UNIVERSITY of VIRGINIA SCHOOL OF LAW

Douglas Laycock

ROBERT E. SCOTT DISTINGUISHED PROFESSOR OF LAW
CLASS OF 1963 IN HONOR OF GRAHAM LILLY AND PETER LOW RESEARCH PROFESSOR OF LAW
PROFESSOR OF RELIGIOUS STUDIES
ALICE MCKEAN YOUNG REGENTS CHAIR IN LAW EMERITUS, UNIVERSITY OF TEXAS AT AUSTIN

December 3, 2014

Hon. Kevin Cotter, Chair
Members of the House Judiciary Committee
Capitol Building
Lansing, MI 48909
via e-mail to kcotter@house.mi.gov

RE: HB 5958
The Religious Freedom Restoration Act

Dear Chairman Cotter and Members of the Committee,

I write in support of the Michigan Religious Freedom Restoration Act, currently pending as HB 5958. I no longer reside in Michigan, but I have deep ties to the state. I am a graduate of Michigan State University, a trustee of its Law College, and a member of the Michigan bar. I taught at the University of Michigan in 1990 and again from 2006 to 2010. I write in my individual capacity as a scholar; none of the universities with which I am affiliated takes any position on this bill.

I heartily endorse HB 5958, based on years of teaching and scholarship on the law of religious freedom. I understand you are also considering a parallel bill, HB 5959, which would amend the Elliott-Larsen Act to include sexual orientation as a protected category. I would encourage you to pass that bill as well. We teach our children that America offers "liberty and justice *for all*." To fulfill that promise, we must protect the liberty of gays and lesbians *and* of traditional religious believers — of all sides in the contemporary culture wars. Both HB 5958 and HB 5959 are important and overdue advances for civil rights, for civil liberty, and for equality. Because my primary expertise is in religious freedom, this letter will focus on HB 5958.

HB 5958 is a version of the Religious Freedom Restoration Acts (RFRAs) that have been enacted at both the federal level (to govern federal law) and 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. A number of other states — including Alaska, Hawaii, Indiana, Maine, Massachusetts, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin — have interpreted their state constitutions to provide similar protection. All in all, more than thirty of the fifty states and the federal government have provided, in one form or another, versions of the protections for religious liberty that would be provided by the bill.

580 MASSIE ROAD • CHARLOTTESVILLE, VA 22903-1738 •
PHONE: 434-243-8546 • FAX: 434-924-7536 • DLAYCOCK@VIRGINIA.EDU

In fact, Michigan too has long provided this level of protection for religious liberty. Article 1, Section 4 of the Michigan Constitution specifically addresses the free exercise of religion: "Every person shall be at liberty to worship God according to the dictates of his own conscience . . . The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." Michigan courts have consistently interpreted this passage to provide the very kind of protection for religious liberty that the bill would now establish by statute. In *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998), the Supreme Court said that if the state imposes a burden on conduct motivated by a sincere religious belief, the court must decide "whether a compelling state interest justifies the burden imposed" and "whether there is a less obtrusive form of regulation available to the state." This is the test to be codified by HB 5958. As the court noted, this is the test developed in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and section 3 of the bill states the legislative purpose to guarantee application of the test recognized in those two cases and in the more recent case of *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006).

McCready was subsequently vacated in part, on the motion of the religious claimants. 459 Mich. 1235 (1999). The court vacated only "that portion of" its opinion holding that the compelling-interest test had been satisfied. It was not vacating the compelling interest test; it was remanding for application of the compelling-interest test. This is clear both from the order granting rehearing and from the opinions of the two justices who dissented.

This is how the Michigan Court of Appeals understands *McCready*. *See Champion v. Secretary of State*, 761 N.W.2d 747, 752-53 & n.5 (Mich. Ct. App. 2008) ("*McCready*, being the latest pronouncement by our Supreme Court on the issue, controls our analysis and requires application of strict scrutiny under the compelling state interest test of religious freedom."); *see also Reid v. Kenowa Hills Public Schools*, 680 N.W.2d 62, 68-69 (Mich. Ct. App. 2004) ("using the compelling interest test set forth in *McCready v. Hoffius*"); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995) ("Michigan courts have always applied a strict scrutiny test to state regulation of religious freedom." (collecting cases)).

HB 5958 is therefore just a continuation and codification of the currently existing state constitutional law. Yet that does not make the bill unnecessary. The Michigan Constitution unambiguously protects religious freedom. But it speaks in quite general terms. And state courts are always free to change their interpretations of state constitutions. A future court hostile to religious liberty might re-interpret Article 1, Section 4, to give much less protection to religious liberty. In 1990, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court did just that to the federal Constitution's guarantee of religious liberty, and any state agency or local government in Michigan could urge the Michigan courts to reverse course and read the new federal rule into the Michigan Constitution. By explicitly stating the existing test in the Michigan Compiled Laws, the bill would give religious freedom more secure protection. Its detailed provisions 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. 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. The Michigan Religious Freedom Restoration Act would help make that happen.

