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Hon. Robert Duncan, Chair
State Affairs Committee
Texas Senate
P.O. Box 12068, Capitol Station
Austin, TX 78711

Dear Senator Duncan:

I write in response to the memorandum by Paul Benjamin Linton, of Texas Alliance for Life, which is apparently circulating in the Legislature.

Mr. Linton and his organization appear to have one real issue, a fear that religious liberty could somehow, someday, be distorted into a new source for the right to choose abortion. But in pursuit of that issue, they have launched a general attack on religious liberty, an attack as hostile to religion and to religious liberty as anything that could have been written by the most ardent opponent of religious faith.

Mr. Linton actually appears to prefer the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). See page 2 of his April 9 memorandum, where he complains that the proposed constitutional amendment would require government to justify burdens on religious liberty instead of presuming that all such burdens are constitutional, and where he complains that the amendment would protect religious liberty even where government does not "single out religious conduct" for unique regulation. Under *Smith*, legislators and bureaucrats are free to regulate or oppress religion as much as they like so long as they find a nondiscriminatory way to do it. Discrimination is described very ambiguously in the *Smith* opinion, and Mr. Linton appears to take the narrowest possible view ("single out religion") of *Smith*'s limited protections. *Smith* has been denounced by every religious organization in America that speaks to public policy issues. This is why the Legislature enacted the Texas RFRA in 1999.

I will speak first to his concerns about abortion, and then to the other issues he raises.

I. Abortion

Mr. Linton envisions a world in which the Supreme Court has overruled *Roe v. Wade* and returned control of abortion to the states. Until and unless that happens, SJR 4 is utterly irrelevant to abortion under any possible theory.

Next he imagines a Texas Supreme Court determined to create a state constitutional right to abortion, despite the absence of any abortion language in the Texas Constitution. This of course is wildly implausible. The Texas Supreme Court has been composed of nine conservative pro-life Republicans for about twenty-five years now, and it will be composed of nine conservative pro-life Republicans for as far into the future as anyone can foresee. And if some kind of radical political change eventually turns Texas deep blue and puts a pro-choice majority on the Texas Supreme Court (even as the country moved further right, electing Presidents who appointed enough Justices to overrule *Roe*), then the pro-life side would need vigorous protection for religious liberty. The pro-choice side would not.

Medical providers — religious hospitals, obstetricians and gynecologists, nurses, emergency room personnel — have a core religious liberty claim not to be forced to perform or assist with abortions. Their right to conscience is currently protected by federal statutes, but those statutes are effectively unenforceable, because they create no private right of action. See *Cenzon-DeCarlo v. Mount Sinai Hospital*, 626 F.3d 695 (2d Cir. 2010). Texas has its own protections for conscience with respect to abortion, Texas Occupations Code chapter 103, but of course, in the radically changed political environment that Mr. Linton imagines, that protection could be repealed. For that matter, all restrictions on abortion could be repealed.

But his focus is on the Texas Supreme Court. So assume that Texas someday has a pro-choice Supreme Court committed to creating a state constitutional right to abortion. Justices of the Court are elected, or appointed by the governor between elections; we have to imagine that the Court somehow becomes strongly pro-choice while the Governor and the Legislature do not. Only in that circumstance would the Court need to strike down abortion regulation.

In such an implausible scenario, the Court could easily and obviously invalidate abortion regulation under the Due Course of Law Clause in Tex. Const. art. I, §19. This is the state equivalent to the federal Due Process Clause, which is the clause the U.S. Supreme Court relied on to create a right to abortion. A decision under the Due Course of Law Clause would protect any woman seeking an abortion, as a pro-choice court would want. Protection would not be limited to only those women who implausibly claim that their abortion is religiously motivated.

So in Mr. Linton's imagined world, Texas will turn deep blue, the Texas Supreme Court will become pro-choice, but it will not think to follow *Roe v. Wade* and invoke the Due Course of Law Clause. It will create a right to abortion only if the Texas

Constitution provides more explicit protection for religious liberty. This scenario is not just implausible; it is absurd.

