

Testimony of Tim Schultz
Senate Labor and Industry Committee
August 30, 2016

Thank you, Chairwoman Baker and members of the committee. My name is Tim Schultz, and I'm the president of the 1st Amendment Partnership, a Washington, DC-based non-profit organization which provides a forum for some of the nation's largest faith communities to conference on issues related to religious freedom. As an example, our National Religious Freedom Conference that was broadcast on C-SPAN, featured speakers including Sikh, Pentecostal, Muslim, Latter-day Saint, Jewish, Evangelical, Eastern Orthodox, Catholic, and Anglican. While I am not speaking here today on behalf of any of these in particular – I can speak generally about their concerns.

I have been privileged to work on the issue of religious freedom in more than 30 state capitols over the last four years and believe the experiences of your sister states can inform your deliberations.

Pennsylvania has a long history of respect for the fundamental importance of religious freedom. The Pennsylvania Constitution asserts, "...[N]o human authority can, in any case whatever, control or interfere with the rights of conscience..."

All generations of Americans have grappled with how best to uphold the principle of religious freedom, while balancing competing societal interests. This requires legislative action to provide the roadmap for navigating the myriad of practical questions that arise in a society that allows the free exercise of religion. Legal scholars across the political spectrum have acknowledged that the intersection of religious freedom and LGBT rights is where some of the most challenging contemporary questions arise. Approaching these questions with "winner-take-all" solutions only serves to exacerbate social tensions, without adequately addressing the highly nuanced, good faith arguments made by both sides.

It's important to note that the Supreme Court has decided the same sex marriage question, and we are not proposing to re-litigate that issue. However, the *Obergefell* same-sex marriage decision looms large as we explore the landscape for religious freedom and LGBT rights. Prior to the *Obergefell* ruling, eleven states legalized same-sex marriage through the legislative process. All of them – every single one – simultaneously created new religious liberty protections in relation to marriage. Thus, states like New York and Hawaii absolutely insulated religious organizations—and not just churches—from lawsuits and other government penalties for their policies and actions regarding marriage. They did so because they recognized that new legal rights in the context of same-sex marriage, created inevitable tensions that demanded clear legislative guidance. The principle that I think still holds is: we should strive to leave religion in no worse position after this law is passed

Though the sequence is different, the legal and cultural issues here are quite similar:, when new LGBT protections are enacted in the form of anti-discrimination statues and

ordinances, inevitable tensions arise. What does all this mean? Since the Obergefell decision, no state has passed new LGBT rights laws. With the exception of Utah—which enacted a compromise protecting religious freedom and LGBT rights— no such laws have been passed anywhere in the country for several years. Utah is instructive because it provides a point of reference for resolving the tension between religious freedom and LGBT rights in a way that both sides win. We call this approach, which has also been introduced in Michigan and Indiana, “Fairness For All.” These proposals have several key elements:

- **Strong Religious Freedom Protections:** Religious freedom is a human right and human rights should not vary based on who holds the governor’s office or sits on the bench. The bills passed in Utah prevented government from, for example, canceling or withholding a professional or business license due to a person’s religious beliefs on marriage, or requiring that church property be used for activities contrary to the religious organization’s beliefs.
- **LGBT Rights:** The true intent of the religious freedom protections was made clear by extending protections against discrimination in housing and employment for LGBT individuals. Therefore, LGBT citizens gain important and long-sought protections in a bipartisan fashion.
- **Benefits for the Economy:** The business community has proven to be the decisive actor in many early 21st Century social issue debates. Businesses in many states where major social issue legislation has been proposed are concerned that economies can be impacted if states appear unwelcoming. A bipartisan consensus bill that strongly protects religious freedom and expands nondiscrimination protections to the LGBT would send the signal that Pennsylvania is welcoming to all people and therefore a great place to do business.

The bill before you today is focused on employment, where the evidence of discrimination against members of the LGBT community is strongest. There is strong anecdotal evidence that to avoid discrimination, gay people feel they must remain closeted in some workplaces. This point demonstrates why it is wrong for either side in this debate to compare sexual orientation discrimination directly to race: race is obvious, sexual orientation frequently is not. In this regard it is much more like religion: a deep part of a person’s identity, that is not always obvious from external appearance.

There is a strong societal consensus that members of the LGBT community should not be subjected to unjust discrimination in the context of employment. Experience from other states suggests that developing a legislative approach that embraces that widely-held belief, while safeguarding the free exercise rights of those with traditional views regarding marriage, family and sexuality, can gather significant support across the political spectrum. Attempts to extend LGBT rights in the area of Public Accommodations, which this legislature might also consider, bring a host of more legally complex and socially controversial issues to the table.

Returning to the bill before you, I would note that America has generally had a “no exceptions” rule for racial discrimination, but this is not true with respect to other kinds of protected classes, especially religion. As just one example, we acknowledge that religious charities have a legitimate interest in having employees of like faith, in order to infuse their specific religious values throughout their mission. The ability to carry out their mission is deeply wedded to their specific religious identity, and we respect this fact, even if it means allowing them an accommodation under anti-discrimination laws so that they can restrict hiring to only people from their own religious tradition.

The point is that accommodations for religious belief and practice are fairly commonplace in anti-discrimination law and adopting them in the context of a bill that protects LGBT rights should not then be understood as unusual, or as imposing a sort of second class protected status. Indeed, when the United States Senate passed the Employment Discrimination Act in 2013 it granted broad religious accommodations that go well beyond those in the current version of this bill.

In our view, because the current Pennsylvania anti-discrimination law has (relative to other states) weak religious accommodation language, there likely must be a close consideration of what types of protections should be added to arrive at an equitable and balanced legal regime that is fair to all concerned. Merely relying upon Pennsylvania’s admirable existing Religious Freedom Restoration Act, is simply not sufficient in this regard. In the civil rights context, the RFRA test is unlikely to be applied in a way that will vindicate religious rights, and even where it does the time, stress and expense of litigation means that religious groups and individuals required to use its provisions will feel as if they have lost the war, even if they win the battle.

Likewise, relying upon federal case law in the hope that the First Amendment will appropriately resolve the issue even in the absence of statutory guidance is ill advised. Even the important 9-0 pro-religious liberty decision in *Hosanna-Tabor* upholding the “ministerial exception”, left many questions unanswered that would be important for Pennsylvania to resolve as part of any new law expanding LGBT employment rights.

The current version of this bill, on its face, would undermine religious freedom in Pennsylvania, and place Pennsylvania in the unenviable position of protecting religious freedom far less than even deep blue states like New York and California. But I respectfully believe that you can do better and that you will do better. So we would urge the Committee to closely consider the work done by legislators in Utah, and other states where a similar discussion is in process, as references point for what a truly balanced approach might look like, giving due consideration to the specific factors that may be uniquely applicable to Pennsylvania; This is not a matter of cutting and pasting a law or proposal from another state. “Fairness For All” means that each side will gain stronger protections and more durable protections with less political strife than could otherwise be obtained with a stand-alone approach. This will likely take longer than anyone would like, but the prospect of protecting everyone’s rights and a balanced way is worth it.

