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Testimony in Support of House Bill No. 2626

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Mr. Chairman and Committee: Thank you for permitting me to submit written testimony regarding the constitutionality of House Bill No. 2626. I hold the Paul R. Verkuil Chair in Public Law at Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in constitutional and, in particular, church/state issues. Among other publications, I am the author of *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (Cambridge University Press 2005, 2007), and I successfully litigated the constitutionality of the federal Religious Freedom Restoration Act before the United States Supreme Court in *Boerne v. Flores*, 521 U.S. 507 (1997)(holding RFRA unconstitutional). Before joining the faculty at Cardozo Law School in 1990, I clerked for Justice Sandra Day O'Connor at the United States Supreme Court. I reside in Washington Crossing, Bucks County, PA.

House Bill No. 2626 brings lay teachers employed by religiously-affiliated schools under the otherwise neutral and generally applicable Pennsylvania Labor Relations Act, 43 PA. CONS. STAT. § 211.1(1937). As such, it is constitutional. *See generally Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding neutral, generally applicable laws constitutional under Free Exercise Clause).. The bill actually increases

entity from responsibility and liability under the law. This is an unsupportable exaggeration of the law.

The Supreme Court's rule is that the government may not determine or dictate religious belief or ecclesiology. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). *Watson v. Jones*, 80 U.S. 679 (1871). As I have previously stated: "religious individuals and institutions are absolutely protected in the creation and observance of their beliefs, including self-governance that is driven by ecclesiology. Following this principle, the Court has declined jurisdiction over 'solely' ecclesiastical disputes, that is, intraorganizational disputes over belief. These are the cases often cited as proof of church 'autonomy,' but they do not stand for independence from the law, but rather the legal principle that government may not determine belief--a principle that appears throughout First Amendment cases, whether they are religious institution cases, Free exercise cases, or Free speech cases." *Id.* at 1113-14.

House Bill No. 2626 does not run afoul of the rule against judicial (or legislative) determination of religious belief. The state is not telling any church¹ what to believe or how to interpret its own theology. In fact, the proposed legislation is careful to state that the government should not violate this principle: "In disputes involving a religious employer, the board may neither define nor interpret religious doctrine." The legislation does no more than permit lay employees of religious organizations to counter "[t]he

¹ It is important to note that the bill also does not single out the Roman Catholic Church among religious institutions. While the problems for lay teachers in religiously-affiliated schools may have been brought to the attention of the legislature by the Church's employees, the bill does not single out or target the Roman Catholic Church schools.

separation of powers. *See generally* Marci Hamilton, "George W. Bush and the Texas Religious Freedom Restoration Act," (Oct. 26, 2000), available at <http://writ.news.findlaw.com/hamilton/20001026.html> (arguing against validity of RFRA on separation of powers grounds). *Cf. Boerne v. Flores*, 521 US 507, 508 (1997) (holding federal RFRA unconstitutional in part on separation of powers grounds).

If Mr. Chopko's reasoning on this score were correct, the existing exceptions within the RFPA would also be unconstitutional. The RFPA already exempts any criminal offense under 18 Pa.C.S. (relating to crimes and offenses) or under the act of April 14, 1972 (P.L. 233, No. 64), [known as The Controlled Substance, Drug, Device and Cosmetic Act], which is graded as a felony or a misdemeanor; any provision of law which requires physicians or professional nurses to be properly licensed in order to practice their profession; any provision of the act of November 10, 1999 (P.L.491, No.45) [known as the Pennsylvania Construction Code Act], which prevents the endangerment of health and safety; and any provision of law which requires the reporting of abuse.

Thank you for permitting me to submit this testimony. I would be happy to respond to any questions the Committee might have regarding the constitutionality of HB No. 2626.

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