BRIAN N SMITH, MEMBER
66th Legislative District

Harrisburg Office:
160A East Wing
P.O. Box 202066
Harrisburg, PA 17120-2066
Phone: (717) 787-3845
Fax: (717) 782-2946

Committees:
Children and Youth
Liquor Control
Tourism and Recreational Development
Urban Affairs

House of Representatives
Commonwealth of Pennsylvania
Harrisburg

Punxsutawney Office:
109 Indiana Street, Suite 3
Punxsutawney, PA 15767
Phone: (814) [illegible]
Fax: (814) [illegible]

Brookville Office:
82 Barnett Street
Brookville, PA 15825
Phone: (814) 849-8008
Fax: (814) 849-6710

www.repsmith.com
facebook.com/RepBrianSmith

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Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Via email: irrc@irrc.state.pa.us

RE: PA Human Relations Commission (PHRC) Proposed Regulation # 52-13 (IRRC #3339): "Protected Classes Under the PHRA and PFEOA"

Dear Commissioners,

I write to express my serious concerns with the Pennsylvania Human Relations Commission's (PHRC's) Proposed Regulation #52-13: "Protected Classes under the Pennsylvania Human Relations Act (PHRA) and the Pennsylvania Fair Educational Opportunities Act (PFEOA)," which seeks to create a new subchapter to define the terms "race;" "sex;" and "religious creed."

Section 5.2 of the Regulatory Review Act requires that the determination of statutory authority and legislative intent be the "first and foremost" duty of the Independent Regulatory Review Commission (IRRC) when undertaking review of regulations:

> Section 5.2. Criteria for review of regulations. (a) In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based. In making its determination, ***the commission shall consider written comments submitted*** by the committees and ***current members of the General Assembly***, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General.

71 P.S. §745.5b (emphasis added).

The PHRC does not have the statutory authority to promulgate these regulations, nor do these changes reflect the intent of the General Assembly.

Statutory Authority

According to the proposed regulatory package, the PHRC cites as the statutory authority Sections 7(d) and 9(g) of the PHRA (43 P.S. §§ 957(d) and 959(g)) and Sections 6(6) and 7 of the PFEOA (24 P.S. §§ 5006(6) and 5007)), which allow the PHRC to: "adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions" of the respective Act and to "establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder."

However, neither the authority to "effectuate policies and provisions" nor to "establish rule of practice" allow an agency to expand the law through regulation.

In *Hommrich v. Commonwealth of PA, PUC*, the Commonwealth Court of Pennsylvania cited the following:

> "To determine whether a regulation is adopted within an agency's granted power, we look for statutory language authorizing the agency to promulgate the legislative rule and examine that language to determine whether the rule falls within the grant of authority." *Marcellus Shale Coalition v. Department of Environmental Protection* , 216 A.3d 448, 459 (Pa. Cmwlth.), *appeals quashed*, 223 A.3d 655 (Pa. 2019) (citing *Slippery Rock* , 983 A.2d at 1239-41)…..the purpose of the statute and its reasonable effect" and whether "the regulation is consistent with the enabling statute." *Id.* "Clearly[,] the legislature would not authorize agencies to adopt binding regulations inconsistent with the applicable enabling statutes." *Slippery Rock*, 983 A.2d at 1241.

Hommrich v. Commonwealth of PA, PUC, 231 A.3d 1027, 1034 (Pa.Cmmw. Ct. 2020). The Commonwealth Court went on to explain:

> Sometimes, the General Assembly confers broad power. For example, in Section 201(a) of the Unemployment Compensation Law, the General Assembly vested power in the Department of Labor and Industry (L&I) "to adopt, amend, and rescind such rules and regulations ... as it deems necessary or suitable. Such rules and regulations shall not be inconsistent with the provisions of this act." In *Slippery Rock*, our Supreme Court described this power as "broad" and one that encompassed L&I's authority "to define by regulation terms otherwise undefined by the statute." *Slippery Rock*, 983 A.2d at 1239.

Id. at 1035.

In *Pa. Human Relations Commission v. Uniontown Area School District*, the Supreme Court of Pennsylvania held that similar statutory language in Section 7(d) of the Pennsylvania Human Relations Act allowed the PHRC to promulgate a regulation that defined "*de facto* segregation" in such a way that it imposed strict desegregation standards and new

accompanying duties on public schools. *Pa. Human Relations Commission v. Uniontown Area School District,* 313 A.2d 156, 168-71 (Pa. 1973).

