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Independent Regulatory Review Commission

INDEPENDENCE LAW CENTER

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Via Electronic Mail

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Re: Proposed Rulemaking to Define Terms in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act, 16 Pa. Code §§41.201 – 41.207, Regulation Reference No. 52-013

Dear Messrs. Bolstein and Sumner:

The Independence Law Center is a civil rights law firm and appreciates the opportunity to comment to the Pennsylvania Human Relations Commission (PHRC) on the proposed regulations that would create an expansive definition of "sex" for the PHRA and the PFEOA. The use of regulatory authority to redefine sex in the manner proposed lacks statutory authority, and the effect of this redefinition would be extremely harmful to the rights of all Pennsylvanians.

I. The PHRC Lacks the Statutory Authority to Promulgate These Regulations.

The PHRC has statutory authority to promulgate regulations to carry out the purposes of the PHRA and the PFEOA. It does not have authority, however, to promulgate regulations that create substantive restrictions beyond those contained in those two statutes. Regulations serve by providing clarity in carrying out the purposes of a statute. But specific policy determinations are best left to be crafted through the democratic process, which can more appropriately balance various interests so that important substantive rights are not destroyed in the process (as discussed more fully in the subsequent sections).

As a basis for its regulatory authority, the PHRC relies on its authority in the PHRA "[t]o adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of this act," 43 P.S. § 957(d), and on its authority in the PFEOA "[t]o adopt, amend, modify or rescind such rules and regulations as may be necessary to carry out the functions

of the commission and to effectuate the purposes and provisions of this act," 24 P.S. § 5006(6). Section 957(d), however, only allows regulations that "effectuate the policies and provisions of the act," and similarly section 5006(6) only allows regulations that "effectuate the purposes and provisions of this act." Creating new substantive restrictions not contained in either act hardly carries out purposes, policies, or provisions of the act.[1]

Despite the PHRC's contention to the contrary, there is no lack of clarity as to the term "sex" in either act. Granted, the term is not defined in the act. But it is not the kind of term that would need to be defined because, up until the last few years, there was no question as to the meaning of the word "sex." Indeed, it has always been understood as the basic biological difference that marks the two halves of humanity. In recent years there has been a push to conflate a person's subjective sense of gender identity with the objective biological category of sex. In fact, despite the PHRC's contentions, the Supreme Court analyzed *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020), without conflating sex with gender identity. *See also Id.* at 1746-47 ("We agree that homosexuality and transgender status are distinct concepts from sex.").

Bostock continued to rely on the category of sex as the biological differences between the two halves of humanity, and it continued to give protections only on the basis of sex. Granted, the gay and transgender litigants were able to receive employment protections on the basis of sex, but it was on the basis that "but for" the litigants' sex, they would have kept their jobs. Any reliance on *Bostock* for drastically broadening the definition of sex is misplaced.

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[1] The PHRC also relies, for statutory authority, on provisions of both acts that address only procedural processes, giving no authority for new substantive provisions. Section 9 of the PHRA, entitled "Procedure," clearly has only to do with the civil procedure applicable to claims under the PHRC, and it states:

> The Commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Three or more members of the Commission or a permanent hearing examiner designated by the Commission shall constitute the Commission for any hearing required to be held by the Commission under this act. The recommended findings, conclusions and order made by said members or permanent hearing examiner shall be reviewed and approved or reversed by the Commission before such order may be served upon the parties to the complaint. The recommended findings, conclusions and order made by said members or permanent hearing examiner shall become a part of the permanent record of the proceeding and shall accompany any order served upon the parties to the complaint.

43 P.S. § 959(g). The PFEOA does no better. It states, "The procedure for processing any complaint and the remedies available shall be in accordance with sections 9, 9.2 and 11 of the act of October 27, 1955 (P.L. 744, No. 222), known as the 'Pennsylvania Human Relations Act.'" 24 P.S. § 5007.

II. Redefining "Sex" Leads to Significant Harms.

Well-meaning attempts to demonstrate commitment to civility and respect to all members of our society through legislation or regulation have not resulted in communities that respect differences, but instead consistently exacerbate the problems and divisions. There is a false notion that LGBTQ+ rights can only be satisfactorily secured by the diminution of other liberties. We can promote both respect and freedom.

