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Faculty

April 27, 2015

Senator Phil Berger
President Pro Tempore of the North Carolina Senate
16 W. Jones Street, Room 2007
Raleigh, North Carolina 27601-2808

Representative Tim Moore
Speaker of the North Carolina House of Representatives
16 W. Jones Street, Room 2304
Raleigh, North Carolina 27601-1096

Re: HB 348 and SB 550
NC Religious Freedom Restoration Act SEND BY EMAIL

Dear Senator Burger and Speaker Moore,

Religious freedom is a central value in American law. Our nation has long respected and protected the right of religious believers not to be forced by law to violate their religion. That is why we write in support of HB 348 and SB550, the proposed North Carolina Religious Freedom Restoration Act (RFRA).

The recent furor over proposed RFRA laws in Arizona, Indiana, and Arkansas may deter North Carolina legislators from voting for the NC RFRA. Unfortunately, criticisms of these proposed laws have been profoundly misleading. We also write because we believe that the legislature's consideration of the NC RFRA should be driven by facts and reason, not by threats and demagoguery.

Our support of the NC RFRA is based on many years of teaching and scholarship on religious freedom. No one who understands the operation of RFRAs over the past 22 years seriously expects them to be used to justify widespread discrimination against gays or other minorities.

What are RFRAs?

RFRAs are hardly radical. The federal government and 21 states have statutory protections for religious freedom similar to the NC bill. A nearly unanimous Congress passed the federal RFRA in 1993. Ted Kennedy, Nancy Pelosi, Harry Reid, and John Kerry all voted for it. The ACLU and almost every other civil rights group supported it. The first state RFRAs were

adopted in 1993 by Rhode Island and Connecticut. Eleven other states enacted RFRAs in the late 1990s and early 2000s after the Supreme Court ruled in *City of Boerne v. Flores* that the federal RFRA does not apply to states.[1] Since 2007 eight additional states have passed RFRA laws.[2]

Federal and state RFRAs are legislative responses to a controversial 1990 Supreme Court decision, *Employment Division v. Smith,* which held that the First Amendment's Free Exercise Clause prohibits laws that intentionally target religion or religious practices, but doesn't entitle religious persons to exemptions from generally-applicable laws. So, if a public school applies a "no hat" rule to both baseball caps and Jewish yarmulkes, there's no free exercise violation because the school isn't targeting religious practices.

RFRAs restore by statute the pre-*Smith* rules that permitted religious exemptions from generally-applicable laws in certain cases. These rules, found in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972), required the government to justify a substantial burden on religiously-motivated conduct by showing that it had a compelling interest for doing so and had no less restrictive way to achieve that interest. The compelling interest test was based on the view that religious freedom occupies a preferred position in the American hierarchy of civil rights and that the government should not punish a person for practicing his or her religion unless it has an extraordinary reason for doing so.

How do RFRAs operate?

RFRAs restore the *possibility* of religious exemptions to generally-applicable laws, but they do not guarantee exemptions will be granted. Even under the pre-*Smith* rules, religious persons seeking exemptions from generally-applicable laws (including antidiscrimination laws) didn't always win—courts were responsible for striking sensible balances between religious freedom and competing state interests and figuring out when religious exemptions should be granted.[3] Similarly, RFRAs do not pick winners and losers. They simply allow persons whose exercise of religion has been burdened by government action to raise a religious freedom claim or defense in a judicial proceeding, even if the burden was created by a generally-applicable law. Courts then will weigh the competing interests in each case and decide whether a religious exemption is proper. Of course, if legislatures do not like where courts are drawing the exemption line, they always can pass corrective legislation.

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[1] Alabama (1998), Florida (1998), Illinois (1998), Arizona (1999), South Carolina (1999), Texas (1999), Idaho (2000), New Mexico (2000), Oklahoma (2000), Pennsylvania (2002), and Missouri (2003).

[2] Virginia (2007), Tennessee (2009), Louisiana (2010), Kansas (2013), Kentucky (2013), Mississippi (2014), Indiana (2015), and Arkansas (2015).

