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February 3, 2015

Hon. Brent Steele, Chair
Members of Senate Judiciary Committee
Indiana Statehouse
200 W. Washington St.
Indianapolis, IN 46204

RE: Religious Freedom Restoration Act

Dear Senator Steele and Members of the Committee:

We write in support of the proposed Indiana Religious Freedom Restoration Act (RFRA), which is currently before your Committee. The sixteen signers of this letter endorse this legislation based on many years of teaching and scholarship on the law of religious freedom. In this letter, we will explain our support for the legislation and address some of the objections that critics might offer.

At the outset, we note that there currently are two versions of this legislation: SB 101 (as amended January 20, 2015) (authored by Sen. Kruse) and SB 568 (authored by Sen. Schneider et al.) . We believe that SB 101 is generally well-crafted, although, as we explain in the accompanying footnote, we would suggest several clarifying amendments in the relief provision.[1] With these amendments in place, we would endorse the particular

[1]As it stands, Section 10 of SB 101 contains what appear to be two inadvertent phrasing errors. In addition, it does not specifically authorize declaratory relief, nor does it explicitly state that, in private-party litigation, a successful religious objector is entitled to a defense against any party as well as affirmative relief against the government. In addition, we believe that the description of available relief should include a provision permitting — but not requiring — an award of attorney fees, without which it might be difficult or impossible for religious objectors, who often have limited resources, to employ counsel. As a result, we believe that if SB 101 goes forward, Section 10 should be amended to read as follows (with suggested omissions indicated with strikeout and suggested additions in italics):

Sec. 10. If a court or other tribunal in which a violation of this chapter is asserted in conformity with section 9 of this chapter determines that:

(1) the person's exercise of religion has been substantially [~~violated~~] *burdened;* and

(2) the governmental entity imposing the burden has not demonstrated that *application of* the burden to the person:

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest;

the court or other tribunal *shall allow a defense against any party and* shall grant appropriate relief against the governmental entity. Relief may include *declaratory relief or* an injunction or mandate that prevents, restrains, corrects, or abates the violation of this chapter. *The court or tribunal also may award all or a portion of the costs of litigation, including reasonable attorney fees, to a person who prevails against a governmental entity under this chapter.*

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language of SB 101. With respect to SB 568, we believe that the specific language of the bill, as introduced, is problematic in various respects. But we understand that SB 568 is likely to be substantially amended. We cannot endorse the current language of SB 568 and of course cannot endorse an amendment that has not yet been offered. What we can do, however, is offer our support, in principle, for SB 568 as well as SB 101, both of which are designed to accomplish similar objectives.

More specifically, we support the core prohibition that each proposal would enact: that governmental action may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

The proposed legislation is part of a nationwide response to a 1990 Supreme Court decision. *Employment Division v. Smith*, 494 U.S. 872 (1990), held that any religious practice, even a worship service, can be prohibited if the law is "neutral and generally applicable," and whether or not there is any good reason for the prohibition or for refusing a religious exception. But religious liberty is not a mere right to believe a religion with no right to practice that religion. Religious Freedom Restoration Acts provide that religious practice is protected, even if a law is neutral and generally applicable, unless the state has a compelling reason to interfere.

The proposed Indiana RFRA is a version of the Religious Freedom Restoration Acts 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, Maine, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin — have interpreted their state constitutions to provide similar protection. All in all, the federal government and more than thirty of the fifty states have provided, in one form or another, versions of the protections for religious liberty that would be provided by this legislation.

The Indiana Constitution itself protects religious liberty to a considerable — but uncertain — degree, based on various provisions in the Indiana Constitution's Bill of Rights. *See* IND. CONST., art. I, §§ 2-8. According to the Indiana Supreme Court, these provisions protect religious freedom to a greater extent than *Employment Division v. Smith*. But the Indiana Supreme Court has adopted a novel approach in its interpretation of the Indiana Constitution, and it is not at all clear that this approach gives adequate protection to religious freedom.

In *Price v. State*, 622 N.E.2d 954 (Ind.1993), the Indiana Supreme Court announced that a law or regulation violates the Indiana Constitution if it imposes a "material burden" on "a core constitutional value." *Price* addressed freedom of political speech, but the court has extended a similar analysis to religious freedom, declaring that the religious liberty provisions of the Indiana Bill of Rights likewise protect "core constitutional values" that cannot be "materially burdened." The leading case is *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443 (Ind. 2001). According to *City Chapel*, the Indiana

Constitution protects religious belief and practice even from neutral laws of general applicability. *See id.* at 445-46. As a result, it provides protection beyond that afforded by the Free Exercise Clause of the First Amendment, as interpreted in *Smith*.

