ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

October 23, 2014

Phil Mendelson
Chairman
Council of the District of Columbia
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Via ElectronicMail

RE: Bill 20-790 "Reproductive Health Non-Discrimination Amendment Act of 2014"

Dear Chairman Mendelson:

The undersigned are pro-life legal and public policy organizations who make Washington, DC their home, serve and employ its residents, and work to encourage respect for the sanctity of human life in our nation's capital. We have previously written to express our grave concerns about Proposed Bill 20-790 in June. We warned that this bill is unconstitutional and is a patent violation of the Religious Freedom Restoration Act. Since that time the United States Supreme Court has issued its opinion in *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014), making the illegality of Proposed Bill 20-790 all the more clear. We urge the Council to reject this ill-fated bill that has no hope of being upheld, will waste taxpayer dollars, and could expose District employees to personal liability for enforcement of a clearly illegal law.

As revised by the Committee, Bill 20-790 would amend the Human Rights Act of 1977 to prohibit employers from "discriminat[ing] against" an individual with respect to the "compensation, terms, conditions, or privileges of employment" because of an individual's "reproductive health decisions." It further defines "reproductive health decisions" as follows:

> "(c) For the purposes of this section, the term "reproductive health decisions" includes a decision by an employee, an employee's dependent, or an employee's spouse related to the use or intended use of a particular drug, device, or medical service, including the use or intended use of contraception or fertility control or the planned or intended initiation or termination of a pregnancy.

This bill would appear to prohibit employers in the District of Columbia from declining to hire any person or otherwise take any employment-related action concerning an employee because the individual had an abortion or makes any other "reproductive health decision." Further, both the bill's chief sponsor, Councilmember Grosso, and virtually every person who submitted testimony in support of the bill at the public hearing confirmed that the chief aim of this bill is to

force objecting employers to provide insurance coverage of all "reproductive health decision[s]."[1] Religious employers, particularly the Archdiocese of Washington, were singled out by Rep. Grosso and others as examples of the need to impose this mandate on their health insurance plans.[2]

Religious Freedom Restoration Act:

As we previously explained, this Bill would clearly violate the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, *et. seq*. "The RFRA prohibits the District from substantially burden[ing] a person's exercise of religion unless the District 'demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest'" (including the District as a covered entity)." *Mahoney v. Doe*, 642 F.3d 1112, 1120 (D.C. Cir. 2011) (internal citations omitted). A substantial burden is any "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008). There is simply no question that the substantial fines that would be imposed for violation of this Act would place a substantial burden on the religious exercise of religious employers in the District. *See Gilardi v. U.S. Dept. of Health and Human Services*, 733 F.3d 1208, 1217-18 (D.C. Cir. 2013) (Requirement that employers facilitate insurance coverage of contraceptives and abortion-inducing drugs was substantial burden on employers' exercise of religion).

Since we previously objected to this Bill on June 20, the Supreme Court has held that the federal mandate on for-profit religious employers, requiring them to provide coverage of items to which they have a religious objection, violates RFRA. The Court noted that, even in the context of for-profit employers, many religious employers "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S.Ct. at

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[1] We observe that in the Conference Committee Report, p. 4, there appears the unexplained statement, "Bill 20-790 is not about insurance coverage." sIt is impossible to square this comment with the entirety of the legislative record. The full committee hearing is available at this link. http://octt.dc.gov/services/on_demand_video/on_demand_june_2014_week_4.shtm (select 6/23/2014 PUBLIC HEARING, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, Tommy Wells, Chairperson). Rep. Grosso, the chief sponsor, introduced it by saying: "I believe that religions don't have to provide contraceptive coverage, which is too bad, but they don't have to, whereas nonprofits and other private entities do have to give this, what is considered now a healthcare right for all Americans." Id. at 31:43. He continued, "I think what we're trying to say here is that in District of Columbia, contraceptions (sic) and coverage of contraceptions (sic) by the employer is part of the package, and we expect that to be there." Id. at 32:06.

[2] See Public Hearing, *supra* n. 1. In addition to Rep. Grosso's lament that actual "religions" themselves could not be forced to provide contraceptive coverage but religious nonprofit ministries could be, the hearing highlighted the Archdiocese itself as the target of the Bill. See, e.g., witnesses for Catholics for Choice (27:44).

2779. As Bill 20-790 goes far beyond anything at issue in *Hobby Lobby*, requiring even nonprofit religious organizations (not for profits) to provide even elective abortion coverage to their employees, the burden on religious exercise here is all the greater. Further, the District has not even attempted to offer any compelling interest or to explain how this mandate is the least restrictive means of serving such an interest. *Id.* at 2780. If the federal government failed this test with its more limited mandate, the District cannot pretend that its far more onerous mandate passes muster.

That Bill 20-790 would appear to require employers to include coverage of even elective surgical abortion – and would require those employers to hire persons who reject the organization's religious views on abortion − only increases the burden. Particularly in light of the *Hobby Lobby* decision, there is no prospect that this law would pass muster under the Religious Freedom Restoration Act.

Indeed, in light of the Supreme Court's recent decision, the violation of the Religious Freedom Restoration Act is so clear that the District must expect that enactment of this law will result in an award of attorneys fees to those who challenge this law and inevitably prevail. Likewise, in light of the Supreme Court's decision in *Hobby Lobby*, the District is risking placing city employees responsible for enforcing this clearly illegal law in jeopardy of personal liability for its enforcement.