[3] Compare, e.g., *Wisconsin v. Yoder,* 406 U.S. 205 (1972), which protected the right of Amish parents not to be forced by the state's compulsory education law to send their children to public school beyond the 8th grade, with *Bob Jones University v. United States,* 461 U.S. 574 (1983), which rejected a religious university's claim for a religious exemption from a federal rule that barred race discrimination by tax-exempt organizations on the ground that the government has a compelling interest in eradicating race discrimination in education.

RFRAs also can deter litigation. *Smith* says that government does not have to make religious exceptions, so government officials have no incentive to talk to religious individuals or groups seeking accommodations. By telling those officials that they must consider how their actions might burden religion, state RFRAs encourage everyone involved to talk together and work out mutually agreeable solutions.

Why does North Carolina need a RFRA?

There are at least three reasons why North Carolina needs a RFRA. First, it is unclear whether North Carolina courts still adhere to the pre-*Smith* exemption rules. Since *Smith* removed religious freedom protections under generally-applicable laws and the federal RFRA does not apply to states, protections from state action that burdens religious exercise must come from state law. The North Carolina Constitution, article I, section 13 provides: "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." The leading pre-*Smith* case from North Carolina interpreting this provision is *In re Williams,* 152 S.E.2d 317 (1967), in which the North Carolina Supreme Court applied the compelling interest test, citing *Sherbert.*

While *Williams* has not been overruled, it is anybody's guess whether North Carolina courts will continue to use the compelling interest test. The *Williams* court observed that "[t]he freedom protected by [the religious liberty] provision of the State Constitution is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States." Citing this language from *Williams,* the North Carolina Court of Appeals in *State v. Carignan,* 631 S.E.2d 892 (2006), observed that "[o]ur courts have not yet addressed whether the analysis in *Smith* should apply with respect to the North Carolina Constitution."

Given the co-extensive nature of the federal and state constitutional provisions, the North Carolina Supreme Court may adopt a *Smith*-like interpretation of NC's constitutional religious freedom provision. Opponents of the proposed NC RFRA obviously plan to urge North Carolina courts to follow *Smith;* otherwise, they would gain nothing by killing NC's RFRA legislation. Adoption of the NC bill will protect religious persons in North Carolina by retaining the compelling interest test when their religious practices are burdened by state action.

The second reason North Carolina needs a RFRA is because it is impossible to legislate in advance to avoid all the ways that state action might burden the free exercise of religion. Most RFRA cases do not involve antidiscrimination laws, but rather disputes between the state and a religious individual or group. Conflicts inevitably will arise between increasing government regulation and the widely-diverse religious practices of North Carolinians. RFRAs protect the Old Order Amish who seek accommodations under traffic regulations that unnecessarily impair their religious reliance on horse-drawn carriages, the Muslim prisoner who wants to practice his faith by wearing a short beard that poses no risk to prison security, Christian or Jewish public school students seeking accommodation for their observation of Good Friday or Yom Kippur, or the Jehovah's Witness patient who is denied a bloodless liver transplant under state Medicaid rules because it is not considered a medical necessity.

The third reason North Carolina needs a RFRA is to preserve space for religious beliefs as the law recognizes same-sex marriage. The Supreme Court soon will issue its decision in the same-sex marriage cases. Many observers think that it will strike down laws, like North Carolina's Marriage Amendment, which define marriage as involving only opposite-sex couples. Marriage has both legal and religious dimensions. Most religions consider marriage to be a sacred union and inherently religious institution, with legal marriage resting on the ground of religious marriage. While the Supreme Court can change the constitutional requirements for legal marriage, it cannot change any religion's view of what constitutes a proper marriage. So long as religious organizations and individuals hold the sincere religious belief that same-sex unions are not the moral equivalent of opposite-sex marriage, the law should protect their religious freedom and not force them to condone or facilitate such unions.