The Indiana Supreme Court's "material burden" analysis, however, is subtle, complex, and underdeveloped. As the court explained in *City Chapel*, "there is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify but not alienate. A right is impermissibly alienated when the State materially burdens one of the core values which it embodies." *Id.* at 446 (quoting *Price*, 622 N.E.2d at 960). Such a material burden is present if "the right, as impaired, would no longer serve the purpose for which it was designed" by those who framed and ratified the Indiana Constitution of 1851. *Id.* at 447 (quoting *Price*, 622 N.E.2d at 960 n. 7). In determining whether there is an impermissible "material burden," moreover, the court ostensibly "looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue." *Id.*

Applying this analysis in *City Chapel*, the court permitted a church to challenge a condemnation proceeding on religious freedom grounds. In so doing, however, the court emphasized that the church, to prevail in its constitutional challenge, would be required to carry "a very substantial burden of proof." *Id.* at 451. In particular, the church would have to establish that the condemnation of its building would "constitute a material burden, not merely a permissible qualification," on "its members' right to worship according to the dictates of conscience, the right freely to exercise religious opinions and rights of conscience, or the right to be free from a government preference for a particular religious society or mode of worship." *Id.*

In speech cases, the Indiana Supreme Court has included an additional element in its "material burden" analysis. Thus, as the court suggested in *Price v. State* and has reiterated more recently, there is no "material burden," and therefore no constitutional violation, if the speaker's actions cause "particularized harm" in a manner "analogous to conduct that 'would sustain tort liability against the speaker.'" *State v. Economic Freedom Fund*, 959 N.E.2d 794, 805 (Ind. 2011) (quoting *Price*, 622 N.E.2d at 964). To this extent, despite the court's stated refusal to consider the "social utility" of challenged state action, it seems that competing interests *are* permitted to influence the "material burden" analysis, albeit only to a limited and uncertain degree. Assuming this additional component of the analysis extends to religious liberty as well as speech, it introduces an additional complication, making it more difficult to discern the scope of state constitutional protection.

In future cases, the Indiana Supreme Court might clarify or change its state constitutional doctrine, but it is difficult to know the direction that any such doctrinal revision might take. The court could read *City Chapel* expansively, or it could move in the opposite direction, much as the United States Supreme Court, in *Employment Division v. Smith*, dramatically curtailed the scope of religious freedom under the First Amendment. Indeed, the Indiana Supreme Court, at the urging of a state agency or local government, could completely repudiate the "material burden" analysis, declaring that *City Chapel* was mistaken and that the Indiana Constitution provides no greater protection than *Employment Division v. Smith*.

The proposed legislation would not replace or supplant state constitutional law. But it

would provide an additional and independent source of legal protection. And this protection would be considerably more straightforward and easily understood than the uncertain legal doctrine of *City Chapel*. The Indiana RFRA would clearly and directly call for a balancing of competing interests, stating that substantial burdens on the exercise of religion are impermissible unless they are necessary to serve compelling governmental interests. And in so doing, the statute would adopt a test that already exists in federal law and in the law of a majority of the states. By explicitly codifying this test in the Indiana Code, the proposed legislation would give religious freedom more transparent and more secure protection, explicitly instructing 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 and local 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 Indiana Religious Freedom Restoration Act would help make that happen.

Although critics might suggest otherwise, the proposed legislation is hardly radical. As we have noted, the standard the legislation 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, under the pre-*Smith* First Amendment doctrine of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In the places where this standard applies, it has not been interpreted in ways that have caused problems for those jurisdictions; if anything, these laws have been enforced too cautiously. Opponents of the legislation may make unsupported claims about the extreme results that it would produce, but they have no examples of judicial *decisions* actually reaching such results.

Some critics might point to the *Hobby Lobby* case, decided this past summer by the United States Supreme Court. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The case has been misunderstood by people on both sides, but it ultimately reinforces the conclusion that these laws have been very cautiously enforced. The issue in *Hobby Lobby* was whether the federal RFRA protected the religious owners of closely held for-profit businesses who objected to a regulation under the Affordable Care Act. That regulation required large employers to provide certain forms of contraception that, in the view of the religious owners of these businesses, sometimes 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 health-care 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. As the Supreme Court explained, "The effect of the accommodation on the women employed by Hobby Lobby and the other companies involved in these cases *would be precisely zero*." 134 S. Ct. at 2760 (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.

