June 21, 2018

Councilmember Charles Allen, Chairperson
Committee on the Judiciary & Public Safety
Council of the District of Columbia

Re: Addendum to June 7, 2018, Testimony of Rachel N. Busick, Esq., Staff Counsel, Americans United for Life, Against Bill 22-0571, the "Abortion Provider Non-Discrimination Amendment Act of 2017."

Chairperson Allen and Honorable Members:

My name is Rachel Busick. I am a resident of Ward 3 and Staff Counsel at Americans United for Life, the oldest and most active pro-life nonprofit advocacy organization. Since its founding in 1971, AUL has been active in all fifty states, as well as the District of Columbia. AUL attorneys are experts on constitutional law and abortion jurisprudence, with over 45 years of dedicated commitment to comprehensive legal protections for human life from conception to natural death, including the protection of conscience rights in health care and for health care providers.

I am submitting this Addendum to my written legal testimony submitted on June 7, 2018, concerning the D.C. Council's proposed Bill 22-0571, the "Abortion Provider Non-Discrimination Amendment Act of 2017," to respond to questions and comments raised during the Committee's public hearing on June 7, 2018. This Addendum incorporates all parts of my prior testimony and reiterates that the Act violates the First Amendment—including the free exercise of religion, the freedom of speech, and the freedom of association—in its application to health care providers who object to abortion based on conscience. I submit this Addendum to explain how the Act is not one of general applicability and how the religious exception to the D.C. Human Rights Act is insufficient to adequately protect health care providers with a conscience objection to abortion.

The Act Is Not Generally Applicable

This Act violates the Constitution because it is not one of general applicability. First, the Act is not generally applicable in the scope of the class of persons that it seeks to protect. Despite comments and assurances by Committee members and public witnesses to the contrary, the newly-created protected class of persons is limited by the actual language of the Act. The Act protects only health care professionals who "participate in abortion" or are "willing to participate in abortion." Under a plain reading of the text, those two phrases are insufficient to protect health care professionals who refuse to participate or are unwilling to participate in abortion. Neither does the phrase "participate in abortion" include "refusal" to participate in abortion, nor does the phrase "willing to participate in abortion" extend to an "unwillingness" to participate in abortion.

For comparison, the text of the Church Amendments explicitly protects both those who "performed or assisted in the performance of a lawful . . . abortion," as well as those who "refused to perform or assist in the performance of . . . abortion." 42 U.S.C. § 300a-7(c)(1)(B). Likewise, all nine states reported as providing protection against discrimination for those who participate or are willing to participate in abortions also include language that explicitly protects those who refuse to perform or are unwilling to perform abortions.

- **California** provides protections against discrimination "on account of the person's participation in the performance of an abortion," as well as for those who refuse to "participate in the induction or performance of an abortion" or are "unwilling[] to participate in the performance of an abortion." Cal. Health & Safety Code § 123420(a), (b).
- **Indiana** provides protections against discrimination "because of the person's moral beliefs concerning abortion," which by definition includes moral beliefs about willingness and unwillingness to participate in abortion. Ind. Code § 16-34-1-6.
- **Iowa** provides protections against discrimination because "of the individual's participation in *or refusal* to participate in recommending, performing, or assisting in an abortion procedure." Iowa Code § 146.1 (emphasis added).
- **Kentucky** provides protections against discrimination based on an individual's "willingness *or refusal* . . . to perform or participate in abortion." Ky. Rev. Stat. § 311.800(5)(b), (c) (emphasis added).
- **Michigan** provides protections against discrimination for those who "previously participated in, or expressed a willingness to participate in, [an abortion]," as well as for those who "*refuse* to perform, participate in, or allow to be performed on its premises an abortion" or "give advice concerning . . . abortion." Mich. Comp. Laws Serv. §§ 333.20181, 333.20183(1), 333.20184 (emphasis added); *see also id.* § 333.20182.
- **Pennsylvania** provides protections against discrimination for those who "express[] a willingness to participate in the performance of abortion" and for those who "express[] *a refusal* to participate in the performance of [an abortion]." 16 Pa. Code § 51.42(a) (emphasis added).
- **South Dakota** provides protections against discrimination for those "who perform[] *or refuse*[] to perform or assist in the performance of an abortion." S.D. Codified Laws § 34-23A-13 (emphasis added).
- **Texas** provides protections against discrimination "because of the person's willingness to participate in an abortion procedure," for those "who *refuse*[] to perform or participate in an abortion procedure," or because of an "applicant's attitude concerning abortion." Tex. Occ. Code. § 103.002(a), (b), (c) (emphasis added).
- **Washington** provides protections against discrimination "because of the person's participation *or refusal* to participate in [an abortion]." Wash. Rev. Code. Ann. § 9.02.150 (emphasis added).

