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By fax to (502) 564-2517

The Honorable Steve Beshear
700 Capitol Avenue, Suite 100
Frankfort, Kentucky 40601

Re: HB 279, Religious Actions and Refusals bill – OPPOSE

Dear Governor Beshear:

We write on behalf of Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") respectfully to urge you to veto HB 279. Lambda Legal is the oldest and largest nonprofit legal organization working nationally through policy advocacy, education, and impact litigation to achieve full civil rights for lesbian, gay, bisexual, and transgender ("LGBT") people and those living with HIV. We urge you to oppose HB 279 because it is **far too broad, confusing,** and **would place a costly, impractical burden on government** to prove to a high evidentiary standard that it has used precise legal drafting and is serving compelling public needs whenever a law governing public conduct happens to burden an individual's personal religious beliefs. In addition to imposing a heavier and considerably more confusing burden of proof upon the government, this bill adds novel "specificity" provisions that might be taken to require new drafting of many statutes to permit their enforcement. **This unclear drafting alone is grounds for your veto.**

In addition, for Lambda Legal and so many organizations that serve the people of Kentucky, reducing discrimination and making communities safer, more inclusive places for all to live, work, attend school, run a business, or raise a family is the core of our mission. From the requests for help we have received from Kentuckians, our educational work in the state, and litigation in other states, we believe **HB 279 would undermine Kentucky's state and local laws against discrimination.** However unintended that consequence may be, the fact remains that **Kentucky's laws against discrimination serve crucial interests of families, businesses, and government.** At a minimum, HB 279 should have been amended to preclude its use as a defense to claims of discrimination. Because such an amendment was offered and rejected, and for other reasons set forth in this letter, **Lambda Legal respectfully encourages your veto.**

I. HB 279 Invites Religious Challenges To Any and All Kentucky Laws, Which Would Impose Unwarranted Administrative Burdens And Litigation Costs.

Last year, this state's Supreme Court applied sound constitutional analysis when, in *Gingerich v. Commonwealth*,[1] it held that the state could enforce public health, safety and welfare laws of general applicability without proving that a particular application of the law was the very least restrictive means to achieve a compelling government objective. Kentucky's high court applied long-settled state and federal precedents when observing that:

> "'religious freedom has two components: freedom to believe and freedom to act. … What one chooses to believe is an *absolute* freedom, which no power on earth can in reality arbitrate. … But, 'in the nature of things,' freedom to act cannot be absolute in human society where beliefs and practices vary, and where a given practice, absolutely freely enacted, can inflict harm on others. … Thus religious *conduct* must remain subject to regulation for the protection of society."[2]

The *Gingerich* decision drew from Justice Scalia's 1990 examination of prior, federal religious liberty case law. Writing for the United States Supreme Court , Justice Scalia concluded that the U.S. Constitution does not require government to satisfy the most rigorous of constitutional tests (the "strict scrutiny" test) in order to enforce laws regulating commerce, taxation, public safety, and other matters of public life even when such laws happen to conflict with the religious views of some.[3] As long as a law applies to everyone alike and was not enacted to target a religious group or practice, the federal Constitution allows it to be enforced if it serves a

[1] 2012 Ky. LEXIS 175, 382 S.W.3d 835 (2012).

[2] *Id*. at 840-41 (citing *Mosier v. Barren Cty. Bd. of Health,* 308 Ky. 829, 833, 215 S.W.2d 967, 969 (1948), and *Lawson v. Commonwealth,* 291 Ky. 437, 164 S.W.2d 972, 973 (1942), both of which cited *United States v. Ballard,* 322 U.S. 78 (1944), and *Cantwell v. Connecticut,* 310 U.S. 296 (1940)) (emphasis in original).

[3] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

legitimate public purpose in a rational manner.[4] This test has proved sensible and practical in the years since then.

As *Gingerich* notes, however, members of Congress wanted to establish more protection for religious believers. They enacted the Religious Freedom Restoration Act ("RFRA") in 1993.[5] That law reinstated the strict scrutiny test for federal religious free exercise claims, along the lines discussed in Justice Scott's *Gingerich* dissent.[6] RFRA has key provisions similar to those of HB 279.

The U.S. Supreme Court considered RFRA in 1997 in a local zoning case and determined that RFRA is unconstitutional as a defense against state and local laws.[7] In his concurring opinion, Justice Scalia again emphasized that a firm commitment to freedom of religious belief and worship does not necessarily mean freedom to disregard general laws that regulate the public sphere in a religiously neutral manner for the safety and wellbeing of everyone in society.[8]

After the U.S. Supreme Court held RFRA unconstitutional, Congress passed a tailored law to give greater protection for religious exercise in two contexts. This law, called the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[9] has made it easier for prisoners to seek – and often obtain – accommodation of a wide range of religious practices, and for religious groups to obtain variances from zoning rules. A quick search among federal decisions yields many cases.[10] Views certainly

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[4] *Id*. at 885. *Compare Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law intentionally targeting a group's religious practice receives strict scrutiny even if generally applicable).

[5] 42 U.S.C. § 2000bb *et seq*.

