UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVENUE , NW, WASHINGTON, DC 20425 www.usccr.gov

Chairman Peter Mendelson
1350 Pennsylvania Avenue NW, Suite 504
Washington, DC 20004

November 17, 2014

Dear Chairman Mendelson:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole.[1] It has come to my attention that the D.C. City Council is considering Proposed Bill 20-790, known as the "Reproductive Health Non-Discrimination Amendment Act of 2014." This bill threatens the religious liberty of employers in the District and I urge the Council not to enact it.

The text of the bill provides:

> An employer or employment agency shall not discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of or on the basis of the individual's or a dependent's reproductive health decision making, including a decision to use or access a particular drug, device, or medical service, because of or on the basis of an employer's personal beliefs about such services.[2]

Based on the statements of Rep. Grosso, one of the co-sponsors of the bill, it appears that this bill will be interpreted to require religiously-objecting employers to provide contraceptives, and perhaps elective abortions, as part of their health insurance plans. At the June 23, 2014 hearing on the bill, he stated, "this legislation addresses the question of whether employers who personally oppose birth control, or other reproductive drugs, devices, drugs, or other medical services, should be allowed to impose their own beliefs on their employees' healthcare."[3] In the same statement, Rep. Grosso also referred

[1] The U.S. Commission on Civil Rights was established, among other things, to "make appraisals of the laws and policies of the Federal Government with respect to . . . discrimination or denials of equal protection under the laws of the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice." 42 U.S.C. § 1975(a).
[2] Proposed Bill 20-790.
[3] Public Hearing, Committee on the Judiciary and Public Safety, June 23, 2014, at 15:55, *available at* http://208.58.1.36:8080/channel13/June2014/06_23_14_JUDICI.mp4.

> The Affordable Care Act improved women's access to health care by providing that newly-issued health plans must cover the full range of FDA-approved contraception at no additional cost. Unfortunately, many companies are fighting the policy, both in Congress and in the courts. I am sure you are familiar with the recent Supreme Court case brought by the company Hobby Lobby, on whether the federal government can require for-profit companies to provide coverage for forms of birth control that conflict with the company's

to the *Hobby Lobby* case as an example of employers who have raised religious objections to the contraceptive mandate.

Given that Rep. Grosso, and by extension the City Council, is aware of the *Hobby Lobby* decision, it is curious that the Council is moving forward with this proposed bill. The District of Columbia is not a state and only exercises legislative authority delegated to it by Congress, which retains ultimate legislative control over the District.[4] Therefore, it is subject to the requirements of the Religious Freedom Restoration Act (RFRA).[5] In *City of Boerne v. Flores*, the Supreme Court ruled that RFRA was unconstitutional only as applied to the states through Congress's § 5 enforcement power, not as applied to the federal government.[6] Because the District is not a state, it too is still subject to the constraints of RFRA. If the Council thought that RFRA's constitutionality was in doubt, the Supreme Court's *Hobby Lobby* decision should have dispelled those misgivings. Not only is RFRA lawful, but the Affordable Care Act's contraceptive mandate violates RFRA and is therefore unlawful.[7] Under *Hobby Lobby*, the federal government may not

---

> owner's personal religious beliefs. The Hobby Lobby case is only one of more than one hundred federal lawsuits brought by employees [sic] on this issue.
>
> As Chairman Wells has already mentioned, this legislation addresses the question of whether employers who personally oppose birth control, or other reproductive drugs, devices, drugs, or other medical services, should be allowed to impose their own beliefs on their employees' healthcare. No boss should be able to tell employees whether or not they can access certain kinds of healthcare that are afforded to all Americans under federal law. No employee should ever be forced to negotiate with their bosses over coverage for personal medical decisions.

[4] District of Columbia Home Rule Act of 1973, P.L. 93-198, 87 Stat. 774, Sec. 10 (Dec. 24, 1973).

[5] 42 U.S.C. § 2000bb *et seq.*

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

[7] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2759-60 (2014).

> Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.
>
> In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on insurance companies that are required to provide or secure the coverage.
>
> Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that

require religious objectors to cover contraceptives in their health plans, and must at least make the so-called "accommodation" that is available to non-profit employers available to for-profit employers. Because the District is not a state, neither can it require religious objectors to cover contraceptives and abortions. The proposed bill does not even offer an accommodation akin to the HHS accommodation that can be a real subject of dispute. Rather, the proposed bill simply mimics the contraceptive mandate that has already been found unlawful.

