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Dear Joe,

You asked me for my opinion regarding Measure Three, a ballot initiative in North Dakota scheduled for a vote on June 12, 2012. I am providing the following results of my research. Note that I am not speaking for the University of North Dakota School of Law or any other university entity. These are my opinions alone, and do not necessarily represent the opinions of anyone else.

**North Dakota's Religious Liberty Restoration Amendment**

The intent of the promoters of Measure Three is that it be added to the North Dakota Constitution. The North Dakota Family Alliance and the North Dakota Catholic Conference are actively promoting the Measure. Having performed online research, I am aware of no organized opposition to the Measure. The text of the Measure, called the Religious Liberty Restoration Amendment (RLRA) is:

> Government may not burden a person's or religious organization's religious liberty. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be burdened unless the government proves it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A burden includes indirect burdens such

as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

The North Dakota Catholic Conference states that the purpose of the RLRA is to restore the strict scrutiny test to restrictions on religion, which the U.S. Supreme Court ostensibly eliminated in 1990. In that case, detailed below, the Court held that strict scrutiny does not apply to governmental action that is content neutral and generally applicable. See http://ndcatholic.org/rlra/aboutrlra/index.html.

The Catholic Conference has detailed a number of categories in which the RLRA would protect religion. These areas include education, reproductive health, justice, marriage and family, places of worship, cemeteries, work, and public facilities. See http://ndcatholic.org/rlra/examples/index.html. In my opinion, the list of categories and examples within each category comprises a hypothetical parade of horribles, many of which are not likely to obtain in fact.

For example, one stated concern is that municipalities might enact laws setting forth specific commercial hours of operation, which would thereby restrict evening or sunrise religious services. Another example is "[a]n ordinance limiting the number of persons who can be served at camps and retreats, when enacted without a legitimate safety reason."

The North Dakota Family Alliance has expressed its concern that "[m]ore and more North Dakotans have an uneasy feeling that the Founder's vision of religious liberty in America is being eroded," and that "the burden has fallen to the people to protect themselves from the government infringing upon their religious liberties, instead of the burden being placed on the government as it seeks to infringe on those freedoms." See http://www.ndfa.org/uploads/RLRA/RLRA_Why_we_need_the_RLRA.pdf. A Family Alliance flyer in support of the RLRA asked, "Have you noticed the frequent news stories about attacks on our religious liberties?" See http://ndfa.org/uploads/RLRA/RLRA_Action_Flyer.pdf.

The RLRA is not unique to North Dakota. An amendment

with the same language is circulating in Colorado. See http://www.coloradansforliberty.com/ballot-language/. Other states have passed measures similar to the RLRA, which I detail below.

**History**

Both the North Dakota Catholic Conference and the North Dakota Family Alliance state that the U.S. Supreme Court decision Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), provided the original impetus to the RLRA. Smith was followed by the federal Religious Freedom Restoration Act (RFRA) in 1993. The Supreme Court in City of Boerne v. Flores, 521 U.S. 507 (1997), held the RFRA unconstitutional as applied to the states. These actions gave rise to state initiatives to protect religion where the RFRA was unable to do so.[1]

In Smith, the Court considered the case of claimants being denied unemployment benefits as a result of dismissal from their jobs because of their sacramental use of peyote. They claimed that their drug use was a protected aspect of their religion, and thus that denial of unemployment benefits violated the free exercise clause of the First Amendment.

The majority, Scalia, J., held that the free exercise clause did not prohibit the application of Oregon's drug laws to ceremonial use of peyote. The Court noted that governmental action that directly infringes upon religious liberty is subject to the strict scrutiny test. Under that test, the government may restrict the free exercise of religion if there is a compelling interest and the government's restriction is narrowly tailored to that interest. The Court held that where a governmental action is neutral as to religion and is generally applicable, the strict scrutiny test does not apply. Rather, the rational basis test is used: the law is upheld if it is rationally related to a legitimate governmental interest.

The Court cited to an older case: "Conscientious

[1] The federal Religious Land Use and Institutionalized Persons Act of 2001 remains in force but, as its name suggests, its coverage is limited. The RLRA and similar state initiatives are designed to protect all aspects of religious conduct.

scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." The Court quoted another case: "Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Concurring in the opinion, Justice O'Connor argued that there was no need to abandon the strict scrutiny test, and that doing so threatened religious liberty. She went on to argue that under the strict scrutiny test, Oregon was within its right to prohibit the use of peyote. Peyote was a schedule I drug with no accepted medical use, and so the state had a compelling interest in prohibiting it, even to the detriment of those who used it for religious purposes.

