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Testimony on Pennsylvania SB1306: No Additional Protections for Religious Freedom

Katherine M. Franke
Columbia Law School, kfranke@law.columbia.edu

Burton Caine
Temple University Beasley School of Law

Lenore F. Carpenter
Temple University Beasley School of Law

Eric A. Feldman
University of Pennsylvania

Thersa Glennon
Temple University Beasley School of Law

See next page for additional authors

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Authors

Katherine M. Franke, Burton Caine, Lenore F. Carpenter, Eric A. Feldman, Thersa Glennon, Nancy J. Knauer, Jules Lobel, Wendell Pritchett, Dara E. Purvis, Brishen Rogers, Victor C. Romero, Kathryn M. Stanchi, and Nancy A. Welsh

THE PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT
CENTER FOR GENDER AND SEXUALITY LAW
COLUMBIA LAW SCHOOL
435 WEST 116TH STREET
NEW YORK, NY 10027
TEL: 212.854.0167
HTTP://TINYURL.COM/PUBLICRIGHTS

**Pennsylvania State Senate
Committee on Labor and Industry
Hearing on Senate Bill No. 1306
Testimony of Professor Katherine Franke¹
August 30, 2016**

Senator Baker, Senator Tartaglione, and Members of the Committee, thank you for inviting me to testify on these important questions of civil rights and religious freedom.

I am the Sulzbacher Professor of Law at Columbia Law School in New York City, where I am also the Faculty Director of the Public Rights/Private Conscience Project, a project in which we bring legal academic expertise to bear on the multiple contexts in which religious liberty rights are in tension with other fundamental rights to equality and liberty.

Introduction

On behalf of the Public Rights/Private Conscience Project (PRPCP) at Columbia Law School I offer the following legal analysis of Senate Bill 1306. Overall, the current version of the bill promises to modernize Pennsylvania’s Human Relations Act by expanding anti-discrimination protections in employment to include sexual orientation and gender identity-based discrimination. Were the Pennsylvania legislature to pass SB 1306, the Commonwealth would join twenty-two states that include sexual orientation and nineteen states that include gender identity in their laws assuring equal employment opportunities for their citizens.² As discussed more fully below, current language contained in Pennsylvania’s Human Relations Act,³ the U.S.

¹ Sulzbacher Professor of Law, Director, Center for Gender & Sexuality Law, Faculty Director, Public Rights/Private Conscience Project, Columbia Law School.

² The District of Columbia also protects against employment discrimination on the basis of sexual orientation and gender identity. *See Non-Discrimination Laws: State by State Information – Map*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Aug. 22, 2016). The District of Columbia also protects against multiple forms of discrimination on the basis of sexual orientation and gender identity. *See Non-Discrimination Laws: State by State Information – Map*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Aug. 22, 2016).

³ Pennsylvania Human Relations Act, 43 P.S. § 954 (b): “The term ‘employer’ ... does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations. 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.”

and Pennsylvania Constitutions,⁴ and Pennsylvania’s Religious Freedom Protection Act,⁵ provide robust protections for the religious liberty rights of faith-based employers, and as such no additional language is needed in SB 1306 to protect employers’ rights to the free exercise of religion. Indeed, some of the language contained in amendments to companion bills previously pending before the Pennsylvania legislature⁶ risks building into the Commonwealth’s Human Relations Act an overly-solicitous accommodation of religious preferences in a manner that could create a violation of the Establishment Clause. An additional accommodation of religious belief, such as that contained in A08770 offered to SB 1307 in the Senate Housing and Urban Affairs Committee, “A08770,” is therefore unnecessary and, moreover, risks unsettling a well-considered balance set by the Pennsylvania legislature and courts between religious liberty and other equally fundamental rights. By creating a religious accommodation that would meaningfully harm other Pennsylvanians, A08770 conflicts with established First Amendment doctrine.

I. Existing Law Provides Ample Protection for the Religious Liberty Rights of Employers Covered by the Pennsylvania Human Relations Act

Current law provides four layers of protection for the religious liberty rights of Pennsylvanians covered by the Human Relations Act. First, the First Amendment to the U.S. Constitution affords all U.S. citizens and institutions the right to have the free exercise of religion protected against infringement by state or federal law. For instance, the U.S. Supreme Court found in 2012 that the First Amendment bars the government from infringing on a religious institution’s “right to shape its own faith and mission through its appointments.”⁷ It therefore held that applying federal or state employment discrimination law to the hiring and firing of ministers by a religious organization was unconstitutional.

