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Before the
United States Senate
Committee on Health, Education, Labor, and Pensions

Regarding the *Employment Non-Discrimination Act of 2011, S. 811*

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I am Craig Parshall, Senior Vice-President and General Counsel for National Religious Broadcasters (NRB). I am appearing today to voice NRB's opposition to S. 811, the Employment Non-Discrimination Act of 2011 (ENDA). We oppose S. 811 because, among other reasons which I also outline below: (1) it generally illustrates the kind of unaccommodating approach to religious organizations that was recently rejected by a unanimous decision of the Supreme Court; (2) the insufficient "religious exemption" provisions of this bill would permit a substantial and unconstitutional burden to be placed on religious organizations; and (3) court decisions dealing with "gender identity" type employment discrimination claims indicate that a legal remedy is already available for such claims under existing Title VII law, also subsuming within them numerous "sexual orientation" claims as well.

NRB is an association representing the free speech interests of Christian communicators, including television, radio and Internet broadcasters, as well as Christian publishing companies, churches with a media outreach, Christian broadcast programmers, preaching and teaching ministries, and faith-based charity and humanitarian organizations. NRB also has among its membership more than a dozen Christian colleges and Bible schools. The comprehensive nature of the Christian groups that we represent gives us a valuable perspective on the religious liberty and free speech implications of S. 811.

S. 811 and the Constitutional Threat to Religious Employers

Sexual Orientation and Gender Identity Cases as a Form of "Sex" Discrimination: the Gutting of Religious Liberty

Discrimination laws must not infringe on the constitutionally protected autonomy of religious organizations. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al.*, ___ U.S. ___, 132 S. Ct. 694, 710 (2012) (unanimous decision, upholding the "ministerial exception" as a bar to Title VII employment discrimination claims, where the Supreme Court stated: "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission"). Requiring discrimination laws to

adequately protect and accommodate the religious liberties of faith groups is not a mere legislative prerogative: it is a constitutional mandate. *Montrose Christian School Corp. v. Carver, Montrose Christian School Corp. v. Walsh*, 770 A.2d 111 (Md. Ct. App. 2001).

S. 811 is an exceedingly broad piece of employment discrimination legislation which protects persons from adverse employment actions that are based on the "actual or perceived sexual orientation or gender identity" of those persons. Structurally it would expand upon the scope and effect of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e et seq.

The bill purports to provide, in its section title to Section 6, an "exemption" for "religious organizations." However, it does so by incorporating the current religious exemption provisions of Title VII, an exemption scheme that would provide little actual protection for religious groups facing sexual orientation or gender identity-based claims. Section 6 of S. 811 provides, in part, that the "Act shall not apply to a corporation, association, educational institution, or society that is exempt from the *religious discrimination provisions* of title VII …" (emphasis added).

Title VII currently exempts religious organizations ("a religious corporation, association, educational institution, or society") regarding employment decisions impacting persons "*of a particular religion* to perform work connected with the carrying on" of the organization's "activities" (emphasis added). Thus, it is the position taken by the employer regarding the *religion of the employee* (not that person's sexual orientation or gender identity), when coupled with the religious nature and structure of the employer, that triggers the religious exemption protections found in Title VII. As the court stated in *Petruska v. Gannon University*, 462 F.3d 294, 303 (3rd Circuit 2006): "[Title VII] exempts religious entities and educational institutions from its nondiscrimination mandate to the extent that an employment decision is based on an *individual's* [i.e. an employee's] *religious preferences*" (emphasis added). On the other hand, as that court also noted, "Title VII '*does not* confer upon religious organizations the right to make those same decisions on the basis of … sex …" *Id*., citing *Rayburn v. Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).

Thus, this question is presented: will future courts construe "sexual orientation" or "gender identity" claims under S. 811 against religious employers as primarily asserting discrimination because of "sex," or discrimination because of "religion?" Numerous court decisions support the former scenario, having already determined that gender identity claims assert discrimination based on "sex." See: *Smith v. City of Salem, OH*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 215-16 (1st Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

Recent legal developments coupled with the text of S. 811 itself indicate that the "gender identity" protections of the bill could spell particular difficulties for religious groups and would result in a serious violation of their religious liberties, despite the superficial insertion of the "religious exemption" language in Section 6. As a textual

matter, the bill prohibits employment discrimination against persons on the basis of perceived or actual "sexual orientation or gender identity." It should be noted that, while each of those two categories is separately defined in the bill, it seems clear that the "gender identity" category ("gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth") is worded very broadly - broad enough in fact to subsume within it various claims of "sexual orientation" discrimination also.

