March 10, 2014

Philip Gunn, Speaker, Mississippi House of Representatives
Andy Gipson, Chair of House Judiciary Subcommittee B
Kimberly Campbell, Vice-Chair of House Judiciary Subcommittee B
Capitol
P. O. Box 1018
Jackson, MS 39215

Re: House Committee Amendment No. 1 to Senate Bill 2681– Mississippi Religious Freedom Restoration Act

Dear Speaker Gunn, Representative Gipson, and Representative Campbell:

We understand that the Mississippi House of Representatives is now actively considering an amended version of Senate Bill 2681, titled the Mississippi Religious Freedom Restoration Act. The signatories of this letter are legal scholars, with expertise in matters of religious freedom, civil rights, and the interaction between those fields.[1] For reasons we explain below, we oppose the Bill. Here is our message, in simple terms -- the Bill's combination of context, timing, and specific provisions will send a powerful message that religiously justified refusals to serve particular classes of customers are legally superior to any state or local prohibitions on invidious discrimination. We also believe that the Bill raises significant problems under the federal Constitution. We urge you to reject it.

Statutes designed to protect religious freedom, once viewed as politically even-handed responses to constitutional developments, have for the past 15-20 years been seen as threats to civil rights laws. The federal Religious Freedom Restoration Act ("RFRA") of 1993 arose in a political context very different from the current one. Federal RFRA was a response to the U.S. Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which many people perceived as a significant setback in constitutional protection for religious liberty. The coalition that supported RFRA included Democrats and Republicans, people of all faiths, and groups that cared generally about civil liberties. Federal RFRA originally applied to all levels of government – federal, state, and local. In addition, several states enacted similar laws in the 1990's. The supporters of these laws, federal and state, had no specific religious or political agenda; they were quite consciously ecumenical, concerned about protecting religious freedom quite widely and generously.

[1] We know that Professor Douglas Laycock of the University of Virginia, together with a different group of legal scholars, has written letters to legislators and governors in a number states to explain and endorse similar bills. See, for example, http://www.azpolicy.org/media-uploads/pdfs/Letter_to_Gov_Brewer_re_Arizona_RFRA.pdf. Our view of the consequences and potential harms of a Religious Freedom Restoration Act is quite different from that expressed by Professor Laycock and his co-signatories.

A few years later, the U.S. Supreme Court ruled in *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997) that federal RFRA was unconstitutional as applied to state and local law. As a response, several groups introduced new federal legislation, entitled the Religious Liberty Protection Act ("RLPA"). While the bill was pending, a decision from the U.S. Court of Appeals for the 9th Circuit upheld a religious liberty defense to a fair housing complaint in Anchorage, Alaska.[2] The landlord had refused to rent an apartment to an opposite-sex, cohabiting couple. Although the decision was later vacated, its effect was to lead 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 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.

The timing and context of SB 2681 reinforces the perception that it is designed to strengthen the ability of commercial actors to avoid the restrictions of state and local civil rights laws. Why are religious freedom restoration acts coming up in various state legislatures in the winter of 2013-2014? It is not difficult to see the connection between federal court decisions on issues of marriage equality in Kentucky, Oklahoma, Texas, Utah, and Virginia and the rise of religious freedom legislation in Arizona, Georgia, Idaho, Kansas, Mississippi, Missouri, and Oklahoma.

We recognize, of course, that these bills are not all the same. The Kansas bill, which failed in the state Senate, involved the grant of explicit and absolute rights to discriminate based on sex or gender in the provisions 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, specified that Arizona law explicitly protected for-profit businesses, and explicitly applied to private lawsuits for redress of invidious discrimination. The current version of Senate Bill 2681 does not have such explicit provisions. But its protection of all "persons" could readily be construed by state courts to include for-profit businesses, and its provisions could supply a defense in an action by any public agency, state or local, against a business that is violating relevant civil rights laws, whether now existing or enacted at any time in the future.

The pendency of the *Hobby Lobby* litigation in the U.S. Supreme Court has intensified these concerns. The *Hobby Lobby* case involves federal RFRA, the operative terms of which are nearly identical to Senate Bill 2681. One of the principal questions in *Hobby Lobby* is whether for-profit corporations are "persons"

[2] 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).

within the meaning of RFRA.[3] If that position prevails in the Supreme Court, it may well influence state courts to similarly interpret state RFRA's, especially those with identical language.

