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**Re: House Bill 88**  
**ACLU Review of Legal Issues**

Chair Gatto, Vice-Chair Thompson:

Thank you for the opportunity to submit written testimony regarding House Bill 88, relating to the application of international law.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. We have several concerns with the proposed legislation, outlined in greater detail below, **and urge a DO NOT PASS vote by Members of the Committee.**

**Attack on Separation of Powers and Judicial Independence**

Fundamentally, HB 88 is counterproductive legislation. This bill represents an attack on the separation of powers, an unwarranted mistrust of the state judiciary and an unnecessary interference in the function of Alaska's legal system.

***It is a core function of both state and federal courts to determine what law is at issue in a given matter.*** The Alaska Legislature should not seek to legislate what law the courts can and cannot consider when deciding cases. By doing so, the Legislature violates the fundamental principle of judicial independence and the constitutional principle of separation of powers.<sup>1</sup>

### **Negative Impacts on Alaska Citizens and Businesses**

Passage of HB 88 would harm the rights of Alaska citizens and businesses who travel and transact across international borders, and would also negatively impact the United States' standing in the global community.

In the normal course of business, organizations may voluntarily choose to waive certain constitutional rights. For instance, an individual generally retains the constitutional right to say what she thinks without restraint. U.S. Const., Amdt. I; Alaska Const., Art. I, Sec. 5. However, individuals regularly contract away their constitutional right to speak freely, for instance, by engaging in nondisclosure agreements. While the ACLU of Alaska strongly values constitutional rights, there are certainly legitimate and appropriate reasons why an informed, non-coerced waiver of such rights should be permitted and legally respected.

Contrary to these principles, the language of HB 88 presumes to disregard **all** waivers of constitutional rights, in any contract that contains a choice of law clause preferring the law of a foreign jurisdiction. For instance, proposed AS 09.68.140(b) states that if a contract contains a choice of law clause preferring foreign law and “if the interpretation or enforcement of the agreement would violate an individual’s [constitutional] right,” the contract **must** be read to preserve the constitutional right, not to waive it. The effect of the statute – by its literal terms – appears to be to nullify **any waiver** of constitutional rights where made in conjunction with a foreign choice of law provision.

Other examples of commonly waived constitutional rights include the right of medical privacy permitting medical records to be shared with a foreign medical provider, or a due process right to an official hearing or trial, such as a provision mandating that disputes go to an arbitrator. *See*, pg. 3, *infra*. The Alaska Legislature risks sweeping up a wide variety of commonplace waivers of constitutional rights in the bill as currently drafted.

***HB 88 is structurally flawed in that it is not narrowly tailored to prevent coerced or uninformed waiver of rights.*** Its only *caveat* is that the contract must have a foreign choice of law provision. This overbreadth would result – should the bill pass – in exposing foreign

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<sup>1</sup> In this regard, we draw the Committee’s attention to the Opinion Letter of the Attorney General, dated March 21, 2011, “Re: HB 88,” signed by Mary Ellen Beardsley, Assistant Attorney General (“Beardsley, AG Opinion”), wherein she notes: “Alaska courts will not apply a foreign law if application of the law would violate an individual’s constitutional rights.” *Id.* at 2. Thus, HB 88 does not provide any positive protections, and has only negative consequences.

partners to the potential that Alaska businesses may unilaterally *and improperly* evade their contractual obligations by using the Bill’s provisions. This obvious legal flaw would make it highly problematic for Alaskans to conduct business with foreign individuals or organizations.<sup>2</sup>

### **Choice of Forum Provision**

A similar problem attends subsections (c) and (d), which prohibit the application of choice of forum or venue contractual provisions, and the granting of motions to dismiss on the grounds of *forum non conveniens*, where a constitutional right could be impaired.

In the case of subsection (c), a business or person may have a valid, legally appropriate and commercially necessary reason to waive certain constitutional rights. But, the extremely broad language of the legislation would invalidate the contractual provisions.

An example of a problem with this language is presented by the Seventh Amendment to the United States Constitution, which guarantees the right to trial by jury in any civil case addressing a matter in value of at least twenty dollars. U.S. Const., Amdt. VII.

The United States jury system does not necessarily have a corollary in judicial proceedings in other countries. Not all countries apply a common law system, and fewer still have regular jury trials. HB 88 could thus be used to prevent the enforcement of any choice of venue or forum clause *in any contract with a foreign company*, or any *forum non conveniens* action, if the foreign court at issue does not guarantee a jury trial for civil action where \$20 or more was at stake. This would seriously deter foreign individuals or corporations from doing business in Alaska.