Furthermore, the proposed bill is more intrusive than the ACA contraceptive mandate in at least three ways. First, the proposed bill appears to target religious nonprofits. One witness from Catholics for Choice, spoke solely about the desire of two former employees of the Archdiocese of Washington to have their former employer's healthcare plan cover contraceptives and perhaps elective abortions.[8] The witness from the National Women's Law Center spoke about cases where teachers were fired from religious schools for violating policies governing behavior.[9] By contrast, the so-called "accommodation" promulgated by HHS at least nods in the direction of protecting the religious liberty interests of religious non-profits. The proposed bill engages in no such niceties. Although I do not believe that an organization's religious exercise should turn

---

> achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties is unlawful.

[8] Public Hearing, Committee on the Judiciary and Public Safety, June 23, 2014, at 27:05, *available at* http://208.58.1.36:8080/channel13/June2014/06_23_14_JUDICI.mp4.

> It is my honor to deliver testimony on behalf of two Catholic women. Both of these women live in DC. Until recently, both worked for employers in the District that restricted their right to make their own reproductive health care decisions. They are unable to be here today, but they feel strongly that this committee needs to hear their stories in order to understand who this bill will protect from discrimination in the future. First, Margaret Johnson had this to share:
>
> "As a Catholic woman, I urge you to pass this legislation to ensure that women have safe access to birth control and other reproductive health needs…."
>
> Margaret is not the only one to feel this way. Another Katie, from D.C., wishes to share this:
>
> "My name is Katie. I am 29 years old, and I'm a proud third-generation Washingtonian. I'm Catholic, and I have worked at Catholic institutions for the majority of my working life. I wanted to begin using birth control two years ago, and was surprised to learn that my Catholic health insurance plan did not cover it. So naturally, I cheered at the passage of the Affordable Care Act, which promised free contraception coverage for all women. But my joys turned to disappointment when I learned that certain religious employers were allowed a so-called "religious liberty exemption," meaning that they would not have to cover contraception. Yes. I am one of the 99 percent of sexually active Catholic women who has used contraception. And because of loopholes, I had to pay out of pocket for what should be a basic healthcare right. That is why I support this bill.

[9] *See* Testimony of Gretchen Borchelt, National Women's Law Center, before the Council of the District of Columbia Committee on the Judiciary and Public Safety, June 23, 2014.

on its particular corporate form, it seems particularly heavy-handed to target non-profit organizations.

Second, several organizations have expressed concern that the proposed bill will require them to cover elective surgical abortions.[10] The fact that this bill has been introduced even though the ACA requires almost all employers, for-profit and non-profit, to in one way or another provide contraceptives and abortifacients, suggests that these organizations' fears are well-founded. If this bill was not intended to require religiously-objecting employers to cover elective abortions, why was it necessary to introduce this bill in the first place? After all, even the "accommodation" for religiously-objecting employers ensures that employees receive contraceptives and abortifacients with a minimum of fuss. The only class of services intended to prevent or end pregnancy not included within the ACA's reproductive health mandate is elective surgical abortion. If indeed the City Council intends that the bill be interpreted to require coverage of elective surgical abortion, or if there is the possibility that it may be so interpreted in future, the burden this bill places on religious liberty goes far beyond that of the ACA.

Third, this proposed bill infringes on religious organizations' rights of free association and free exercise of religion. The proposed bill provides that employers "shall not discriminate against an individual with respect to . . . employment because of or on the basis of the individual's or a dependent's reproductive health decision making". This undermines the ability of religiously-based nonprofits to communicate their religious message. Under the proposed bill, a Catholic school could not fire a principal who had an elective abortion, announced this to the staff and students, and stated that she believed this decision was consistent with Church teaching. This is absurd.

Under well-established precedent, both religious and secular organizations can choose the people they want to be part of their group because the composition of the group affects their message.[11] The Supreme Court recently recognized in *Hosanna-Tabor v. EEOC* that the First Amendment protects the right of religious organizations to choose their ministers, a term which encompasses a broader group of people than pastors and priests.[12] This right is more extensive than the right of free association that is available to both religious and secular organizations.[13] The EEOC asserted that the rights of religious

[10] *See* Letter from Alliance Defending Freedom et al., Oct. 23, 2014, *available at* http://www.adfmedia.org/files/DCHealthBillLetter.pdf; *see also* Letter from U.S. Conference of Catholic Bishops, July 2, 2014, *available at* file:///E:/USCCB%20Letter%20Against%20the%20Reproductive%20Health%20NonDiscrimination%20Amendment%20Act.pdf.

[11] *See* Boy Scouts of America v. Dale, 530 U.S. 640, 661 (2000) ("public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message").

[12] Hosanna-Tabor v. EEOC, 132 S.Ct. 694 (2012).