Please note that the Hobby Lobby Corporation has over 13,000 employees. If Hobby Lobby is covered by federal RFRA, and if state RFRA's are similarly interpreted, the religious defenses allowed by such laws will extend to very large, for-profit enterprises.

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 facilitating the personal choices of its customers. Senate Bill 2681 is not focused on weddings or the provision of goods and services to weddings or receptions. It is far more general than that. And that means that its provisions might be invoked with respect to any commercial transaction that is now or in the future covered by a nondiscrimination law – 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 decent life, including provision of medical care (see next point below). 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, and sexual orientation. Senate Bill 2681 does not make explicit reference to sex, gender, national origin, or sexual orientation. 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; others might object to inter-racial relationships; still others might have religious objections to out of wedlock pregnancy or parenthood, or to the practice of minority faiths. Perhaps these defenses would prevail in a complaint by a public agency, 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.

One stark example of how Senate Bill 2681 might apply in the context of current Mississippi law arises from Mississippi Statutes section 41-107-5, which provides:

"**Rights of Conscience of Health Care Providers**

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[3] Professor Laycock, and co-signatories of the letter to Governor Brewer re: Arizona RFRA, have argued strenuously that for-profit corporations do so qualify as persons in this regard. See, e.g., http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/Nos__13-354__13-356_bsac_Christian_Legal_Soc.pdf.; (*amicus* brief, with Professor Laycock as Counsel of Record, in *Hobby Lobby* case); http://www.scotusblog.com/2014/02/symposium-accommodations-religious-freedom-and-the-hobby-lobby-case/ (post by Professor Richard Garnett).

(1) Rights of Conscience. A health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience. However, this subsection does not allow a health care provider to refuse to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation."

This provision protects health care providers against being forced to participate in a procedure, such as an abortion, that offends the provider's religious convictions. Please note the express prohibition on discrimination "based on race, color, national origin, ethnicity, sex, religion, creed or sexual orientation." Suppose a doctor, nurse, hospital, pharmacy or other health care provider refuses on religious grounds to treat any LGBT person suffering from any sexually transmitted disease, including AIDS. Senate Bill 2681, if enacted, would offer a possible defense to a charge that the refusal to treat was a violation of the non-discrimination proviso in Section 41-107-5. None of us knows precisely how such a case would be resolved in the Mississippi courts, but the precise terms of Senate Bill 2681 (see next point below) make it apparent that such a provider would have a more-than-plausible claim.

Mississippi has additional laws that forbid discrimination based on race, religion, sex, or other grounds. These laws cover applicants for small business loans,[4] and providers of publicly assisted housing.[5] Senate Bill 2681, if enacted, might be raised as a defense by any person charged with violation of any of these laws.

We note that Oxford, Hattiesburg, and Starkville have all recently enacted sweeping resolutions condemning a wide variety of forms of discrimination, including that based on race, religion, and sexual orientation.[6] We hope that the views reflected in these resolutions will eventually be transformed into enforceable policy at the state and local level.[7] It would undermine any such achievement if these policies, whenever enacted, were qualified by a religiously based license to discriminate under Senate Bill 2681.

The terms of Senate Bill 2681 are tilted heavily in favor of religious freedom claims and against competing civil rights concerns. Those considering Senate Bill 2681 should understand exactly how the identical terms in federal RFRA

[4] Mississippi Statutes section 57-71-19.
[5] Mississippi Statutes section 43-33-723.
[6] http://www.dailykos.com/story/2014/03/05/1282304/-Oxford-Mississippi-becomes-3rd-MS-city-to-pass-LGBT-euuality-resolution#. The Oxford resolution reads: "NOW, THEREFORE, BE IT RESOLVED that the Mayor and Board of Aldermen of the City of Oxford declare it the policy of the City to reject discrimination of any kind and to respect the inherent worth of every person without regard to race, color, religion, national origin, sex, gender identity or expression, age, marital status, sexual orientation, family status, veteran status, disability or source of income, this the 4th day of March, 2014."
[7] We note that a state RFRA cannot provide a defense to a charge of violating federal civil rights law, whether based on a federal statute or the U.S. Constitution. In such cases, federal law pre-empts the use of any such state law defenses.

have been recently construed. Recent decisions by the Supreme Court and the lower federal courts highlight RFRA's significant weighing in favor of religious interests, and against whatever government interests are on the other side.