The Pennsylvania Supreme Court has similarly interpreted the First Amendment’s Free Exercise clause to protect religious employers. The court, for instance, upheld the right of Norwood-Fontbonne Academy, a private Catholic elementary and secondary school in Philadelphia, to deny its lay teachers and librarians the right to collectively bargain on the grounds that “unionization of lay employees of church-operated schools necessarily leads to government involvement which would violate the First Amendment of the United States Constitution.”⁸

⁴ The First Amendment to the U.S. Constitution sets out that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Article I, Section 3 of the Pennsylvania Constitution provides that “all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience,” that “no man can be compelled to attend, erect, or support any place of worship or to maintain any ministry against his own consent,” and that no human authority can interfere with the “rights of conscience and no preference shall ever be given by law to any religious establishment or modes of worship.”

⁵ Pa. Stat. tit. 71, §2403.

⁶ We refer specifically to Section 6 of SB 1307, adding a new Section 5.4 entitled: “Protection of Religious Exercise,” hereinafter referred to as the “A08770,” available at: <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=S&billTyp=B&billNbr=1307&pn=1959>.

⁷ *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694, 706 (2012).

⁸ *Association of Catholic Teachers, Local 1776 v. Pennsylvania Labor Relations Bd.*, 547 Pa. 594, 597 (Pa. S.Ct. 1997).

Faith-based employers in Pennsylvania are also protected by religious liberty principles in the Pennsylvania Constitution. Article I, Section 3 of the Pennsylvania Constitution provides that “all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience,” that “no man can be compelled to attend, erect, or support any place of worship or to maintain any ministry against his own consent,” and that no human authority can interfere with the “rights of conscience and no preference shall ever be given by law to any religious establishment or modes of worship.”⁹

Pennsylvania courts have interpreted the state Constitutional protections for religious liberty broadly, and have stressed the fundamental importance of religious liberty in the Keystone state: “It is incontrovertible, of course, that the guarantee of the free exercise of religion is a fundamental constitutional right.”¹⁰ Another court noted, “The provisions of [Pennsylvania’s] Constitution to which we have referred were undoubtedly intended to secure to its citizens that religious freedom which had been denied their ancestors in the countries from which they came. These constitutional provisions must be construed in the light of that history.”¹¹ Commentators have explained that “[t]he distinct text of the religious liberty provisions of the Pennsylvania Constitution lends protection to religious freedom that is not only independent of, but also broader than, the Free Exercise Clause of the First Amendment.”¹²

The religious beliefs of persons and groups in Pennsylvania are also accommodated under the Religious Freedom Protection Act (RFPA),¹³ which was passed by the Pennsylvania legislature in 2002. RFPA bars the state and its municipalities from acting in such a way as to impose a substantial burden on a person’s free exercise of religion, unless doing so is the least restrictive way of furthering a compelling government interest. The passage of RFPA mirrored similar legislative action during this period by the U.S. Congress and many states designed to create statutory protections for religious liberty following the Supreme Court’s First Amendment decision in *Employment Division v. Smith*,¹⁴ a case written by Justice Antonin Scalia that narrowed the Supreme Court’s reading of the Free Exercise clause of the First Amendment.

Finally, Pennsylvania’s Human Relations Act itself already contains protections for faith-based employers. Under the Act, the term employer “does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations,” although the term employer *does* include such religious corporations “with respect to discriminatory practices based on race, color, age, sex, national origin or non-job related handicap or disability.”¹⁵ Read together, these provisions suggest that while most religious organizations can limit hiring to co-religionists, they may not discriminate on the basis of other protected classes including race and sex.

⁹ Pennsylvania Constitution, Article I, Section 3.

¹⁰ *Christian School Ass’n of Greater Harrisburg v. Com., Dept. of Labor and Industry*, 423 A.2d 1340, 1347 (Comm. Ct. 1980) (invalidating state action that “tend[s] to jeopardize the religious freedom of the [religious] organization.” *Id.* at 1344).

