, in its employee health care plan under the Affordable Care Act. Only women – female employees and female dependents of all employees – use those contraceptives. The case was not litigated as a sex discrimination case, because the parties were the company and the federal government, rather than the employees themselves. But the outcome of the case was the imposition of an employer’s religious belief on women who did not share that belief. *Hobby Lobby* provides a dangerous example for state courts, in interpreting religious liberty legislation, to uphold similar, discriminatory impositions by business owners of their religious commitments on their employees or potential customers.

The terms of HB 29 are tilted heavily in favor of religious freedom claims and against competing civil rights concerns. Those considering HB 29 should understand exactly how the identical terms in federal RFRA have been recently construed. As demonstrated in *Hobby Lobby*, the requirement that persons relying on the religious freedom law show a “substantial burden . . . [on the] . . . exercise of religion”¹⁵ will be remarkably easy to satisfy. Any sort of fine or legal sanction imposed for conduct that the actor asserts is motivated by his religious faith will be sufficient to show such a burden. Moreover, it will be very difficult to demonstrate that a believer is religiously insincere if she claims that even remotely incidental involvement in the actions of her employees, customers, clients, or tenants makes her religiously complicit – that is, responsible – for those actions. Thus, a public servant, employer, or merchant who asserts complicity in what she sees as the religious wrong of an inter-racial, inter-faith, or same-sex relationship is very likely to be able to demonstrate that her religious exercise has been substantially burdened by state or local anti-discrimination law.

aware of the controversy over the dismissal of Atlanta’s fire department chief. To the extent HB 29 is expressing concern over actual expression in word or writing, we respectfully suggest that federal constitutional principles regarding free speech rights of public employees are adequate to resolve that controversy. HB 29 extends far beyond “religious expression” to religiously motivated practices of exclusion and discrimination.

¹⁴ Note that *Hobby Lobby* has over 13,000 employees. If HB 29 were to be similarly interpreted, the religious defenses allowed by such laws will extend to very large, for-profit enterprises. Although *Hobby Lobby* is a closely held corporation, owned by a single family, nothing in the Supreme Court’s opinion excludes other corporations, even if publicly held, from the status of “person” under federal RFRA.

¹⁵ HB 29, Section 3, 50-15A-2 (a).

Once a showing of substantial burden has been made, the requirement in HB 29 that the government show that application of a law is “in in furtherance of a compelling state interest” and the “least restrictive means” to do so¹⁶ may be very difficult to satisfy. Would state courts consider the interest of a local government, such as that of Atlanta, in equal treatment of the LGBT minority to be strong enough to trump the religious exercise protected by HB 29, if it became state law? We believe that Atlanta’s interest in eliminating invidious discrimination is compelling, and that no less restrictive alternatives to satisfy that interest are available, but there is no guarantee that state court judges will agree.

Even if the courts consider anti-discrimination interests to be compelling, a person relying on HB 29 would likely assert that other, non-objecting persons will provide the same or similar goods and services, or employment opportunities. Such a person would argue that the existence of alternative providers or employers means that the government’s interest in equal treatment of its citizens will be satisfied. A county marriage license clerk would argue that other clerks are normally available to handle the applications from same sex couples. Under the terms of HB 29, the government would have the legal burden of proving that such alternatives are not available.¹⁷ We think that the government should prevail in these cases, even if alternatives are available, because of the insult and dignitary harms that discrimination inflicts on victims. But the risk of a favorable outcome for a discriminator under the terms of HB 29 is quite real.

Application of HB 29 in situations that inflict discrete and material harms on employees or customers of Georgia business firms may violate the Establishment Clause of the First Amendment to the U.S. Constitution. Several decisions of the U.S. Supreme Court strongly suggest that religious accommodations that impose significant harms on third parties may violate the Establishment Clause of the First Amendment.¹⁸ If applied in anti-discrimination cases, the proposed HB

¹⁶ HB 29, Section 3, 50-15A-2 (b).

¹⁷ *Id.* (placing on the government the responsibility to demonstrate that the challenged burden on religious exercise is “in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest.”) On January 20, 2015, in *Holt v. Hobbs*, U.S. Sup. Ct., No. 13-6827, the U.S. Supreme Court upheld a Muslim prison inmate’s complaint, under the federal Religious Land Use and Institutionalized Persons Act (“RLUIPA”), concerning the inmate’s religiously motivated desire to wear a one-half inch beard. RLUIPA’s relevant terms are nearly identical to those of federal RFRA and HB 29. In ruling for the inmate, a unanimous Court once again signaled that federal religious liberty legislation will be interpreted in ways that make it quite simple to show a “substantial burden,” see slip op. at 6-8, and very difficult for the government to demonstrate compelling interests and lack of alternative ways to satisfy them, see slip op. at 8-13. Outside of prisons, the pressure on government from religious liberty legislation to accommodate religious objections is likely to be even stronger.

¹⁸ In particular, see *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (unconstitutional for Connecticut to require employers to accommodate all employee requests to not work on their Sabbath day, because such requests would shift the costs of religious observance to the employer and other employees); see also *Cutter v. Wilkinson*, 544 U.S. 709 (2006)(unanimously upholding federal RLUIPA on its face, but opining that religious accommodations must be interpreted in light of potential harms to third parties).

29 would risk offending this constitutional principle, by imposing the cost of religiously motivated objections on those who are denied goods and services.

HB 29 can be revised to eliminate the risk that it will support invidious discrimination. The ways to eliminate these terrible possibilities from the operation of HB 29 are straightforward. First, the Bill should explicitly exclude for-profit business entities from the class of “persons” whose religious exercise is protected. Second, the Bill should explicitly say that it does not apply to any law – federal, state, or local -- designed to protect the people of Georgia against discrimination, in any sphere of social or economic life, based on race, religion, national origin, sex, disability, age, marital or familial status, gender identity, or sexual orientation.¹⁹

HB 29 is unnecessary to protect freedom of belief and worship in Georgia. The state constitution already protects each person’s “natural and inalienable right to worship God, each according to the dictates of that person's own conscience.”²⁰ In its current form, HB 29 is potentially quite harmful to the legal and business culture of Georgia. It might be interpreted to “justify practices inconsistent with the peace and safety of the state.”²¹ HB 29 would permit the religious beliefs of some Georgians to deprive others of their equal rights to participate in the state’s economic and social life. In its current form, we strongly urge you to reject it.

Sincerely,

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¹⁹ The current version of the Bill already carves out prison regulation from the Bill’s coverage. HB 29, Section 3, 50-15A-3 (c). It would be simple to add a similar carve-out for anti-discrimination laws -- federal, state and local.

²⁰ Georgia Constitution, Art. I, Section 1, Par. III.

²¹ Georgia Constitution, Art. I, Section 1, Par. IV.

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