Blaine Adamson, a t-shirt printer, was charged with sexual orientation discrimination in Lexington, Kentucky for declining to print t-shirts for a gay pride parade because he disagreed with the message he was asked to print. This constitutes compelled speech. Therefore, a lesbian woman who owned a similar printing business publicly supported him, recognizing what many miss at first glance: Freedom of conscience not to promote messages or events that we disagree with cuts both ways — just like the freedom of speech. She said, quite reasonably, that she would resist being forced to print a religious message with which she disagreed, even though religion is a protected class. Both business owners would serve LGBTQ+ and religious persons for most any reason. Both would not turn away a job simply because a person is of a particular religion or is gay or transgender. To do so really would be discrimination based on class. However, both should not be compelled to print a message or serve an event that conflicts with their consciences.

Similarly, a number of famous designers notably refused to design dresses for Melania and Ivanka Trump for the inauguration because they disagreed with President Donald Trump's policies and practices and did not want to use their artistic creation to contribute to that event. In their minds, designing dresses for a member of the Trump family would express approval of his politics. No one should be forced to violate his or her conscience by saying something that conflicts with his or her core convictions. That same respect for freedom — and the right to live with authenticity — must apply to other artistic professionals, too.

To be sure, that event was very meaningful for Melania and Ivanka Trump, but the more substantially meaningful an event is, the more likely it will be important to continue to protect the conscience rights of others who wish not to express or support that meaning.

In W*est Virginia v. Barnette*, 319 U.S. 624 (1943), the Supreme Court recognized that the:

> freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any

circumstances which permit an exception, they do not now occur to us.

It is extremely important that the PHRC refrain from adopting regulations that would penalize the freedom to make expressive choices like those of the above-mentioned printers. We understand this in the speech context. We may disagree with a person's viewpoint, but we'd fight for their right to live consistently with it. Disagreement—even on profound and personal principles—does not imply disparagement or discrimination. We can, and must, maintain space for that freedom of conscience which is essential for a robustly tolerant society. These rights are essential both for religious people with traditional viewpoints on human sexuality and also for the LGBTQ+ community.

Elaine Huguenin of Elane Photography was forced to pay nearly $7,000 in legal fees after the New Mexico Supreme Court held that her refusal to use her artistic expression in the service of a same-sex wedding constituted sexual orientation discrimination. A concurring justice wrote that violating one's conscience is sometimes "the price of citizenship." This application of nondiscrimination law harms photographers in the LGBTQ+ community as well as people like Elaine Huguenin. For example, a transgender photographer ought not be forced to use their talents to promote events that conflict with their beliefs about gender.

A person who chooses not to service a same-sex wedding is not discriminating. There is no malice here. The identity of the people—*who* they are—is not the reason for this choice. Instead, such vendors believe that cooperation in a particular spiritually meaningful *event* encroaches on his or her conscience. There is a fundamental distinction between discrimination against a person's status of being gay or being religious on one hand, and declining to provide services for a particular event or refusing to materially support a message on the other. Unfortunately, legislation and regulations like the ones proposed consistently lack this critical distinction, ultimately undermining the civil liberties of us all. The proposed regulations substantially broaden the definition and application of discrimination in a manner that would force citizens, both in and out of the LGBTQ+ community, into cooperation with events or messages that violate their consciences.

A. Redefining "Sex" to Mean "Gender Identity" for Purposes of Privacy Facilities Such as Bathrooms, Locker Rooms and Showers Harms Fundamental Rights.

The PHRC discusses with approval *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), advocating that privacy facilities be opened up on the basis of gender identity rather than sex. In general, however, the existence of a protected class is a reason for *not* separating groups. We should not separate privacy facilities on the basis of classes that are irrelevant to the separation. Separating these spaces on the basis of gender identity is as constitutionally impermissible as doing so on the basis of race. The only reason we separate these spaces at all is because of the biological differences between the two sexes that are

revealed in these intimate settings. In fact, forcing the two sexes together in this setting creates a sexually harassing situation, precisely because of the bodily privacy considerations inherent in such a setting.

Consider, too, that the logic of *Bostock* counsels against conflating gender identity with sex and opening up these spaces on the basis of gender identity. The logic of *Bostock* was that "but for" the fact that a transgender employee was born male, that employee would still have a job—thus evidencing impermissible sex-based discrimination. But if a biological male with a female gender identity wants to use the female locker room, it should be possible to deny such use on the basis of sex since a sex-based distinction in these settings has long been permissible.

PHRC's proposed regulations would go well beyond federal law and bring about significant substantive changes to the use of privacy facilities in this Commonwealth. Such a substantive alteration in the law should not and may not occur through regulations, particularly since such an outcome would be contrary to current law.[2]

B. Employers Seek to Hire on the Basis of a Shared Mission -- But These Regulations Prohibit Religious Employers from Doing So.