¹¹ *Gobitis v. Minersville School Dist.*, 21 F.Supp. 581, 585 (E.D. Pa. 1937).

¹² Gary S. Gildin, *Coda To William Penn’s Overture: Safeguarding Non-Mainstream Religious Liberty Under The Pennsylvania Constitution*, 4 U. Pa. J. Const. L. 81, 85 (2001).

¹³ Pa. Stat. tit. 71, §2403.

¹⁴ *Employment Division v. Smith*, 494 U.S. 872 (1990).

¹⁵ Pennsylvania Human Relations Act, 43 P.S. § 954 (b).

Accordingly, employers in Pennsylvania already possess four meaningful layers of protection for their religious beliefs. In this sense, any additional protections, such as those contained in A08770, appear to be a solution in search of a problem. Those additional protections are unnecessary and, indeed, harmful.

II. Additional Protections For Religious Belief Beyond Those Already Contained In Existing Law Could Run Afoul Of The Constitution’s Establishment Clause

To be sure, current law provides ample protection to the religious liberty rights of faith-based employers in Pennsylvania, and thus it is unnecessary to build further accommodations of religious belief into SB 1306. As will be explained below, the overly solicitous accommodation of religion, such as that contained in A08770, risks creating a situation where the state endorses, favors, or entangles itself in religion in violation of the Establishment Clause.

The First Amendment’s religion clauses state that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁶ The balance between the two important values contained in this clause – one prohibiting the establishment of religion by the state and another securing religious liberty for the citizenry – is a delicate one. The Supreme Court has rejected the notion that *any* statutory accommodation of religion amounts to a violation of the Establishment Clause,¹⁷ yet has also warned that “[a]t some point, accommodation may devolve into ‘an unlawful fostering of religion.’”¹⁸ Government accommodations of religion that have a religious purpose, have the primary effect of advancing or endorsing religion, or that entangle the state in religion cross the line from a protection of religious faith to a violation of the Establishment Clause.¹⁹

The Establishment Clause has been construed to prevent the government from favoring or disfavoring any particular religion or religion in general.²⁰ Further, the Supreme Court has consistently relied on the Establishment Clause of the First Amendment to strike down legislative accommodations for religious beliefs that cause a meaningful harm to other private citizens.²¹ In 1985, the Court struck down a Connecticut accommodation that gave religious workers the absolute right to a Sabbath day of rest regardless of the effect on employers or co-

¹⁶ U.S. CONST. amend. I.

¹⁷ *Hobbie Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987).

¹⁸ *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987), citing *Hobbie Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 145 (1987).

¹⁹ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²⁰ See, e.g., *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion...favoring neither one religion over others nor religious adherents collectively over nonadherents”) (internal quotation marks omitted).

²¹ See *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985). See also Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); *Board of Education of Kiryas Joel Village School District*, 512 U.S. at 725 (“There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment”) (Kennedy, J., concurring).

workers.²² Four years later, it overturned a Texas tax exemption for religious periodicals that forced non-religious publications to “become indirect and vicarious donors” to religious entities.²³ In 2005, the Court upheld a broad religious accommodation law while explaining that accommodations need not be granted where they “impose unjustified burdens” on third parties or the State.²⁴ Only two years ago, in *Burwell v. Hobby Lobby*, the Court granted a religious accommodation to employers under the federal Religious Freedom Restoration Act but emphasized repeatedly in its opinion the fact that employees’ rights and interests would, according to the Court, not be harmed.²⁵ And most compellingly, a federal court recently found that a religious accommodation similar to that contained in A08770, Mississippi’s HB 1523, improperly harms the rights of others in violation of the Establishment Clause. In a decision ordering that a state law be enjoined, the court found that the law “violates the First Amendment because its broad religious exemption comes at the expense of other citizens.”²⁶ Thus a clear line of cases hold that religious accommodations that impose material harms on others overstep the bounds of religious freedom and become an improper establishment of religion.

The government may also violate the First Amendment’s Establishment Clause if it acts in a way that expresses support for a particular religious faith.²⁷ This non-endorsement principle is best articulated in several Supreme Court cases that involve expressive actions that may be attributed to the state, such as those taken by government employees, on government property, or during government-sponsored activities.²⁸ In these contexts, the relevant test is whether, in light of the context and history of the relevant law or action, a reasonable observer would perceive a state endorsement of religion.²⁹ If so, it amounts to a violation of the Establishment Clause.

