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Honorable Robert E. Belfanti, Jr.
Chairman, House Labor Relations Committee
30 East Wing
P. O. Box 202107
Harrisburg, PA 17120

Dear Chairman Belfanti:

I am Professor Emeritus at Notre Dame Law School where I have taught constitutional law for 32 years. I take the liberty of offering comments which I hope will be helpful in your consideration of HB2626.

Initially, permit me to express my appreciation for the careful analysis of HB2626 presented to this committee by Bruce E. Endy, legal counsel to the National Association of Catholic School Teachers. Mr. Endy's statement is helpful in its analysis of cases upholding New York, Minnesota and New Jersey laws applying state collective bargaining requirements to teachers in Catholic schools. Those cases, however, do not resolve the basic constitutional issues raised by HB2626.

The Supreme Court of the United States, in *NLRB v Catholic Bishop of Chicago*, 440 U.S. 490(1979), did not decide whether a law could constitutionally impose National Labor Relations Board jurisdiction on Catholic schools. All the Court decided was that the statute did not confer such jurisdiction on the NLRB. Whatever the lower federal and state courts in New York, Minnesota and New Jersey have decided, the ultimate resolution of the question lies with the Supreme Court of the United States which has left the issue open.

Mr. Endy properly describes the 1990 Supreme Court case of *Employment Division v Smith*, 494 U.S. 872 (1990), which held that a burden on religious exercise which is "merely the incidental effect of generally applicable and otherwise valid provisions" does not offend against the First Amendment. 494 U.S. at 878. Such an incidental burden will be evaluated by the courts under the least demanding judicial scrutiny that requires only that the law be supported by a rational basis. Prior to *Smith*, burdens on free exercise of religion, to be upheld, had to be narrowly tailored to achieve a compelling governmental interest. See *Sherbert v Verner*, 374 U.S., 398(1963). Pennsylvania responded to the *Smith* lowering of judicial scrutiny in free exercise cases by enacting the Religious Freedom Protection Act in 2002. The RFPA requires that a governmental burden on a person's free exercise of religion must be the "least restrictive means" of furthering a "compelling interest" of the governmental agency. Sec.4.

The RFPA implemented the principle, accepted by the Supreme Court, that a state can provide in its laws and constitution greater protections for individual rights than are required by the United States Constitution as interpreted by the Supreme Court. *Pruneyard Shopping Center v Robins*, 447 U.S. 74(1980). The RFPA restored, in Pennsylvania law, the strict protection of free exercise of religion formerly observed under *Sherbert v Verner*. HB2626, however, exempts its mandatory collective bargaining regime from the RFPA.

The bottom line in Mr. Endy's statement seems to be that the legislature "can" constitutionally impose the collective bargaining regime on Catholic schools. His analysis and conclusion, however, provide insufficient justification for enacting HB2626.

First, on the constitutional point, it is not at all clear that HB2626 would be upheld by the Supreme Court of the United States. That Court is not bound by the lower federal and state court rulings quoted by Mr. Endy on New York, Minnesota and New Jersey laws. And there is reason to conclude that the relaxed scrutiny imposed by *Smith* in free exercise cases may not even apply to a case under HB2626. That is so because, as the Supreme Court said in *Smith*, "the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions [in cases involving] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press ... or the right of parents ... to direct the education of their children" 494 U.S. at 872. One could easily conclude, especially in light of the factual analysis presented in the Statement of the Pennsylvania Catholic Conference on HB2626, that an enforcement of HB2626 against Catholic schools would trigger "such a hybrid situation," 494 U.S. at 882, in which an assertion of the free exercise of religion would be inextricably linked to claims of free speech, free association (and non-association), parental rights, etc. If so, one could hardly expect that HB2626 would survive the strict scrutiny of the *Sherbert v Verner* test recognized by *Smith* in "hybrid" cases.

A separate and intriguing point is raised by the repeated assertion by HB2626 that the board has power to examine whether religiously based justifications advanced by the school are merely pretextual. For example, while "the board may neither define not interpret religious doctrine," the board "may inquire into whether the espoused doctrine is a pretext for the action of the employer." When that flexible empowerment is applied to actual cases one can fairly anticipate that the scrutiny of a "doctrine," to see whether the interpretation of that doctrine presented by the school really justifies the action of the school or is a mere "pretext," could possibly verge upon the official determination of the truth or falsity of religious doctrine which is unequivocally forbidden by the First Amendment. *U.S. v Ballard*, 322 U.S. 78(1944).

Apart from its constitutional problems, HB2626 would impose unjustifiable practical burdens on Catholic schools and the parents and children who rely upon those schools for independent religious education. There is no point in repeating here the analysis offered to this Committee by the Pennsylvania Catholic Conference. Rather, suffice it to say that the essence of Catholic education is that the faith and its teachings permeate every aspect of the school day. The enforcement of the "facially neutral" standards of HB2626 would inevitably dilute the religious character of the school. The statement of the Catholic Conference convincingly demonstrates the many ways in which HB2626, in practice, would bring government into the

excessive entanglement with religion that the First Amendment forbids. *See Walz v Tax Commission*, 397 U.S. 664(1970)

In short, the enactment of HB2626 would be an invitation to protracted constitutional litigation in which it would not be at all clear that HB2626 would be upheld by the Supreme Court of the United States. More important, the enactment of HB2626 would amount in practical effect to the cancellation of a central aspect of religious and familial freedom, the right to educate one's own children in accord with one's own beliefs

Thank you for considering these comments..

Sincerely,

Charles E. Rice
Professor Emeritus of Law