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Before the
United States Senate
Committee on Health, Education, Labor, and Pensions

Regarding the *Employment Non-Discrimination Act of 2009, S. 1584*

November 5, 2009

I am Craig Parshall, Senior Vice-President and General Counsel for National Religious Broadcasters (NRB). I am appearing today to voice NRB's opposition to S. 1584, the Employment Non-Discrimination Act of 2009 (ENDA). It is my legal opinion that S. 1584, if passed into law, would impose a substantial, unconstitutional burden on religious organizations and would interfere with their ability to effectively pursue their missions, both those which are non-profit groups, as well as faith-based institutions and enterprises which operate commercially.

NRB is the pre-eminent association representing the interests of Christian television, radio and Internet broadcasters. Our organization also includes in its membership Christian groups not directly engaged in broadcasting activities but which are involved in activities which provide support services specifically to religious broadcasters or are involved in communications-related activities, such as public relations agencies, law firms with an emphasis on media law, Christian publishing companies, churches with a media outreach, Christian programmers, preaching and teaching ministries and faith-based charity and humanitarian organizations. NRB also has among its membership more than a dozen Christian colleges and Bible schools. Thus, the wide variety of Christian organizations comprising our membership provides National Religious Broadcasters with a unique view of the potential collision between S. 1584 and the religious liberties of faith-based organizations.

S. 1584 Threatens the Constitutional Rights of Religious Employers

S. 1584 is a sweeping new piece of employment discrimination legislation which protects persons from adverse employment actions that are based on the "actual or perceived sexual orientation or gender identity" of that person. While the bill references Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e et seq., it structurally stands alone as a separate form of substantive employment law.

The bill provides a purported "exemption" for "religious organizations" in Section 6, and then defines the organizational status that would qualify an employer for

exemption by directly referencing the exemption scheme under Title VII. [1] Section 6 will be discussed at more length below. However it is my opinion that Section 6 is fatally insufficient to protect religious employers. As such, it is infirm because it violates several protections under the First Amendment.

Free Exercise of Religion

When a government law sweeps into its regulatory purview religious groups whose operations are thereby substantially and selectively burdened, and it fails to provide ample exemptions for those religious organizations, it violates the Free Exercise provisions of the First Amendment. *Church of the Lakumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-532 (1997).

In the realm of private religious employers, broad and adequate exemptions for religious organizations are constitutionally imperative. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (holding that Title VII religious exemptions do not collide with the Establishment Clause but are fully consistent with it, the court in *Amos* going on to state: "Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."). The principal expressed in Amos is clear: where attempted "exemptions" in discrimination laws are so unclear, confusing, or overly broad so as to cause religious organizations to guess or speculate as whether it they are sufficiently "religious" either in structure of activities to qualify for the exemption, then the religious liberty provisions of the First Amendment are violated. Moreover, where a law is passed in the area of employment discrimination and it fails, as S. 1584 does here, to provide a sufficiently adequate exemption for religious institutions regarding faith-based employment decisions it also violates the Free Exercise Clause of the First Amendment. *Montrose Christian School Corp. v. Carver, Montrose Christian School Corp. v. Walsh*, 770 A.2d 111 (Md. Ct. App. 2001) (county employment discrimination code violated the Free Exercise rights of a private religious school by failing to provide a satisfactory, substantive exemption for it, the Court noting that "[a] uniform line of cases apply[] this principle, namely that the free exercise guarantee limits governmental interference with the internal management of religious organizations …"). The Free Exercise guarantee of the First Amendment reflects "a spirit of freedom for religious organizations, and independence from secular control or manipulation …" *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

Establishment Clause

The Establishment Clause prohibits excessive entanglement between government and religion. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (exemption of religious schools from federal National Labor Relations Board oversight). *Walz v. Tax*

[1] Title VII exempts religious organizations regarding the employment of persons "*of a particular religion* to perform work connected with the carrying on" of the organization's "activities" (emphasis added).