My colleagues and I said, in our letter of April 5, that when opponents tell you about terrible things that could happen under the Religious Freedom Amendment, you must insist on examples where such things have actually happened. Of course Mr. Linton did not give you any examples. In his November 19 memorandum, he collected several cases, arising over thirty plus years, where lawyers made arguments under religious liberty guarantees. But he did not find any case where such arguments prevailed.

He relies principally on *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y. 1980), where a federal district court appeared to believe that there is a free exercise violation if different faith groups disagree about the morality of a practice or of the law regulating it. I say "appeared to believe," because there is no free exercise analysis anywhere in the opinion, and the apparently implicit theory is not a free exercise theory that the Supreme Court (or any other court, so far as I know) has ever been recognized. Mr. Linton's memorandum confidently inserts "Free Exercise Clause" in brackets in a quotation that is 51 pages removed from the last mention of "free exercise"—and that mention was merely a quotation of the plaintiffs' argument.

The Supreme Court understood the district court to have found a free exercise violation. But it reversed on the ground that no plaintiff alleged that she wanted an abortion for religious reasons. *Harris v. McRae*, 448 U.S. 297, 320-21 (1980). This is technically a standing decision, as Mr. Linton says, but its practical effect is to dramatically limit the potential for free exercise claims about abortion. Most of these religious claims to abortion rights have argued that the plaintiff's religion *permits* abortion—*not* that the plaintiff's religion requires or motivates abortion.

"My religion permits it" is not enough under *McRae*, and that is clearly right. Religions permit all sorts of things. Your religion permits you to serve in the legislature, and my religion permits me to teach in law schools—but no one thinks that those acts are exercises of religion. Everything is either permitted or forbidden or required by every religion. Recognizing "my religion permits it" as a basis for free exercise claims would turn all of human behavior into the free exercise of religion. The Texas Supreme Court will not adopt such an absurd theory—even if Texas turns deep blue. *Harris v. McRae*, and it's underlying logic, is a much more substantial obstacle to free exercise claims to abortion than Mr. Linton acknowledges.

Then he says that in *Planned Parenthood v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000), the Supreme Court of Tennessee found a right to abortion in the state constitutional right to privacy, first recognized in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). This is literally true but deeply misleading. *Davis* found the right to privacy first and foremost in the Law of the Land Clause, another variant formulation of the Due Process Clause. ("[N]o man shall be . . . deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I §8.) Then, in a penumbras, emanations, and kitchen sink opinion, the court found collateral support for its decision in *six* other

clauses, including the Freedom of Worship Clause (art. I, §3). The language of this clause that the Tennessee court relied on also appears, with only the slightest of stylistic variations, in the *existing* Texas Freedom of Worship Clause (Tex. Const., art. I, §6).

Plainly the Tennessee court would have reached the same result with or without a Freedom of Worship Clause. Equally plainly, if a pro-choice court were determined to use a religious liberty clause in support of abortion rights, the existing Texas Constitution would be quite sufficient. Such a decision would not be a legitimate use of the Religious Freedom Amendment, and the Religious Freedom Amendment would not be necessary to such a decision.

Finally, Mr. Linton claims that the Supreme Court of Montana relied on a religious liberty clause to support abortion rights. *Armstrong v. State*, 989 P.2d 364 (Mont. 1999). He acknowledges that the Montana court relied primarily on an express right to privacy in the Montana Constitution, and that the language he relies on comes in "a coda" to the opinion. That "coda," like the Tennessee opinion in *Sundquist*, quickly invoked five different constitutional clauses (separately noting a right to dignity and a right to equal protection in one of them), with no real analysis of any of them. The court said that the speech and religion clauses together protect "the freedom to accept or reject any religious doctrine, including those about abortion, and the right to express one's opinion in all lawful ways and forums." 989 P.2d at 383. This passage is about speech an opinion; the right to actually have an abortion came from the Privacy Clause (art. II, §10).

Summing up, the sequence of dramatic political events that Mr. Linton imagines is extremely unlikely. But if those events come to pass, the presence or absence of the proposed Religious Freedom Amendment in the Texas Constitution will have no impact on the ability of a pro-choice Texas Supreme Court to create a right to abortion if it chooses to.

