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VIA E-MAIL

Mr. Jeff Graham
Executive Director
Georgia Equality, Inc.
1530 DeKalb Ave., Suite A
Atlanta, Georgia 30307

Re: Legal Analysis of Proposed Religious Freedom Restoration Legislation

Dear Mr. Graham:

This is in response to your request that I analyze House Bill 218 and Senate Bill 129 of the 2015 Session of the Georgia General Assembly. I have attached the versions of H.B. 218 and S.B. 129 which I analyzed as they were pending on this date in the Georgia General Assembly. Both H.B. 218, the "Preventing Government Overreach on Religious Expression Act," and S.B. 129, the "Religious Freedom Restoration Act" (collectively, "the proposed RFRA") are modeled on the federal Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.* ("the federal RFRA"). The operative language of the federal RFRA and the proposed RFRA are nearly identical.[1]

For the reasons summarized below and explained in greater detail later in this letter, as an attorney with over 40 years of law practice, a great deal of which has been involved with state government, I find the proposed RFRA troubling. First, I believe if enacted into law this legislation will be an excuse to practice invidious discrimination. Second, if enacted, the proposed RFRA will permit everyone to become a law unto themselves in terms of deciding what laws they will or will not obey, based on whatever religious tenets they may profess or create at any given time. The potential intended and unintended consequences are alarming. Third, if law, the proposed RFRA is full of uncertainties making enforcement and administration difficult.

[1] While the operative language of H.B. 218 is nearly identical to the federal RFRA, S.B. 129 differs in small but important ways. The federal RFRA and H.B. 218 require a burden on religious exercise to be "in furtherance of a compelling governmental interest." S.B. 129, on the other hand, requires that the burden be "essential to achieve a compelling government interest[.]" Thus, the Senate version appears to impose a higher requirement on the government to justify a burden on religious exercise.

1. **The proposed RFRA authorizes discrimination.**

The federal RFRA sought to overturn the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). That decision held that laws that substantially burden the exercise of religion do not violate the Free Exercise Clause of the First Amendment so long as they are neutral laws of general applicability. H.B. 218 states, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion[.]"[2] The findings of the General Assembly contained in H.B. 218 include the statement that *Employment Division v. Smith* "had the practical effect of eliminating the requirement, absent a statute enacted by Congress, that government justify burdens on religious exercise imposed by laws neutral toward religion[.]"[3] The dual stated purposes of H.B. 218 are to "restore the compelling interest test" employed by the courts before *Smith*, and to provide a claim or defense to persons whose religious exercise is "substantially burdened by government."[4] H.B. 218 states "the compelling interest test as set forth by the federal courts is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[5]

The obvious unstated purpose of the proposed RFRA is to authorize discrimination against disfavored groups. By not limiting its application to core religious practices or religions receiving tax exempt status under IRS code 501(c)(3), the bill enacts an excuse to discriminate in the broadest and most arbitrary sense. Interpreting language virtually identical to the proposed RFRA regarding the exercise of religion, the United States Supreme Court held "the truth of a particular belief is not open to question; rather, the question is whether the objector's beliefs are truly held."[6] Courts "are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a [person] are sincerely held and whether they are, in his own scheme of things, religious."[7]

The breadth of H.B. 218 is extraordinary; S.B. 129 goes even further by defining the "exercise of religion" to include "the right to act or refuse to act in a manner that is substantially motivated by a sincerely held religious belief[.]"[8] This "refusal to act" surely, and intentionally, includes the right to deny services to any person or group a "person" contends burdens the exercise of religion.

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[2] 42 U.S.C. § 2000bb(a)(4).
[3] H.B. 218 lines 20-23.
[4] 42 U.S.C. § 2000bb(b).
[5] H.B. 218 lines 24-26.
[6] *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005).
[7] *United States v. Seeger*, 380 U.S. 163, 185 (U.S. 1965); *see also Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1298 (11th Cir. Fla. 2007) ("The question is not whether the plaintiff's beliefs are religious in the objective, reasonable person's view, but whether they are religious in the subjective, personal view of the plaintiff.)
[8] S.B. 129, line 36-38.