Commission, 397 U.S. 664 (tax exemption for religious groups wisely facilitates a "desired separation [of government from religion] insulating each from the other"). Confusion has been created in the Section 6 religious exemption of S. 1584, as it attempts to exempt only those religious groups that would be exempt under Title VII. But by doing that, Section 6 will invite courts to engage in searching inquiries into the beliefs and doctrines of religious employers regarding homosexuality, lesbianism, bisexuality, transgenderism and similar issues in an attempt to parse-out the scope of the religious exemption in Section 6; i.e. to determine whether, under the provisions of S. 1584 (which does expressly include sexual orientation and gender identity as categories for protection) a religious employer would, under the language of Section 6, be "exempt from the *religious discrimination provisions* of Title VII" (which does not expressly provide protections for sexual orientation or gender identity). This kind of apples-and-oranges incorporation of Title VII into Section 6 of S. 1584 creates a nether world of uncertainty for religious organizations. As will be discussed in more detail below, if sexual orientation and gender discrimination are construed by courts to be more like traditional "sex" discrimination under Title VII, then religious groups will be given no practical exemption or a very limited one, but if it those categories of discrimination are deemed to be more like "religious discrimination" then some religious groups (i.e. those recognized organizationally under the Title VII religious exemption) might be entitled to exemption.

One added concern is that Section 6 of S. 1584, through its adoption wholesale by cross-reference to the Title VII religious exemption scheme, has also incorporated Title VII's separate exemption provision for religious schools. That exemption applies where the school's curriculum is determined to have been "directed toward the propagation of a religion." However, this is an intensely intrusive and unconstitutional inquiry for any secular court to undertake. A school seeking this exemption paradoxically would have to forfeit it private religious autonomy, in effect, in order to try to save it. When the government exercises an "official and continuing surveillance" over the internal operations of a religious institution, religious freedom under the First Amendment is jeopardized. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 675 (1970). A secular court may not review a religious body's decisions on points of faith, discipline, or doctrine, *Watson v. Jones*, 80 U.S. 679 (1872), nor may it govern the affairs of religious organizations. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

Freedom of Association

The First Amendment's free association guarantee has been interpreted to mean that a discrimination law could not be used to force the Boy Scouts of America to employ a professed homosexual as an assistant scout leader. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). And while *Dale* did involve a *non-profit association* as a party, and it addressed the groups "moral" (as opposed to religious) objections to homosexuality, the Supreme Court nowhere conditioned its reasoning on that fact that the Boy Scouts were a non-profit organization. Further, "moral" beliefs are not explicitly protected under the First Amendment as a stand-alone-right; rather they are were protected in *Dale* because they were anchored to the Free Speech aspects of the right of Association . By contrast,

religion is given explicit protection in the First Amendment in its own right and therefore ought to receive *even more protection* under the principals of the *Dale* case. This would mean that S. 1584 is of questionable constitutionality regarding its negative impact on those religious group that have faith-based objections to hiring persons who are self-identified as homosexuals or persons of non-heterosexual gender identity. Private religious employers, like private associations, must be given the *right to reject* members or staff who would conflict with the religious organization's declared mission and beliefs. A religious group has "the autonomy to choose the content of [it's] own message." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995)

S. 1584's Religious Exemption Provision is Fatally Flawed

S. 1584 prohibits employment discrimination regarding the "actual or perceived sexual orientation or gender identity" of any person. Sec. 6 purports to provide an exemption for "a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of Title VII of the Civil Rights Act …" (hereinafter Title VII). Thus, Sec. 6 shifts the inquiry back to the "religious discrimination provisions" of Title VII. However, S. 1584 does not define what it means by the phrase "religious discrimination provisions" of Title VII. One likely interpretation is that the phrase could be construed to mean "discrimination on the basis of religion." See: *E.E.O.C. v. Mississippi College*, 626 F.2d 477, 484 (5th Cir. 1980). But what does Title VII's exemption mean when it says that it permits discrimination "on the basis of religion?" According to *Petruska v. Gannon University*, 462 F. 3d 294 (3rd Cir. 2006) it means this: "The statute exempts religious entities and educational organizations from its non-discrimination mandate to the extent that an employment decision is based on an individual's [i.e. the plaintiff's] religious preferences" (emphasis added). The current state of the law is that organizations can be exempted from the operation of Title VII only regarding adverse employment decisions which are made "on the basis of [the] religion" of the plaintiff; however, generally speaking, Title VII grants no exemption for religious organizations whose actions are held to implicate discrimination on the basis of the "race, color, sex or national origin" of the plaintiff, regardless of the alleged religious motivations of the religious organization. *Id.* See also: *Rayburn v. Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).