In dissent, Justice Blackmun complained that the majority held that strict scrutiny for neutral laws that restricted religion was a "luxury" that a well-ordered society could not afford. Like Justice O'Connor, Justice Blackmun was concerned about the restrictions on religion that the majority opinion implied. Justice Blackmun went beyond Justice O'Connor in arguing that Oregon's prohibition on religious use of peyote did not satisfy strict scrutiny. The Native American Church, which sponsored the use of peyote, tightly controlled it, and there was no evidence that it was being abused.

Three years after Smith, Congress passed the RFRA, with which it attempted to reinstall the strict scrutiny test for neutral and generally applicable laws that restricted religious conduct. The text of the RFRA, at 42 U.S.C. § 2000bb-1, is:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

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

(2) is the least restrictive means of furthering that compelling governmental interest.

In 1997, the Supreme Court in City of Boerne v. Flores, 521 U.S. 507 (1997), found that the RFRA's application to the states was unconstitutional because it exceeded Congress' power under the Fourteenth Amendment. In essence, the Court held that the RFRA was so broad that it amounted to an attempt to change the meaning of the free exercise clause. The holding could, therefore, be seen less as a free exercise holding and more a separation of powers holding.

This history has resulted in state initiatives like the RLRA that seek to install the strict scrutiny test to govern neutral and generally applicable governmental action that restricts the exercise of religion.

**General Concepts and Issues**

The broad, underlying constitutional issue that should inform inquiries into the RLRA is whether the Fourteenth Amendment is concerned with absolute equality or actual fairness.

If the Fourteenth Amendment is concerned with absolute equality, then Justice Scalia's opinion in Smith is correct, because it treats people who use peyote for religious purposes and people who use peyote recreationally the same. An absolute equality approach to the Fourteenth Amendment is reflected in Anatole France's observation that "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

If the Fourteenth Amendment is concerned with actual fairness, then people's individual characteristics must be taken into account when the law is applied to them. For example, young criminal suspects are treated differently

than adults for Miranda purposes because of their unique characteristics. People who hold genuine religious beliefs should similarly be treated differently because of their beliefs.

In my opinion, the law is constantly struggling to deal with the fact that absolute equality *and* actual fairness are important goals. The result is that some laws are given the strength of the absolute equality approach, some laws are sensitive to individual characteristics, and the strict scrutiny test has been developed to govern cases in which governmental interests compete against individual religious interests. This is the test when governmental action directly infringes on the free exercise of religion. The RLRA would extend this test to laws of general application.

This theoretical debate is reified when presented as the debate between individual rights/freedoms and the power of government to establish rules by which we all need to live. The difficulty is that Justices Scalia, O'Connor, and Blackmun in Smith were all "correct" in that each of their approaches is reasonable and defensible.

**RLRA-Specific Concepts and Issues**

The RLRA has been advertised as necessary to protect people's right to freely practice their religion. To address this assertion, consider four categories of governmental action: (1) direct governmental infringement on religious freedoms that have no negative externalities (the infringement only affects those who want to practice the targeted religion); (2) neutral governmental action that incidentally infringes upon religious freedoms and has no negative externalities; (3) direct governmental infringement on religious freedoms that has negative externalities; and (4) neutral governmental action that incidentally infringes upon religious freedoms and has negative externalities.

Categories (1) and (3) are now subject to strict scrutiny, and so the RLRA will have no effect on them. The RLRA would have something to say about categories (2) and (4). Since it addresses only laws of neutral application, the RLRA can be seen as religious people's request to be treated more favorably under the law than nonreligious people when religious conduct conflicts with these laws.

My opinion is that treating religious people differently when it comes to category one governmental action is not problematic. A good example is Smith, much derided as "wrongly" decided. There was no evidence in Smith that the members of the Native American Church who used peyote harmed anyone else in any way in their activities. There were no negative externalities inherent in this religious practice.

What *is* problematic is treating religious people differently when it comes to category three situations in which there are negative externalities associated with the religious practice in question. A hypothetical variant of Smith might entail a group that uses heroin for religious purposes. Heroin being illegal and expensive (unlike peyote, which is natural and locally available), users are forced to steal to buy heroin, they use and dispose of dirty needles that create a public health hazard, they fuel a violent drug trade, and so forth.