Every state that has adopted same-sex marriage by statute also has adopted some form of protections for religious conscience as a solution to the inevitable conflict between same-sex marriage and religious freedom.[4] While more specific legislative exemptions may be needed in the future, the general religious freedom protection provided by the proposed NC RFRA is an important step in the right direction.

Does North Carolina's proposed RFRA go too far?

Critics claim that the NC RFRA bill is broader than the federal RFRA and therefore goes too far in protecting religious freedom. The NC bill differs from the federal RFRA in three ways. None of these represent a substantial departure from the federal RFRA (or other state RFRAs, for that matter).

The NC bill first seems to loosen the burden requirement, requiring that a person's religious exercise only be "burdened" rather than "substantially burdened," as required by the pre-*Smith* constitutional rules.[5] This distinction won't matter in most cases, since laws that burden religion typically require religious persons to do something that is forbidden by their faith or not to do something that is required by their faith. Such burdens always have been considered "substantial." To be sure, religious freedom protections should not be triggered by mere inconvenience on religious exercise, so the NC bill could be amended to add "substantially" before "burden." We would point out, however, that the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.* (2014), suggested that the inquiry into whether a burden on religious exercise is "substantial" should not become a forbidden inquiry into whether the underlying religious belief is reasonable.[6]

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[4] These states are Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. A helpful chart can be found here: http://www.christianitytoday.com/assets/15205.pdf.

[5] This is not the first time the term "burden" has appeared unmodified in a state RFRA. Both Connecticut and Alabama use only "burden."

[6] The Supreme Court in *Hobby Lobby* observed that the government's contention that the HHS mandate did not impose a substantial burden on the exercise of religion was really an argument that the religious belief asserted was unreasonable. The Court rejected that argument,

The NC bill also allows an individual or business to raise a religious freedom defense in civil cases brought by private parties claiming discrimination under state or local laws. Such language is absent from the federal RFRA, but a majority of federal appellate courts have allowed the federal RFRA to be raised as a defense in private suits seeking to enforce public laws, and the Obama Justice Department has taken that same position in pending litigation.[7] The provision makes sense—if a private party is suing to enforce state law, the state law is what burdens religion, not the private party. The NC bill therefore makes explicit what these courts and the Obama administration already have recognized about the federal law. If this language is omitted from the NC bill, the private suit issue surely will be litigated, as it has in federal courts; by including it, the threshold issue will be resolved and RFRA cases can be decided on their merits.

The NC bill additionally applies to associations, businesses, corporations, churches, and religious institutions. The Supreme Court in *Hobby Lobby* interpreted the federal RFRA also to cover non-profit corporations and for-profit businesses closely held by a small group of religiously-united owners. While the *Hobby Lobby* decision was controversial (and often is misunderstood), it properly recognized that protecting the religious freedom rights of businesses and corporations protects the rights of people associated with those entities. That is why the Supreme Court has allowed both RFRA and Free Exercise claims brought by non-profit and for-profit corporations.[8] Moreover, courts long have recognized corporations as having other First Amendment rights such as free speech and free press.[9]

Does North Carolina's proposed RFRA give businesses a "license to discriminate"?

Opponents claim that the NC RFRA will give businesses a "license to discriminate" against racial minorities and gays. That claim is greatly exaggerated.

NC's proposed RFRA will not permit race discrimination. Race discrimination is a unique evil for American society and our legal system. Slavery and the oftentimes violent subjugation of African-Americans for the 100 years following it are horrors that cannot be compared easily to

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stating that "it is not for us to say that their religious beliefs are mistaken or insubstantial." 134 S.Ct. 2751, 2778-79 (2014).

[7] The Second, Eighth, Ninth, and D.C. Circuit Courts of Appeals have allowed the federal RFRA to be raised as a defense in a private suit. The Sixth and Seventh Circuits have limited the federal RFRA to suits where the government is a party. The Obama Administration took the position that RFRA could be used as a defense in a private suit against a non-profit corporation in *Wheaton College v. Sebelius,* No. 1:12-cv-01169-ESH, a case in federal district court in the District of Columbia. See http://www.scribd.com/doc/260227963/Wheaton-College-Reply-MTD (page 3). For a helpful summary, see Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs,* 99 Va. L. Rev. 343 (2013).