Uniontown, however, addresses a regulation promulgated in response to prior court precedent holding that 'de facto segregation' was prohibited under the PHRA, and was created to achieve that prohibition; the PHRC's regulations here are being promulgated without any relevant court precedent interpreting the PHRA and compelling such definitions. Additionally, the regulations proposed here would establish a number of broad policy changes, rather than the single issue of 'de facto segregation' at issue in *Uniontown*. Just to briefly summarize, this regulation would, when used in connection with unlawful discriminatory practices proscribed by the PHRA and the PFEOA:

- Define 'religious creed' as "all aspects of religious observances and practices, as well as belief." It also includes a definition for "religious beliefs."
- Define 'sex' to include several areas, such as "pregnancy, childbirth, breastfeeding, sex assigned at birth, sexual orientation, differences of sex development, variations of sex characteristics or other intersex characteristics."
- Define 'race' in several areas, including "traits historically associated with race, including, but not limited to hair texture; protective hairstyles, such as braids, locks, and twists."

Neither the PHRA nor the PFEOA include definitions for any of these terms. In their May 6 comments submitted to IRRC and the PHRC, the Pennsylvania Catholic Conference (Catholic Conference) argues further that the definitions proposed in this regulation exceed the PHRC's statutory authority, and cites the following:

> [T]he Supreme Court of Pennsylvania has ruled that the Pennsylvania Human Relations Commission (PHRC) has no such power to act outside the legislatively established boundaries. In *PHRC v. St. Joes Minerals Corporation, Zinc Smelting Division*, when the Commission wanted to force the company to submit to discovery methods not specifically authorized by the General Assembly, the Court rejected the PHRC's overreach. The Court said: The Legislature did not include the power sought to be confirmed in the Commission. Whether or not this omission was wise is of no moment to this Court. Our function is to interpret the statute according to what the Legislature said, not according to what it should have said or might have said.

Pennsylvania Catholic Conference comments, *citing Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division,* 382 A.2d 731, 736 (Pa. 1978) at page 3.

I would add that while the purpose of regulations can be to address any confusion or gaps in clarity, with such broad and sweeping changes, it is difficult to gauge whether these regulations meet that purpose or simply seek to circumvent and exceed the law, as enacted. *See EQT Prod. Co. v. Dep't of Env't Prot. of Commonwealth*, 181 A.3d 1128, 1147 (Pa. 2018) (In the absence of such clarity, we find the agency's expansive construction of a statute that

is inexplicit in such regards to be too unreasonable to support an affordance of deference. Cf. *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (explaining that, when sanctions are drastic, "'elementary fairness compels clarity' in the statements and regulations setting forth the actions with which the agency expects the public to comply" (quoting *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968)).

Furthermore, while the PHRC looks at Federal law, recent court cases and other states when developing this proposed rulemaking, the PHRC's Regulatory Analysis Form implies some definitions are not necessarily comparable with the proposed rulemaking or courts have not had the opportunity to consider the issue. For example, page 3 of the RAF states that:

> Additionally, the proposed regulation explains that the term race includes traits historically associated with race. The Commission recognizes that this definition of race has not been adopted by the few federal courts that have had the opportunity to consider this issue.... However, the Commission has considered this issue and determined that the term race, as used in the PHRA and the PFEOA, should be interpreted as including hairstyles culturally associated with race. Given the Commission's understanding of the term race and the Commission's power and duty to promulgate regulations to effectuate the provisions of the PHRA and the PFEOA, the Commission defines race as including traits historically associated with race, including hair texture and protective hairstyles. This definition is consistent with other state anti-discrimination laws, including laws in New Jersey, New York, Connecticut, and California.

Regulatory Analysis Form, Proposed Regulation #52-013 at page 3.

Again, I find it difficult to make such a leap and must assume that this is nothing more than an attempted alteration of the statute through regulation.

Without clear direction in either Act that these terms should be defined in this manner, I am concerned that the PHRC does not have the statutory authority to promulgate this regulation.

