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REPRESENTATIVE WES KELLER
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TO: Representative Talerico

THROUGH: Representative Keller

FROM: Ken Truitt, Staff to Rep. Keller
Alaska Bar no: 9406053

DATE: April 4, 2016

RE: Response to 4/1/16 ACLU letter

CC: Rep. LeDoux, Chair, House Judiciary Committee
Rep. Keller, Vice-Chair, House Judiciary Committee

I write to offer some additional comments and clarifications to those of Joshua Decker of the Alaska ACLU regarding HB 236. In his letter of April 1, 2016, Mr. Decker recounted his organizations impressive record of defending constitutionally protect religious liberties—and to be sure when constitutional enumerated rights are protected, we all benefit—but to also suggest HB 236 as drafted presented perhaps negative unintended consequences. I offer some clarifying thoughts to those conclusions.

Mr. Decker referred to how well in balance constitutional religious liberties have been over the last almost 60 years with those rights guaranteed by the various nondiscrimination laws and suggests that HB 236 as drafted will upset that balance.

I have been licensed to practice law in Alaska for over 20 years and for almost 10 of those years I regularly defended the State of Alaska against claims that either the state or its employees had violated a person's constitutional rights. Through that experience I have learned that constitutional doctrine is never static. "In balance," as Mr. Decker writes, implies a permanence or that constitutional doctrine remains immovable.

To the contrary, constitutional doctrine is more like a pendulum on a grandfather clock: It is always in motion and every so often subject to the total reversal of direction and then travel in the opposite direction.

The *Obergefell v. Hodges*[1] case from this past summer was just such a momentum change. Yet, when Mr. Decker refers to the "decades long balance" he fails to discuss *Oberfell*'s effect on both First Amendment religious liberties and the various nondiscrimination laws. Specifically, never before has a right protected by nondiscrimination laws directly conflicted with a constitutionally protected Sacrament of the Catholic Church and an essential tenant of a majority of protestant churches and other major world religions.

Obviously, a tension now exists between these two rights that before *Obergefell* were in balance. Yet the Court in *Obergefell* issued no guidance to clarify how these competing rights may co-exist going forward. Indeed, one of *Obergefell's* defining attributes as a Supreme Court decision is the Court neither explained its rationale nor offered any insight as to how far that rationale might extend. Thus, while the case announced a new right, it created more uncertainty than clarity in how that new right will impact more traditional religious liberties.

Typically, this type of uncertainty gains clarity through litigation, or legislation. As I read HB 236, the bill provides clarity where none currently exists and eliminates areas of possible litigation. Given how most churches are funded through member donations, and thus, not typically funded far beyond the monthly tithes and offerings, clarity and reduced risk of litigation are good outcomes.

Mr. Decker also briefly mentioned two different cases that I will offer some additional thoughts to. Justice Scalia, in writing for the majority in a free exercise case from 1990 did author the quote Mr. Decker cited. The sum of the quote being that religious beliefs do not excuse a person from complying with a valid law that prohibits certain conduct. Some context helps clarify this quote.

In that case[2] two Oregon residents lost their jobs as drug rehabilitation counselors because they had ingested peyote during a ceremony of their church, the Native American Church. At the time peyote was a schedule I controlled substance and its intentional possession a crime in Oregon with no religious use exemption. They were later denied unemployment benefits from the State of Oregon because their dismissal was the result of work related misconduct. They sued in state court. Their case eventually reached the U.S Supreme Court where the Court denied their claim that Oregon had unlawfully encroached on their First Amendment free exercise of religion rights.

Thus, when Justice Scalia refers to religious beliefs not excusing one from complying with otherwise valid laws that prohibit conduct, he is specifically referring to the illegal possession and consumption of schedule I controlled substances.

The case is most known for prompting Congress to enact the Religious Freedom Restoration Act (RFRA); Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993). In ruling against two employees, Justice Scalia announced a new test for free exercise cases while abandoning the long established compelling state interest test used to adjudicate fundamental rights issues (recall the earlier discussion about constitutional doctrine being more like a

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[1] 576 U.S. ___ (2015), Docket No. 14-556 (the gay marriage case).
[2] *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

pendulum). Congress quickly—for Congress—passed the RFRA, overruled the new test Justice Scalia had created, and reinstated the compelling state interest test for free exercise cases.[3]

Mr. Decker also referred to an Alaska Supreme Court case that is a little more relevant—while not directly on point still speaks to the merits of HB 236. In *Swanner v. Anchorage Equal Rights Commn.*, 874 P.2d 274 (Alaska 1994) a landlord was found to have violated an Anchorage municipal ordinance that prohibited landlords from denying a rental based on someone's marital status. Mr. Swanner had consistently applied a policy of not renting to couples who planned to live together without being married. His cited reason was his sincere religious belief in the sanctity of marriage. *Id.* at 277. The Alaska Supreme Court upheld the Anchorage ordinance and found its application against Mr. Swanner did not violate his free exercise rights under the U.S. and Alaska Constitutions. *Id.* At 284.

The *Swanner* scenario differs from the effect of HB 236 on many levels. *Swanner* dealt with two heterosexual people living together while unmarried and a landlord who was in business to make money from offering living units to people for profit. Whereas HB 236 provides liberty to churches and religious institutions that offer their facilities as a public service to their communities. Absent HB 236 being adopted, it is not too hard to imagine a church facing a challenge under the *Swanner* rationale for the refusal to allow its facility to be used for events related to the solemnization or celebration of certain marriages. HB 236 provides clarity and would announce when these competing interests collide, the state's policy is to protect the free exercise of religion. This is absolutely within the legislature's purview to do so.

In summary, constitutional jurisprudence likens more to a pendulum than a static item balanced in stillness. Whatever balance may have existed between the nondiscrimination laws and protected exercise of religion was upset by the *Obergefell* case and as a result uncertainty not clarity exists between these two areas of protected liberties. HB 236 would bring more clarity where there is confusion, more certainty where there is doubt.

If I can be of further assistance, please do not hesitate to ask.

[3] The Supreme Court turned around and ruled the RFRA was unconstitutional, at least as it applied to the states (that pesky pendulum again) and since then states have been enacting their individual versions of RFRA, although Alaska has yet to do so.

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