The fact that Michigan has long interpreted its state constitution to provide the same kinds of protections as the bill should be sufficient proof that the bill will not cause the sky to fall. Moreover, the standard the bill would codify now applies to the federal government and a majority of the states, and it was the standard for the entire country from 1963 to 1990. 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. If opponents of the bill tell you that it will lead to terrible results, demand specific examples, with citations, of judicial *decisions* — not of claims made. Litigants can argue anything, but the general experience with Religious Freedom Restoration Acts has been under enforcement, not over enforcement.

You have probably heard of 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 not led to extreme results. The issue in *Hobby Lobby* was whether the federal RFRA protected the religious owners of closely held for-profit businesses. These owners objected to a regulation, adopted pursuant to the Affordable Care Act, which required large employers to provide 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 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.

One other important issue today is what state RFRAs will mean for anti-discrimination laws. 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. Michigan forbids discrimination in employment without making any exception for religious organizations. Michigan even forbids *religious* discrimination in employment without making any exception for religious organizations. See Mich. Comp. Laws § 37.2202. Among other things, this means that churches, religious schools, and other religious institutions generally have to hire and promote on a religion-neutral basis. I find it hard to believe that any legislator intended this, but that is what the statute says.

Catholic schools, for example, should not have to hire teachers who believe and do things inconsistent with Catholic teaching. They should not have to hire people who reject Catholicism as patriarchal and oppressive, or who flout Catholic moral teachings, or even people who are lukewarm or ambivalent about Catholicism. But Michigan law requires Catholic schools and churches to hire and promote such people without regard to religion. And this is no artificial example; it happened in Kalamazoo.

A Catholic school was sued by a Protestant teacher for alleged religious discrimination. *See 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 the case were to arise now, the school would have to defend under the Michigan constitution, and the plaintiff would no doubt urge the Michigan courts to overrule *McCready v. Hoffius* and adopt the test of *Employment Division v. Smith.*[1]

One recent issue that has arisen is the possibility that religious owners of for-profit corporations might use the state RFRA as a possible shield against discrimination claims.

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[1] This footnote explains the boundaries of two other doctrines that apply in very narrow circumstances. The United States Supreme Court has held that Michigan's 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; claims of religious discrimination, age discrimination, and race discrimination are all barred by the First Amendment. *Hosanna-Tabor Evangelical Church and School v. EEOC*, 132 S. Ct. 694 (2012). The court in *Porth* declined to decide whether that teacher was within the ministerial exception. 532 N.W.2d at 197 n.1. Most cases elsewhere have held that teachers in religious schools are not within the ministerial exception unless they teach a religion class or lead worship.

Michigan also has a *bona fide* occupational qualification exception (BFOQ), *see* Mich. Comp. Laws § 37.2208, but these provisions are narrowly interpreted, and the opponents of this bill would undoubtedly argue that the BFOQ exception does not apply in cases like *Porth*. The exception is not mentioned in the *Porth* opinion. Either the school's attorney did not think it worth arguing, or the court did not think it worth mentioning. Clearly the court thought that RFRA was a much easier path to decision.

One 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. I believe that individuals providing personal services, and especially creative services designed to make the wedding ceremony the best and most memorable that it can be, should be protected from providing such services when to do so would violate their conscience and when similar services are available from another reasonably accessible provider. I would not exempt large and impersonal businesses who can assign the task to an employee who has no conscientious objection to assisting it.

If you want to protect the religious claim in cases like *Elane Photography*, you should add a religious exemption specific to marriage and weddings to the Elliott-Larsen Act. A state RFRA may not be enough. 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] I think that the New Mexico Supreme Court clearly erred when it held that its state RFRA does not even apply when a religious organization or religiously motivated individual is sued by a private citizen.[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.

If the Supreme Court, the legislature, or the people eventually bring same-sex marriage to Michigan, it will be important to protect the rights of same-sex couples and also to protect the religious liberty of those who cannot conscientiously assist with same-sex marriages or weddings. Amending Elliott-Larsen to protect the legitimate interests of both sides is not a simple drafting task. There is proposed statutory language, drafted after long discussion by a group of scholars on both sides of the same-sex marriage debate, in a detailed letter written to the leadership of the Hawaii legislature. This letter is available at http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html.[4] The language of HB 5958 is much more specific than the language of the Michigan constitution, but it is not specific to marriage or to anti-discrimination laws. The bill would leave it to courts to strike the balance in specific cases, and the New Mexico experience is not encouraging.

Whether or not you enact more specific provisions about marriage, you should enact HB 5958. State RFRAs have been important to the practice of religion in this country, particular the practice of minority faiths. State RFRAs do not usually wind up applying to

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[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 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).

[4] The proposed statutory language begins at page 4 of the "Group 1 letter" to Hawaii.

large numbers of cases. But those few cases 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, for practicing their religion — in America, in the 21st century.

You are authorized to share this letter with anyone who is interested, and I ask that you enter it in the record of the hearing on the bill. I regret that I could not appear to testify in person, but I am happy to respond to questions by letter, phone, or e-mail.

Very truly yours,

Douglas Laycock