



Honorable Tommy Wells, Chairperson  
Committee on the Judiciary and Public Safety  
Council of the District of Columbia  
c/o Nicole Goines  
Room 109  
1350 Pennsylvania Ave., NW  
Washington, DC, 20004  
[ngoines@dccouncil.us](mailto:ngoines@dccouncil.us)  
*Via ElectronicMail*

**RE: Bill 20-790 “Reproductive Health Non-Discrimination Act of 2014”**

Dear Chairperson Wells:

Proposed Bill 20-790 would punish pro-life employers, including the nonprofit organizations who make their home in the District, serve and employ its residents, and work to encourage respect for the sanctity of human life in our nation’s capital. The bill is unconstitutional and a patent violation of the Religious Freedom Restoration Act. The undersigned Washington, D.C.-based pro-life organizations strongly urge the Committee to reject this bill.

Bill 20-790 would amend the Human Rights Act of 1977 to prohibit employers from discriminat[ing] 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.

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 against an employee because the individual had an abortion or makes any other “reproductive health decision.” Although the text of the bill would not support such an interpretation, there is also concern that it might be intended to require employers providing health insurance to their employees to also include insurance coverage of elective abortion and all other potential “reproductive health decision[s]” even where the employer has a religious or conscientious objection.

The undersigned organizations 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, DC. 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. 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.

With respect to the organizations represented below that are religious, Bill 20-790 would also 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 those nonprofit organizations represented below. *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). 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.

The District cannot satisfy the strict scrutiny to which this law would be subjected by the courts. Bill 20-790 appears to be aimed more at making a political point about pending cases challenging other mandates from the U.S. Department of Health and Human Services rather than addressing any actual problem in need of resolution in the District. In any case the District has other means at its disposal to address any legitimate interests. This bill could not satisfy the demanding requirements of RFRA.

Likewise, Bill 20-790 would also violate the Free Exercise Clause of the First Amendment. "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.

Furthermore, to the extent that Bill 20-790 would require religious organizations in the District to provide insurance coverage of all possible "reproductive health decision[s]" that a woman might make, including elective abortion, it 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.

Finally, 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, it is not clear that these exemptions would serve to eliminate the burden on the undersigned organizations. 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...." Thus, since the exception does not expressly mention the employer's terms of employment, it is not clear that the Commission would apply this exception were a religious organization simply not to provide insurance coverage of elective abortions or other items that would violate the employer's religious beliefs. Also uncertain is the scope of the

Hon. Tommy Wells  
June 20, 2014  
Page 4 of 4

exception permitting a religious employer to draw employees from those who are of the “same religion or political persuasion.”

Moreover, the “business exception” in D.C. Code § 2-1401.03(a) is subject to several limitations that may undermine its protection for pro-life employers like the undersigned organizations. For example, this exemption is limited to cases where the effect of the D.C. Human Rights Act would be that “such business cannot be conducted.” *Id.* Moreover, the exception “cannot be justified by the fact[] of ... the preferences of co-workers, employers, customers or any other person.” *Id.* Thus, it is uncertain whether the Commission or a court would apply the exception where the employers declined to hire persons or to provide coverage of abortion or other items that would contravene their organization’s message.

The undersigned pro-life organizations contribute to the economy of the District and hire and serve its residents. We encourage the District to reject Bill 20-790 and its unnecessary violation of our constitutional and statutory rights.

/s/ M. Casey Mattox  
M. Casey Mattox  
Senior Counsel  
Alliance Defending Freedom

/s/ Ovide Lamontagne  
Ovide Lamontagne  
General Counsel  
Americans United for Life

/s/ Jeanne Monahan  
Jeanne Monahan  
President  
March for Life

/s/ Marjorie Dannenfelser  
Marjorie Dannenfelser  
President  
Susan B. Anthony List

/s/ Chuck Donovan  
Chuck Donovan  
Executive Director  
Lozier Institute

/s/ Penny Nance  
Penny Nance  
President & CEO  
Concerned Women for America

/s/ Douglas Johnson  
Douglas Johnson  
Legislative Director  
National Right to Life Committee

/s/ David Christensen  
David Christensen  
Vice President for Government Affairs  
Family Research Council