It follows that Mr. Linton's proposed abortion-neutral language would make no substantive difference to any imaginable litigation. The Religious Freedom Amendment is irrelevant to abortion, and adding language to say it is irrelevant would not change that. The question is whether you can pass the amendment once abortion language is added. The experience in Congress, and in some other state legislatures, has been that the abortion issue kills nearly every bill it touches, because the pro-choice and pro-life sides cannot agree on language, and anything that seems neutral to one side seems biased to the other. You should not let this be bill be killed by symbolic fights over abortion politics.

II. Other Issues

About the rest of Mr. Linton's issues, less needs to be said.

First, he says that the proposed amendment would protect religiously motivated conduct, but that the pre-*Smith* law protected only conduct that was religiously required or religiously prohibited. This simply misdescribes the pre-*Smith* law. Sometimes the Court talked in terms of religious compulsion, but more often when it debated free

exercise, it talked in terms of religious motivation. *See Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("acts or abstentions . . . engaged in for religious reasons, or . . . because of the religious belief that they display"); *id.* at 881 ("religiously motivated conduct"); *id.* at 882 ("conduct . . . accompanied by religious convictions"); *id.* at 893 (O'Connor, J., concurring) ("conduct motivated by sincere religious belief," "religiously motivated conduct"); *id.* at 894 (O'Connor, J., concurring) ("religiously motivated conduct"); *id.* at 897 (O'Connor, J., concurring) ("conduct . . . motivated by their sincere religious beliefs"); *id.* at 898 (O'Connor, J., concurring) ("religiously motivated conduct"); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("rooted in religious belief"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("following the precepts of her religion"); *Braunfeld v. Brown*, 366 U.S. 599, 603 ("in accord with one's religious convictions"); *Cleveland v. United States*, 329 U.S. 14, 20 (1946) ("motivated by a religious belief").

Advocates and lower courts that experimented with protecting only conduct that is religiously compelled produced absurd results in that era. See, e.g., *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990) (government argued that whether to orient the altar with the priest facing the people or with his back to the people was not a protected religious choice unless the orientation of the altar was compulsory); *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1123 (Wash. 1989) (holding that becoming a minister is not an exercise of religion, because it is not required by the church); *Brandon v. Board of Education*, 635 F.2d 971, 977 (2d Cir. 1980) (holding that Christian prayer is not an exercise of religion, because it is not required at any particular time or place).

To avoid such issues, most Religious Freedom Restoration Acts enacted or amended since *City of Boerne v. Flores*, 521 U.S. 507 (1997), have expressly protected religiously motivated conduct, including the Texas RFRA ("substantially motivated by sincere religious belief," Tex. Civ. Prac. & Remedies Code §110.001), and the federal RFRA ("any exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. §2000bb-2(4), 42 U.S.C. §2000cc-5(7).

Second, Mr. Linton complains that the statutory Texas RFRA applies only when government "substantially burdens" the exercise of religion, and that the proposed constitutional amendment omits the word "substantially." This is true, and of little moment. These cases inevitably end in a judicial balancing of the burden on religion against the government's asserted compelling interest, so that insubstantial burdens are vastly easier to justify. If the Committee wishes to insert "substantially" before "burden" and "burdened" in the amendment, little would change. The same would be true if the Committee wanted to say "substantially motivated" in the proposed constitutional amendment. Courts are naturally skeptical of claims that appear to have a bit of religious motivation and a larger amount of secular motivation.

Third, Mr. Linton worries that the proposed amendment adds a definition of "burden" (or "substantially burden," if that word is added). Indirect burdens of the sort specified in this definition have been included in the law of free exercise at least since *Sherbert v. Verner*, 374 U.S. 398 (1963), where plaintiff lost her unemployment compensation because she would not work on the Sabbath. This kind of case is what "withholding

benefits" refers to: cases where a religious person forfeits some benefit to which he would otherwise be entitled, because of his exercise of religion.