[8] See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006) (RFRA); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 S.Ct. 694 (2012) (Free Exercise); *Gallagher v. Crown Kosher Super Market of Mass., Inc.,* 366 U.S. 617 (1961) (Free Exercise); *Braunfeld v. Brown,* 366 U.S. 599 (1961) (Free Exercise).

[9] See, e.g., *New York Times Co. v. Sullivan,* 403 U.S. 713 (1971).

other wrongs. We've had a civil war and three constitutional amendments that establish a compelling interest in the elimination of race discrimination in public accommodations.

Nor will NC's RFRA be used to excuse widespread discrimination against gays. To begin with, the overwhelming majority of religious business owners have no objection to serving gay persons meals, renting them hotel rooms, or selling them products. If they deny such services, they almost certainly will lose in court even if NC's RFRA passes.[10]

Courts have enforced RFRA laws very cautiously. They generally hold that antidiscrimination laws serve compelling government interests. In fact, no RFRA has been used successfully to defend discrimination against members of the LGBT community in the 22 years since Congress and states began adopting such laws.

There are very narrow circumstances in which claims for religious exemptions from antidiscrimination laws might properly succeed, especially in religiously-sensitive spaces. Churches, synagogues, mosques, and other non-profit religious organizations should not be required to perform weddings, hire employees, or accept members if contrary to their religion. Religious educational institutions and social service agencies (such as the Salvation Army or Catholic Charities) should not be open to prosecution or suit if they don't admit or accommodate persons with conflicting religious or moral beliefs. Kosher butchers should not be forced to sell pork to non-Jewish customers or Christian marriage counselors compelled to counsel non-Christian couples.

For-profit businesses owners *might* be exempted from nondiscrimination laws if personally required to provide creative services for same-sex weddings when those services are readily available elsewhere. For many religious persons, weddings are profoundly religious events and providing their creative services is seen as taking part in the celebration of same-sex marriage. They can't participate without violating their religion.

Religious merchants who don't want to facilitate same-sex marriages still will have an uphill battle in seeking exemptions under NC's RFRA, like they have with RFRAs in other states. The proposed bill does not guarantee that merchants will win when sued for discrimination. It simply allow courts to consider whether an exemption might be proper in a given case. To date, every court and administrative tribunal has ruled *against* the religious photographer or other creative service provider.[11]

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[10] While NC state law does not make discrimination on the basis of sexual orientation or gender identity illegal, some local communities have passed ordinances prohibiting such discrimination in employment and public accommodations.

[11] The leading case is *Elane Photography v. Willock,* 309 P.3d 53 (N.M. 2013). Other cases in which wedding service providers have lost include *Washington v. Arlene's Flowers,* No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Feb. 18, 2015), *In the Matter of Klein dba Sweetcakes by Melissa,* Nos. 44-14 & 45-14, Oregon Bureau of Labor & Industries (Jan. 29, 2015), and *Craig v. Masterpiece Cake Shop,* CR 2013-0008, Colorado Office of Administrative Courts (Dec. 6, 2013).

Apart from uniquely-religious businesses and specific services facilitating same-sex weddings, the threat of religious business owners being allowed to refuse to serve gays is a fabrication. Opponents of NC's RFRA make extreme claims about the results it will produce, but they have no examples of court cases actually reaching such results. These same objectors told us three years ago that the sky would fall on heterosexual couples if the state passed Amendment One. The amendment passed and not one of the consequences they predicted came true.

For these reasons, we urge you to approve the proposed NC RFRA in order to better protect religious freedom in North Carolina. No one should be forced by law to violate his or her religion except under the most extraordinary circumstances.

Our institutional affiliation is for identification only. Our university does not take any position on this legislation.

Respectfully,

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Richard Bowser
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