If Georgia courts were to place a similar construction on virtually identical statutory language in the proposed RFRA, there is no limit to the discrimination and disruption that could be brought about in the name of religious freedom. Any time a person wished to refuse to act in response to a government requirement, he or she could assert the protection of the proposed RFRA. Whether legitimate or not, a controversy would likely ensue involving law enforcement officials, school officials, hospital administrators, or other government officers, and possibly the courts. The potential undermining of the rule of law is limitless.

It is irrational to accept at face value that H.B. 218 is merely Georgia's twenty-five-years-late legislative response to *Employment Division v. Smith*. Contrary to the bill's stated intent, the unstated intent is inextricably intertwined with current events. The proposed RFRA is one of many state-level attempts that have proliferated in recent years to enact so-called religious freedom of expression statutes.[9]

The timing of Georgia's legislation—and similar legislation in other states—coincides with the rapid legalization of gay marriage across the country, the United States Supreme Court's 2014 decision striking down the federal Defense of Marriage Act,[10] and the 2013 Supreme Court ruling that religious freedom of expression excused compliance with mandatory coverage for contraception in employee health insurance programs.[11] A challenge to Georgia's constitutional prohibition[12] on same sex marriages is proceeding in federal court.[13] The proposed RFRA is nothing more than an effort to legalize discrimination against disfavored groups, requiring only the discriminating party's assertion of a burden on his or her (or, discussed below, a corporation's) purported religious belief.[14]

2. <u>The proposed RFRA makes every "person" the unilateral arbiter of the law.</u>

The operative section of the proposed RFRA would be code section O.C.G.A. 50-15A-2(c): "a person whose religious exercise has been burdened in violation of this chapter may assert a claim or defense in a judicial proceeding and obtain appropriate relief against government." By its terms, the legislation purports to do two things: (1) create a cause of action against the government for burdening a person's religious

[9] Jacob Gershman, "Religious-Freedom Bills Proliferate in Statehouses." *Wall Street Journal*. February 25, 2014. http://blogs.wsj.com/law/2014/02/25/religious-freedom-bills-proliferate-in-statehouses/.

[10] *United States v. Windsor*, 133 S. Ct. 2675 (U.S. 2013).

[11] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (U.S. 2014) ("*Hobby Lobby*").

[12] Ga. Const. Art. I, § IV, ¶ I.

[13] *Inniss v. Aderhold*, 2015 U.S. Dist. LEXIS 9697 (N.D. Ga. Jan. 8, 2015).

[14] http://www.redstate.com/2015/02/13/imposing-values-on-individuals/ ("The Supreme Court will undoubtedly impose gay marriage on the nation by June. State legislatures need to pass RFRA now to protect people of faith").

exercise,[15] and (2) create a defense to the alleged violation of any law a person might contend burdens his or her religion.

"Person" is not defined by the proposed RFRA. Thus, one must look to the O.C.G.A. § 1-2-3(b), which creates two classes of persons: natural and artificial. Under Georgia law, "corporations are artificial persons."[16] Moreover, O.C.G.A. § 1-3-3(14) states, "[a]s used in this Code or in any other law of this state, the term ... 'Person' includes a corporation." Thus, the proposed RFRA applies equally to natural and artificial persons.