This conclusion that both "gender identity" and "sexual orientation" claims are likely to be construed as a species of "sex" discrimination is supported by *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009): "Wise [the employer] cannot persuasively argue that because Prowel is homosexual, he is precluded from bringing a gender stereotyping claim" (submitting the claim of a homosexual for employment discrimination to a jury trial under existing Title VII law based on "sex" discrimination). The court also noted the "line between sexual orientation discrimination and discrimination 'because of sex' [the latter category having been extended to include "gender identity" status under case law discussed below] can be difficult to draw." *Id*. at 291.

It is also noteworthy that the court in *Prowel* observed that much of the alleged harassment levied by co-workers (and endorsed by the company) regarding the plaintiffs's effeminate conduct and mannerisms and which included criticism of his status as a homosexual, was *religious in nature*. *Supra* at 288 and 293. Yet the Third Circuit also concluded that despite this, the nature of this discrimination was <u>not</u> "religious discrimination" and therefore the plaintiff had no "religious discrimination" claim under Title VII. Even though the plaintiff Prowel referenced allegedly discriminatory conduct expressly connected to the religious beliefs and expressions of his co-workers, the court concluded: " … we cannot accept Prowel's de facto invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality." *Supra* at 293. This necessarily means that if Prowel was employed by a religious organization, and the same adverse conduct occurred after the enactment of S. 811, the court would have found that the employer would <u>not be entitled</u> to a religious exemption, because the employer could not show that it was in fact a "religious organization … exempt from the religious discrimination provisions of title VII …" regarding the plaintiff's claim. If no "religious discrimination" took place in *Prowel v. Wise Business Forms, Inc*. under Title VII <u>before</u> S. 811 is passed, neither would "religious discrimination" be found to have taken place, sufficient to invoke the "religious exemption" in Section 6 for an employer, <u>after</u> passage of S. 811. This is true, because Section 6 simply incorporates, wholesale, the existing religious discrimination exemption scheme of Title VII, and the case law that has interpreted it. And under existing case law, religious employers receive no protection against "sex" discrimination lawsuits. [1]

[1] The sole exception, of course, being those claims relating to employment of ministers and other clergy under the "ministerial exception" vindicated in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al*., ___ U.S. ___, (2012).

Even further, on April 20, 2012, the Equal Employment Opportunity Commission (EEOC) rendered its decision in *Macy v. Holder*, Appeal No. 0120120821, officially recognizing "gender identity" discrimination claims by "transgender" individuals to qualify as "sex" discrimination under Title VII. Thus, under Title VII, except for disputes involving "minister" or other clergy type positions (see nt. 1 *infr*a), such "sex" discrimination claims can be prosecuted against religious groups. Because S. 811 simply incorporates the existing exemption scheme of Title VII for religious groups, if this bill is passed, they will have no exemption regarding "gender identity" employment disputes, as several court decisions, and now the administrative decision of the EEOC, consider such claims to be a species of "sex" discrimination. And many of those types of suits will also be available for homosexual plaintiffs as well, under the reasoning of *Prowel v. Wise Business Forms, Inc., supra.*

A religious organization recently faced this type of "gender identity" discrimination claim under existing employment discrimination law. A former dean and faculty member of Spring Arbor University, an institution affiliated with the Free Methodist Church, filed a claim based on "sex" discrimination because of alleged "gender identity" mistreatment by the university. The plaintiff, a male, underwent gender change counseling and as a result, started wearing women's clothing, wearing makeup and painting his nails. When he was fired in the wake of religious objections from the Christian school, he filed an EEOC claim. [2] Later, the discrimination claim was settled, with the plaintiff stating that by the terms of the settlement he considered himself to have been "treated with justice and fairness …" [3] On the other hand many religious employers would probably prefer the kind of "justice and fairness" that comes from adequate legal protections from such lawsuits in the first place. And in that regard, S. 811 would provide little solace for them.