²² *Caldor*, 472 U.S. at 709.

²³ *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (internal quotations omitted).

²⁴ *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005).

²⁵ See *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”).

²⁶ *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA at 55 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction).

²⁷ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”) (O’Connor, J., concurring); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 305 (2000) (“Contrary to the District’s repeated assertions that it has adopted a ‘hands-off’ approach ... the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (“the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally”); *U.S. v. Lee*, 455 U.S. 252, 263 fn. 2 (1982) (Stevens, J., concurring) (“[T]he risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.”).

²⁸ See *Santa Fe Independent School District*, 530 U.S. 290; *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Backmun, J., concurring) (“Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion”); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). See also *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460 (2009) (Stevens, J., Concurring) (government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses”).

²⁹ See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring) (“To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute.”); *Santa Fe*

It is more than proper for the state to encourage the flourishing of religion and religious belief in society, but it may not do so in such a way that it “takes up,” embraces, or endorses religiosity in general or particular religious views. Again, all lawmaking must be motivated by an essentially secular purpose.³⁰

On our reading of the law of religious liberty, A08770 risks violating these constitutional principles.³¹ As explained in more detail below, by exempting religious entities—defined broadly—from compliance with municipal law, regardless of the impact on other rights-holders, the language contained in A08770 sacrifices the liberty and equality rights of many in order to accommodate the religious preferences of a few. Further, by sanctioning religiously-motivated discrimination within government-funded programs, it improperly lends the color of law to a particular religious belief.

a. A08770 Provides Broad Religious Accommodations to Municipal Law and State Antidiscrimination Protections

A08770 states that nothing in Pennsylvania’s Human Relations Act, or in *any* municipal ordinance, charter, law, or regulation, may be interpreted to prohibit a religious entity from “engaging in any conduct or activity that is required by or that implements or expresses its religious beliefs” or to require a religious entity “to engage in any conduct or activity that is prohibited by or is inconsistent with its religious beliefs.”³² The term “religious entity” is not limited to houses of worship and their auxiliaries but includes any “nonprofit entity that holds itself out as a religious organization,” including sectarian charitable organizations.

Significantly, a provision of the Amendment states that it should *not* be construed to permit a religious entity to discriminate on the basis of race, color, ancestry, age, sex, national origin, or disability—in other words, nearly any protected class aside from sexual orientation, gender identity and expression.³³ Thus the clear purpose and effect of the Amendment is to shield from liability religiously-motivated discrimination against LGBT Pennsylvanians that would otherwise violate state or local law. Were SB 1306 to be passed with language similar to A08770, the Commonwealth would grant LGBT citizens second-class equality rights, a kind of “equality-lite,” insofar as those rights would be far weaker than those enjoyed by other groups protected by the Pennsylvania Human Relations Act.

Independent School Dist. v. Doe, 30 U.S. 290, 308 (2005) (“In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools”) (internal citations omitted).

³⁰ See, e.g., *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (holding that the government violates the Establishment Clause when it “conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred”) (internal citations and quotation marks omitted).

³¹ We note that not all provisions of the law pose clear Constitutional problems. For example, the Amendment’s addition to Section 5.4(2) merely protects freedom of association already protected under the First Amendment of the U.S. Constitution.

³² A08770 § 5.4(a)(3)-(4).

³³ A08770 § Section 5.4(b).

Of equal concern is the degree to which the Amendment’s preemption language would undermine, if not eviscerate, already existing non-discrimination protections contained in municipal or county law, such as discrimination on the basis of marital³⁴ or familial status.³⁵

Currently, over thirty Pennsylvania municipalities have laws or policies that protect LGBT people from some forms of discrimination.³⁶ The states’ five largest localities—Philadelphia³⁷, Pittsburgh³⁸, Allentown³⁹, Erie County⁴⁰ and Reading⁴¹—all have robust LGBT

³⁴ Philadelphia Code § 9-1103 (prohibiting employment discrimination based on marital status); Philadelphia Code § 9-1106 (prohibiting public accommodations discrimination based on marital status); Philadelphia Code § 9-1108 (prohibiting housing discrimination based on marital status); Allentown Administrative Code Part 1 tit. 11 § 181.04 (prohibiting housing discrimination based on marital status); Allentown Administrative Code Part 1 tit. 11 § 181.06 04 (prohibiting public accommodations discrimination based on marital status); Allentown Administrative Code Part 1 tit. 11 § 181.03 (prohibiting employment discrimination based on marital status).

