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March 1, 2016

The Honorable Nathan Deal
The Governor of the State of Georgia
206 Washington Street
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Atlanta, Georgia 30334

The Honorable Casey Cagle
The Lieutenant Governor of Georgia
240 State Capitol
Atlanta, GA 30334

The Honorable David Ralston
The Speaker of the Georgia House of Representatives
332 State Capitol
Atlanta, GA 30334

Dear Governor Deal, Lieutenant Governor Cagle, and Speaker Ralston:

This letter responds to a letter from Mr. Joe D. Whitley to you, dated February 24, 2015, regarding the need for the Georgia First Amendment Defense Act, HB 757.[1] This letter is mindful of Mr. Whitley's record of distinguished public service. Nonetheless, written at the behest of Georgia Equality, the February 24th letter makes several points that require a response because they inaccurately reflect First Amendment law, as well as the very real threats to religious liberty that currently exist.

When properly understood, the Georgia First Amendment Defense Act ("Act") will keep Georgia true to her founding as a haven for religious dissenters of all faiths. The Act does not place Georgia on the side of one group or the other; its terms are neutral in its protections of those who hold varying beliefs about lawful marriage. Rather the Act places Georgia on the side of religious liberty for all her citizens. By passing the Act, Georgia will protect all citizens from adverse government action based on their religious beliefs.

A. Correcting two inaccuracies regarding First Amendment law: In summarizing the First Amendment, the letter makes the mistake, often made by liberal commentators, that the "First Amendment in and of itself protects all Americans' rights . . . to worship freely." But the First Amendment is not narrowly limited to protecting the right "to worship freely," as important as that right is. Instead, the First Amendment protects the broader right of all Americans to the "free exercise of religion." "Free exercise . . . implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v.*

[1] The date on the letter presumably should be "2016".

Hobby Lobby, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). The Georgia First Amendment Defense Act is necessary to protect clergy and congregations, religious colleges and schools, as well as religious citizens in the myriad ways that the government touches their lives in the public square.

The letter also mistakenly states that "the United States Supreme Court has long held that civil courts cannot adduce the 'sincerity' of professed religious views." (p. 3). To the contrary, the Supreme Court has long held that courts may assess the sincerity of a religious claimant. This principle was first articulated seventy years ago in *United States v. Ballard*, 322 U.S. 78 (1944), and was most recently reaffirmed in *Hobby Lobby.* There the Court explained that "[t]o qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." 134 S. Ct. at 2774 n. 28, citing *United States v. Quaintance,* 608 F.3d 717 (10th Cir. 2010) (upholding a district court finding that a claimants' religious beliefs were insincere). The Supreme Court noted that courts routinely assess the sincerity of religious claims. 134 S. Ct. at 2774. While *Hobby Lobby* involved federal statutory protection of religious exercise under RFRA, the sincerity standard has long been applied in cases brought under the Free Exercise Clause and other federal statutes. As the Court stated fifty years ago, while "the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case." *United States v. Seeger*, 380 U.S. 163, 185 (1965) (interpreting Selective Service laws' exemption for religious objectors).

B. Why the Act Protects Pastors: Contrary to the letter's claim that there is no basis for their concern, hundreds of Georgia pastors are deeply concerned that they will be sued by private citizens or the government, or otherwise penalized by the government, for refusing to perform same-sex marriages. For several reasons, the General Assembly should enact legislation that allays pastors' concerns so that they can focus on their ministries without the threat of harassing lawsuits or penalties by state or local governments, including administrative agencies.

1. **In States in which the state legislatures adopted same-sex marriage, the legislation always explicitly protected ministers from having to perform same-sex marriages.** The following States explicitly protect ministers from having to perform same-sex marriages: Connecticut, Delaware, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Utah, Vermont, and Washington State, as well as the District of Columbia.[2] Because same-sex marriage was legalized in Georgia by court decree, rather than by the General Assembly, it is necessary for the General Assembly to enact the explicit protections for pastors that the General Assembly would have enacted if same-sex marriage had been legalized through the legislative process.