Legislative Intent

In addition to lacking the statutory authority to promulgate this regulation, I am concerned that the PHRC has insufficient legislative direction, and in fact that the proposed regulations do not conform to the legislative intent of the General Assembly in enacting the PHRA and the PFEOA.

This is now the second recent attempt by the PHRC to alter the meaning of these statutes through agency action. In 2018, the PHRC adopted a guidance document explaining further the meaning of 'sex' as a protected class, even though this document had no binding effect

nor was it a regulation, nor was there Pennsylvania case law or legislative intent to support it.

Since then, it would appear to me that the PHRC is yet again bypassing the General Assembly through promulgation of this proposed regulation. The PHRC now cites the *Bostock* decision as basically superseding any legislative intent. In June of 2020, the Supreme Court of the United States issued a ruling in *Bostock v. Clayton County* in which it held that Title VII of the Civil Rights Act of 1964, which prohibited discrimination 'on the basis of sex,' includes discrimination against an individual on the basis of sexuality or gender identity. In the words of the Court: "[w]hen an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1734 (2020).

However, the Supreme Court in *Bostock* is careful to clarify that this holding narrowly pertains to the realm of employment discrimination prohibited under Title VII of the Civil Rights Act. Indeed, it discusses and specifically refutes the extension of its holding to such state laws as the PHRA:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination… But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.

Id. at 1753.

Pennsylvanian employers and employees are of course bound or protected by the provisions of Title VII, as it was interpreted by the Court in *Bostock*. However, to the extent that 'sex discrimination' may be defined and applied to other non-discrimination contexts contained within the PHRA, neither the PHRC nor the General Assembly are subject to any particular interpretation of that term under the holding in *Bostock*.

The policy choice of whether Pennsylvania should extend the definition of 'sex discrimination' in such a manner remains just that: a policy choice. And as such it is squarely and exclusively the prerogative of the General Assembly to pursue. The expanded definitions of 'race discrimination' and 'religious creed discrimination' are likewise clearly policy decisions to be properly made by the General Assembly and are not related to the *Bostock* decision or any other new, binding court precedent.

The General Assembly has yet to make these policy decisions.

The Catholic Conference further states:

> [A]bsent further developments in constitutional or federal law, only our General Assembly has the power to align Pennsylvania with Philadelphia and our numerous sister states that have chosen to provide legal protections to persons who suffer discrimination on the basis of their gender identity or sexual orientation….None of the majority of the Supreme Court Justices (JJ. Mundy, Baer, Saylor and Wecht)

disputed Justice Wecht's argument that "[t]his Court may not override the [General Assembly's] choice by seeking to improve upon or read into the PHRA what cannot be fairly inferred under our rules of statutory construction.

Pennsylvania Catholic Conference comments, *citing Southeastern Pennsylvania Transportation Authority (SEPTA) v. City of Philadelphia,* 159 A.3d 443,458 (Pa. 2017) at page 6.

Furthermore, the General Assembly has assumed its duty is to consider enactment of such protections through the law rather than regulation, based on related legislation that has been introduced during several legislative sessions. For example:

- HB300 (Frankel): Fairness Act.
- HB1066 (McClinton): CROWN Act-Hair type and Hairstyle Discrimination

Even the Governor himself has supported the view that changes in these types of legal protections should be taken up by legislation, not regulation. *See Governor Wolf Supports Fairness Act, Highlights Need for LGBTQIA + Protections Under State Law* (June 15, 2021) https://www.governor.pa.gov/newsroom/gov-wolf-supports-fairness-act-highlights-need-for-lgbtqia-protections-under-state-law/

However, these bills have been introduced during multiple legislative sessions but have yet to be even considered in our standing Committee, let alone by the full Chamber. Just because the General Assembly does not take up legislation a governor requests, this does not give agencies the ability to bypass the constitutional legislative process. Without the General Assembly's action to do so, the PHRC is attempting to circumvent the constitutional power and responsibility of the General Assembly.

Therefore, the PHRC may not only be acting without statutory authority or sufficient legislative intent, but also promulgating regulations that would disrupt the proper separation of powers between the branches of Pennsylvania's government.

I would ask that IRRC take these issues under advisement as IRRC reviews this proposed rulemaking.

Sincerely,

Brian Smith

Brian Smith
PA State Representative
66th Legislative District