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Before the
House of Representatives
Committee on Education and Labor

Hearing on *"H.R. 3017, Employment Non-Discrimination Act of 2009"*

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I am Craig Parshall, Senior Vice-President and General Counsel for National Religious Broadcasters. I am appearing today to voice the opposition of my organization, NRB, to H.R. 3017, the Employment Non-Discrimination Act of 2009. It is my considered opinion that H.R. 3017, if passed into law, would impose a substantial and crippling burden on religious organizations, both those who 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 who proclaim a Gospel-orientated message. 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 such as public relations agencies and law firms with an emphasis on media law. Our membership also includes communications-related organizations, such as Christian publishing companies, churches with a media outreach, Christian programmers, preaching and teaching ministries and faith-based charity organizations. NRB also has among its membership well over 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 H.R. 3017 and the religious liberties or faith-based organizations.

H.R. 3017's Religious Exemption Provision may well be a Mirage

H.R. 3017 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, H.R. 3017 does not define what it means by the phrase "religious discrimination provisions" of Title VII. One likely interpretation, though by no means exclusive, is that the phrase would 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). 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.*

This distinction is critical: for it is more than feasible 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 does would not qualify for exemption under Title VII for sex discrimination, neither will it receive exemption for "gender identity" discrimination under H.R. 3017. The end result would be that the supposed protections of the Sec. 6 religious "exemption" in H.R. 3017 would prove to be, in the end, only a mirage.

But even aside from the 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, other insurmountable difficulties reside in H.R. 3017.

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

By bootstrapping Title VII's religious exemption language into Sec. 6, H.R. 3017 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 H.R. 3017 would be given a very narrow, cramped interpretation are substantial. 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, it restricted inter-racial dating on religious grounds). 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 H.R. 3017. 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).

On added concern is that H.R. 3017 has adopted wholesale the Title VII exemption language for religious schools which 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).

Broad and adequate exemptions for religious organizations are constitutionally imperative. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (Title VII religious exemptions are not violative of the Establishment Clause). Moreover, where a law is passed in the area of employment discrimination, and it fails, as H.R. 3017 does here, to adequately exempt religious institutions from its grasp regarding faith-based employment decisions it 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).

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 H.R. 3017 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 bookstores, adoption agencies, counseling centers and Christian 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 H.R. 3017 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 H.R. 3017 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 is different than the Title VII language. H.R. 3017 exponentially increases the uncertainty regarding which law applies. Furthermore, would "gender identity" protections under H.R. 3017 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.

Conclusion

It is clear that some proponents of this form of legislation view Christian objectors to the creation of new "sexual orientation" and "gender identity" rights to be hypocritical and mean-spirited. In the 110th Congress, one witness, a Congressional Representative, noted that he had often listened to religious radio on that subject (styled "an act of self-torture") and was forced to indict Christian dissenters this way: "How can an American who claims to embrace God and uses that theology to then discriminate against another individual." Hearing Before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and Labor, House of Representatives, September 5, 2007, Statement of Hon. Emanuel Cleaver, page 15-16.

The answer to that question lies at the very core of the concept of religious liberty. Neither the Congress nor the courts have jurisdiction over the religious beliefs of people of faith. Holding the faithful in contempt because they advance unpopular religious doctrines itself evidences a form of cultural discrimination. Christian ministries that

object to those sexual preferences which are in clear violation of the standards of the Bible are standing on a long and well-worn road. Those doctrines are proscribed in both the Old and New Testaments and have endured for several thousand years. The rights to preach and practice those beliefs spring from a Bill of Rights that is two hundred and twenty years old, and in turn which reach back to hundreds of years of English common law. Against all of that comes H.R. 3017 and similar measures, which can claim to have newly-minted a set of sexual orientation and gender-identity privileges which, at most, are just a few decades old in their very recent cultural currency.

We urge this Committee not to jettison the paramount rights of people of faith. 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.