Broadly speaking, my concern with the RLRA is that it will protect religious people even in category three situations. The easy, and most polarizing, example is in the area of reproductive rights. Under the RLRA, a pharmacist might be able to refuse to fill a birth control prescription, a hospital employee could refuse to participate in an abortion, and so forth. North Dakota is a large, sparsely populated rural state, and many people may have access to only one pharmacy or one hospital.[2]

There are other concerns. For example, an ER doctor may refuse to perform a blood transfusion. These concerns, discussed more below, illustrate the problem inherent in the RLRA: how should we as a society balance the interest that people have in exercising their religion with others' interest in accessing constitutionally protected goods and services? The RLRA will protect religious practice, but its negative externalities may severely curtail others' enjoyment of their own constitutional rights. More on that

[2] In North Dakota, there is only one clinic that performs abortions, and it is located in the southeastern corner of the state. The fact that access to abortions is already limited illustrates the potential problem of access to reproductive services if other health care providers are free to refuse to provide certain health care services.

below.

Proponents of the RLRA see another problem: the amendment would apply only to governmental actors. Private hospitals could fire people who refuse to perform certain procedures, and Walmart could refuse to hire people who will not work on holy days.

**Implications**

There are a number of general and specific implications I see in the RLRA: (1) the notion of a well-ordered nation subject to the rule of law would be undermined; (2) some drug laws would be unenforceable (Smith laws concerning peyote, and marijuana for Rastafarians, to name two); (3) Customs seizures might be prohibited; (4) other bad behavior, like financial fraud in religious institutions and default on government loans, might go unprosecuted and unremediated; (5) property law, as in Boerne, could tilt in favor of religious institutions; (6) access in the private market to constitutionally protected goods and services could be curtailed (access to birth control, abortions, and adoption for same-sex couples, for example); (7) compelled governmental funding of religion-based activities where there is a secular counterpart receiving funding (including vouchers for student attendance at religious schools); and (8) increased volume and complexity of litigation in many areas of law.

At the most theoretical level, the RLRA would upset the notion of a "well-ordered" nation in which the law applies to all citizens equally. It would reject the theory that the Fourteenth Amendment is about absolute equality, and would inject a theory of fairness based on religiosity that would allow religious activities to be accorded special privileges against the application of a wide variety of laws. The Smith majority opinion noted that such special treatment would be felt in the areas of compulsory military service, payment of taxes, health and safety regulations such as manslaughter and child neglect laws, compulsory vaccination laws, traffic laws, minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for racial equality.

Some drug laws would be unenforceable against certain religions. See Smith. Customs seizures of some illegal

drugs might be unconstitutional. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425 (2006).

Financial fraud or embezzlement in religious organizations might be unprosecutable. See Heitkamp v. Family Life Services, Inc., 2000 ND 166, 616 N.W.2d 826; State v. Burckhard, 1998 ND 121, 579 N.W.2d 194.

Property law, such as zoning and permitting requirements, could tilt in favor of religious institutions. See Boerne. For example, a zoning ordinance that prohibits new buildings from obstructing sunlight to any existing residence could apply to an office building or restaurant, but not to a church.

Access to the private market for constitutionally protected goods and services could be curtailed. For example, a hospital that receives governmental funding might be prohibited from taking disciplinary action against an employee who refuses to provide health care services such as abortions, blood transfusions, and birth control. A police officer might be able to refuse to guard an abortion clinic if it conflicts with her religious preferences.

Government might be compelled to fund religious-based service programs if similar secular programs are funded. For example, if the government funds a secular adoption agency, it might be required to fund a Catholic adoption agency, even though that agency refuses to provide services to same-sex couples. This could lead to a constitutional crisis in which the government chooses to (1) fund no agency at all, (2) fund only secular agencies, leading to free exercise litigation from the religious agencies, or (3) fund all agencies, leading to equal protection litigation from gay rights organizations.

Finally, the RLRA would likely lead to more lawsuits of greater complexity. This is so because the RLRA seeks to insert First Amendment free exercise issues into nearly every area of law. Historically, the free exercise clause prevented government from directly and intentionally infringing on people’s right to practice their religion. Proponents of the RLRA seek to extend the free exercise clause’s protection to cover laws that do not directly, and are not intended, to infringe upon religious practice. This includes, of course, virtually every single law.