Society has long understood that religious organizations should have freedom to hire those who share their mission through a commitment to the elements of their particular religious faith. Whether under Title VII in federal law or the PHRA, religious ministries have always

[2] *See* Public School Code of 1949, 24 P.S. § 7-740 (requiring that privacy facilities "shall be suitably constructed for, and used separately by the sexes"). *See also* 43 P.S. § 109 (requiring application of industrial sanitation code to all employers, which involves separate restrooms); 7 Pa. Code § 1.57 (requiring separate facilities for meat packers); 7 Pa. Code § 78.75 (requiring separate restrooms at eating establishments); 7 Pa. Code § 82.9 (requiring separate facilities on the basis of sex for seasonal farm labor, "distinctly marked 'for men' and 'for women' by signs printed in English and in the native languages of the persons" using those facilities); 28 Pa. Code § 18.62 (requiring "separate dressing facilities, showers, lavatories, toilets and appurtenances for each sex" at swimming pools); 25 Pa. Code § 171.16 (requiring schools to follow the provisions of the Public Bathing Law (35 P. S. § § 672—680d) and 28 Pa. Code Chapter 18 (requiring separate privacy facilities at swimming and bathing places); 28 Pa. Code §19.21 (requiring separate restrooms on the basis of sex at camps); 28 Pa. Code § 205.38 (requiring separate restrooms at long term care facilities); 31 Pa. Code § 41.121 (requiring separate privacy facilities for each sex on railroads); 31 Pa. Code § 41.122 (requiring separate bathrooms to be provided for each sex and clearly designated and forbidding any person to use or frequent a toilet room assigned to the opposite sex); 31 Pa. Code § 47.127 (same); 34 Pa. Code § 403.28 (requiring restrooms for each sex); 43 Pa. Code § 41.24 (designating the entrance of "retiring rooms" to be clearly marked by sex and preventing opposite sex entry); 43 Pa. Code § 41.31 (requiring separate toilet rooms "for each sex" which shall be clearly designated and that "no person shall be permitted to use or frequent a toilet room assigned to the opposite sex"); 43 Pa. Code § 41.32 (requiring partitions separating toilet rooms on account of sex, which shall be "soundproof").

been free to hire on the basis of religion.[3] These ministries are not interested in a person's nominal religious affiliation, but their commitment to the mission through the lives they live and the values they hold.[4] Aside from the importance of outward messages communicated by employees, many employees at religious organizations seek a culture where they themselves can grow spiritually as they strive towards living consistently with the teachings of their shared faith. If these regulations are approved, what will happen when a person applies for a job with an explicitly religious organization but does not share that organization's values regarding human sexuality or marriage? These areas of shared religious belief and practice (human sexuality and marriage) could no longer be the basis of an employment decision.

Religious organizations like churches, religious schools, and ministries must continue to be free to make employment decisions based on their religious beliefs, for all employees, not just those in ministerial positions. This is extremely important for a robust and diverse civil society.

Religious organizations are currently permitted to hire *all* employees on the basis of religion. This is accomplished in two ways. There are two types of employees of religious organizations. Ministerial employees are protected by virtue of constitutional law and are not subject to any employment nondiscrimination laws. To find out who is a ministerial employee often involves litigation and application of multi-factored judicially created tests.

Non-ministerial employees of religious organizations are subject to all the protected classes in non-discrimination laws unless the class is exempted by statute. Title VII in federal law and the PHRA exempt the class of religion from the non-discrimination laws applicable to religious employers. That is why *all* employees of religious organizations, even non-

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[3] Federal law exempts religious employers: "This subchapter shall not apply to an employer with respect 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." 42 U.S. Code § 2000e–1(a). The Pennsylvania Human Relations Act addresses this issue by pulling religious employers within the definition of employer for most protected classes, but not for religion. "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." Pennsylvania Human Relations Act, § 4(b). The end result is that religious employers may make distinctions on the basis of religion.

[4] This desire for shared commitment is not limited to religious groups. For instance, non-profit entities seeking the best for our environment would want employees that share that commitment, and may not want employees that fly on private jets or drive large, gas-guzzling vehicles. Likewise, those promoting a vegan diet in order to advance the ethical treatment of animals would not want employees that go hunting in their free time.

ministerial employees, can be hired on the basis of religious belief and adherence to those beliefs.

Consider the second half of the definition of employer in the PHRA. Subsection (b) of the definitions section states: "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." (italics added). Employers *cannot* discriminate, even as a religious employer, on protected classes *other than religion*. This is why a religious employer could not use religion as a pretext for not hiring an employee on the basis of disability or based on race or national origin.

