BACKGROUND | D.C. Acts RHNDA and HRAA

The Reproductive Health Non-Discrimination Amendment Act (RHNDA)

RHNDA (Bill 20-0790) was introduced in the Council of the District of Columbia on May 6, 2014. All twelve members of the Council co-sponsored the legislation.

The Council moved quickly, publishing a Notice of Intent to Act just 10 days later, and holding a public hearing on June 23. At the hearing—attended by two Councilmembers—it became clear that the bill was targeted specifically at religious employers, and that the Council did not intend to address the serious constitutional and other legal concerns raised by the bill.

The Council passed RHNDA on December 17, in the face of warnings from then-Mayor Vincent Gray and the D.C. Attorney General that the bill violates the rights of religious employers. Mayor Gray never had an opportunity to act on the legislation; the Council Chairman did not transmit the bill to the Mayor's Office until after Mayor Muriel Bowser succeeded him, and she signed the bill on January 23, 2015. On March 6, 2015, the act was transmitted to Congress. Without Congressional action, RHNDA will take effect after the 30-legislative-day congressional review period expires.

RHNDA expands the definition of sex discrimination under D.C. law to prohibit discrimination on the basis of "reproductive health decisions." As a result, religious, faith-based and pro-life organizations' hands are tied if an employee chooses to publicly make known his or her reproductive health decision that directly conflicts with the organization's own sincerely-held beliefs. In other words, religious, faith-based and pro-life groups cannot ensure that their own employees support the mission and principles of their organization without risking a lawsuit. This law is extremely problematic, in a number of ways.

RHNDA TRAMPLES ON RELIGIOUS LIBERTY

- The First Amendment and the Religious Freedom Restoration Act (RFRA) protect the right of churches and other religious organizations to practice their faith free from government intrusion. But RHNDA would coerce a religious entity into hiring or retaining employees whose public behavior directly undermines the entity's religious beliefs and mission.

- Religious denominations and institutions whose sincerely-held beliefs include religious teachings regarding reproductive health decision-making are particularly in RHNDA's cross-hairs. RHNDA expressly prevents these religious employers from putting their religious faith into practice when making employment decisions.

- The government has no business interfering with a religious organization's ability to pursue its mission effectively by dictating who should carry out its mission.

- RHNDA is yet another example of the ongoing government assault on the freedoms of religious believers and organizations.

RHNDA VIOLATES THE FIRST AMENDMENT GUARANTEE OF FREEDOM OF ASSOCIATION

- The First Amendment guarantees freedom of association, which is especially strong when the association serves one of the other First Amendment freedoms. An organization's religious freedom would be severely hampered if it could not exercise a corresponding freedom to determine whether and with whom to associate in pursuit of its religious beliefs and activities. The right to associate includes a right not to associate.

- Who speaks on an organization's behalf—in both word and action—can be as critical to an organization's messaging as what is said.

BACKGROUND | D.C. Acts RHNDA and HRAA

- By coercing a religious, faith-based, or other entity into hiring or retaining employees who act inconsistently with the entity's core mission, RHNDA would violate freedom of association.

RHNDA OFFERS NO PROTECTION TO RELIGIOUS ORGANIZATIONS

- Although the District's Office of the Attorney General recommended that RHNDA include an exemption for religious employers, and former Mayor Vincent Gray made the same recommendation, the Council of the District of Columbia did not include it.

- RHNDA, as passed, does not include any protections for religious institutions and organizations. Nor is there any applicable protection elsewhere in DC law.

- Any protection that might be offered to religious employers by the "ministerial exception" upheld in the Supreme Court's Hosanna-Tabor decision could only be invoked by a religious entity as a defense, after a lawsuit has been filed. It does not protect religious entities from the expense and other ill effects of defending against lawsuits filed under RHNDA. Moreover, the boundaries of the ministerial exception are uncertain, and may not provide religious employers a defense for non-ministerial positions.

- Most troubling, proponents of RHNDA both on and outside of the D.C. Council have been clear that the law specifically targets religious employers.

RHNDA IS NOT JUST A D.C. ISSUE

- RHNDA is just the beginning. Although D.C. is the only jurisdiction that has passed a bill like RHNDA so far, the Council declared itself at the forefront of a "national trend," and similar bills have already been introduced in Illinois, Michigan, New York, North Carolina, and Ohio. More will surely follow suit in this coordinated effort to tie the hands of religious employers across the country.