³⁵ Philadelphia Code § 9-1103 (prohibiting employment discrimination based on familial status); Philadelphia Code § 9-1106 (prohibiting public accommodations discrimination based on familial status); Philadelphia Code § 9-1108 (prohibiting housing discrimination based on familial status); Pittsburgh Code of Ordinances § 659.03 (prohibiting housing discrimination based on familial status); Allentown Administrative Code Part 1 tit. 11 § 181.04 (prohibiting housing discrimination based on familial status); Erie Cty. Human Relations Commission Ordinance 39 Article XI (prohibiting public accommodations discrimination based on familial status); Erie Cty. Human Relations Commission Ordinance 39 Art.VIII (prohibiting employment discrimination based on familial status”); Erie Cty. Human Relations Commission Ordinance 39 Art. IX (prohibiting housing discrimination based on familial status); Reading Code of Ordinances § 23-509 (prohibiting public accommodations discrimination based on familial status); Reading Code of Ordinances § 23-506 (prohibiting employment discrimination based on familial status”); Reading Code of Ordinances § 23-507 (prohibiting housing discrimination based on familial status”).

³⁶ See *Ending Discrimination*, EQUALITY PENNSYLVANIA, <http://equalitypa.org/what-we-do/ending-discrimination/> (last visited Aug. 18, 2016).

³⁷ Philadelphia Code § 9-1103 (prohibiting employment discrimination based on sexual orientation and gender identity), *but see* Philadelphia Code § 9-1104 (exempting from employment discrimination provision religious entities “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by any such corporation, association, educational institution, or society of its religious activities”); Philadelphia Code § 9-1106 (prohibiting public accommodations discrimination based on sexual orientation and gender identity); Philadelphia Code § 9-1108 (prohibiting housing discrimination based on sexual orientation and gender identity) *but see* Philadelphia Code § 9-1109 (permitting religious institutions to adopt co-religionist housing preferences).

³⁸ Pittsburgh Code of Ordinances § 659.04 (prohibiting public accommodations discrimination based on sexual orientation and gender identity); Pittsburgh Code of Ordinances § 659.03 (prohibiting housing discrimination based on sexual orientation and gender identity while permitting religious organizations to practice co-religious housing preferences in buildings operated “other than [for] commercial purposes”); Pittsburgh Code of Ordinances § 659.02 (prohibiting employment discrimination based on sexual orientation and gender identity) *but see* § 651.04 (c) (exempting religious organizations from the definition of “employer” unless they receive government funds).

³⁹ Allentown Administrative Code Part 1 tit. 11 § 181.03 (prohibiting employment discrimination based on sexual orientation and gender identity); Allentown Administrative Code Part 1 tit. 11 § 181.04 (prohibiting housing discrimination based on sexual orientation and gender identity while permitting religious organizations to practice co-religious housing preferences in buildings operated “other than [for] commercial purposes”); Allentown Administrative Code Part 1 tit. 11 § 181.06 04 (prohibiting public accommodations discrimination based on sexual orientation and gender identity).

⁴⁰ Erie Cty. Human Relations Commission Ordinance 39 Article XI (prohibiting public accommodations discrimination based on sexual orientation and gender identity); Erie Cty. Human Relations Commission Ordinance 39 Art.VIII (prohibiting employment discrimination based on sexual orientation and gender identity, with an exemption for religious organizations where “sex or sexual orientation is a bona fide occupational qualification because of the religious beliefs, practices, or observation of the institution or organization.”); Erie Cty. Human Relations Commission Ordinance 39 Art. IX (prohibiting housing discrimination based on sexual orientation and

antidiscrimination protections in the employment, housing, and public accommodations contexts (although religious organizations are exempted from certain provisions, in most cases this is to allow for co-religionist preferences in housing and employment). LGBT Pennsylvanians are also protected by an Executive Order that bans discrimination by government contractors and grantees.⁴² If adopted, SB 1306 itself would provide discrimination protections to LGBT persons in the Human Relations Law, while withdrawing those protections, along with existing protections contained in municipal, county or state law, where they conflict with a religious entity's beliefs. A08770 would substantially limit the effect of these existing and newly-created antidiscrimination protections, allowing for discrimination that far exceeds what is required under the ministerial exception of the U.S. Constitution, or under the state constitution and state law.