[13] *Id.* at 706.

organizations were adequately protected by the freedom of association available to both religious and secular groups, which position the majority described as "untenable." The Supreme Court recognized that it is difficult for a church to continue to teach that Christians should not go to civil court to settle disputes with other Christians if they are forced to reinstate a teacher who was fired for suing the church in civil court.[14] Even if the church continues to teach its traditional beliefs, its witness has been compromised. The same is true of employees who are expected to publicly adhere to a church's teaching on sexual behavior and reproduction. Although which employees will be considered to fall within the ministerial exception must be determined on a case-by-case basis, the Supreme Court's decision in *Hosanna-Tabor* is far more expansive than the proposed bill.

It is precisely the right to select the person who conveys the message of a religious organization that is targeted by this proposed bill. The language of the bill and the testimony of those who support it make this clear. The witness who testified on behalf of the National Women's Law Center cites cases in which teachers at religious schools were fired for using artificial reproductive technology to become pregnant or for having

---

> The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association – a right "implicit" in the First Amendment. The EEOC and Perich thus see no need – and no basis – for a special rule for ministers grounded in the Religion Clauses themselves.
>
> We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers. [citations omitted]

[14] *Id.* at 701 ("According to the Church, Perich was a minister, and she had been fired for a religious reason – namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."); *id.* at 709.

> Perich no longer seeks reinstatement, having abandoned that relief before this Court. But that is immaterial. Perich continues to seek frontpay in lieu of restatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.

sex outside of marriage as examples of why this proposed bill is necessary.[15] Without venturing an opinion on the merits of each employment decision cited, adopting a bill that curtails the ability of religious organizations to fire employees who violate religious teachings would make it far more difficult for those organizations to convey the teachings of their faith. This is the lesson of *Hosanna-Tabor*. Indeed, in a world where there is an increasingly stark divergence between sexual behavior accepted by secular culture and traditional religious teachings regarding sexual behavior, these sorts of employment decisions may become increasingly common. They may seem unfair to those who do not share an organization's religious beliefs. But on the other hand, forcing a religious organization to continue to employ a person whose behavior is diametrically opposed to the organization's beliefs is unfair to that organization.

This is the crux of the debate. Many members of society scorn traditional religious teachings regarding sexual behavior. This is their right. If a Microsoft employee publicly disparaged Microsoft products and promoted Apple products, Microsoft would be well within its rights to fire that employee on the spot. Yet the supporters of this bill want to deny religious organizations the same right that Microsoft has. And this is despite the fact that religious organizations have *greater* First Amendment protection because of the Religion Clauses than do secular organizations.

It is erroneous to classify these employment decisions as discrimination akin to racial discrimination, which it appears the Council is attempting to do by using the term "discrimination." Religious employers who decline to provide coverage for contraception, or who fire employees known to have bucked church teaching regarding abortion or artificial reproductive technology, are not discriminating on the basis of status. They are discriminating on the basis of employee behavior, just as Microsoft would be discriminating on the basis of employee behavior when firing the Apple-promoter. There is nothing invidious about religious organizations making employment decisions on the basis of employee behavior. And to reiterate, not only is there nothing invidious about religious organizations making employment decisions on the basis of employee behavior, but such decisions are protected by the First Amendment's guarantees of freedom of association and freedom of religion.

Lastly, insofar as this proposed bill requires objecting employers to cover elective abortions, it likely violates the Weldon Amendment. The Weldon Amendment prohibits federal funds from being made available to a state or local government that discriminates against a health care entity "on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[16] The Weldon Amendment includes

[15] *See* Testimony of Gretchen Borchelt, National Women's Law Center, before the Council of the District of Columbia Committee on the Judiciary and Public Safety, June 23, 2014.
[16] Consolidated Appropriations Act, Pub. L. 113-76, 128 Stat. 5, Sec. 507 (Jan. 27, 2014).

"health insurance plan" within its definition of "health care entity."[17] Therefore, if the District enacts this bill and enforces it against objecting organizations, it runs the risk of forfeiting federal funds.

Given this proposed bill's manifest flaws in regard to RFRA, the First Amendment, and the Weldon Amendment, I respectfully suggest the Council give further consideration to the bill's legality.

Sincerely,

Peter Kirsanow
Commissioner

cc: Senator Rand Paul, Ranking Member, Subcommittee on Emergency Management, Intergovernmental Relations, and the District of Columbia
Senator Jeff Sessions, Ranking Member, Committee on the Budget
Senator Lamar Alexander, Ranking Member, Committee on Health, Education, Labor, and Pensions
Representative Hal Rogers, Chairman, Committee on Appropriations
Congressman Darrell Issa, Chairman, Committee on Oversight and Government Reform
Congressman Jack Kingston, Chairman, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

[17] *Id.*