- Because D.C. is the first jurisdiction to pass RHNDA, Congress has the opportunity to weigh in—and send a clear message to state legislators considering similar bills that this legislation is an unacceptable intrusion on constitutional freedoms—before it spreads any further.

The Human Rights Amendment Act (HRAA)

HRAA was introduced in the Council of the District of Columbia on May 21, 2014. Despite objections from various members of the City's religious and university communities, HRAA was passed on December 2, 2014, and signed by Mayor Muriel Bowser on January 25, 2015. Once the bill is sent to Congress HRAA will take effect after the 30 day congressional review period expires unless Congress takes action.

The D.C. Human Rights Act (Section 2-1402.41) currently recognizes the settled constitutional principle that a private organization– in the words of the Act an "educational institution that is affiliated with a religious organization" – has the freedom to decide when to offer "endorsement, approval, or recognition" to a group organized to promote or condone homosexual activity. This provision is known as the "Armstrong Amendment." It recognizes a religious school's freedom not to fund or provide facilities or other benefits to such persons or groups. This provision of the Act recognizes the diversity of our City and the freedom of religious organizations truly to practice what they preach. To remove this protection suggests that there is a role for government in determining how a private, religious, educational institution carries out its mission, the sort of intrusion that flouts our Constitution and our civic traditions.

BACKGROUND | D.C. Acts RHNDA and HRAA

If allowed to become law, HRAA would repeal the "Armstrong Amendment"—a long-standing provision of the District of Columbia code that was passed by Congress as part of the District of Columbia Appropriations Act of 1990. Congress took action at that time to ensure that D.C.'s far-reaching anti-discrimination laws could not be construed to require religiously-affiliated schools to officially endorse, fund, or provide other benefits to persons promoting homosexual identity and conduct. For many religions, marriage is the union of a man and a woman, and sexual relations are reserved solely for marriage. Thus, the Armstrong Amendment prevents the government from forcing religiously affiliated schools to adopt the government's views on marriage and human sexuality.

HRAA VIOLATES FREE EXERCISE OF RELIGION

- The First Amendment and the Religious Freedom Restoration Act (RFRA) protect the right of churches and other religious organizations to practice their faith free from government intrusion.

- If HRAA is enacted, religiously affiliated schools in the District could be forced to violate their beliefs about marriage and human sexuality.

- Part of practicing one's religion is teaching it to others. Religious schools cannot effectively teach their beliefs about marriage and human sexuality when they are simultaneously forced to endorse and support groups that actively oppose those beliefs.
- Other than the Armstrong Amendment, the D.C. Human Rights Act contains no other conscience protections for religiously-affiliated schools. Therefore, religiously-affiliated schools who take action consistent with their religious beliefs on marriage and human sexuality could be subjected to lawsuits and will be forced to expend significant resources to defend their rights in court.

HRAA VIOLATES FREEDOM OF ASSOCIATION

- The Armstrong Amendment recognizes the well-settled constitutional principle that private organizations have the freedom to decide the persons or groups to whom they offer endorsement, approval, or recognition.

- A school or other entity makes a statement about itself every time it extends official recognition to an affiliate group. By forcing private organizations to associate — via endorsement, or the provision of funding and benefits — with groups who espouse views that directly conflict with the organization's mission and purpose, the government wrongfully commandeers the organization's message.

CONGRESS SHOULD ACT, AGAIN, TO PROTECT RELIGIOUS LIBERTY

- The government should not, in the name of "human rights," be permitted to discriminate against any individual or group based on their beliefs about marriage or human sexuality.

- Under the Constitution, Congress has exclusive jurisdiction over the District of Columbia "in all cases whatsoever." (Art. I, Section 8.)

- Congress should exercise its authority in this case to once again protect religiously-affiliated schools located in the District of Columbia from unlawful government coercion.

RHNDA AND HRAA ARE NOT THE SAME AS THE RECENT CONTROVERSY IN INDIANA

That was about what rights individual business owners have to exercise religion in the way they run their for-profit businesses. RHNDA and HRAA affect faith- and mission-driven organizations. RHNDA denies religious and pro-life organizations the right to practice their faith and be true to their mission, and HRAA denies religious schools the right to practice and teach their faith.