I can envision that some future courts might seek to minimize this harsh and illogical result of Section 6's "religious exemption" being nullified by its own terms, through a variety of legal gymnastics, a direct consequence of Section 6 ratcheting itself into an unwieldy and mismatched partnership with Title VII's religious exemption structure. For instance, courts might require, as an example, that a *central issue* involving the religious beliefs of the employee must be present in sexual orientation or gender identity cases before the "religious exemption" protections of Section 6 could be triggered to protect the religious employer. Such reasoning could conceivably be justified by virtue of Section 6's wording that only employers who are "exempt from the *religious* discrimination" [as opposed to sex or gender discrimination] provisions of title VII" in given cases could be exempt under S. 811. What are the "*religious* discrimination provisions" of Title VII, then, which Section 6 of S. 811 refers to? Clearly, under prior precedent, courts are likely to hold that this wording of Section 6 of S. 811 refers to adverse employment decisions made by an employer because of the *religion of the employee*. But what if an employee of a religious organization declares that he is a homosexual, yet maintains that his religious opinions are otherwise consistent with the beliefs of the religious employer except for the single issue of "sexual orientation?" If he

[2] *Gender Change Costs Dean a Job*, InsideHigherEd.com, February 6, 2007.
[3] *Spring Arbor and Transgender Dean Settle*, InsideHigherEd.com, March 14, 2007.

is subsequently fired, would a court find that his discrimination claim is basically one based on "sex," a position substantiated by court decisions and the EEOC, or would the court decide that it is fundamentally a claim about discrimination based on the employee's "religion?" [4]

The uncertainty and complexity presented by this one scenario illustrates the burden imposed on the religious liberties of religious employers. After all, First Amendment rights of religious organizations can be fatally chilled when those groups must guess at how courts will construe their religious activities. "Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider [to be] religious." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987).

Free Exercise of Religion

When a government law sweeps into its regulatory purview religious groups whose operations are thereby substantially and selectively burdened, and it fails to provide ample exemptions for those religious organizations, it violates the Free Exercise provisions of the First Amendment. *Church of the Lakumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-532 (1997).

In the realm of private religious employers, broad and adequate exemptions for religious organizations are constitutionally imperative. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (holding that Title VII religious exemptions do not collide with the Establishment Clause but are fully consistent with it). The principle expressed in *Amos* is clear: where attempted "exemptions" in discrimination laws are so unclear, confusing, or overly broad so as to cause religious organizations to speculate as whether they are sufficiently "religious" either in their structure or in their activities to qualify for the exemption, then the religious liberty provisions of the First Amendment are violated. Moreover, where a law is passed in the area of employment discrimination and it fails, as S. 811 does here, to provide a sufficiently adequate exemption for religious institutions regarding faith-based employment decisions it also violates the Free Exercise Clause of the First Amendment. *Montrose Christian School Corp. v. Carver*, *Montrose Christian School Corp. v. Walsh*, 770 A.2d 111 (Md. Ct. App. 2001) (county employment discrimination code violated the Free Exercise rights of a private religious school by failing to provide a satisfactory, substantive exemption for it, the Court noting that "[a] uniform line of cases apply[] this principle, namely that the free exercise guarantee limits governmental interference with the internal management of religious organizations …"). The Free Exercise guarantee of the First Amendment reflects "a spirit of freedom for religious organizations, and independence from secular control or manipulation …" *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

[4] As an additional complication, a secular court's intense scrutiny of a religious employer's beliefs on these issues would likely run afoul of the "excessive entanglement" prohibitions of the Establishment Clause. See: "Establishment Clause" discussion, *infra*.

