UNITED STATES COMMISSION ON CIVIL RIGHTS

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Anthony Rendon
Speaker, California Assembly
State Capitol
Room 219
Sacramento, CA 95814

June 6, 2017

Dear Speaker Rendon:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, to express my concerns regarding AB 569.

The current version of AB 569 is an incursion upon religious liberty.[1] This letter will only address the way in which this bill, if enacted, would infringe the religious liberty rights of religious institutions.

The bill treats "reproductive health decisions" like race. Decisions are not immutable characteristics akin to race. A decision is by its nature mutable. Race is not. Decisions require moral agency, and a person may fairly be judged on the morality of his or her decisions.

Most, if not all, religions prescribe moral standards for sexual and reproductive behavior. The religions that predominate in America also teach that actions taken in this life have eternal consequences for the person's soul, whether for good or ill. Therefore, a religious organization has a solemn duty not to condone behavior they believe endangers a person's soul, or to allow that person's actions to lead another astray.

No one is forced to work for a religious organization. When someone enters into an employment relationship with a religious organization, they implicitly agree to adhere to the organization's beliefs. Should a Muslim school be required to employ a teacher who espouses the Trinity? Should an Orthodox Jewish day school be required to employ a janitor who repeatedly tells the students that keeping kosher is not a religious requirement? If these institutions should be required to continue employing these people, the elected representatives of the state of California fail to understand the gravity of religious belief and the basis for its First Amendment protection. If the aforementioned institutions should *not* be required to continue employing these people, why should an evangelical Christian college be required to continue employing a registrar after she has obtained an abortion, or a Catholic school to continue employing a teacher who is undergoing IVF treatment?

[1]AB 569, *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB569.

The fact is that every person in a religious organization is there to advance the organization's mission. A religious institution may reasonably determine that continuing to employ a person who is known to have violated an important tenet of the faith undermines its witness – particularly if, as this bill seems to contemplate, the person is not repentant. In that case, the institution is being required to employ someone who disagrees with its mission, just like the hypothetical Muslim school and Jewish day school.

The assumption undergirding this bill is that religious teachings do not really matter, and that it simply is not the case that the decision to use contraception or have an abortion or any other reproductive health decision affects one's eternal soul. Therefore, there is no reason to allow religious organizations to discriminate on such bases outside the mandates of the narrowest possible construction of *Hosanna-Tabor*.[2]

But the United States does not protect religious liberty as a grudging concession to backward religious folk. "We protect religious liberty on the premise that God is real and the commands of God trump the ordinary commands of man."[3] The bill is premised on the assumption that God is not real, but in quiet moments every person must echo the words of Agur: "Who has ascended to heaven and come down?"[4]

A person who disagrees with a particular religious institution's teaching regarding reproductive health decisions does not have to abide by those teachings, but nor do they have the right to require the institution to continue employing them. The vast majority of employers care only if their employees are good at making widgets, and could not care less what reproductive health decisions their employees make. The effect of this bill is to allow people who disagree with unpopular religious teachings – mainly at Christian institutions – to undermine those institutions from within.[5] And an organization of any sort has no obligation to employ saboteurs.

As was so often the case, James Madison wrote eloquently about the importance of religious liberty and the limits of government:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be

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[2] I must note that the drafters of the bill misunderstand Justice Alito's concurring opinion. Justice Alito's concurrence was intended to clarify that the ministerial exception should not depend upon an individual being called a "minister" or upon ordination. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., concurring)("it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one.").

[3] Michael Stokes Paulsen, *The Priority of God*, 39 PEPP. L.REV. 1159, 1203 (2013).

[4] PROVERBS 30:4.

[5] In a press release from NARAL Pro-Choice California supporting the bill, the only religious institutions mentioned were Christian. NARAL Pro-Choice California, "California Bill Bans Discrimination Based on Reproductive Health Choices," Feb. 24, 2017, http://www.prochoicecalifornia.org/media/press/20170214.shtml.

> considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can ultimately be determined, but the will of the majority; but it is true that the majority may trespass on the rights of the minority.
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> Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and viceregents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the People. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.[6]

Accordingly, I urge revision of AB 569 to preserve the religious liberties of religious institutions.

Sincerely,

Peter Kirsanow
Commissioner

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[6] James Madison, *To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance*, https://founders.archives.gov/documents/Madison/01-08-02-0163.