ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

LEGAL MEMORANDUM

DATE: June 26, 2018
RE: Legal Analysis of H. 767

Alliance Defending Freedom ("ADF") is a nonprofit legal organization that advocates for Americans' constitutionally-protected free speech and free exercise rights. In the past seven years, ADF has won nine cases before the U.S. Supreme Court involving free speech and free exercise issues. On request, we regularly provide legal analysis of proposed laws, including bills like H. 767. This bill strips for-profit organizations, including small, family-owned businesses, of the ability to assert their rights under the Free Exercise Clause of the U.S. Constitution, the federal Religious Freedom Restoration Act, and other state and federal protections for religion as a defense against non-discrimination claims. The proposal suffers from several constitutional infirmities, which will be addressed below.

1. Massachusetts lacks authority to strip legal entities of their constitutional rights.

A State legislature may not statutorily deprive a person or organization of the ability to exercise rights protected under the U.S. or state constitution. But H. 767 attempts to prohibit for-profit entities from exercising constitutionally-protected freedoms and asserting their religious beliefs as a defense against non-discrimination claims. The ability of a for-profit entity to assert such defenses is not a result of the kindness of the legislature. Rather, it is a constitutionally-protected right that derives from the entity's owners, officers, and employees. As the Supreme Court explained in *Hobby Lobby*:

> When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people [the shareholders, officers, and employees of the corporation]. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. *And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies*.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014) (emphasis added). Because the rights of the entity are connected to the rights of the individuals who own and operate the entity, any effort by the State to strip away or limit the rights of the entity would be an attack on the rights of the individuals.

Nor does the State have the authority to deprive entities of the defenses afforded to them by the federal Religious Freedom Restoration Act ("RFRA"). The U.S. Supreme Court in *Hobby Lobby* conclusively determined that "a federal regulation's restriction on the activities of a for-profit

closely held corporation must comply with RFRA." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014). Massachusetts cannot override the federal protections bestowed upon all corporations, no matter their location.

Furthermore, by conditioning the ability of an individual to form a for-profit corporation on giving up one's right to freely exercise religion, H. 767 violates the unconstitutional condition doctrine. "We have said in a variety of contexts that 'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Free exercise is a constitutional right, for individuals and businesses alike, and the State cannot strip that freedom or coerce individuals into giving it up in order to open a business.

2. H. 767 unconstitutionally treats similarly situated entities differently based solely upon their religious status and beliefs.

In *Trinity Lutheran*, striking down a Missouri law that prohibited religious organizations from participation in a government scrap-tire program, the Supreme Court held that "[t]he Free Exercise Clause 'protects religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). "[S]uch a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 2021.

And earlier this month, the Supreme Court affirmed this principle, finding that the state of Colorado acted with hostility towards cake artist Jack Phillips when it treated his religious objections to creating a custom-designed cake celebrating a same-sex wedding as "illegitimate" while "treat[ing] the other bakers' conscience-based objections as legitimate." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, 2018 WL 2465172, at *11 (U.S. June 4, 2018). Such differential treatment "sends a signal of official disapproval of Phillips' religious beliefs." *Id*.

H. 767 would operate in the same unconstitutional fashion. A for-profit business—for example a Catholic-owned print shop or a Jewish-run counseling agency—who had religious convictions that obliged them not to print positive messages about abortion or to counsel a person to marry someone of the same sex—would be unable to assert its owner's religious convictions as a defense if it did not want to create expression or provide counseling that violated its beliefs. But a non-profit entity would be free to assert a free exercise defense if a non-discrimination law was being used to try to violate its conscience

The result is that for-profit entities owned by people of faith are subject to differential treatment than non-profit entities, a result that cannot stand legal scrutiny. As the *Hobby Lobby* court noted, there is no constitutional basis for arguing that "nonprofit corporations are special" and entitled to exercise religion in their operation. "[T]his principle applies equally to for-profit corporations." 134 S. Ct. at 2769.

In sum, by treating for-profit entities differently than non-profits, H. 767 lacks the neutrality demanded by our Constitution.