### **Negative Impact on Elections to Arbitrate**

Courts across the country encourage alternative dispute resolution, as an option to reduce the work-load on an often over-taxed judicial system, and as a benefit to the parties in reducing the potentially high costs of litigation. Many contracts include an arbitration clause. In some cases, parties may choose a specific arbitrator or alternate quasi-judicial forum. HB 88 would unnecessarily introduce uncertainty into the validity of these provisions, negatively impacting both the courts and the parties.<sup>3</sup>

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<sup>2</sup> Again, it is instructive to note that Alaska’s Attorney General has cited this problem as well. *See*, Beardsley AG Opinion, pg 2, “HB 88 might affect a foreign entity’s willingness to do business with individuals or businesses in Alaska if it knows that provisions of the contract may be void by law . . . .”

<sup>3</sup> Of note, attorneys in Georgia, where a bill similar to HB 88 was introduced, testified against it. “Michael J. Broyde, academic director of Emory University’s law and religion program, said he thinks ‘the consequences of the bill have not been well thought out’ partly because its restrictions on arbitrators and choice of venue would

### U.S. and Alaska Standing in Foreign Relations

HB 88 would generally strain our relations and standing with other nations. Opportunistic businesses and individuals could thwart efficient judicial enforcement by filing suit in Alaska and then demanding that the defendant respond in Alaska.

For example, a person with a contractual dispute with a Spanish oil services company<sup>4</sup> could (assuming that the matter had sufficient minimal Alaska contacts to establish personal and subject matter jurisdiction), file a suit for declaratory relief in Anchorage, even where all the evidence, witnesses, and items at issue were in Spain.

Even where such a suit would normally be dismissed as *forum non conveniens* and then re-filed in Spain, an Alaska court could be obliged to hear the case in Alaska, since the plaintiff would be deprived of her Seventh Amendment right to a jury trial if the case were heard in Spain.

While there may be foreign jurisdictions whose legal systems are so deeply unfair as to offend fundamental American values of fairness, there are many – such as Spain’s – that do not. One should also note that the doctrine of *forum non conveniens* is **one of mutual respect**, which may be undermined where one nation flouts the respect owed to other nations.<sup>5</sup> Passage of HB 88, along with similar bills in sister states, could result in many American litigants finding themselves sued in foreign jurisdictions and unable to remove their cases to Alaska or other US state courts.

HB 88 signals to the rest of the world that Alaska believes that our judges have “little to learn from their counterparts in other nations . . . . This wholesale rejection of the value of consulting international law or foreign decisions in certain circumstances evokes years of ‘American exceptionalism,’ during which the U.S. was internationally criticized for exempting itself from human rights standards that were otherwise universal.”<sup>6</sup>

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‘incapacitate Georgia companies as they engage in international commerce.’ [¶] A bigger problem, he added, is that the bill ‘violates the Federal Arbitration Act and becomes an unconstitutional exercise of state authority. Arbitration is a routine business exercise by people who are prepared to sacrifice some of their constitutional rights in return for reduced cost and expediency,’ said Broyde, who also is an ordained rabbi and member of the Beth Din of America -- the largest Jewish law court in the country. Banning people from ‘willingly submitting to an ecclesiastical tribunal’ is ‘inconsistent with traditional American practice.’ *Lawyers Speak Against Ga. Bill That Bans Use of Foreign Laws in State Courts*, Kathleen Baydala Joyner, *Fulton County Daily Report*, February 07, 2011. [http://www.law.com/jsp/article.jsp?id=1202480459397&Lawyers Speak Against Ga Bill That Bans Use of Foreign Laws in State Courts&slreturn=1&hblogin=1](http://www.law.com/jsp/article.jsp?id=1202480459397&Lawyers_Speak_Against_Ga_Bill_That_Bans_Use_of_Foreign_Laws_in_State_Courts&slreturn=1&hblogin=1).

<sup>4</sup> <http://www.businessweek.com/ap/financialnews/D9LRQDGO0.htm>.

<sup>5</sup> Yet again, this analysis is shared by Alaska’s Attorney General, *see*, Beardsley AG Opinion, pg 3, “A party will not be sent to a jurisdiction that does not have equal protections and due process.”

<sup>6</sup> Martha Davis & Johanna Kalb, *Oklahoma State Question 755 and an Analysis of Anti-International Law Initiatives*, American Constitution Society Issue Brief, 5 (2011).

A vote for HB 88 would have the effect of alienating U.S. allies and the commercial partners of Alaska companies, putting at risk U.S. interests at home and abroad. Indeed, the simple perception that the United States is ignoring its legal obligations puts Alaskan citizens and Alaskan companies seeking to do business internationally at risk. If potential foreign business partners believe that Alaska's courts will not enforce foreign judgments or adhere to the businesses' choice of law in their contracts, international companies may simply be unwilling to contract with Alaska businesses or establish commercial ties to our state. Given the ambiguity surrounding which laws Alaskan courts may consider, foreign investors may be wary of ever consenting to jurisdiction in our state courts.