This distinction is critical. It is foreseeable that future courts could construe the adverse decisions of faith-based groups regarding non-hiring of homosexuals, as an example, as being more akin to discrimination based on "race … [or] sex" than discrimination "on the basis of religion." An even stronger argument might be made that "gender identity" discrimination by a religious organization is tantamount to discrimination based on "sex" (a gender issue) and therefore, because the religious group would not qualify for exemption under Title VII for sex discrimination, neither will it receive exemption for "gender identity" discrimination under S. 1584. This likely confusion by the courts is not just idle speculation. As the Court said in *Powel v. Wise Business Forms, Inc*., __ F.3d __ (3rd Circuit, August 28, 2009) appeal No. 07-3997, slip

op. page 14: " … the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw." The end result of the uncertainty created by Section 6 could well be that the supposed protections contained in its religious "exemption" in S. 1584 would prove in the end to have been only a mirage.

But even aside from these intractable problems of whether the wholesale adoption of Title VII religious exemptions into a "sexual preference" and "gender identity" discrimination law actually provides any protection whatsoever from a religious liberty standpoint, there are other insurmountable difficulties in S. 1584.

Sec. 6 Simply Compounds a Crazy Quilt of Inconsistent Court Decisions

By bootstrapping Title VII's religious exemption language into Sec. 6, the ENDA bill, S. 1584, subjects religious organizations to a crazy-quilt of inconsistent decisions that have been rendered by the courts in construing the exemption language of Title VII. This approach will stultify and confuse religious groups and lead to endless, expensive, and harassing litigation.

Title VII (42 U.S.C. §§ 2000e et seq.) provides in part:

> This title … shall not apply 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.

Unfortunately, Congress "did not define what constitutes a religious organization, - 'a religious corporation, association, educational institution, or society'" under Title VII. *Spencer v. World Vision, Inc*. 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008). As a result, "courts conduct a factual inquiry and weigh '[a]ll significant religious and secular characteristics …'" *Id*. (citations omitted).

What has resulted is a sad pattern of inconsistent and complex decisions which render very scant religious freedom to faith groups but which have sent a chilling pall over their activities not to mention their budgets: *Leboon v. Lancaster Jewish Community Center Association*, 503 F. 3d 217 (3rd Cir. 2007) (Jewish Community Center qualified as a religious organization so that its firing of a Christian was non-actionable under Title VII); but compare: *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988) (no exemption for small, closely held manufacturing shop whose owner had a clearly Christian world view and wanted it to permeate the work place). A Christian humanitarian organization dedicated to ministering to the needs of poverty-stricken children and families around the world was entitled to take adverse employment actions against an employee because of that's person's religion because it qualified for exemption under Title VII (*Spencer v. World Vision, Inc., supra*); but a Methodist orphan's home dedicated to instilling in orphaned children Christian beliefs was held not to be qualified as a "religious corporation …" etc. where it had a temporary period of

increased secular leadership followed by return to its original spiritual mission, *Fike v. United Methodist Children's Home of Virginia, Inc*. 547 F. Supp. 286 (E.D. Va. 1982). Further compare: *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (newspaper covering secular news but with close relationship with the Christian Science Church allowed to discriminate on basis of religion).

