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Senate Labor & Industry Committee Hearing on SB1306
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Thank you for inviting testimony regarding SB1306. I write on behalf of the Pennsylvania Family Council and the various persons and ministries that have contacted us for assistance. As we have talked to thousands of people about proposed amendments to Pennsylvania's Human Relations Act, there is a consensus that we desire a civil, loving, respectful community that provides freedom for all of us. Unfortunately, the proposed legislation would result in a less tolerant and respectful Commonwealth by punishing good, loving members of our community.

Just last year, the United States Supreme Court issued its marriage decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). In it, Justice Kennedy recognized that there are people of goodwill on both sides of the marriage issue, and that people should continue to be able to order their lives around their ideas and to teach others.[1] Despite these gracious aspirations, state legislatures continue to consider laws that would punish those reasonable people of goodwill.

I'm regularly contacted by Christian schools and colleges. Their leaders are sobered by what this law--and similar proposals--would mean for their

[1] Justice Kennedy noted that the belief that is marriage a "gender-differentiated union of man and woman" is a view that "has been held—and continues to be held—in good faith by reasonable and sincere people." *Obergefell*, 135 S.Ct. at 2594. He went on to explain that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Id*. at 2602. "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id*. at 2607. He talked about the right to "teach the principles that are so fulfilling and so central to their lives and faiths." *Id*.

religious mission. These educational institutions exist to teach religious values, not only through curricula but modeled in the life of their employees. We've traditionally understood that such institutions should have freedom to hire those who share their mission through a commitment to the elements of their particular religious faith. Whether under Title VII in federal law or the Pennsylvania Human Relations Act, religious ministries have always been free to hire on the basis of religion.[2] These ministries aren't interested in a person's nominal religious affiliation but their commitment to the mission through the lives they live and the values they hold.[3] Aside from the importance of outward messages communicated by employees, many employees at religious organizations seek a culture where they themselves grow spiritually as they strive towards living consistent with the teachings of their shared faith. If this law passes, what will happen when a person applies for a job with an explicitly religious organization but does not share that organization's values regarding human sexuality or marriage? These areas of shared religious belief and practice (human sexuality and marriage) could no longer be the basis of an employment decision.

We all want to stop invidious discrimination. But it's important to consider what such discrimination is and what it isn't. Non-discrimination

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[2] Federal law exempts religious employers: "This subchapter shall not apply to an employer with respect to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S. Code § 2000e–1(a).

The Pennsylvania Human Relations Act addresses this issue by pulling religious employers within the definition of employer for most protected classes, but not for religion. "The term 'employer' with respect to discriminatory practices based on race, color, age, sex, national origin or non-job related handicap or disability, includes religious, fraternal, charitable and sectarian corporations and associations employing four or more persons within the Commonwealth." Pennsylvania Human Relations Act, § 4(b). The end result is that religious employers may make distinctions on the basis of religion.

[3] This desire for shared commitment isn't limited to religious groups. For instance, non-profit entities seeking the best for our environment would want employees that share that commitment, and may not want employees that fly on private jets or drive large, gas-guzzling vehicles. Likewise, those promoting a vegan diet in order to advance the ethical treatment of animals would not want employees that go hunting in their free time.

laws were historically directed at ending our culture's mistreatment of persons on account of race. There was a systemic problem arising out of an effort to create a favored class at the expense of a subjugated one. Even the findings of our Pennsylvania Human Relations Act point to this history.[4] When we consider the complete refusal to serve African-Americans at a lunch counter or hotel or tragic instances where they had fire hoses turned on them and dogs unleashed to attack them, it is clear that the bad actors were hateful and filled with nothing but animus. We are willing to call such actions unlawful discrimination and punish it severely because of the depth of that evil. But the same is not true regarding the reasonable people of goodwill with beliefs about marriage or human sexuality that compel them, in the context of a religious ministry, to make hiring decisions that would be irrelevant to a purely secular employer.