Weldon Amendment:

Bill 20-790 would also violate, and jeopardize the District's funding under, the federal Weldon Amendment.[3] This federal law provides that no federal government entity nor any state or local government receiving funding under the Departments of Health and Human Services, Labor and Education Appropriations Act may "subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." The term "health care entity" specifically includes a health care plan. As a recipient of funding under this Appropriations Act, the District has committed to comply with the Weldon Amendment. Bill 20-790 would directly violate the District's obligation and risk forfeiture of its funding.

Free Exercise Clause:

Likewise, Bill 20-790 would also violate the Free Exercise Clause of the First Amendment. The legislative record is clear that the very purpose of this law is to target religious employers whose pro-life views some members of the Council may oppose. A simple review of the Committee hearing confirms that the District's religious employers are the very target of this law. Such targeting of religious beliefs is unconstitutional. *Lukumi*, 508 U.S. at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for

[3] "Weldon Amendment, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Division H, Title V General Provisions."

religious reasons." Further, requiring religious organizations in the District to provide insurance coverage of all possible "reproductive health decision[s]" that a woman might make, including elective abortion, would impose a grave burden on religious exercise that could not be justified by even a legitimate, much less a compelling interest of the District. The Conference report fails to provide any compelling basis for this law.

The bill independently violates the free exercise clause by interfering with the internal employment practices of religious employers. For religious organizations, "determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is … a means by which a religious community defines itself." *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 342 (Brennan, J., concurring). For this reason, the First Amendment prohibits government from interfering with the religious hiring decisions of religious organizations. *See E.E.O.C. v. Catholic University,* 83 F.3d 455 (D.C. Cir. 1996); *and see Montrose Christian School v. Walsh,* 363 Md. 565, 597 (Md. 2001) (declaring unconstitutional on state and federal free exercise grounds a county ordinance that prohibited religious school from "discriminating" on grounds of religion in hiring for teacher's aide, bookkeeper/secretary and cafeteria worker positions). Bill 20-790 would place a substantial burden on this fundamental right and violate the First Amendment.

Freedom of Association and Free Speech:

Finally, Bill 20-790 would violate the First Amendment rights of expressive association and free speech. A nonprofit organization speaks through its employees. And, particularly in an era of social media and hyper-partisan politics, an organization's message is compromised if those who communicate that message on its behalf are compromised in their personal fidelity to the organization's message. While some of the undersigned organizations are religious, all are pro-life. Among the purposes of these organizations, and in some cases their sole focus, is public advocacy for the sanctity of human life and rights of conscience for healthcare workers, taxpayers, and others who object to participating in or enabling the destruction of innocent human life through abortion. These organizations contribute to the development of public policy and the democratic process by speaking out on these issues in Washington, D.C. They also employ District residents and contribute to the economy of the District. This bill would threaten the work and contributions to the District of many or all of these organizations.

Any organization advocating for a cause, as the undersigned do, must zealously guard the integrity of their organization and their mission. The individuals who work and speak for a nonprofit organization are the face and voice of the organization. Many of the undersigned organizations advocate for compassionate alternatives to abortion, encourage and assist women who regret their abortions to recover from their emotional, spiritual and physical harms, and work with these women who have had previous abortions as valued employees and volunteers. However, these pro-life organizations' messages would be undermined were they required to hire persons who advocate for abortion or otherwise act in contravention of the organizations' mission by undergoing an abortion. Just as a nonprofit organization supporting abortion might believe it necessary to ensure that its employees were not participating in the March for Life or other pro-life activism, or an organization advocating for veganism might believe its message

cannot be effectively communicated by someone who eats meat, a pro-life organization must be free to choose to expend its resources to employ those whose words and actions uphold and do not detract from the organization's mission.

The First Amendment protects the undersigned nonprofit organizations' right of association. The Supreme Court has recognized that government violates the right of expressive association by "intrusion into the internal structure or affairs of an association" such as a "regulation that forces the group to accept members" who reject the association's message. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984). This is because such an intrusion would "impair the ability [of the organization] to express only those views that" it was created to foster. *Id.* The employees of a nonprofit advocacy organization, no less than their membership, communicate the organization's message and thus the hiring decisions of such organizations are protected by the First Amendment right of expressive association. *Association of Faith-Based Organizations v. Bablitch,* 454 F.Supp. 2d 812, 815 (W.D. Wis. 2006). Bill 20-790 would violate this fundamental First Amendment right.

Bill 20-790 itself contains no express exceptions. While certain exceptions available under the Human Rights Act, D.C. Code § 2-1401.03, might apply, the Committee Report emphasizes that they would provide no real protection for religious or other pro-life employers in the District. D.C. Code § 2-1401.03(b) provides an exception for some types of religious and political organizations, but only insofar as they limit employment to "to persons of the same religion or political persuasion…." The report states at footnote 12:

> "The exception in §2-1401.03 narrowly applies only to employers that are operated, supervised or controlled by or in connection with a religious or political organization, and are operated for charitable or educational purposes, and relates specifically to limiting employment. Bill 20-790 has broader application beyond the context of hiring practices, and relates to all employment related interactions."

Thus, according to the Committee, religious or political nonprofits not "operated, supervised or controlled by" a religious or political organization would not be protected. And even were the exemption to apply it would only permit the organizations to deny employment altogether and would not provide any protection where a religious or political organization refused to provide insurance coverage of abortions or other "reproductive health decisions" or made any other "employment-related" decision because of an individual's procurement of an abortion.

It is clear that the Committee anticipates that this Bill will burden religious and other pro-life employers, indeed as the hearing demonstrated that is its very aim.

We urge the Council to reject Bill 20-790 and its unnecessary violation of our constitutional and statutory rights.

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