The legal tests employed by the courts in deciding religious exemptions under Title VII are complex and discordant. The 9th Circuit has employed a complicated six-factor test. *Spencer, supra* at 570 F. Supp. 2d 1284. Whereas the 6th Circuit has applied an even more complex nine-factor test. *Id.* at 1285-86. In addition, the 9th Circuit has construed the religious exemption narrowly, whereas the 3rd Circuit has not. *Id*.

The chances that the religious exemption in Sec. 6 of S. 1584 would be given a very narrow, cramped interpretation are substantial. Where general discrimination laws collide with sincerely held religious beliefs, religion often loses. See: *Bob Jones University v. U*.S., 461 U.S. 574 (1983) (private religious college loses its tax exempt status as a non-profit religious corporation because, while it admitted students from all races, its inter-racial dating rules were found to violate a national policy regarding discrimination). In *Bob Jones University* the Supreme Court could only muster a meager reference to the thoroughly religious school's Free Exercise rights, holding that the compelling interest of the government in stamping out discrimination outweighed "whatever burden" was caused to the organization's freedom of religion. *Id*. at 604. To the extent that "sexual preference" or "gender identity" discrimination are likened by the courts to racial discrimination, religious organization will find little comfort under Sec. 6 of S. 1584. See also *Swanner v. Anchorage Equal Rights Commission*, ___ U.S. ___, 115 S.Ct. 460 (1994)(Thomas, J., dissenting) where the Supreme Court declined the chance to grant certiorari and to vindicate the rights of a landlord successfully sued for state housing discrimination where he refused on religious grounds to rent to unmarried couples.

Title VII grants a separate exemption specifically for religious schools. 42 U.S.C. §§ 2000e-2 (e)(2) provides exemption for such religious institutions provided that they are at least "in substantial part owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society …" or where the curriculum "is directed toward the propagation of a religion."

But here again the resulting court interpretations there have been just as dismal: *EEOC v. Kamehameha School/Bishop Est*ate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993) (private Protestant religious school was denied Title VII religious exemption even though it had numerous religious characteristics and activities); *Pime v. Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984)(Catholic college held not to be entitled to religious exemption relating to its preference for Jesuit professors over a Jewish professor), reversed on other grounds at 803 F.2d 351 (7th Cir. 1986)(where Judge Posner noted in his concurrence that, regarding the religious exemption issue, "the statute itself does not answer it," and "the legislative history … is inconclusive," *Id*. at 357). Contrast with: *Hall v. Baptist Memorial Care Corp.*, 215 F. 3d 618 (6th Cir. 2000)

(Baptist entity training students for health care had sufficiently religious overtones to qualify for exemption regarding its firing of a lesbian staffer who was a minister at a pro-homosexual church).

N.R.B.'s membership includes some 200 Christian radio stations that are commercial in their organizational structure. Considering the chilly reception such commercial religious entities receive by the courts when they are other than non-profit corporations, they can expect to be shut out of any exemption under S. 1584 in litigation. We can add to that list other of our for-profit members whose mission is Christian in nature but who will be denied exemption: Christian publishers, religious media consulting groups and agencies. Also, food vendors who work exclusively with Christian schools may be denied exemption; Christian-oriented bookstores, adoption agencies, counseling centers and drug rehab facilities will also suffer the same fate.

Confusion Regarding the F.C.C.'s EEO Jurisdiction

Currently, the Federal Communications Commission has promulgated EEO rules regarding broadcast licensees. An exemption is provided for a "religious broadcaster" regarding all employment decisions impacting religious belief, but they still must abide by a non-discrimination standard respecting "race … or gender." *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd. 24018 (2002) ("EEO Order"), ¶¶ 50, 128.

