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The Honorable Larry A. Martin
Member, House of Representatives
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Dear Representative Martin:

In a letter to this Office you referenced the recent decision of the United States Supreme Court in Estate of Thornton et al. v. Calder, Inc., 472 U.S. ___, 86 L.Ed.2d 557, 105 S.Ct. ___ (1985) which held that a Connecticut statute which provided Sabbath observers with an absolute right not to work on their chosen Sabbath, violates the Establishment Clause of the First Amendment of the United States Constitution. You have questioned whether a recent amendment to this State's blue laws, Section 53-1-5 of the 1976 Code of Laws which provides for the conscientious objection to Sunday work for employees, is affected by the decision of the Court in Thornton. Such provision states:

> "(t)he provisions of this chapter do not apply after the hour of 1:30 p.m. on Sunday. Any employee of any business which operates on Sunday under the provisions of this section has the option of refusing to work in accordance with the provisions of Section 53-1-100." 1/ Section 53-1-5 of the 1976 Code of Laws.

1/ Such provision authorizing an employee to refuse to work is identical to another provision included in the recent amendments to the "blue laws". Section 3(B) of Act No. 86 of 1985 provides that the "blue laws" are not applicable to certain counties meeting specified tax revenues. Pursuant to Section 3(C) of such Act, employees of businesses in such counties which operate on Sunday also have the option of refusing to work on Sunday in compliance with the provisions of Section 53-1-100. The conclusions of this opinion relevant to Section 53-1-5 are similarly applicable to the provisions of Section 3(C).

Section 53-1-100 of the 1976 Code of Laws states:

> "... (n)o person shall be required to work on Sunday who is conscientiously opposed to Sunday work. If any person refuses to work on Sunday because of conscientious or physical objections, he shall not jeopardize his seniority rights by such refusal or be discriminated against in any manner...."

The Connecticut provision construed by the Court in Thornton stated:

> "(n)o person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." Conn. Gen. Stat. Section 53-303e(b) (Supp. 1962-1984).

It appears that the referenced Connecticut statute is distinguishable from this State's "blue law" provisions noted above.

As stated, the Supreme Court in Thornton determined that the Connecticut statute violated the Establishment Clause of the First Amendment. In making its ruling, the Court referenced its previous holding in Lemon v. Kurtzman, 403 U.S. 602 (1971) stating:

> "(t)o pass constitutional muster under Lemon a statute must not only have a secular purpose and not foster excessive entanglement of government with religion, its primary effect must not advance or inhibit religion."

86 L.Ed.2d at 562. The Court stated that the Connecticut statute "... arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath." 86 L.Ed.2d at 562. As a result, the Court determined that employers and employees must conform their business practices to a particular employee's religious practices. In the Court's opinion, Sabbath religious concerns were singled out and controlled any secular interests in the workplace. It was also noted that the Connecticut statute took no account of interests or concerns of employers or employees who did not observe a Sabbath. For instance, employees who had a "strong and legitimate but nonreligious reason" for not

wanting to work on Sundays had no rights under the statute. Supra at n. 9.

Referencing the considerations given to Sabbath observers as opposed to individuals with other interests, the Court held that the Connecticut statute contravened a basic principle of the religion clause of the First Amendment. The Court particularly noted,

> "(t)he First Amendment ... gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."

86 L.Ed.2d at 563.

As stated, it is our opinion that the conscientious objector provision included in this State's "blue laws" is distinguishable from the Connecticut statute. This State's provision simply states that an employee of a business which operates on Sunday has the right to refuse to work in accordance with Section 53-1-100. Such latter statute provides that any person who is "conscientiously opposed" to working on Sunday cannot be required to work on Sunday. Neither of the noted provisions use religious criteria as a basis for refusing to work on Sunday.

Under this State's statute, an employee who declines to work on Sundays not only is not required to base his refusal on religious reasons, he is not required to cite any specific reason at all. An employee who refuses to work on Sunday for religious reasons is not given any preferential treatment over an employee who prefers not to work on Sunday for any other reason. 2/

2/ The United States Supreme Court has noted that Sunday has come to have special significance as a day of rest in this country. The Court has stated:

> "(p)eople of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like." McGowan v. Maryland, 366 U.S. 420 at 452 (1961).

The South Carolina Supreme Court in State v. Solomon, 245 S.C. 550, 141 S.E.2d 818 (1965) determined that the purpose of this State's "blue laws"

> "... is not religious but to provide a uniform day of rest for all citizens... . The statute was enacted ... pursuant to the legislative finding and purpose that 'social, economic and other factors have made increasingly apparent the need for a more equitable and uniform method of securing the observance of a day of rest in South Carolina... .' The declared legislative purpose in enacting the legislation is secular, not religious ... (T)he purpose and effect of the statute is not to aid religion but to set aside a uniform day of rest in furtherance of the State's legitimate concern for the improvement of the health and general well-being of its citizens." 245 S.C. at 566-567. See also: Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

Furthermore, in McGowan v. Maryland, 366 U.S. 420 (1961), the United States Supreme Court stated as to Sunday closing laws that:

> "(t)he present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." 366 U.S. at 445.