The requirement that persons relying on the religious freedom law show a "substantial burden" on their "exercise of religion"[8] 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. So will any threat of lost government benefits, "exclusion from government programs," or lost "access to governmental facilities" as a result of religious exercise.[9]

The ease of satisfying this standard is likely to be magnified by the U.S. Supreme Court's ruling in *Thomas v. Review Board of Indiana*, 450 U.S. 707 (1981), that courts may not second-guess an individual's religious beliefs, even if those beliefs are idiosyncratic and not shared by others in the same faith. The potency of this principle as applied to RFRA has been demonstrated in the *Hobby Lobby* litigation, which involves the contraceptive mandate of the Affordable Care Act.[10] Moreover, it is difficult to demonstrate that a purported believer is religiously insincere in her claims of religious complicity in the actions of her customers, clients, or tenants. A merchant who asserts complicity in what she sees as the religious wrong of an inter-racial, inter-faith, or same-sex ceremony of commitment is very likely to be able to force the state or local agency to litigate further.

Once a showing of substantial burden has been made, the requirement in Senate Bill 2681 that the government show that application of a law is "essential to further a compelling state interest" and the "least restrictive means" to do so[11] is likely to be very difficult to satisfy. Federal RFRA imposes an identical standard on the federal government. In the most prominent federal RFRA decision to date, *Gonzales v. O Centro*, 546 U.S. 418 (2006), the Supreme Court unanimously ruled that the federal government had not sufficiently proven that it had a compelling interest in stopping importation of a hallucinogenic drug (*hoasca* tea), banned by the federal Controlled Substances Act. The government could not show in court that the risks of trafficking and harm to human health from the drug were sufficient to satisfy the compelling interest test. In addition, the exemption in the Controlled Substances Act of peyote use by Native American tribes led the Court to conclude that the federal government does not have a compelling interest in suppressing the use of *hoasca* tea, a hallucinogen comparable to peyote.

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[8] Senate Bill 2681, Section 1. (5) (a).
[9] Senate Bill 2681, Section 1. (4) (a).
[10] See Hobby Lobby Corp. Inc. v. Sebelius, 723 F. 3d 1114 (10th Cir. 2013) (en banc)(courts cannot second-guess owners of Hobby Lobby on whether purchase of a health insurance policy makes purchasers complicit in use of contraceptives by employees or their female dependents).
[11] Senate Bill 2681, Section 1. (5) (a)(i) – (ii). Note also Section 1. (4) (b): "'Compelling governmental interest' means a government interest of the highest magnitude that cannot otherwise be achieved without burdening the exercise of religion."

Suppose Senate Bill 2681 becomes law. If a person raises a RFRA defense to a charge under state or local anti-discrimination law (whether already enacted or enacted after Senate Bill 2681), that person would likely include as part of his defense that other, non-objecting persons provide the same or similar goods and services. Such a person would assert that the existence of alternative providers renders application of the law not "essential" as to him. Whatever the outcome of such a case, we hope you see that the existence of market options should never be enough to make up for the indignity and lost opportunity inflicted by discrimination.[12]

In addition, a person asserting defenses based on a Mississippi RFRA would exploit the *O Centro* decision by pointing to gaps in coverage in state or local civil rights law. The person would assert that these gaps or exceptions, whatever they may be, undercut the government's compelling interest in fighting discrimination against vulnerable minorities. Thus, if state courts follow the model of *O Centro*, the state's RFRA might protect exactly that kind of discrimination.

Application of a state RFRA in situations that inflict discrete and material harms on customers of Mississippi 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.[13] If applied in anti-discrimination cases, the proposed Mississippi RFRA would risk offending this constitutional principle, by imposing the cost of religiously motivated objections on those who are denied goods and services.

Twenty years ago, the Religious Freedom Restoration Act might have been less fraught with legal and policy peril. Now, when it will most likely be both seen and used as a shield against enforcement of civil rights laws (current and future), enacting it seems like a uniquely poor idea. Doing so will harm the state's reputation as well as its legal culture. Article 3, section 18 of the Constitution of Mississippi already protects as sacred "the free enjoyment of all religious sentiments and the different modes of worship." Senate Bill 2681 is unnecessary to protect freedom of belief and worship in Mississippi, and potentially quite harmful. We strongly urge you to reject it.

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[12] In cases of racial discrimination, the Supreme Court has ruled that the federal government has a compelling interest in overriding claims of religious exercise. Bob Jones University v. United States, 461 U.S. 574 (1983). The Court has not made similar rulings with respect to the government's interest in overriding religious exercise in cases of discrimination based on religion, sex, or sexual orientation.

[13] 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).

Sincerely,

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(Institutional affiliations are for identification only. Our institutions take no position on this Bill.)