To be clear, however, the Amendment does not only exempt religious entities from compliance with state and local *antidiscrimination* laws. Rather, religious entities are permitted to violate any municipal law—including criminal ordinances—that conflicts with their religious beliefs. This is a result of A08770's overly-broad language that “[n]othing... in any ordinance, charter, law, or regulation adopted by a political subdivision of the Commonwealth” may be interpreted to require a religious entity to act in a way that conflicts with its religious belief. Thus, a religious entity could rely on its beliefs to violate municipal ordinances related to the condemnation of blighted properties,⁴³ noise control,⁴⁴ regulation of firearms,⁴⁵ or labor regulations such as paid sick day mandates.⁴⁶ Moreover, this right is absolute: religious entities may violate municipal law regardless of any effect their actions may have on other citizens or on the interests of local government. A08770 would essentially give religious entities a trump card to play any time it wanted to avoid compliance with any local law it finds religiously objectionable.

Finally, the Amendment eliminates the ability of Pennsylvania and its municipalities to require that taxpayer funding be awarded to organizations that serve all residents equally or, in the case of localities, to organizations that fully comply with the terms of grant contracts. The Amendment states that the Human Rights Act and all Pennsylvania municipal law should not be

gender identity while permitting religious organizations to practice co-religious housing preferences in buildings operated “other than [for] commercial purposes”); Article X (making it unlawful to “coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected” under the ordinance).

⁴¹ Reading Code of Ordinances § 23-509 (prohibiting public accommodations discrimination based on sexual orientation and gender identity); Reading Code of Ordinances § 23-506 (prohibiting employment discrimination based on sexual orientation and gender identity, with an exemption for religious organizations where “sex or religion is a bona fide occupational qualification because of the religious beliefs, practices or observances of the corporation or association.”); Reading Code of Ordinances § 23-507 (prohibiting housing discrimination based on sexual orientation and gender identity while permitting religious organizations to sometimes practice co-religious housing preferences in “property held for noncommercial purpose”).

⁴² Pennsylvania Exec. Order No. 2016-05 (Apr. 7, 2016) *available at* https://www.governor.pa.gov/executive_orders/executive-order-2016-05-contract-compliance/.

⁴³ Pittsburgh Code of Ordinances §§ 694.01 et al.

⁴⁴ Allentown Administrative Code Part 7 §§ 710.01 et seq.

⁴⁵ Pittsburgh Code of Ordinances §§ 607.01 et al.

⁴⁶ Pittsburgh Code of Ordinances §§ 626.01 et. al.; Philadelphia Code § 9-4100.

read to require “any religious entity to engage in any conduct or activity that would violate its religious beliefs or tenets, as a condition of entering into any contract with either the Commonwealth or any agency thereof, or with any political subdivision of the Commonwealth or any agency thereof.”⁴⁷ In practice, this strips the government’s right to refuse to award a contract or grant to, for example, a homeless shelter that for religious reasons denies housing to same-sex couples, to interracial or interfaith couples, or to women who have had children when they were unmarried. Taken to the extreme, such an exemption could have absurd consequences. For example, it could require that a locality treat a health clinic that is religiously opposed to contraceptives as eligible to receive a grant to provide family planning services, or a youth services organization that is religiously committed to treating LGBT youth with conversion therapies as eligible for a mental health services contract.

b. By Providing a Religious Accommodation That Causes Third-Party Harms and Endorses Religion, A08770 Risks Violating the Establishment Clause of the First Amendment

The broad accommodations of religious faith provided by A08770 may violate the Establishment Clause by shifting a significant burden from religious actors to other private citizens. Under the Amendment, religious organizations will obtain an absolute right to violate any municipal law—including health, labor, social service, and criminal law—that conflicts with their religious beliefs and practices, regardless of the consequence to others. A08770 thus allows religious faith to trump other private rights without considering how religious liberty claims might be balanced against the rights of other Pennsylvanians and other important government interests. By shifting these significant costs from religious to secular parties, a law that includes language similar to A08770 would likely violate the Establishment Clause.