[6] 382 S.W.3d at 845-51.

[7] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[8] *Id*. at 537-44.

[9] 42 U.S.C. § 2000cc-1(a)(1)-(2).

[10] *See, e.g.*, *Shakur v. Schriro*, 514 F.3d 878 (9th Cir. 2008) (reversing summary judgment for prison on Muslim prisoner's claim for special diet because factual record on which district court had ruled was too sparse and court should have done "a careful analysis of a fully developed record"); *Greene v. Solano County Jail*, 513 F.3d 982 (9th Cir. 2008) (reversing summary judgment for jail on claims by maximum security prisoner wanting to join group worship services, finding factual disputes existed and government had not carried its burden); *Guru Nanak Sikh Soc'y*

vary about what religious accommodations are appropriate in prisons and zoning contexts. Two things are clear from the decisions applying RLUIPA to date, however. First, the more demanding legal standard set by that law has made it harder for government to maintain uniform policies.[11] Second, there is great diversity among the individuals and groups who have used the strict legal test in sometimes-protracted litigation to seek exemptions from standard rules.[12] As our American society grows ever more diverse, **this means a potentially very broad spectrum of accommodation requests.**

For at least four additional reasons, HB 279 would present a significantly greater challenge for Kentucky law enforcement than RLUIPA.

- First, **HB 279 is not limited to particular contexts** (such as zoning or prisons). Instead, it aims to permit individuals to defy general laws in any and all contexts – from health and safety laws, to wage and hour laws, to tax laws, to rules of contract and fair business practices, to public nuisance laws, to antidiscrimination laws – unless government proves the law serves a compelling public interest and is narrowly drawn.
- Second, **HB 279 inserts a "clear and convincing evidence" requirement** that has not been part of the "compelling interest" test in Kentucky or federal law. However that test might be construed by courts, it seems designed to make it harder for government to enforce public health and safety laws.
- Third, **HB 279 includes an unclear provision that might be construed to require rewriting of many, if not most, Kentucky laws** to make them enforceable without context-specific litigation. It says government must prove a compelling interest in "infringing the specific act or refusal to act."

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v. County of Sutter, 456 F.3d 978 (9th Cir 2006) (group was entitled to exemptions from agricultural and residential zoning restrictions to build temple).

[11] For example, under the prior "rational basis" test, a requirement to submit one's Social Security number to renew one's driver's license was enforced over an individual's religious objection (*Miller v. Reed*, 176 F.3d 1202 (9th Cir 1999)), and a prison policy against smoking inside was upheld where the inmate was permitted to perform a religious burning ritual of "smudging" outside three times per week (*Hills v. Stewart*, 1999 U.S. App. LEXIS 26896 (9th Cir. 1999)). Both rules might survive strict scrutiny review, but the government's litigation burden would be heavier.

[12] For example, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), adherents of the Satanist, Wicca, and Asatru religions and the Church of Jesus Christ Christian sought accommodations from Ohio prisons.

Whether intended or not, this language might be read to mean, for example, that laws based on factual findings of need for sanitary conditions in food or pharmaceutical manufacturing plants would have to specify all the species of livestock, pets, animals used for religious sacrifice, and vermin that must be excluded from such facilities. Or, it might be read to require that laws banning weapons from government buildings must list the specific types of guns, swords, and explosives that are forbidden. Concerning civil rights laws enacted based on findings of public need to end the harms of discrimination, courts might view the bill as requiring specification of the harms and related anti-bias rule regarding the sale of shoes, lunch, and car insurance, rather than the current guarantee of equality in the public marketplace as a whole. Because such specification concerning sanitary conditions, weapons-free buildings, and equal access to enumerated goods and services is **plainly impractical**, the end result might simply be that **every enforcement effort would require proof** both of a particularized compelling interest and that requiring a specific individual's compliance is the least restrictive alternative.

- Fourth, **HB 279 adds a new provision barring even "indirect" burdens on conduct with religious motives**, defined to include limitations on benefits, imposition of penalties, or exclusion from programs or facilities. Again, however this provision may be construed in litigation, it seems likely to invite claims of a religious right to public benefits and access to programs and facilities without complying with standard eligibility rules.

HB 279 adds **new requirements of unclear scope and meaning** to a test already found by both Kentucky's courts and the federal courts to make it **needlessly hard to enforce public safety and other general laws**. Lambda Legal thus respectfully recommends your **veto** due at least in part to the **vast range of accommodations that will be requested**, and the resulting **confusion, administrative complications, and potentially immense financial and other public costs**.

II. Because Discrimination Remains a Pervasive Problem, Laws Should Be Clear That Even Sincere Religious Views Do Not Excuse Harassment Or Other Mistreatment Of Other People.

A. Discrimination Remains a Pervasive Problem

State and local laws now provide Kentuckians essential protections against various forms of invidious bias. Efforts are underway to secure state-level protections against discrimination based on sexual orientation or gender identity, as localities as diverse as Louisville, Lexington, Covington, Richmond, and Vicco in Perry County) have already provided. These laws and ongoing efforts should be publicized so

unfair treatment in employment, housing, public accommodations, and other business transactions can be reduced. We know this goal has not yet been achieved from the calls Lambda Legal receives from across the state seeking advice and assistance with discrimination problems.