[2] Conn. Gen. Stat. §§46b-22, 46b-35a; Del. Code Ann. tit. 13, §106; D.C. Code §46-406(c); Md. Code Ann., Note: Fam. Law §§ 2-201, 2-202, 2-406, 2012 Mary. Laws Ch. 2 (H.B. 438); Minn. Stat. Ann. §517.09; N.H. Rev. Stat. Ann. § 457:37; N.Y. Dom. Rel. Law § 11(1); R.I. Gen. Laws Ann. §15.3-6.1; Utah Code 1953 § 63G-20-101, et seq.; Vt. Stat. Ann. tit. 18, § 5144(b); Wash. Rev. Code § 26.04.010.

2. Several recent events justify Georgia pastors' concerns regarding refusal to participate in same-sex marriages.

- In 2015, two ordained ministers filed a lawsuit against the City of Coeur d'Alene, Idaho, to avoid fines and jail time for declining to officiate same-sex weddings at their wedding chapel. A city attorney reportedly had stated that the ministers' refusal to perform same-sex marriages violated the city's nondiscrimination policy that prohibited discrimination on the basis of sexual orientation. Nina Culver, "Hitching Post Sues Coeur d' Alene after Declining to Marry Same-Sex Couple," *The Spokesman-Review,* October 17, 2014 http://www.spokesman.com/stories/2014/oct/17/hitching-post-sues-coeur-dalene-after-declining-ma/. **The Georgia First Amendment Defense Act ensures that state and local laws cannot be used to threaten ministers who will not perform same-sex weddings, as happened in Idaho.**

- A Methodist retreat center was required to allow its facilities to be used for a same-sex civil union ceremony after several same-sex couples filed complaints under the New Jersey "public accommodations" law. Eventually, the retreat center had to stop performing all marriages in order to avoid performing same-sex ceremonies. "Judge Rules in Favor of Same-Sex Couple in Discrimination Case," ACLU, January 13, 2012, https://www.aclu-nj.org/news/2012/01/13/judge-rules-in-favor-of-same-sex-couple-in-discrimination-case/. **The Georgia First Amendment Defense Act ensures that state and local laws cannot be used to force religious facilities to choose between either hosting same-sex ceremonies or hosting no weddings at all, as happened in New Jersey.**

- In 2015, the City of Houston, Texas, subpoenaed the sermons of five pastors who had preached in their pulpits against the City's recent amendment of its nondiscrimination law to include sexual orientation and gender identity as protected classes. The pastors had to go to court to defend their right to preach without government harassment. Josh Sanburn, "Houston Pastors Outraged after City Subpoenas Sermons Over Transgender Bill, *Time*, October 17, 2014, http://time.com/3514166/houston-pastors-sermons-subpoenaed/. **The Georgia First Amendment Defense Act ensures that state and local laws cannot be used to harass ministers who preach sermons that the government does not agree with, as was done in Texas.**

- Many government employees serve as Sunday school teachers, worship leaders, and lay ministers in their churches. State and local governments should not punish government employees who express their religious beliefs regarding marriage while serving as Sunday school teachers, worship leaders, and lay ministers in their churches. Yet Atlanta fired its nationally respected fire chief for publishing his Sunday school lessons about sexuality and marriage in a book. **The Georgia First Amendment Defense Act ensures that state and local laws cannot be**

used to punish government employees for what they say when they teach Sunday school, lead worship, or preach as lay ministers in their churches.

3. Pastors correctly understand that government bureaucracies currently do -- and will continue to seek to -- condition participation in the public square on their support for same-sex marriage. Even if the government does not directly *require* pastors to perform same-sex marriages, government may nonetheless *penalize* pastors and churches for their refusal to participate by *conditioning* access to government programs on their willingness to support same-sex marriages.

- **Religious organizations' tax exemption "is going to be an issue":** During oral argument last April in the same-sex marriage case, *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015), Justice Alito asked the United States government's lawyer whether religious schools might lose their tax exempt status if they opposed same-sex marriage. The government's lawyer, Solicitor General Donald Verrilli, replied, "[I]t's certainly going to be an issue. I -- I don't deny that. I don't deny that, Justice Alito. It is-- it is going to be an issue." Oral arg. tr. 38 http://www.supremecourt.gov/oral_argument/argument_transcript/2014/14-556q1_7148.pdf.