### **Misrepresentations of American Public Policy Alliance and Others**

It is important to note the misleading testimony that has been supplied at length in support of this bill by, amongst others, the American Public Policy Alliance. See, "Representative Civil Legal Cases Involving Shariah Law," November 8, 2010, American Public Policy Alliance, [HB88 Supporting Documents-Relevant Cases APPA 11-08-10.pdf](http://www.legis.state.ak.us/basis/get_documents.asp?session=27&bill=HB88), [http://www.legis.state.ak.us/basis/get\\_documents.asp?session=27&bill=HB88](http://www.legis.state.ak.us/basis/get_documents.asp?session=27&bill=HB88), implying that Sharia law is being used in US courts to the detriment of parties' rights. See, also, [HB88 Supporting Documents-FAQ ALAC 03-14-11.pdf](#), "**2. This bill is not needed because shariah is not a threat in the US and is not in our court systems.** The Act is not simply about shariah but also transnationalism—or the documented creep of foreign and offensive laws being recognized by state and federal courts. More, shariah has already crept into the legal systems of Western Europe, including 85 shariah courts operating openly with the full authority of law in the United Kingdom. There are numerous cases in which shariah doctrines have been invoked in the US. Here is a sampling of 17 examples from 11 states."

In fact, however, the document mostly contains examples of cases where Islam was involved due to a religious freedom claim, an arbitration claim, or in connection with a discussion of comity being granted to a decision of a foreign legal system that happens to be based on Islam. Other cases merely involve reference to Islam because it bears on the facts of the case. Such references to Islam are not impermissible.

The cases cited in this report illustrate exactly why Sharia law is NOT being improperly imposed in the United States and highlight the problem with this measure and others intended to target Islam.

Courts often consider a prisoner's religious beliefs and requirements when adjudicating a claim under RLUIPA, **a law passed to protect the religious exercise rights of prisoners of all faiths.** Thus, the court's discussion of an inmate's religious views in *Allah v. Jordana-Luster*, which is the first case cited in the report, is appropriate. Were the courts to be barred from referring to religious laws in these cases, Christian and Jewish inmates (or inmates of other faiths) would be unable to provide support for their free exercise claims. In any event, the court did not accept the inmate's evidence in that case, and the inmate lost his claim for halal meat.

In other cases involving Islamic law, where it conflicts with our public policy, courts have refused to recognize it, just as they are required to do with regard to any rule that violates public policy. For example, in *Aleem vs. Aleem*, which is cited in the report, a Maryland court of appeals held that a Pakistani divorce granted in accordance with Pakistani customs (based on Islamic law) would not be recognized in Maryland because it conflicted with state public policy requiring fair and equitable division of assets.

In another case, when a New Jersey court held that a man's Islamic religious beliefs regarding sex with his spouse meant that he did not have the requisite intent to commit sexual assault, consistent with our public policy, the appeals court immediately reversed the decision and issued a restraining order to the petitioning wife.

Other cases involve courts enforcing agreements to present disputes for Islamic arbitration. *But it is not unusual for a court to enforce an arbitration agreement where the parties agree in advance that they will take any disputes to a particular type of arbitrator. The court's enforcement is based on neutral principles of law and denying courts the ability to enforce such agreements could compromise arbitration itself as a means to settle legal disputes.*

**These cases show that our courts are very aware of their obligations to comply with public policy and do so when presented with any claims that may undermine that public policy, regardless of whether Islam or some other faith may be involved.**

### **Potential for Needless Entanglement in Lengthy Litigation**

Finally, we note that there are significant constitutional infirmities with respect to HB 88 and constitutional protections for the free exercise of religion and the establishment clause.

While the plain language of HB 88 refers only to “international law,” in reviewing the constitutionality of HB 88 or any statute, the courts will necessarily look to legislative intent. In that regard, the Sponsor Statement will be reviewed by the courts as one element of that intent.

While the revised Statement does not reference Sharia, it is important to note that the original does so, asserting:

HB88 offers a baseline law that provides a statutory framework for precluding constitutionally objectionable foreign laws and legal systems from finding their way into the state judicial system. **One example of an offending transnational law is sharia—authoritative Islamic law that is applied as the law of the land in many countries around the world. Sharia is patently offensive to U.S. and Alaska constitutional law because it criminalizes apostasy (violation of Free Exercise of Religion) and blasphemy against Islam, Mohammed, and sharia itself (violation of**

Free Speech). Sharia also violates principles of due process and equal protection by discriminating against non-Muslims and women.

HB 88 Use of Foreign Law, original Sponsor Statement, dated March 9, 2011, (emphasis added).

**Conclusion**

In sum, HB 88 is unnecessary, and its passage would cause real harm to Alaska's citizens, businesses, and judicial system. **We urge you to oppose HB 88.**

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,



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