This is consistent with the harsh national picture. Although more states, municipalities, and private businesses are adopting nondiscrimination rules, anti-LGBT bias and HIV discrimination remain persistent, under-reported problems.[13] Harassment and other forms of discrimination remain especially widespread and harsh toward transgender and gender non-confirming individuals.[14]

As the Kentucky Legislature concluded when enacting the existing anti-bias laws, discrimination is harmful and costly. Harassment and ostracism mean skilled workers are driven from their jobs. Patients avoid medical care. Students are unable to learn. Laws against discrimination are intended to reduce such unjust treatment, not merely to offer victims a way to seek a remedy in court.

At least as written, **HB 279 is likely to be taken by some as new permission to discriminate if one has a religious reason**. This may be an unintended consequence. And such religious claims ultimately may be rejected and the civil rights laws given their proper effect.[15] But even if that were to happen eventually, **the impact of the increased discrimination would be devastating for those most vulnerable –** populations simply wanting to avoid unfair treatment, most of whom have neither a desire nor the means to seek any remedy after the fact. For LGBT Kentuckians who do not yet have even basic civil rights protections in state law, HB 279 represents a still greater threat.

B. Even Sincere Religious Beliefs Must Not Excuse Discrimination.

Our nation's history of staunch commitment to religious liberty includes a distressing record of discrimination based on race, sex, marital status, and other

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[13] *See generally* Pizer, *et al.*, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012).

[14] *See generally* Grant, *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), *available at* http://www.thetaskforce.org/reports_and_research/ntds.

[15] In the cases cited in footnotes 16 and 17, for example, the courts did reject free exercise objections to civil rights laws in various contexts after applying analysis somewhat different from that which HB 279 would require.

grounds prompted by the sincere religious beliefs of some about others who are different or hold different views. The good news is that enforcement of anti-bias laws has dramatically reduced invocation of religion to excuse these forms of discrimination, bringing increased harmony between religious freedom and fairness guarantees.[16]

Although they too need these protections and this harmony, **LGBT people and those with HIV face a great deal of religiously motivated discrimination.** This is due in part to the fact, as noted, that laws explicitly forbidding discrimination based on sexual orientation and gender identity have yet to pass at the state level in Kentucky and some other states, and remain new and unfamiliar in some others. Also, because religious disapproval of gender and sexual orientation minorities is openly expressed, more people honestly believe they have a religious duty to urge others, for example, to change their sexual orientation or gender identity, or to agree that HIV infection is punishment for sin. Confusion about whether religious liberty rights permit disregard of anti-bias rules has led to discrimination in many contexts that can be instructive.[17] **All of Kentucky's antidiscrimination rules serve essential purposes. HB 279 should not be allowed to undermine them.**

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[16] A sampling of cases includes: *Smith v. Fair Emp. & Housing Comm'n*, 12 Cal. 4th 1143 (1996) (despite fair housing laws, Christian landlord refused on religious grounds to rent to unmarried heterosexual couple); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska Sup. Ct., 1994) (same); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (despite federal nondiscrimination law, school offered unequal health benefits to female employees based on religious tenets); *Bollenbach v. Board of Ed.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (employer improperly refused to hire women drivers due to objection of Hasidic male students); *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships); *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967) (asserting religious objection to racial integration, restaurant refused service to non-white guests).

[17] *See, e.g., North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez),* 44 Cal. 4th 1145 (2008) (lesbian patient was improperly refused infertility care based on physician's religious objection to patient's same-sex relationship); *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (Christian supervisor wrongfully claimed a religious right to harass lesbian subordinate); *Chalmers v. Tulon*, 101 F.3d 1012, 1021 (4th Cir. 1996) (employee claimed religious right to send letters to co-workers criticizing their private lives, despite warning that she might cause harassment complaints); *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342

Conclusion

Despite the good intentions that may have prompted HB 279, this bill would change the legal standard in an unnecessary and impractical manner. It would make it harder and more expensive for Kentucky to enforce important public safety and welfare laws, including laws against discrimination. However the courts ultimately might construe the law's mix of familiar and novel provisions, the practical effect would be to invite new religious objections to rules that apply generally to everyone in the public sphere.

This would be a mistake. For years, it has been settled that, when anyone engages in business or other conduct regulated by law to protect others, they should comply with the principle that has served our country well: "'When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.'"[18]

Lambda Legal most respectfully urges you to veto HB 279.

Very truly yours,

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(8th Cir. 1995) (employee engaged in antigay proselytizing despite company nondiscrimination policy); *Knight v. State of Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (visiting nurse engaged in antigay proselytizing to home-bound AIDS patient); *Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352 (Ind. 1988) (lab technician claimed religious discrimination when fired for refusing to do tests on specimens labeled with HIV warning because he believed "AIDS is God's plague on man and performing the tests would go against God's will").

[18] *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 565 (2004) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).