Many suggest that the ministerial exception is sufficient to protect religious liberty. It's a protection arising from the First Amendment that stands for the proposition that a church minister should be chosen based on the religious entity's convictions, not on the basis of state or federal employment law. This exception was extended to apply to a teacher at a church-run school because she was ordained by the church as a minister. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S.Ct. 694 (2012). But this is a limited exception that is applied on a case by case basis, not a meaningful protection for most religious hiring decisions. Religious organizations should not be forced to face litigation to determine which employee a particular judge thinks should agree with the organization's religious teachings on human sexuality, and which employee should not be required to do so.

[4] "The denial of equal employment, housing and public accommodation opportunities because of such discrimination . . . deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, thereby resulting in grave injury to the public health and welfare, compels many individuals to live in dwellings which are substandard, unhealthful and overcrowded, *resulting in racial segregation in public schools and other community facilities*. . . ." Pennsylvania Human Relations Act, § 2(a).

Instead, the historic legal basis for religious freedom in hiring came from the aforementioned provisions of state[5] and federal law[6] that allowed religious based hiring for all positions. But that historic basis is destroyed when even religious employers are explicitly no longer allowed--as in the case of this legislation--to make employment decisions on the basis of sexual orientation or gender identity and expression. *See* SB1306, page 6, lines 7-13 ("The term 'employer' with respect to discriminatory practices based on race, color, age, sex, sexual orientation, gender identity or expression, national origin or non-job related handicap or disability, includes religious, fraternal, charitable and sectarian corporations and associations employing four or more persons within the Commonwealth.") (emphasis in original).

By way of illustration, Fontbonne Academy is a Catholic school in Massachusetts that sought to hire each employee as a "minister of the mission" and expected employees to "model Catholic teaching and values." *Barrett v. Fontbonne*, NO CV2014-751 (Mass. Superior Ct., Dec. 16, 2015). The headmaster explained this to a prospective employee. But when it came to the school's attention that he was in a same-sex relationship, his offer of employment was rescinded since he would not be able to model Catholic teaching. A distinction that would be wholly irrelevant for a secular employer was highly relevant to this Catholic school. The school argued that its decision was made not on the fact the man had same sex attraction, but that he disagreed with and lived contrary to church teaching. This decision was made on the basis of religion, but the court ultimately determined that the religious beliefs of the school were secondary to the fact that the state had added sexual orientation to its non-discrimination law. The court found no ministerial exception applicable, despite the fact that the school sought to hire employees that shared and displayed the religious values of the school. Sure, the ministerial exception applies to ministers of churches (and by extension applied to an ordained minister of a church-run school), but there's no case

[5] Pa. Human Relations Act, § 4(b).

[6] 42 U.S. Code § 2000e–1(a).

law that gives any assurance that it would apply to most employees, even most teachers. If this legislature wants to protect the right of religious ministries to hire persons who share their religious values, do not pass the proposed legislation, because it explicitly takes away the ability of even religious ministries to maintain their religious identity.

Our concerns extend far beyond the school setting. We have been contacted by both nonprofit and for-profit ministries such as religious camps, religious broadcasters, rescue missions, and a religious ministry engaged in spreading religious beliefs through the arts. They all must have the freedom to hire like-minded people, because to effectively spread their beliefs, they must have messengers who embody those beliefs. Clearly invidious discrimination is a social ill that we all want to stop. But punishing religious ministries for hiring choices that are relevant to the mission of the ministry should be protected. The current legislation makes no distinction between those choices that are clearly wrong and those in which reasonable members of our society will disagree.

As I stated in a Continuing Legal Education I delivered last year for the Pennsylvania Bar, we have traditionally given room for persons with differing views to follow their convictions, but that space is shrinking. People with unpopular convictions are increasingly given little freedom to live according to those convictions. We see that here. If the majority decides to create laws that categorically treat *all* decisions implicating sexual orientation and gender identity and expression as unjust discrimination, those who hold convictions about human sexuality and marriage will suffer. As Americans we learned early that protections were needed for those whose convictions were derided by the majority. For instance, during the colonial era, Quakers and Mennonites suffered because of their conscientious objection to warfare. But this ultimately resulted in greater freedom as our founders saw that the power of government should be limited when persons' convictions--even minority convictions--are at stake. By the time of our independence, we recognized that instead of punishing those who cannot comply with certain mandates due

to their convictions, we all benefit by working together in those area where we can. By way of example, our Continental Congress in calling Americans to take up arms recognized the plight of those like the Quakers and Mennonites and instead asked them to help the revolutionary cause in the way that they could.[7]