  Last July, in a hearing before the Senate Judiciary Oversight Subcommittee, United States Senator Mike Lee asked the current IRS Commissioner whether there were plans to revoke religious organizations' tax-exempt status if they opposed same-sex marriage. The IRS Commissioner's answer was disconcerting. He assured Senator Lee that would not happen in the next two-and-a-half years. http://www.lee.senate.gov/public/index.cfm/press-releases?ID=B237C7ED-B6FA-4268-93B9-0465057A3B3B. **The Georgia First Amendment Defense Act protects Georgia churches from having their state and local tax exempt status revoked because they refuse to perform same-sex marriages, regardless of what the federal IRS does.**

- **Denial of pastors' license to marry:** The late Justice Scalia asked during the *Obergefell* oral argument whether a State could *condition* a minister's license to perform legally valid marriages on his or her willingness to perform same-sex marriages. Oral arg. tr. 23-27. In response to Justice Scalia's inquiry, the lawyer declared that the First Amendment protected clergy from being forced to marry any one they did not wish to marry. But Justice Scalia clarified that he had asked a slightly different question: whether the State could *condition* the license to perform state-recognized marriages on the minister's willingness to perform same-sex marriages. **The Georgia First Amendment Defense Act protects Georgia pastors from having their ability to perform legally recognized marriages conditioned upon their willingness to perform same-sex marriages.**

- **Protecting religious colleges' housing policies:** Chief Justice Roberts asked during the *Obergefell* oral argument, "Would a religious school that has married

housing be required to afford such housing to same-sex couples?" Oral arg. tr. 36-37. The government's attorney, Solicitor General Verrilli, responded that would depend on state and local nondiscrimination laws. Specifically, it was "going to depend on how States work out the balance between their civil rights laws, whether they decide that there's going to be civil rights enforcement of discrimination based on sexual orientation or not, and how they decide what kinds of accommodations they are going to allow under State law." Relatedly, on February 11, 2016, AB 1888 was introduced in the California Assembly to prohibit state educational grants to students who attend colleges that have policies that reflect traditional religious beliefs regarding sexual conduct and marriage. http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1851-1900/ab_1888_bill_20160211_introduced.html. **The Georgia First Amendment Defense Act "works out the balance" for Georgia, as the Solicitor General said each State must do. The Act protects religious colleges from state and local laws that would 1) require them to permit same-sex conduct in their student housing; 2) require them to allow transgender students to live in dorms designated for members of the opposite sex; or 3) withhold state education grants from students who attend colleges that have policies reflecting traditional religious beliefs regarding sexual conduct and marriage.**

C. <u>The Act prevents discrimination and ensures equal protection of the law for persons regardless of their religious beliefs</u>: As the examples cited above demonstrate (and more examples occur on a weekly basis), religious citizens who hold traditional religious beliefs regarding marriage are being targeted for government discrimination because of their religious beliefs. The Act would proactively protect all citizens regardless of their religious beliefs regarding lawful marriage, without making any citizen more vulnerable to discrimination.

1. The letter's claim that the Act will allow discrimination is completely unsupported. The letter lists six "acts of discrimination that arguably would be permissible under Georgia law were the Act to go into effect." (p. 4). Two of these acts have been illegal for fifty years under the federal Civil Rights Act of 1964, and one is prohibited by a 2011 federal regulation. Obviously, the Act cannot and does not preempt federal law. Thus, the letter's claims that "a restaurant could refuse service to an interracial couple" or "a hotel could refuse to make its ballrooms available for Jewish weddings" are false. 42 U.S.C. 2000a (a) & (b). The claim that a hospital could deny a man visitation with a dying spouse is also wrong. In 2011, the U.S. Department of Health and Human Services adopted regulations that require all hospitals participating in Medicaid and Medicare programs to permit patients to designate visitors of their choosing and prohibit discrimination in visitation based on a number of factors, including sexual orientation and gender identity. 42 C.F.R. 482.13(h)(4).