In contrast, glaringly absent from D.C.'s Act is language that explicitly protects those who refuse to participate in abortion or are unwilling to participate in abortion, revealing that the *prima facia* purpose

of the Act is limited to protecting only those who are pro-abortion at the expense of those who have a conscientious objection to abortion. This type of one-sided protection is, by definition, government coercion in favor of that side. As such, the Act cannot be considered generally applicable.

Second, the Act is not generally applicable because it targets health care providers with a conscience objection to abortion in violation of their First Amendment rights. At the public hearing it was posited that the Act is generally applicable because the Act does not explicitly use the words "religion," "faith," or "belief." Despite the lack of such explicit language, the Act, in effect, implicitly targets health care providers who have a conscience objection to abortion. This is made even more clear by the lack of language in the Act protecting conscience rights. In comparison, unlike D.C.'s proposed Act, seven of the nine state statutes mentioned above also include language in the same statute broadly protecting conscience rights. *See* Cal. Health & Safety Code § 123420(a), (b) ("moral, ethical, or religious reasons"); Ind. Code § 16-34-1-6 ("moral beliefs"); Iowa Code § 146.1 ("religious beliefs or moral convictions"); Ky. Rev. Stat. § 311.800(4), (5) ("moral, religious or professional grounds"); Mich. Comp. Laws Serv. § 333.20182 ("professional, ethical, moral, or religious grounds"); 16 Pa. Code § 51.42(a) ("moral, religious or professional grounds"); Tex. Occ. Code § 103.002(c) ("attitude concerning abortion"). The lack of explicit language in the Act protecting conscience rights reveals that the true purpose of the Act is to coerce health care providers who have conscience objections to providing or facilitating abortions to condone the provision and facilitation of abortions. Moreover, despite multiple assurances made during the public hearing, the presence of the religious exception to D.C.'s Human Rights Act, D.C. Code § 2-1401.03(b),[1] does not adequately remedy these failures.

The Religious Exception to D.C.'s Human Rights Act is Insufficient

The religious exception to D.C.'s Human Rights Act is insufficient to protect health care providers who have a conscience objection to abortion from most of the requirements of the proposed Act. Although the exception is inefficient in numerous ways, I will focus on three major shortcomings for purposes of this Addendum. First, the exception is limited to religious organizations and organizations operated for charitable or educational purposes, which are operated, supervised, or controlled by or in connection with a religious organization. *Id*. This exception is under-inclusive because it does not include health care providers that have a conscience objection to abortion but are not formed or connected directly with a religious organization. Thus, the religious exception leaves many unprotected, including organizations with a religious affiliation that are not controlled by a religious organization and any non-religious pro-life pregnancy center, clinic, or other health care provider.

Second, the scope of the proposed Act is much broader in the protected acts it covers than those included in the religious exception. The exception applies only to the following three acts: "limiting

[1] The text of the religious exception also includes reference to a political exception, but for purposes of this Addendum, I refer to the exception and its text solely in relation to religion.

employment, or admission to or giving preference to persons." *Id.* In contrast, the Act applies to the following acts: failing or refusing to hire, discharge, or transfer; discriminating against a health care professional with respect to compensation or promotion, or with respect to residency training opportunities, staff privileges, admitting privileges, staff appointments, or licensure or board certification; taking adverse administrative action against a health care professional; causing a loss of career specialty for a health care professional; otherwise penalizing, disciplining or taking adverse action against a health care professional; or "prohibit[ing] public statements or manifestations of attitudes or views related to abortion . . . that are made outside the scope of employment by an individual who is employed, enrolled in a training program, has an academic appointment, or who has staff privileges with that health care provider." Act § 291(b)(1), (c). Thus, the religious exception is insufficient, leaving health care providers with a conscientious objection to abortion unprotected and exposing them to liability for following their sincerely held religious and moral beliefs.

Third, not only is the scope of the acts covered much narrower, but the scope of health care professionals the exception applies to is narrowly limited as well. The religious exception only applies to persons "of the same religion" as the religious organization. D.C. Code § 2-1401.03(b). Assuming that the health care provider is a qualified organization for purposes of the religious exception, this provision creates issues over how to determine whether a health care professional is of the same religion. Is "religion" defined according to the religious organization or by the self-identification of the health care professional? Moreover, what is deemed "the same religion" for non-sectarian or ecumenical religious organizations? At best, the religious exception leaves gaps in coverage for health care providers with a conscientious objection to abortion. In sum, the religious exception is insufficient to adequately protect the First Amendment Rights of health care providers.

Because the Act is not generally applicable and does not contain an adequate religious exemption, in addition to the fact that the Act violates the First Amendment, we urge this Committee to **reject** Bill 22-0571. Thank you.

Sincerely,

Rachel N. Busick, Esq.
Staff Counsel
Americans United for Life