Establishment Clause

The Establishment Clause prohibits excessive entanglement between government and religion. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (exemption of religious schools from federal National Labor Relations Board oversight). *Walz v. Tax Commission*, 397 U.S. 664 (tax exemption for religious groups wisely facilitates a "desired separation [of government from religion] insulating each from the other"). Confusion has been created in the Section 6 religious exemption of S. 811, as it attempts to exempt only those religious groups that would be exempt under Title VII. But by doing that, Section 6 will invite courts to engage in searching inquiries into the beliefs and doctrines of religious employers regarding homosexuality, lesbianism, bisexuality, transgenderism and similar issues in an attempt to parse-out the scope of the religious exemption in Section 6; i.e. to determine whether, under the provisions of S. 811 (which does expressly include sexual orientation and gender identity as categories for protection) a religious employer would, under the language of Section 6, be "exempt from the *religious discrimination provisions* of Title VII" (which does not expressly provide protections for sexual orientation or gender identity). This kind of apples-and-oranges incorporation of Title VII into Section 6 of S. 811 creates a nether world of uncertainty for religious organizations.

One added concern is that Section 6 of S. 811, through its wholesale adoption by cross-reference to the Title VII religious exemption scheme, has also incorporated Title VII's separate exemption provision for religious schools. Regarding religious schools that do not otherwise qualify, that exemption applies where the school can show that its curriculum is determined to have been "directed toward the propagation of a religion." However, this is an intensely intrusive and unconstitutional inquiry for any secular court to undertake. A school seeking this exemption paradoxically would have to forfeit its private religious autonomy, in effect, in order to try to save it. When the government exercises an "official and continuing surveillance" over the internal operations of a religious institution, religious freedom under the First Amendment is jeopardized. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 675 (1970). A secular court may not review a religious body's decisions on points of faith, discipline, or doctrine, *Watson v. Jones*, 80 U.S. 679 (1872), nor may it govern the affairs of religious organizations. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

Freedom of Association

The First Amendment's free association guarantee has been interpreted to mean that a discrimination law could not be used to force the Boy Scouts of America to employ a professed homosexual as an assistant scout leader. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). And while *Dale* did involve a *non-profit association* as a party, and it addressed the groups "moral" (as opposed to religious) objections to homosexuality, the Supreme Court nowhere conditioned its reasoning on that fact that the Boy Scouts were a non-profit organization. Further, "moral" beliefs are not explicitly protected under the First Amendment as a stand-alone-right; rather they were protected in *Dale* because they

were anchored to the Free Speech aspects of the right of association. By contrast, religion is given explicit protection in the First Amendment in its own right and therefore ought to receive *even more protection* than under the principles of the *Dale* case. This conclusion is buttressed by the decision in *Hosanna-Tabor, supra*:

> The EEOC and Perich [the plaintiff] thus see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves. We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club …That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.

Hosanna-Tabor, 132 S. Ct. 694, at 706. Private religious employers, like private associations, must be given the *right to reject* members or staff whose opinions would conflict with the religious organization's declared mission and beliefs. A religious group has "the autonomy to choose the content of [its] own message." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

Sec. 6 Adopts a Pattern of Inconsistent Court Decisions

By bootstrapping Title VII's religious exemption language into Sec. 6, the ENDA bill, S. 811, subjects religious organizations to a crazy-quilt of inconsistent decisions that have been rendered by the courts in construing the exemption language of Title VII. This approach will stultify and confuse religious groups and lead to endless, expensive, and harassing litigation.

Title VII (42 U.S.C. §§ 2000e et seq.) provides in part:

> This title … shall not apply 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.

Unfortunately, Congress "did not define what constitutes a religious organization, - 'a religious corporation, association, educational institution, or society'" under Title VII. *Spencer v. World Vision, Inc*. 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008). As a result, "courts conduct a factual inquiry and weigh '[a]ll significant religious and secular characteristics …'" *Id*. (citations omitted).

What has resulted is a sad pattern of inconsistent and complex decisions which render very scant religious freedom to faith groups but which have sent a chilling pall

over their activities not to mention their budgets: *Leboon v. Lancaster Jewish Community Center Association*, 503 F. 3d 217 (3rd Cir. 2007) (Jewish Community Center qualified as a religious organization so that its firing of a Christian was non-actionable under Title VII); but compare: *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988) (no exemption for a small, closely held manufacturing shop whose owner had a clearly Christian world view and wanted it to permeate the work place). A Christian humanitarian organization dedicated to ministering to the needs of poverty-stricken children and families around the world was entitled to take adverse employment actions against an employee because of that person's religion because it qualified for exemption under Title VII (*Spencer v. World Vision, Inc., supra*); but a Methodist orphan's home dedicated to instilling in orphaned children Christian beliefs was held not to be qualified as a "religious corporation …" etc. where it had a temporary period of more secular leadership which was then followed by return to its original spiritual mission, *Fike v. United Methodist Children's Home of Virginia, Inc*. 547 F. Supp. 286 (E.D. Va. 1982). Further compare: *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (newspaper covering secular news but with close relationship with the Christian Science Church was allowed to discriminate on basis of religion).