H.B. 218 defines the "exercise" of religion in proposed O.C.G.A § 50-15A-1(2) as any practice or observance, "whether or not compelled by or central to system of religious belief, including but not limited to the building, or conversion or real property for the practice or observance of religion." This definition is so broad that it excludes virtually nothing a person contends is part of his or her religion. This is a consequential and intentional component of the legislation because some courts have trimmed the application of RFRAs by concluding a challenged practice was not central to the practice of religion.[17]

The potential impact of the proposed RFRA could be dramatic. The proposed RFRA would open the door for people to attempt to discriminate against others in violation of federal, state and local law. The proposed RFRA would eviscerate existing state non-discrimination laws,[18] state and local fair housing laws,[19] and the University System of Georgia's non-discrimination policies.[20] Obvious targets for discrimination based on a supposed burden on religious exercise are members of the LGBT community and religious minorities. But more insidiously, this legislation will allow state and local government employees to refuse services to citizens. Again, an obvious example is the refusal to issue marriage licenses sought by same-gender couples, but would also provide a defense to a Muslim city clerk who refused to issue a marriage license to a heterosexual couple between a Muslim and a person of a different religion. Any Georgia citizen or corporation could refuse services to, deny employment to—or even terminate employment of—another person by simply asserting a burden on the exercise of his or her religion.

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[15] I express no opinion on the effectiveness of this remedy.

[16] O.C.G.A. § 1-2-1(b).

[17] *See, e.g., Smith v. Fair Employment & Housing Comm'n*, 913 P. 2d 909 (Cal. 1996) (finding no burden on exercise of religion because landlord's religion did not require her to rent out apartments).

[18] *See, e.g.,* O.C.G.A §§ 20-2-315 and § 34-5-3 (gender discrimination), § 34-1-2 (age discrimination), and § 7-6-1 (access to credit on the basis of sex, race, religion, national origin, or marital status).

[19] See O.C.G.A. § 8-3-200 *et seq.*, and Atlanta Code § 94-92 *et seq.*

[20] *See, e.g.*, University System of Georgia general policies § 4.1.2 and § 8.2.1.

Under the guise of a burden on religion, the proposed RFRA could be used to justify a refusal to abide by a wide range of laws. For example, a person could refuse to participate in mandatory child vaccinations. In the post-*Hobby Lobby* world, a corporation could refuse to provide insurance coverage for such vaccinations. Parents could demand customized public school criteria based on objections to teaching human sexuality, evolution, creationism, world history, or whatever a "person" found religiously objectionable. The proposed RFRA could be used to justify extreme corporal punishment or physical abuse of children by parents, or the refusal of police officers to protect certain members of the community.

In fact, it is no exaggeration that the proposed RFRA could be used to justify putting hoods back on the Ku Klux Klan. For decades, Georgia's Anti-Mask Act has prohibited wearing masks in public.[21] This law was enacted to prohibit the Ku Klux Klan from wearing hoods in public, and by extension, to discourage participation in its activities. While this statute contains exceptions for holidays, sporting events, theatrical performances, and gas masks, it does *not* contain a religious exercise exception—because many Klansman used religion to justify their participation in the Klan. But the proposed RFRA would create a religious exception that was purposefully excluded. Anonymous participation in hate groups would undoubtedly rise if Georgia enacts the proposed RFRA.

3. **The proposed RFRA destroys uniformity of the law and ushers in uncertainty for those bound by and those enforcing the law.**

The protection of religious freedom is in both the federal and state constitutions. There is a large body of federal law interpreting the breadth of First Amendment protection. The express purpose of the proposed RFRA is to expand the existing constitutional protections.

It is difficult to predict how Georgia courts might interpret the RFRA. Even where a court finds a substantial burden on religious exercise, the court may conclude the challenged state action survives strict scrutiny because the state has a compelling interest and has employed the least-restrictive means of furthering that interest.[22] Courts in the Eleventh Circuit have been reluctant to interpret Florida's RFRA beyond the well-established boundaries of the First Amendment.[23] These decisions provide some insight into how federal courts in this circuit might apply the proposed RFRA.

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[21] O.C.G.A. § 16-11-38.

[22] *See State v. Hardesty*, 214 P.3d 1004 (Ariz. 2009) (rejecting a defendant's free exercise claim under Arizona's RFRA and holding no less-restrictive alternative exists to serve the state's compelling public safety interest and still excuse the possession of marijuana).