Additionally, under A08770 LGBT citizens would lose significant protections against employment, housing, and public accommodations discrimination under existing municipal law. To be sure, in 1987 the Supreme Court held that an exemption within Title VII of the Civil Rights Act of 1964 that allows certain religious organizations to impose religious conditions on their employees does not violate the Establishment Clause.⁴⁸ However, the exemption in Title VII is narrow in scope, and A08770 provides a more expansive exemption than what the Court upheld in *Amos*. Specifically, Title VII exempts from its religious discrimination provisions any “religious corporation, association, educational institution, or society,” but does not define these terms.⁴⁹ Courts have been cautious in interpreting the scope of the exemption, and “organizations which courts have found to qualify for the [Title VII] exemption have by and large been either formal houses of worship or entities affiliated with such.”⁵⁰ In contrast, A08770 defines a “religious entity” as any “nonprofit entity that holds itself out as a religious organization.”

⁴⁷ A08770 5.4(a)(5).

⁴⁸ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

⁴⁹ 42 U.S.C. § 2000e-1.

⁵⁰ See John P. Furfaro & Rise M. Salins, *Religious Organizations Exemption*, 239 N.Y. L.J. 65 (Apr. 4, 2008) available at https://www.skadden.com/sites/default/files/publications/Publications1379_0.pdf.

Second, the Title VII exemption allows only for hiring preferences on the basis of religion, and does not permit other forms of discrimination.⁵¹ A08770 would allow for discrimination on the basis of identity characteristics including sexual orientation, gender identity and expression, familial status, and marital status. Thus, the language in Title VII and upheld in *Amos* differs considerably from that contained in A08770 in two important regards: first, it more narrowly defines exempt organizations and the exemption only extends to the hiring of co-religionists. The Court’s concern in *Amos* was “to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions”⁵² or a “Church’s ability to propagate its religious doctrine.”⁵³ A08770, by providing a far more expansive right to discriminate to a larger number of institutions, may be broad enough that it raises Establishment Clause questions.

Notably, the means by which religious belief is overly accommodated in A08770 upends the reasonable balance between fundamental rights struck by the people of Pennsylvania in the Religious Freedom Protection Act of 2002. RFPA sets forth that: “an agency shall not substantially burden a person’s free exercise of religion, including any burden which results from a rule of general applicability.”⁵⁴ This right is not, however, absolute. Mirroring language contained in U.S. Supreme Court cases, in the federal Religious Freedom Restoration Act, and in many similar state statutes, the RFPA sets forth that “[a]n agency may substantially burden a person’s free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following: (1) In furtherance of a compelling interest of the agency. (2) The least restrictive means of furthering the compelling interest.”⁵⁵

The language contained in A08770 departs significantly from the measured balance between rights contained in the Pennsylvania RFPA: the Amendment’s language grants an absolute right to an exemption from any local law or policy that is inconsistent with a religious organization’s beliefs or tenets – regardless of the substantiality of any burden imposed on the person seeking the exemption or the harm the exemption would inflict on third parties. In fact, A08770 would override RFPA as applied to municipal law, substituting a much broader religious exemption than currently secured under that statute. In so doing, the language of A08770 shifts the entire cost of religious liberty accommodations onto rights-holding third parties in a manner that conflicts with Establishment Clause of the U.S. and Pennsylvania constitutions. Pennsylvania courts have recognized reasonable limits to the reach of religious liberty claims, particularly when they come into tension with third parties’ rights, holding that “The First Amendment does not exempt religious institutions from all statutes that regulate employment. For example, the First Amendment does not exempt religious institutions from laws that regulate the minimum wage or the use of child labor, even though both involve

⁵¹ See Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights* 7 ALA. C.R. & C.L. L. REV. 1, 43 (2016) (“The co-religionist exemption thus permits religious entities to prefer members of their own religious community for the purposes of carrying out the organization’s mission. It does not, however, extend to excluding members of faiths that the employer views as undesirable.”).

⁵² *Amos* at 335.

⁵³ *Id.* at 337.