The legal tests employed by the courts in deciding religious exemptions under Title VII are complex and discordant. The 9th Circuit has employed a complicated six-factor test. *Spencer, supra* at 570 F. Supp. 2d 1284. Whereas the 6th Circuit has applied an even more complex nine-factor test. *Id.* at 1285-86. In addition, the 9th Circuit has construed the religious exemption narrowly, whereas the 3rd Circuit has not. *Id.*

The chances that the religious exemption in Sec. 6 of S. 811 would be given a very narrow, cramped interpretation are substantial. Where general discrimination laws collide with sincerely held religious beliefs, religion often loses. See: *Bob Jones University v. U.*S., 461 U.S. 574 (1983) (private religious college loses its tax exempt status as a non-profit religious corporation because, while it admitted students from all races, its inter-racial dating rules were found to violate a national public policy regarding discrimination). In *Bob Jones University* the Supreme Court could only muster a meager reference to the religious school's Free Exercise rights, holding that the compelling interest of the government in stamping out discrimination outweighed "whatever burden" was caused to the organization's freedom of religion. *Id*. at 604. To the extent that "sexual preference" or "gender identity" discrimination are likened by the courts to racial discrimination, religious organizations will find little comfort under Sec. 6 of S. 811. See also *Swanner v. Anchorage Equal Rights Commission*, ___ U.S. ___, 115 S. Ct. 460 (1994) (Thomas, J., dissenting) where the Supreme Court denied certiorari and declined the chance to vindicate the rights of a landlord who had been successfully sued for state housing discrimination where he refused on religious grounds to rent to unmarried couples.

Title VII grants a separate exemption specifically for religious schools. 42 U.S.C. §§ 2000e-2 (e)(2) provides exemption for such religious institutions provided that they are at least "in substantial part owned, supported, controlled, or managed by a particular

religion or by a particular religious corporation, association, or society …" or where the curriculum "is directed toward the propagation of a religion."

But here again the resulting court interpretations there have been just as dismal: *EEOC v. Kamehameha School/Bishop Est*ate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993) (private Protestant religious school was denied Title VII religious exemption even though it had numerous religious characteristics and activities); *Pime v. Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984)(Catholic college held not to be entitled to religious exemption relating to its preference for Jesuit professors over a Jewish professor), reversed on other grounds at 803 F.2d 351 (7th Cir. 1986)(where Judge Posner noted in his concurrence that, regarding the religious exemption issue, "the statute itself does not answer it," and "the legislative history … is inconclusive," *Id*. at 357). Contrast with: *Hall v. Baptist Memorial Care Corp.*, 215 F. 3d 618 (6th Cir. 2000) (Baptist entity training students for health care had sufficiently religious overtones to qualify for exemption regarding its firing of a lesbian staffer who was a minister at a pro-homosexual church).

NRB's membership includes numerous Christian radio stations that are commercial in their organizational structure. Considering the chilly reception such commercial religious entities receive by the courts when they are other than non-profit corporations, they can expect to be shut out of the exemption language of S. 811. We can add to that list other for-profit groups whose mission is distinctly Christian in nature but who will be denied exemption: Christian publishers, religious media consulting groups and agencies, food vendors who work exclusively with Christian schools, Christian-oriented bookstores, adoption agencies, counseling centers, and drug rehab facilities.

Confusion Regarding the F.C.C.'s EEO Jurisdiction

Currently, the Federal Communications Commission has promulgated EEO rules regarding broadcast licensees. An exemption is provided for a "religious broadcaster" regarding all employment decisions impacting religious belief, but they still must abide by a non-discrimination standard respecting "race … or gender." *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd. 24018 (2002) ("EEO Order"), ¶¶ 50, 128.