Mr. Linton's fear that the amendment could create a right to government funding for abortion has no basis. There is a large body of law holding that the government's failure to fund a constitutional right does not burden that right. Much of this law was made precisely in the context of government's refusal to fund abortions. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). The Supreme Court of Texas has also upheld refusal to fund abortions under the Texas Constitution, including under the more specific provisions of the Texas Equal Rights Amendment. *Bell v. Low Income Women*, 95 S.W.3d 253 (Tex. 2002). Here too, the kind of sweeping political change that would lead the Texas Supreme Court to require abortion funding, under any theory, is extremely difficult to imagine. And as I already noted, if such change ever comes about, there would be many ways for the Court to do it, and it would be the pro-life side who would be most in need of strong and explicit religious liberty protections.

Fourth, Mr. Linton complains that the bill does not propose to move all the detail of the statutory Texas RFRA into the state constitution. Of course the detail appropriate to a statute is rarely appropriate to a Constitution; no other provision of the Texas Bill of Rights has that kind of detail. But the legislative history will be that the constitutional amendment was based on the pre-existing statute. And some of the details in the statutory Texas RFRA—especially the provision on refusal to fund religious institutions—were aimed at dangers just as imaginary as Mr. Linton's fears about a religious right to abortion. And of course, even with the proposed amendment added, the Texas Constitution will still say, in the very same section, that "No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." That would make it impossible to reach a good-faith interpretation that the proposed amendment requires government funding of the exercise of religion.

Mr. Linton particularly complains about the omission of the language in the statutory Texas RFRA freezing land use regulation of churches as of April 17, 1990. That language is now largely irrelevant, because any religious land use case can be litigated under the federal Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc *et seq.* And the Texas Supreme Court has correctly concluded that on April 17, 1990, both state and federal law provided substantial protection to churches in the land use process. *Barr v. City of Sinton*, 295 S.W.3d 287, 296-99 (2009).

Fifth, Mr. Linton complains that of the seventeen state RFRAs, only one is a constitutional amendment. That is true. But there is little basis for his view that constitutional amendments are peculiarly vulnerable to "absurd and unreasonable interpretation." And while he may think that *Roe v. Wade* is an example of such absurd interpretation, the federal Constitution is essentially impossible to amend on any issue that is at all controversial. The Texas Constitution is much easier to amend.

Of course it is true that constitutional provisions are more insulated from the political process. That is the point, as I said in my letter of April 5. The relevant concern about the greater ease of amending a statute as compared to the state Constitution is not the remote possibility that some future Texas Supreme Court will run amuck. The real concern is that the Court will protect some small religious minority that is unpopular for some reason, or that has irritated some influential people without doing any real harm, and that the statutory Texas RFRA would be amended to exclude that religion's practice from the protection of the law. That could happen with the Constitution too, but it would be at least somewhat more difficult; the process would at least be slowed down.

Finally, Mr. Linton complains that I gave insufficient attention to variations in the language of court opinions in the thirteen states that have judicially rejected the approach of *Employment Division v. Smith*. There is one fundamental disagreement here: should religious liberty be protected against all unjustified governmental interference, or should it be protected only against laws that are in some (vaguely defined) sense discriminatory against religion? The thirteen states I listed are unambiguously on the side of protecting religious liberty against all unjustified interference. It is true that there are variations in the formulation of the rule in these thirteen states. Occasionally, some of these variations will matter. Most of the time, most of them will not.

The Texas RFRA puts Texas squarely on the side of protecting religious liberty against all burdens that cannot be justified. The question before your Committee is whether Texas will put that protection into the state Constitution, thereby giving it somewhat greater protection against the sort of cataclysmic political change that Mr. Linton claims to fear. Protections for fundamental liberties belong in the Constitution, and not merely in statutes. Nothing in Mr. Linton's two memoranda suggests to me that the free exercise of religion should be an exception.

Shortness of time, and the degree of detail in Mr. Linton's memoranda and therefore in this response, made it impossible to circulate drafts and reach agreement on the text among the sixteen original signers. This time, I write on my own.

As you may know, I lived in Texas for twenty-seven years, and left only with the greatest reluctance, when my wife got the proverbial job offer we couldn't refuse. I testified in hearings on the statutory Texas RFRA, and I regret that I am too far away to testify during the semester on the proposed constitutional amendment. I am available for further consultation from a distance if that would be helpful.

Very truly yours,

Douglas Laycock