The remaining three examples have not happened even though state law does not prohibit them. That is, right now, completely apart from the Act, state law does not prohibit a sales clerk from refusing to attend a single mother (marital status), a business from refusing to hire a single woman living with her opposite-sex partner (marital status), or a mobile phone operator from refusing to sell a family plan to a same-sex couple (sexual orientation). ***Yet none of these things***

are occurring now when state law does not prohibit these actions. **Passing the Act will have no effect whatsoever on the legality of these acts. But more importantly, these actions are not happening now when they are lawful. Nothing in the Act makes them any more lawful or any more likely to happen.**

2. The Act explicitly does not protect government employees who refuse to perform their jobs. The letter states that "the Act prohibits Georgia from fulfilling its governing functions" if government employees refuse to do their jobs. (p. 4). But in Section 50-15A-4(c), the Act explicitly states that "nothing in this chapter shall be applied to afford any protection or relief to a public officer or employee who fails or refuses to perform his or her official duties."

3. An individual's free exercise of religion includes her ability to run her business as her religious conscience dictates. It has always been recognized as familiar practice for citizens to have the freedom to run their businesses according to the peaceful tenets of their faith. In 2014, the Supreme Court found that "protecting the free-exercise rights of corporations . . . *protects the religious liberty of the humans who own* and control those companies." *Hobby Lobby,* 134 S. Ct. at 2768 (emphasis supplied). Just as Apple asserts its Fourth Amendment rights, and The New York Times asserts its First Amendment rights, so some businesses may be eligible to assert free exercise of religion claims in appropriate cases, although those claims almost always will be limited to companies that are closely held and family-owned. *See id.* at 2775 (holding applies to "a for-profit closely held corporation").

In the same way that some religious people determine not to take contracts to advertise alcohol or tobacco (legal products), print posters for abortion (a legal procedure), or bake cakes with offensive ornaments or messages (legal expression), this legislation ensures that a person's creative talents and expression are her own to provide or withhold according to her faith with regard to participating in marriage ceremonies. In the past, this freedom to act on a religious conviction as a business owner has rarely been questioned and has generally been a respected freedom of the marketplace. (It is important to note that rare religious claims to engage in racial discrimination have never succeeded and will never succeed.)

Currently, however, a hostile climate has developed questioning religious freedom as it pertains to marriage. Unfortunately, it now requires States to act in order to protect what should be the general understanding of what the First Amendment is designed to protect, the Free Exercise of Religion.

D. The Act embodies the best of American Lockean tradition by respecting religious diversity and allowing each person, in all aspects of their daily lives, to determine, in a peaceful manner, how to glorify God and best serve Him with their time, talents, goods, and resources: Increasingly, in today's culture, we lack an essential appreciation for the overall value of religious liberty and its vital importance to the maintenance of all human rights, dignity, and freedom to choose to live lives of integrity. We have lost even our understanding of the foundational influence that religious liberty had in establishing not only this nation, but also our constitutional system of governance. We fail to understand that our Anglo-American heritage of Lockean individualism and pluralism is vastly superior to the current demands for coerced uniformity. This historical perspective is vital to today's current debate.

America has already traveled the long, hard road from mere religious tolerance to true religious liberty for all citizens. Colonial times were rife with government orthodoxy requiring uniformity in religious doctrine and practice. Dissenters were ostracized, persecuted, and even killed. Even those who could "worship freely" were nonetheless required to pay tithes to support the Church of England. In 1763, Patrick Henry finally stepped out to denounce the tyranny of the established church in the case of the *Parson's Cause*. Subsequent efforts by Thomas Jefferson and James Madison in Virginia resulted in religious liberty becoming part of the state's new Constitution. By June 12, 1776, final language had been adopted by Virginia's Constitutional Convention, which read:

> That religion, or duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[3]

Sadly, in our day, it appears that many Americans are willing to turn the clock back 240 years and abandon the great strides that our forefathers made to ensure real religious freedom for all in this great nation. The Founders understood that without true freedom of conscience and the ability to act peacefully upon those beliefs, in the end, other freedoms, including speech, press and assembly, cannot survive.

The nation is at a crossroads, and the choice as to how we honor our foundational principles increasingly rests with State leaders. Georgia is well positioned to be a leader on religious liberty and ensure that the Founders' vision of a Republic dedicated to religious liberty is handed down to our children and grandchildren.

Yours truly,

/s/ Kim Colby

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Christian Legal Society

cc:
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[3] The Constitution of Virginia, June 29, 1776; The Avalon Project at Yale Law School [Online] available at http://www.yale.edu/lawweb/avalon/states/va05.htm.

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