Not all the signers of this letter agree with the decision in *Hobby Lobby*. But we all agree that given the comparatively narrow contours of the decision and the likely judicial reaction to any claim by a for-profit business that is *not* closely held by a small group of religiously united owners, *Hobby Lobby* does not create a license for businesses to engage in conduct that undermines important public interests. Nor does it guarantee victories to all or even most claimants who petition courts for exemptions from neutral laws of general applicability.

The most common charge opponents make against RFRA legislation is that it is a "license to discriminate." It is no such thing. *Hobby Lobby* certainly provides no support for this proposition. Indeed, the Supreme Court in *Hobby Lobby* specifically rejected Justice Ginsburg's suggestion, in her dissenting opinion, that the Court's decision created "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction." *Id.* at 2783. The Court explained that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* To be sure, the Court did not specifically address discrimination on other grounds or in other settings. Even so, its language suggests that the Supreme Court, interpreting the federal RFRA, will be reluctant to uphold religious objections to anti-discrimination laws.

We are confident that Indiana courts will likewise be inclined to resist such claims under the Indiana RFRA. Protecting Americans from discrimination is generally a compelling interest, and few claims to exemption from anti-discrimination laws are likely to succeed.

In narrow circumstances, some claims to exemption from anti-discrimination laws might properly succeed, especially when the anti-discrimination laws reach into religiously sensitive contexts. For example, a state or local regulation or policy forbidding discrimination on the basis of religion might give rise to a valid RFRA objection as applied to religious organizations, including churches, synagogues, mosques, or other religious bodies. The point may be obvious, but religious organizations, in selecting their own members and employees, generally should have the freedom to prefer their fellow believers — as opposed to nonbelievers or adherents of other faiths. As far as we can tell, current Indiana law and practice generally is sensitive to this concern, providing exemptions for religious organizations in appropriate circumstances.

But this is not universally true, as a pending controversy attests. Section 22-9-1-10 of the Indiana Code precludes state and local contractors, apparently including grant recipients, from engaging in various forms of employment discrimination, including discrimination on the basis of religion. For most contractors and most grantees, the

prohibition on religious discrimination is entirely appropriate, but the prohibition as written contains no exception for religious institutions. According to media accounts, the Indiana Attorney General's office determined that the rule applied to Indiana Wesleyan University, a Christian university that hires on the basis of religion, rendering the university ineligible for state workforce training grants. A legislative fix is in the works, in the form of SB 127. The Senate Civil Law Committee has unanimously approved this bill, which would protect the religious freedom of religious institutions, including religious colleges, by exempting them from this rule, in conformity with a similar exemption that exists in federal law. The Indiana RFRA might have obviated the need for a specific legislative accommodation. In any event, it would provide a basis for religious organizations to contest any future laws or regulations that might prevent them from maintaining religious standards for membership or employment.

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

Some of the signers of this letter support same-sex marriage; others do not. But the issue here is different: should the law accommodate religious objectors by exempting them from legal requirements that would force them to violate their religion by participating (in their view) in the celebration of same-sex weddings? For many religious believers, weddings are inherently religious events in which their participation must conform to religious obligations. This creates a serious conflict for religious individuals who personally provide creative services to assist with weddings. But whatever one thinks of the arguments for and against exempting such individuals, it is not at all clear that the proposed Indiana RFRA would lead courts to recognize such an exemption.

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] The New Mexico Supreme Court held that its state RFRA does not even apply when the religious objector has been sued by a private citizen. That was almost certainly a mistake,[3] and the proposed Indiana legislation makes it clear that the Indiana RFRA would indeed apply in these circumstances. But even had the New Mexico RFRA applied, the New Mexico Supreme 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.

Apart from specific services directly relevant to weddings, the specter of religious business owners refusing to serve gays and lesbians is a myth. We are aware of only one

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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).

reported case, nearly thirty years ago, in which a for-profit business sought a religious exemption from dealing with gays or lesbians simply because they were gay or lesbian. That case involved employment rather than customers. And of course the religious claimant lost, even though the court applied the standard to be codified in the proposed legislation. *State ex rel. McClure v. Sports and Health Club*, 370 N.W.2d 844 (Minn. 1985). Courts generally believe that anti-discrimination laws serve compelling government interests, and nothing in the proposed legislation would change that.