[23] *See Warner v. City of Boca Raton*, 420 F.3d 1308 (2005) (finding no burden on religion imposed by a municipal ordinance of general application); *Youngblood v. Fla. Dep't of Health*, 224 Fed. Appx. 909 (2007) ("although the FRFRA requires that courts apply strict scrutiny to a Florida law that substantially burdens the free exercise of religion … Plaintiffs have

Georgia courts, however, may interpret the proposed RFRA differently from the federal courts. The free exercise clause in the Georgia constitution is not a mere recitation of the text of the First Amendment. Whereas the First Amendment expressly limits the power of the government to interfere with religious freedom, Georgia's free exercise clause is directed at citizens and contains an outright limitation on the free exercise of religion: "*the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.*"[24] However, given the breadth of Georgia's free exercise clause, Georgia courts may use it to constrain acts of discrimination unleashed by the proposed RFRA. But there is little recent case law interpreting Georgia's free exercise clause.

It has been decades since the Georgia Supreme Court issued a major ruling interpreting the free exercise clause. In a 1943 decision, the Georgia Supreme Court upheld a municipal ordinance restricting magazine sales on city sidewalks because of its general application and limited scope. The Court stated, "the constitutional guarantee of the exercise of religious freedom does not extend to acts which are inimical to the peace, good order, and morals of society." The Court held that "to construe this constitutional right as being unlimited, and to hold as privileged any act if based upon religious belief, would be to make the professed doctrine of religious faith superior to the law of the land, and in effect would permit every citizen to become a law unto himself."[25]

Allowing each person to become a law unto his or herself destroys uniformity of the law and creates mass uncertainty on the part of law enforcement, state and local officials, and professional educators confronted by those challenging the applicability of law or policies on religious grounds. It is impossible to anticipate whether Georgia courts would follow the lead of the Eleventh Circuit and interpret the RFRA as co-extensive with First Amendment jurisprudence, or whether the courts would treat the RFRA as ushering in a new era of religious freedom jurisprudence that strikes down neutral laws of general applicability based on an alleged burden on the exercise of religion. However, it is assured that this uncertainty will encourage lawsuits seeking pronouncements on the proposed RFRA and could result in a flood of new cases.

CONCLUSION

The proposed RFRA, contained in H.B. 218 and S.B. 129, is unequivocally an excuse to discriminate. As the Georgia Supreme Court held, permitting citizens to opt-out of laws because of a so-called burden on the exercise of religion in effect "would permit every citizen to become a law unto himself." The impact of the proposed RFRA

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failed to demonstrate how Defendants' acts constituted a 'substantial burden' on Plaintiffs' free exercise of religion").

[24] "No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; *but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.*" Ga. Const. Art. I, § 1, ¶ 4 (emphasis added).

[25] *Jones v. City Of Moultrie*, 196 Ga. 526, 531, 27 S.E.2d 39 (1943)

is far-reaching and cannot be precisely known. An excuse to persecute, it could one day be the means by which the persecutor is persecuted. The playwright Robert Bolt presciently addressed this paradox in his 1960 work, "A Man for All Seasons." Sir Thomas More, shortly before he was beheaded for refusing to accede to Henry VIII, addressed his son-in-law, Roper, with the following question:

> And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down—and you're just the man to do it—do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake. [Act I]

This legislation is not about gay marriage, or contraception, or even so-called "religious freedom." It is more important than all of these, because it ultimately involves the rule of law. Regardless of whether one agrees with a particular policy, or if it offends one's religious sensibilities, the proposed RFRA is bad for all Georgians of good faith, or for that matter of any faith whatsoever. It is not just bad public policy; it is ill-conceived, unnecessary, mean-spirited, and deserving of a swift death in the General Assembly.

Sincerely,

Michael J. Bowers

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MJB:bw

Enclosures