However, redefining the word "sex" would involve changing the denotation of that word to include sexual orientation, gender identity, and gender expression in the definition of "employer" quoted above, a definition which specifically applies to religious corporations and associations.

Ministerial employees are *not* subject to any nondiscrimination laws by virtue of constitutional protections. No one disputes that no matter what law is passed, ministerial positions will not be affected. For instance, the Catholic Church can still select men as candidates for ordination, even though that decision is based on a protected class: sex. Likewise, even if sexual orientation or gender identity and expression are added as protected classes, a church could still decide whether or not to hire a ministerial employee on the basis of whether that employee's lifestyle is in conformity to the church's teaching on human sexuality. However, those protections would disappear for non-ministerial employees of religious organizations which simply desire to have employees who agree with their religious teachings on human sexuality and seek to live consistently with those teachings.

Whether an employee agrees with and adheres to the organization's religious beliefs about marriage, sexuality, and gender is important. In other states that have acted similarly, lawsuits have begun to arise against religious organizations. In one example in December 2015, a Massachusetts court held that because sexual orientation was now a protected class, a Catholic school, even though permitted to hire all its employees on the basis of religion, could no longer extend that to include religious beliefs or practices dealing with sexual orientation. The court determined a food services director was non-ministerial, and as such, the school was required to hire a man who both disagreed with church teaching on marriage and also married another man contrary to church teaching. Prior to learning about the man's lifestyle, the head of the Catholic school pointed out "that every employee is regarded as a 'minister of the mission'" and "would be expected to model Catholic teaching and values." *Barrett v. Fontbonne Academy*, CV2014-751 (Dist. Ct. Mass., Dec. 16, 2015). But the school's vision of having all its employees model the faith was not enough for the court to grant a ministerial exception. **And to be clear, religious groups are not asking for some**

special favor. They just want the freedom—the same freedom that other employers enjoy—to hire those who share their mission. It just so happens that these issues are very closely aligned to core religious beliefs.

At stake, therefore, is the ability of religious organizations to adhere to the principles of their own faith. The reason state and federal nondiscrimination law allowed religious groups to hire on the basis of religion was to protect their religious independence and religious distinctives. Forcing religious groups to hire non-ministerial employees irrespective of sexual orientation and gender identity and expression would take away religious organizations' ability to hire according to their faith when it comes to those particular religious issues. Lest we quickly jump to the conclusion that anything implicated by sexual orientation and gender identity and expression is akin to racial bigotry, Justice Kennedy wisely pointed out in the recent marriage decision that "Marriage, in [the view of respondents], is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—*in good faith by reasonable and sincere people* here and throughout the world." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (emphasis added).

Space should continue to be given for differing views of marriage, human sexuality, and gender. However, some human-relations commissions allow little room for those "reasonable and sincere people" that Justice Kennedy made reference to. Discrimination laws historically have provided their great benefit by breaking down widespread systemic thinking and actions that subjugated a whole group of people for centuries. Our present situation is different. There is a nearly universal belief and practice that the LGBTQ+ community should be treated with dignity and respect, and this is good.

The risk is not for those that the majority treats with respect; the risk is for those who are treated as the cultural outliers. And in this debate, those with traditional beliefs about marriage, sexuality, and gender fall in that category. Those earlier casualties (Catholic Charities in Boston, Illinois, San Francisco, and the District of Columbia, wedding service providers, t-shirt printers, etc.) give evidence to the cultural insensitivity that non-discrimination laws ironically bring. Clearly, the tyranny towards rights of conscience and the ability to order our lives around our sincerely-held religious beliefs was not put to an end in these contexts. Consequently, we have reason to believe that tyranny towards rights of conscience will cause undue harm in the employment context, particularly when the advocates of this proposed rulemaking clearly desire to eliminate the right of religious organizations to hire "non-ministerial" employees (whatever the courts deem them to be) according to an employer's religious conviction about human sexuality.

III. Conclusion

While intended to further society's shared goal of greater civility and respect, the proposed regulations actually undermine those ends. We all want to live lives true to our core beliefs—true to who we are. As Justice Kennedy put it, the Fourteenth Amendment protects "choices

central to personal dignity and autonomy," and "[a]t the heart of liberty is the right to define one's own concept . . . of meaning. . . ." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). Persons should not be punished because they seek to live consistently with their convictions. Unfortunately, laws creating special protections on the basis of sexual orientation and gender identity, applied broadly and without common sense limitations, have taken away liberties and protections that affect all of us, the LGBTQ+ community and others alike. We can do better for everyone.

Respectfully submitted,

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