Would S. 1584 supersede the regulations of the F.C.C regarding the employment activities of broadcasters? We simply do not know. The only help we have in answering that comes from a sparse comment in *The King's Garden, Inc. v. F.C.C.*, 498 F. 2d 51, 53 (D.C. Cir. 1974)(F.C.C. is justified in pursuing its own EEO regulations against religious broadcasters where "Congress has given absolutely no indication that it wished to impose the [Title VII] exemption upon the F.C.C."). Nothing in the language of S. 1584 gives us any Congressional intent to regulate broadcasters. On the other hand, would this new legislation be held to regulate those broadcasters that do not qualify for the F.C.C.'s definition of a "religious broadcaster?" The F.C.C. has generated a "totality of the circumstances" test for what is, or is not, a "religious broadcaster" that differs from the Title VII language. S. 1584 exponentially increases the uncertainty regarding which law applies. Furthermore, would "gender identity" protections under S. 1584 be viewed as the same, or different from the requirement imposed by the F.C.C. that even religious broadcasters not discriminate on the basis of "gender?" Again, such uncertainties only ratchet-up the probability that the religious liberties of Christian broadcasters and communicators will be chilled as they try to speculate what the law actually provides and what their rights really are.

Sexual Orientation and Gender Identity are Already Protected

S. 1584 declares that the "purposes of his Act" are in part "to provide … meaningful and effective remedies" for "employment discrimination on the basis of

sexual orientation or gender identity." Section 2, Purposes, paragraph (1). Yet that stated purpose behind S. 1584 ignores the fact that remedies already exist in federal employment law. Title VII has been construed to already provide "gender stereotyping" discrimination protection for homosexuals or persons of non-heterosexual gender identity under existing "sex discrimination" provisions. *Powel v. Wise Business Forms, Inc*., __ F.3d __ (3rd Circuit, August 28, 2009) appeal No. 07-3997. See also: *Vickers v. Fairfield Med. Ctr*., 453 F.3d 757 (6th Cir. 2006); *Nichols v. Azteca Rest. Enters., Inc*. 256 F 3d 864 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc*., 194 F. 3d 252 (1st Cir. 1999).

Conclusion

S. 1584, and its companion ENDA bill in the House of Representatives, H.R. 3017, are the result of a public debate over sexual orientation and gender identity legal protections. But when we consider the entire course of American history, that debate is of very recent vintage.

Compare, by contrast, the long-standing recognition in our nation that religious liberty is a foundational right and that government should have few occasions to invade it. In fact, that concept of religious freedom pre-dates the Constitution. America's first Supreme Court Chief Justice, John Jay, a decade before the constitutional convention, described the notion of free exercise of religion this way: "… Adequate security is also given to the rights of conscience and private judgment. They are by nature subject to no control but that of the Deity, and in that free situation they are now left. Every man is permitted to consider, to adore, and to worship his Creator in the manner most agreeable to his conscience." [2]

John Witherspoon, a member of the Continental Congress and signer of the Declaration of Independence was an evangelical minister who also served as President of the College of New Jersey (later renamed Princeton). His students at that school included future signers of the Declaration as well as delegates to the constitutional convention. James Madison was one of them. Witherspoon recognized the inherent relationship between civil liberty and religious freedom and when assaults came against either, both must rallied in support of the other. He stated the matter well when he said in the paradigm of a prayer: "God grant that in America true religion and civil liberty may be inseparable and that unjust attempts to destroy the one, may in the issue tend to the support and establishment of both." [3]

S. 1584 and its companion in the House represent an assault on these historical notions of religious freedom. Time and the deliberative decisions of this Senate will

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[2] John Jay's "Charge to the Grand Jury of Ulster County," April 20, 1777 cited in Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay 1745-1826*, (New York: Da Capo Press, 1971), Vol. I, page 163.

[3] "The Dominion of Providence Over the Passions of Men," delivered at Princeton on May 17, 1776, from *The Selected Writings of John Witherspoon*, edited by Thomas Miller (Carbondale, Ill.: Southern Illinois University Press 1990), page 147.

determine whether the idea behind John Witherspoon's prayer will be honored. We urge this Committee not to jettison the rights of people of faith, turn them into lesser privileges, or reduce them to a mere miniature of the concept that our Founder's held. If that happens here, it means that we have set ourselves on a very dangerous path, a radical departure from those basic liberties for which our Founders risked their lives, their fortunes and their sacred honor. Thank you.

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