Our task is to recognize that in seeking to promote diversity, tolerance, and respect, we should refrain from punishing those with diverse beliefs, we should seek to be tolerant of actions that are core to who people are, and respect the space for freedom that we all need. If we fail to do so, we will not be promoting a better community, but one that is worse for all of us, regardless of our views on the present issue.

Robust liberty requires breathing room—even for those we consider profoundly wrong. The issue isn't what you believe about marriage or human sexuality, but whether you will give space for people to be free. This is little different from the freedom we give for speech we disagree with. If speech we disagreed with were censored, what would become of our right to free speech? The same is true here. We may or may not agree with religious ministries' hiring decisions. But if we take that liberty away, we all suffer, because it's never long before the shoe is on the other foot. The same principle that protects a religious organization's right to hire an employee who shares their beliefs about traditional marriage also protects the ability of another organization to only hire employees who agree with that organization's teaching which embraces same-sex marriage and sexual relationships. Consider our Supreme Court's handling of the refusal of Jehovah's Witnesses to salute the flag during the height of World War II.

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[7] "As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1469 (1990) (quoting *Resolution of July 18, 1775*, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187, 189 (W. Ford ed. 1905 & photo, reprint 1968)).

Rather than chiding them for their lack of patriotism, the court recognized the danger of enforcing uniformity.

> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
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> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).[8]

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[8] For those who want to see the context of this quote, it is well worth reading:

> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.
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> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

What is the result if we don't give room for people to follow their convictions? The result isn't compliance. It's the loss of religious independence of religious ministries. It's the closure of such ministries. It's the loss of those institutions that help to build the communities that we enjoy. And it's the loss of a bedrock freedom that protects all of us. What is the loss if we don't pass such a law? The federal government is already prosecuting cases of sexual orientation and gender identity discrimination in the workplace. The one thing they're not doing is applying this to religious employers. Surely we should not pass a law that targets this group that deserves protection.

It's important to recognize that the effect of this law goes beyond religious ministries hiring persons with shared religious beliefs. Instead, the

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> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.
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> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
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> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 640-42 (internal footnotes omitted).

words “terms, conditions, and privileges of employment” (Pennsylvania Human Relations Act, § 5(a)) have been interpreted elsewhere (including by the federal government) to include the personal facilities offered by an employer, including changing rooms, showers, and bathrooms. I have been contacted because a person who was anatomically male was demanding to use the women’s locker room at a Pennsylvania employer, and the women were concerned about protecting their personal privacy. Currently there is no state law in place, so those affected were in a position to work out an accommodation to protect personal privacy. But once a law like this passes, the ability to come up with an amicable solution is curtailed, and one-size fits all mandates—that are no solution to personal privacy—are imposed.

Maintaining the privacy and safety of employees in restrooms and locker rooms is not mutually exclusive with respecting employees who identify with a different gender than their biological sex. Employers can do both. Employers must be permitted to continue to respect the dignity of all people by providing separate space for men and women in those few instances where privacy between the biological sexes is relevant, such as in restrooms, showers and locker rooms.

In summary, we at the Pennsylvania Family Council on behalf of the thousands of persons we’ve interacted with on this issue ask you to oppose this legislation. It would take away the freedom that we all share and in the name of tolerance, love, and respect, would punish other members of our community who deserve tolerance, love, and respect. And it would jeopardize privacy in personal facilities at a time when there is a concerted effort across the nation to open up showers, locker room, and restrooms irrespective of anatomical sex. It’s important to recognize that this effort is part of a larger effort both in Pennsylvania and nationally to make changes not only to our employment law but housing and public accommodation as well. Once the Commonwealth begins this process, we fear where this will end and how many in our Commonwealth will be maligned and lose their ability to live consistent with their faith. We are confident that Pennsylvania can do better.