⁵⁴ Pa. Stat. tit. 71, §2404(a).

⁵⁵ *Id.* At §2404(b).

employment relationships.”⁵⁶ Under A08770, however, religious organizations could ignore such laws, such as municipal sick leave laws, where they conflict with their “religious beliefs or tenets of faith.”

A08770 would allow religious organizations to become a law unto themselves, picking and choosing which local ordinances they will comply with based upon their private beliefs. Federal courts have been clear that the nation’s commitment to religious liberty does not extend so far as to “[t]o permit every individual to decide for himself which valid, rational laws could be ignored due to personal religious beliefs,” as this “would ‘permit every citizen to become a law unto himself.’”⁵⁷

Finally, in addition to providing a religious accommodation that will cause significant harm to third parties, A08770 runs the risk of violating the Establishment Clause by improperly endorsing, or seeming to endorse, certain religious beliefs. The Amendment lends the color of law to religiously-motivated discrimination by organizations performing state functions with taxpayer funds. Providing public funds to an organization that places religious restrictions on the use of those funds creates the perception that the government has endorsed such discrimination.⁵⁸ To give an example, awarding a grant to an organization that explicitly refuses to provide services to same-sex couples could cause a reasonable observer to believe that the government has endorsed the religious belief that this population is sinful or unworthy of assistance. This violates the Establishment Clause, which forbids the government from supporting organizations that “impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endors[ing] the religious beliefs of” that organization.⁵⁹

In summary an equal employment opportunity bill that includes language similar to A08770 would accommodate religious belief too broadly in such a manner that conflicts with established First Amendment doctrine.

⁵⁶ *Mundie v. Christ United Church of Christ*, 987 A.2d 794, 798 (Super.Ct.Pa. 2009, appeal denied, 14 A.3d 829 (S.Ct. Pa. 2010)).

⁵⁷ *Parrott v. District of Columbia*, 1991 WL 126020 (D.D.C. 1991). See also *Gillette v. United States*, 401 U.S. 437, 461 (1971) (“Our cases do not at the farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.”).

⁵⁸ Of course, the Supreme Court has held that not every grant given to a religious organization or group violates the Establishment Clause. The Court has typically upheld grants where secular services are provided to religious and secular institutions on a neutral basis. See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000). Permitting religious grant recipients to discriminate, however, is *not* a matter of merely providing funds for the same services in a neutral way. Rather, by permitting grant recipients to refuse to provide funded services to certain populations based on a religious belief, the government allows the grant recipients to redefine state programs in religious terms, to the benefit of religion, and to the detriment of non-adherents and program recipients.

⁵⁹ *Am. Civil Liberties Union of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (2012) (finding that it violated the Establishment Clause for a nonprofit to place religious conditions on the use of federal funds). See also *Dodge v. Salvation Army*, 1989 WL 53857 (S.D. Miss. 1989) (“The [government] grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion...would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement.”).

Katherine Franke
Sulzbacher Professor of Law
Columbia Law School

Burton Caine
Professor of Law
Temple University School of Law
Past President, ACLU-Philadelphia
Chair, Americans for Religious Liberty

Leonore F. Carpenter
Associate Professor of Law
Temple University Beasley School of Law

Eric A. Feldman
Professor of Law
Professor of Health Policy and Medical Ethics
University of Pennsylvania

Theresa Glennon
Professor of Law
James E. Beasley School of Law at Temple University

Nancy J. Knauer
I. Herman Stern Professor of Law
Director, Temple Law & Public Policy Program
Temple University, Beasley School of Law

Jules Lobel
Bessie Mckee Walthour Professor of Law
University of Pittsburgh Law School

Wendell Pritchett
Presidential Professor of Law and Education
University of Pennsylvania

Dara E. Purvis
Assistant Professor of Law
Penn State Law

Brishen Rogers
Associate Professor
Temple University, Beasley School of Law

Victor C. Romero
Associate Dean of Academic Affairs
Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law
Penn State Law

Kathryn M. Stanchi
Jack E. Feinberg Professor of Litigation
Temple University, Beasley School of Law

Nancy A. Welsh
Chair, ABA Section of Dispute Resolution
Professor of Law and William Trickett Faculty Scholar
Penn State University
Dickinson School of Law