



Senate of Pennsylvania



June 6, 2022

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

Dear Commissioners,

Section 5.2 of Act 181 (1982) otherwise known as the Regulatory Review Act of Pennsylvania states clearly that when considering proposed regulations, the Independent Regulatory Review Commission (IRRC) "...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." As duly elected members of the Pennsylvania General Assembly, it is our intent to state for the record that 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)," operates in contrast to the intent of the legislature, lacks prescribed statutory authority and ultimately garners our disapproval.

Regarding legislative intent, this is now the second attempt in recent years by the PHRC to greatly alter the meaning of statute via action by the agency rather than through the legislative process. In 2018, the PHRC chose to adopt guidance affecting the meaning of 'sex' as a protected class despite this guidance having no required effect, nor was it a regulation, nor was there case law or stated intent to allow this guidance to stand. Four years later the PHRC is now attempting to utilize *Bostock v. Clayton County* to bypass the General Assembly.

However, the Supreme Court was clear in its decision that that particular holding narrowly pertains to the realm of employment discrimination prohibited under Title VII of the Civil Rights Act. In fact, the ruling goes as far as to specifically refute the extension of its holding to such state laws similar to the PHRA when it said, "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." In other words, while employers and employees are bound and/or protected by the provisions of Title VII, neither the PHRC nor the General Assembly are subject to any interpretation of the term 'sex discrimination' under the holding in *Bostock*.

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In addition, further proof and implication that changes to these definitions fall under the jurisdiction of the legislature are exemplified in the introduction of legislation on this very matter:

- SB 531 (Hughes) – Creating a Respectful and Open World for Natural Hair (CROWN) Act
- SB 570 (Santarsiero/Saval) – Prohibiting Discrimination Based on an Individual’s Sexual Orientation, Gender Identity or Expression
- HB 300 (Frankel) – Fairness Act
- HB 1066 (McClinton) – CROWN Act – Hair Type and Hairstyle Discrimination

In fact, even Governor Tom Wolf has openly stated that he was in support of the General Assembly taking up legislation on the matter, not regulation. His press release statement entitled: *Gov. Wolf Supports Fairness Act, Highlights Need for LGBTQIA+ Protections Under State Law* (June 15, 2021) can be found here: <https://www.governor.pa.gov/newsroom/gov-wolf-supports-fairness-act-highlights-need-for-lgbtqia-protections-under-state-law/>

It is our firm affirmation that any statutory changes to definitions, in this case the altering of the definition of ‘sex discrimination,’ is a policy choice with deep legal ramifications. As such, these changes belong under the jurisdiction of the legislature and the legislature alone. While the General Assembly has yet to make these policy decisions, that should not be interpreted as an abdication of responsibility and thus a signal to a bureaucratic agency to pick up the task. Without the General Assembly’s action to do so, the PHRC is attempting to circumvent the constitutional power and responsibility of the General Assembly.

Regarding statutory authority, the PHRC improperly cites Sections 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)). However, it is the strong belief of the cosignatories of this letter that neither of these sections allow an unelected and therefore unaccountable agency to bypass the legislative process and expand the law through regulation. Further, the courts have historically agreed with us. Specifically, in *Hommrich v. Commonwealth of PA, PUC*, the Commonwealth Court of Pennsylvania recognized that sometimes the General Assembly confers broad discretionary power. However, even then those instances, power could not be inconsistent with the provisions of existing statute nor assumed as simply granted carte blanche.

To be clear, what is being proposed when used in concert with unlawful discriminatory practices proscribed by the PHRA and the PFEOA would establish substantive changes otherwise reserved to the jurisdiction of the General Assembly including:

- To define ‘religious creed’ as “all aspects of religious observances and practices, as well as belief.” It also includes a definition for “religious beliefs.”
- To 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.”
- To 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.”

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Let it be noted that neither the PHRA nor the PFEOA included definitions for any of these terms. Further, as was argued by the Pennsylvania Catholic Conference in their comments submitted to IRRC and the PHRC, the Supreme Court of Pennsylvania has already ruled in *PHRC v. St. Joes Minerals Corporation, Zinc Smelting Division* that without the Legislature's specific inclusion of language granting the authority to the PHRC, it lacked the authority to exercise powers looking to be confirmed in the case. The Court added that its ruling was not affirmation of the omission of expressed authority but rather their function as a Constitutional body to interpret statute according to what the General Assembly said, not according to what it should have said or might have said.

While we as a body recognize the role agencies play regarding regulation and the need to address any of the intricacies broad statutory language is unable to cover at the time of its passage, we feel that what has been proposed is simply too broad and comprehensive to be considered another regulation not subject to the strict and scrupulous legislative process that changes of this magnitude are historically tested against. Therefore, we echo the statements previously provided by Representative Seth Grove when it was submitted to the Commission that "...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."

We, the cosignatories of this letter, respectfully request that the Independent Regulatory Review Commission take the issues mentioned above under consideration as it continues to review the proposed rulemaking.

Sincerely,



Senator Scott F. Martin
13th Senatorial District



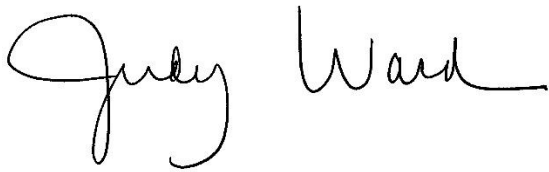
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