The Legislature's express purpose in enacting § 53-1-5 was simply to amend § 53-1-10 et seq. so as to provide that the "blue laws" do not apply after the hour of 1:30 p.m. Thus, in view of the recognition by the Courts in McGowan and Solomon, supra, that the "blue laws" themselves were designed to insure

that citizens receive a uniform day of rest, the present amendment to the blue laws would undoubtedly have the same secular purpose. The conscientious objector provision merely protects one who "is a conscientious objector to Sunday work" for whatever reason he might object. 3/

The lower court decision in Caldor, which the United States Supreme Court subsequently affirmed, recognized the clear distinction between a conscientious objector provision which gives employees the right to have as a day off their "sabbath" and one, like the South Carolina provision, which gives employees

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3/ The Court in McGowan stated that the underlying purpose of a statute must not be "to use the State's coercive power to aid religion" and that the face of the statute, its legislative history and operative effect could be examined to determine such purpose. 366 U.S. at 453. See also, Two Guys From Harrison-Allentown v. McGinley, 366 U.S. 582 (1961).

As noted above, this question is resolved in large part by State v. Solomon, supra. Moreover, like the statute examined in Two Guys, supra, virtually every provision in the newly enacted amendment simply uses the word "Sunday". The title of the Act indicates the legislative purpose is to amend the laws "RELATING TO SUNDAYS AND PROHIBITED ACTIVITIES ON SUNDAYS." And, as noted, the conscientious objector provision in question addresses the rights of those who, for whatever reason, conscientiously object to Sunday work. While undoubtedly religious motives were, to some extent underlying in the bill's enactment, we believe that, in its entirety, the Act reflects a secular purpose. Two Guys, supra at 592-597; State v. Solomon, supra.

One specific provision of the Act does give us some concern, however, and for that reason our conclusion cannot be free from doubt. Section 53-1-5 provides that no proprietor opposed to working on Sunday may be forced by his lessor to open his establishment on Sunday "nor may there be discrimination against persons whose regular day of worship is Saturday." Of course, such provision is separate from the conscientious objector provision under consideration here. Moreover, this one provision does not change the fact that the bill as a whole is secular in purpose.

the right to continue to insist upon Sunday as a uniform day of rest. 4/

> Although the McGowan court upheld the "Sabbath Breaking" statute at issue in that case because of the valid secular purpose of providing a common day of rest for both religious and nonreligious citizens; McGowan v. Maryland, supra, 366 U.S. at 450-452, 81 S.Ct. at 1117-19; § 53-303e(b) takes this rationale one step further, a step which, in our view, invalidates the subsection under the establishment clause. Subsection (b) authorizes each employee to designate his or her own observance of Sabbath. The unmistakable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do so. We conclude that § 53-303e(b) does not pass the "clear secular purpose" test of establishment clause scrutiny.

464 A.2d at 793. The lower Court further was careful to note that it did not mean to imply "that the State may not legislate so as to allow individual employees their desired day off." Supra at n. 10.

Moreover, at least one federal district court has recognized that a conscientious objector provision similar to that contained in Section 53-1-5 would be constitutionally valid. 5/ In Ciba-Geigy Corp. v. Local No. 2548, 391 F.Supp. 287, 297 (D.R.I. 1975), the Court stated:

4/ Section 53-1-5 generally references § 53-1-100 as a guide. However, since § 53-1-5 appears on its face to apply only to "conscientious" objectors, we need not reach the question whether those "physical" objections to Sunday work, mentioned in § 53-1-100, also apply to § 53-1-5. Moreover, the title to the present amendment refers only to "conscientious" objections to Sunday work.

5/ The Rhode Island statute provided that "nothing herein shall be a ground for discharge or other penalty upon any employee for refusing to work [on Sundays]."

> ... as the Union concedes, § 25-1-6 can afford no greater protection to those employees objecting to Sunday work on religious grounds, since 25-1-6 must be viewed to be a part of a non-sectarian statutory scheme to provide a uniform day of rest, lest it succumb to the First Amendment prohibitions of the Establishment Clause. See McGowan v. Maryland, 366 U.S. 420, 453, 81 S.Ct. 1101, 6 L.ED.2d 393 (1961).

In our judgment, by inserting the conscientious objector provision in § 53-1-5, the State continues to maintain a "non-sectarian statutory scheme to provide a uniform day of rest" to those employees who wish to have it.

We caution that our conclusion herein is based upon our reading of the Caldor decision, as well as other cases decided prior thereto. To our knowledge, no court has yet commented upon the Caldor decision or attempted to distinguish it in the manner set forth in this opinion. Until such time as a court comments upon the statute, there can of course be no final resolution of the question. However, absent such a definitive ruling by our courts or one concluding that the conscientious objector provision is unconstitutional, we must presume its constitutionality. See, McGowan v. Maryland, supra, 366 U.S. at 426.

Sincerely,

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CHR:djg

REVIEWED AND APPROVED BY

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