**The RLRA in Other States**

A number of state supreme courts have written opinions establishing rules akin to the RLRA.[3] State legislatures have passed laws with similar results.[4] These actions were done in response to the holding in Smith.

At least one state, Alabama, has passed an RLRA-like constitutional amendment.[5] It appears that the amendment has been construed by the Alabame Supreme Court on only one occasion, in a child custody dispute. Ex parte Snider, 929 So.2d 447, 466 (2005).

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[3] Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 245-47 (1998); Huffman v. State, 204 P.3d 339, 344 (Alaska 2009); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 2009); City of Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 445-46 (Ind. 2001); State v. Van Winkle, 889 P.2d 749, 754-55 (Kan. 1995); Rupert v. City of Portland, 605 A.2d 63, 66 (Me. 1992); Kolodziej v. Smith, 588 N.E.2d 634, 637 (Mass. 1992); Soc'y of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990); State v. Hershberger, 462 N.W.2d 393, 396-97 (Minn. 1990); State v. French, 460 N.W.2d 2, 8-9 (Minn. 1990); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1276-77 (Mont. 1992); Palmer v. Palmer, 545 N.W.2d 751, 755 (Neb. 1996); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 465-67 (N.Y. 2006); Humphrey v. Lane, 728 N.E.2d 1039, 1043 (Ohio 2000); Hunt v. Hunt, 648 A.2d 843, 850 (Vt. 1994); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 182-83 (Wash. 1992).

[4] Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 (1999); Ariz. Rev. Stat. Ann. § 41-1493 (2010); Conn. Gen. Stat. Ann. §52-571b (West 2005); Fla. Stat. Ann. §§ 761.01-05 (West 2010); Idaho Code Ann. §§73-401-404 (West 2006); 775 Ill. Comp. Stat. Ann. 35/1-99 (West 2010); Mo. Ann. Stat. §§ 1.302-307 (West 2011); N.M. Stat. Ann. §§ 28-22-1-5 (West 2003); Okla Stat. Ann. tit. 51, §§ 251-58 (West 2008); 71 Pa. Cons. Stat. §§ 2401-2407 (2010); R.I. Gen. Laws Ann. §§42-80-1-4 (West 2006); S.C. Code Ann. §§ 1-32-10-60 (2005); Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001-012 (West 2005); Va. Code Ann. § 57-1 (West 2009).

[5] Ala.Const. Art. I, § 3.01 (reprinted below in appendix).

**Problems with a constitutional amendment**

If our system of law depends upon a balancing of constitutional rights as well as the equal application of neutral laws, then an RLRA enshrined in a state constitution may not be preferable to a similar statute or state supreme court holding.

There are times during which religious conduct should be protected, and times during which the neutral application of laws should prevail over religious interests. Broadly, the question is approached based on the axiom that people should be free to do what they want, so long as they do not harm anyone else.

The problem with this axiom is that a lot of conduct—religious and otherwise—has *some* negative externalities. My Jewish neighbor might object to the crèche on the front lawn of my home—but there is nothing he can or should be able to do about it. When does the harm resulting from religious conduct become so substantial that general laws should be able to prohibit it? To illustrate, maybe the Native American Church in Smith should have been able to use peyote, but maybe the church's use of the drug so stimulated the peyote market that others were harmed by the drug or violence associated with the drug trade.

Would a police officer who refuses to guard an abortion clinic produce a substantially harmful externality? By favoring one officer's preferences, the administration of law enforcement would be more inefficient, resulting in increased costs.

Would an ER nurse who refuses to give a rape victim emergency contraception produce a substantial harm? Maybe not, if there are many other nurses and hospitals that are willing and able to administer the drug. Yes, if the ER is in the only hospital in a rural area, and the ER nurse is the only person on duty who is able to administer the drug.

The problem with an RLRA constitutional amendment is that it enshrines the strict scrutiny test to govern complex and varied fact patterns, some of which call for a religious exemption, and some of which do not. When an RLRA is enshrined in legislation or case law, it is easier for the law to evolve and embrace the complexities. When the

rule is constitutional, it is much more difficult to do so.

North Dakota's RLRA is strikingly broad, and contains no enumerated exceptions to the religious exemption rule. More than some other states' rules, the North Dakota RLRA does not say anything about when religious exemptions impermissibly harm others.

Ironically, North Dakota's sweeping RLRA is so broad that judges will be able to craft exceptions as they arise. Judges will be put into the difficult position of having to limit constitutionally unlimited language, possibly drawing the criticism that they are being activist. In fact, they will simply be balancing interests, a deeply entrenched and quotidian part of constitutional analysis.