Would S. 811 supersede the regulations of the F.C.C regarding the employment activities of broadcasters? We simply do not know. The only help we have in answering that comes from a sparse comment in *The King's Garden, Inc. v. F.C.C.*, 498 F. 2d 51, 53 (D.C. Cir. 1974) (F.C.C. is justified in pursuing its own EEO regulations against religious broadcasters where "Congress has given absolutely no indication that it wished to impose the [Title VII] exemption upon the F.C.C."). Nothing in the language of S. 811 gives us any Congressional intent to regulate broadcasters. On the other hand, would this new legislation be held to regulate those broadcasters that do not qualify for the F.C.C.'s definition of a "religious broadcaster?" The F.C.C. has generated a "totality of the circumstances" test for what is, or is not, a "religious broadcaster" that differs from the

Title VII language. S. 811 exponentially increases the uncertainty regarding which law applies. Furthermore, would "gender identity" protections under S. 811 be viewed as the same, or different from the requirement imposed by the F.C.C. that even religious broadcasters not discriminate on the basis of "gender?" Again, such uncertainties only ratchet-up the probability that the religious liberties of Christian broadcasters and communicators will be chilled as they try to speculate what the law actually provides and what their rights really are.

Sexual Orientation and Gender Identity are Currently Protected without S. 811

S. 811 declares that the "purposes of his Act" are in part "to provide … meaningful and effective remedies" for "employment discrimination on the basis of sexual orientation or gender identity." Section 2, Purposes, paragraph (1). However, S. 811 appears to ignore the fact that remedies already exist in federal employment law. In addition to the new rule pronouncement by the EEOC in *Macy v. Holder*, courts have construed Title VII to provide "gender stereotyping" discrimination protection for homosexuals or persons of non-heterosexual gender identity under existing "sex discrimination" provisions. *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009); *Smith v. City of Salem, OH*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 215-16 (1st Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

Conclusion

S. 811 is the result of a public debate over legal protections for sexual orientation and gender identity. But when we consider the sweep of American history, that debate is of very recent vintage. Compare, by contrast, the long-standing recognition in our nation that religious liberty is a foundational right and that government should have few occasions to invade it. In fact, that concept of religious freedom pre-dates the Constitution. America's first Supreme Court Chief Justice, John Jay, a decade before the constitutional convention, described the notion of free exercise of religion this way: "… Adequate security is also given to the rights of conscience and private judgment. They are by nature subject to no control but that of the Deity, and in that free situation they are now left. Every man is permitted to consider, to adore, and to worship his Creator in the manner most agreeable to his conscience." [5]

John Witherspoon, a member of the Continental Congress and signer of the Declaration of Independence was an evangelical minister who also served as President of the College of New Jersey (later renamed Princeton). His students at that school included future signers of the Declaration of Independence as well as delegates to the constitutional convention. James Madison was one of them. Witherspoon recognized the

[5] John Jay's "Charge to the Grand Jury of Ulster County," April 20, 1777 cited in Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay 1745-1826*, (New York: Da Capo Press, 1971), Vol. I, page 163.

inherent relationship between civil liberty and religious freedom and when assaults came against either, both must rally in support of the other. He stated the matter well when he said in the paradigm of a prayer: "God grant that in America true religion and civil liberty may be inseparable and that unjust attempts to destroy the one, may in the issue tend to the support and establishment of both." [6]

S. 811 represents an assault on these historical notions of religious freedom. Time and the deliberative decisions of this Senate will determine whether the idea behind John Witherspoon's prayer will be honored. We urge this Committee *not* to jettison the rights of people of faith, turn them into lesser privileges, or reduce them to a mere miniature of the concept that our Founder's advanced. If that happens here, it would mean that we have set ourselves on a very dangerous path, a radical departure from those basic liberties for which our Founders risked their lives, their fortunes and their sacred honor. Thank you.

[6] "The Dominion of Providence Over the Passions of Men," delivered at Princeton on May 17, 1776, from *The Selected Writings of John Witherspoon*, edited by Thomas Miller (Carbondale, Ill.: Southern Illinois University Press 1990), page 147.