Most RFRA cases, of course, do not involve anti-discrimination laws or disputes that arise between private parties. Rather, they involve disputes between the government and a religious individual or group. In a case just decided under the federal RFRA standard, for example, a unanimous Supreme Court protected the right of a Muslim prisoner to practice his faith by wearing a half-inch beard that posed no risk to prison security. *See Holt v. Hobbs*, 135 S. Ct. 853 (2015).[4] Like the federal RFRA, the Indiana RFRA will be available to members of all faiths. It might be invoked by Old Order Amish, for example, to request that they be exempted from having their photographs on state identification cards,[5] or to request accommodation from traffic regulations that unnecessarily impair their religiously based reliance on horse-drawn buggies.[6] Or by Christian or Jewish students seeking accommodation by public schools for their observation of Good Friday or Yom Kippur. Or in a variety of other circumstances that might arise in the future but that are difficult to anticipate in advance. General protection for religious liberty is important precisely because it is impossible to legislate in advance for all the ways in which government might burden the free exercise of religion.

State RFRAs have been important to the practice of religion in this country, and especially to the practice of minority faiths. State RFRAs do not usually wind up applying to large numbers of litigated cases. But they encourage government officials and religious minorities to talk to each other and work out mutually agreeable solutions. And the few cases that arise 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 — or, in the worst case, die — for practicing their religion, in America, in the 21st century.

The possibility of dying for your faith because of government intransigence came to

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[4]The Supreme Court's decision was based on a federal statute that serves as a companion to the original federal RFRA. This companion statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), adopts the same test as the original federal RFRA. *See* RLUIPA, 42 U.S.C. §2000cc–1(a).

[5]This particular issue currently is before the Indiana House, which is considering legislation, HB 1631, that would provide a religious exemption from the state's existing photograph requirement as long as alternative identification safeguards are in place. If the Indiana RFRA were in effect, it would not preclude specific legislation such as this, but it would offer Amish and other religious objectors a legal basis for seeking accommodation even in the absence of such legislation.

[6]An issue of this sort arose in *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990). In this case, the Minnesota Supreme Court considered Amish religious objections to a slow-moving-vehicle law that required them to use fluorescent orange-red triangular emblems on their buggies. Applying a RFRA-like test under the Minnesota state constitution, the court held that the state was required to accommodate the Amish by exempting them from this requirement and by permitting them to use silver reflective tape and lanterns instead.

pass in a real case from Kansas. Mary Stinemetz needed a liver transplant. And because she was a Jehovah's Witness, the surgery had to be done without blood transfusions. A bloodless liver transplant was available in Omaha, and it was cheaper than the liver transplant with blood transfusions that was available in Kansas. But Kansas Medicaid had a rule, a rule that it claimed was neutral and generally applicable: No out-of-state medical treatment except for medical necessity. And religious obligations did not create a medical necessity.

Kansas had not yet enacted its state RFRA, so the case had to be argued under the state and federal constitutions. And Kansas argued that its courts should adopt the federal constitutional rule, that of *Employment Division v. Smith*, and reject Mrs. Stinemetz's claim. The Kansas Court of Appeals eventually interpreted the state constitution to incorporate the RFRA standard, and it held that Mrs. Stinemetz was entitled to an out-of-state transplant. *Stinemetz v. Kansas Health Policy Authority*, 252 P.3d 141 (Kan. Ct. App. 2011). But by the time the litigation ended, her health had deteriorated to the point that she was no longer medically eligible for a transplant; she died in 2012.[7] If a state RFRA had been in effect, so that the legal standard were clear from the beginning, she would have had a much better chance to live.

For all these reasons, we urge you to approve the proposed Indiana RFRA in order to better secure religious liberty in Indiana. If we can be of further assistance, please feel free to call on any of us. Institutional affiliations are for identification only; none of our universities takes any position on this legislation.

Respectfully,

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[7] *See* Brad Cooper, *Jehovah's Witness Who Needed Bloodless Transplant Dies*, Kansas City Star (Oct. 25, 2012), http://www.kansascity.com/news/local/article310218/Jehovahs-Witness-who-needed-bloodless-transplant-dies.html.

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