North Dakota's RLRA also contains some messy implications. It ostensibly applies to all religions. How are we to define religion? Why should religion, and not secular sounding belief systems, be exempted? Should it be analytically important whether a neutral governmental action infringes upon central or peripheral religious tenets?

**Conclusion**

North Dakota's RLRA is embedded in the various states' long-standing opposition to and action against the holding in Smith. It departs from what most states have done in that it is proposed to be a constitutional amendment, and not legislation or established through court order.

In my opinion, the RLRA would most immediately result in increased litigation, both from proponents who see governmental violations of the RLRA and from others who are deprived of their rights because religious people assert a right to religious exemption under the RLRA. North Dakota courts will therefore begin to carve out exceptions. The result over time will be a reshaping of the relationship between religion and secular law.

Because the RLRA would protect religious conduct more than the current regime, this reshaped relationship would probably favor religion more than it is currently protected. I do not predict the extent to which it will be more protected, but the examples of other states that have enacted RLRA rules may be a guide.

## APPENDIX

**Ala.Const. Art. I, § 3.01—Alabama Religious Freedom Amendment**

SECTION I. The amendment shall be known as and may be cited as the Alabama Religious Freedom Amendment.

SECTION II. The Legislature makes the following findings concerning religious freedom:

(1) The framers of the United States Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution, and the framers of the Constitution of Alabama of 1901, also recognizing this right, secured the protection of religious freedom in Article I, Section 3.

(2) Federal and state laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.

(3) Governments should not burden religious exercise without compelling justification.

(4) In Employment Division v. Smith, 494 U.S. 872 (1990), the United States Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.

(5) The compelling interest test as set forth in prior court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests in areas ranging from public education (pedagogical interests and religious rights, including recognizing regulations necessary to alleviate interference with the educational process versus rights of religious freedom) to national defense (conscription and conscientious objection, including the need to raise an army versus rights to object to individual participation), and other areas of important mutual concern.

(6) Congress passed the Religious Freedom Restoration Act,

42 U.S.C., § 2000bb, to establish the compelling interest test set forth in prior federal court rulings, but in City of Boerne v. Flores, 117 S.Ct. 2157 (1997), the United States Supreme Court held the act unconstitutional stating that the right to regulate was retained by the states.

SECTION III. The purpose of the Alabama Religious Freedom Amendment is to guarantee that the freedom of religion is not burdened by state and local law; and to provide a claim or defense to persons whose religious freedom is burdened by government.

SECTION IV. As used in this amendment, the following words shall have the following meanings:

(1) Demonstrates. Meets the burdens of going forward with the evidence and of persuasion.

(2) Freedom of religion. The free exercise of religion under Article I, Section 3, of the Constitution of Alabama of 1901.

(3) Government. Any branch, department, agency, instrumentality, and official (or other person acting under the color of law) of the State of Alabama, any political subdivision of a state, municipality, or other local government.

(4) Rule. Any government statute, regulation, ordinance, administrative provision, ruling guideline, requirement, or any statement of law whatever.

SECTION V. (a) Government shall not burden a person's freedom of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Government may burden a person's freedom of religion only if it demonstrates that application of the burden to the person:

(1) Is in furtherance of a compelling governmental interest; and

(2) Is the least restrictive means of furthering that compelling governmental interest.

(c) A person whose religious freedom has been burdened in violation of this section may assert that violation as a claim or defense in a judicial, administrative, or other proceeding and obtain appropriate relief against a government.

SECTION VI. (a) This amendment applies to all government rules and implementations thereof, whether statutory or otherwise, and whether adopted before or after the effective date of this amendment.

(b) Nothing in this amendment shall be construed to authorize any government to burden any religious belief.

(c) Nothing in this amendment shall be construed to affect, interpret, or in any way address those portions of the First Amendment of the United States Constitution permitting the free exercise of religion or prohibiting laws respecting the establishment of religion, or those provisions of Article I, Section 3, of the Constitution of Alabama of 1901, regarding the establishment of religion.

SECTION VII. (a) This amendment shall be liberally construed to effectuate its remedial and deterrent purposes.

(b) If any provision of this amendment or its application to any particular person or circumstance is held invalid, that provision or its application is severable and does not affect the validity of other provisions or applications of this amendment.