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Mr. Jim W. Smith
Director, Legislative Council
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

By U.S. Mail

Dear Mr. Smith,

We write to provide you our opinion concerning the Religious Liberty Restoration Amendment that will be on the June 12 ballot as "Measure 3." We heartily endorse the Amendment. This endorsement is based on our years of teaching and scholarship on the law of religious freedom.

The proposed Amendment is a version of the Religious Liberty Restoration Acts (RFRAs) that have been enacted at both the federal level (to govern federal law) and in sixteen states: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. Another fifteen states have interpreted their state constitutions to provide similar protection: Alaska, Indiana, Maine, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, North Carolina, Ohio, Washington, and Wisconsin. By this count, thirty-one of the fifty states and the federal government have provided, in one form or another, the protection for religious liberty that would be provided by the proposed Amendment. These protections, including the compelling interest test, which North Dakota does not currently apply to religious freedom claims, have proven to be invaluable tools for promoting justice and freedom for citizens in these other states, including Minnesota and Montana. North Dakota would do well to join the majority of states in protecting religious liberty with the compelling interest test.

The federal RFRA has applied to federal law since 1993. Some of these state laws and decisions have also been around for a long time. The standard enacted in these laws was the constitutional law for the entire country from 1963 to 1990. In the places where these laws exist, they have not been interpreted in crazy ways that have caused problems for those jurisdictions; if anything, they have been enforced too cautiously. If the sky has not fallen in the 31 states where these provisions are already the law, including neighboring states like Minnesota, there is no reason to think the experience will be any different in North Dakota.

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Indeed, these laws typically do not wind up applying to 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.

We understand that some opponents of the Amendment have said that it will be too protective of religion. That reflects a misunderstanding of the compelling interest test, which is the way that the Amendment and laws like it protect the interests of the broader community. For example, as applied to racial discrimination, or to censorship of speech, the compelling interest test nearly always leads to unconstitutionality. But that is not inherent in the compelling interest test; that is because there are so few good reasons for racial discrimination or censorship of speech. As applied to conduct, the compelling interest test will more often be satisfied, because conduct will more often do tangible harm to somebody else. For example, preventing harm to children is a quintessential compelling governmental interest, and the state could prohibit any conduct resulting in harm to children. Everyone agrees that the state has a compelling interest in preventing physical injury to other persons.

This letter is necessarily too short so we are sending along with this letter a recent article on the issues presented by the Amendment. Douglas Laycock, *The Religious Exemptions Debate*, 11 Rutgers J. L. & Religion 139 (2009), available at www.lawandreligion.com/publications.

You are authorized to share this letter with anyone who is interested.

Very truly yours,

[Institutional affiliations provided for purposes of identification only]

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