



Chairwoman Cronin, Claire.Cronin@mahouse.gov
Chairman Brownsberger, William.Brownsberger@masenate.gov
Joint Committee on the Judiciary

RE: H.767, An act to strengthen civil rights

November 14, 2017

Dear Chairwoman Cronin and Chairman Brownsberger,

We write in support of H.767, which addresses the problem of business corporations claiming religious exemptions from anti-discrimination law.

1. Nature of the problem

Massachusetts law prohibits many forms of discrimination, in employment, housing, credit, and service at public accommodations, on grounds such as race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, disability, ancestry, or veteran status.¹ However, these important civil rights protections are in danger from a new legal strategy: the use of religious freedom claims to challenge anti-discrimination law.

This strategy is not new. For example, when a corporate restaurant chain was sued in 1966 for refusing to serve black customers, its principal stockholder argued that the Civil Rights Act of 1964 violated his First Amendment right to freedom of religion “since his religious beliefs compel him to oppose any integration of the races whatever.”² (That argument failed.) However, until quite

¹ See, e.g., G.L. ch. 151B, § 4; G.L. ch. 272, § 98.

² *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). For more background on the history of religious freedom claims against anti-discrimination law, see Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 *Wake Forest L. Rev.* 173 (2012), http://wakeforestlawreview.com/wp-content/uploads/2014/10/w08_Curtis_LawReview_4.12.pdf.

recently, for-profit businesses could not succeed in religious freedom-based legal challenges to, or defenses against, anti-discrimination law.

The Supreme Court's 2014 *Hobby Lobby* decision, however, marked a shift in federal law.³ In that case, the U.S. Supreme Court held for the first time that the protections of the federal Religious Freedom Restoration Act (RFRA) applied to a for-profit corporation. As Justice Ginsburg noted in dissent, *Hobby Lobby* seems to suggest that "commercial enterprises, including corporations . . . can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."⁴

The *Hobby Lobby* Court hastened to add that its decision would not allow business corporations to use religious freedom objections to discriminate based on *race*.⁵ But the Court pointedly *avoided* opining on whether businesses might use the newly-conferred religious freedom objections to discriminate against lesbian, gay, bisexual, transgender, or queer (LGBTQ) people.⁶

Since *Hobby Lobby*, claims by corporations for religious freedom exemptions from anti-discrimination law—apparently, all involving businesses that discriminate or seek to discriminate against LGBTQ people—have arisen under both RFRA and the First Amendment to the Constitution. For example, in a case currently on appeal to the U.S. Court of Appeals for the Sixth Circuit, a federal judge in Michigan held that a funeral home company was exempt, under RFRA, from a claim of sex discrimination against a transgender employee under Title VII of the Civil Rights Act of 1964.⁷ Another case, currently on appeal to the U.S. Court of Appeals for the Eighth Circuit, argues that Minnesota anti-discrimination law violates the religious freedom of the owners of a videography company.⁸ And in a case currently before the U.S. Supreme Court, a corporation

³ *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

⁴ *Id.* at 2787 (Ginsburg, J., dissenting).

⁵ *Id.* at 2783.

⁶ Furthermore, there is some concern that, even in the context of race, the logic of *Hobby Lobby* opens the door to new claims by businesses seeking religious exemptions from application of the Civil Rights Act of 1964. See Hanna Martin, Note, *Race, Religion, and RFRA: The Implications of Burwell v. Hobby Lobby Stores, Inc. in Employment Discrimination*, 2016 Cardozo L. Rev. de novo 1 (2016), <http://www.cardozolawreview.com/content/denovo/MARTIN.denovo.37.pdf>.

⁷ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016), *appeal filed*, No. 16-2424 (6th Cir. argued Oct. 4, 2017).

⁸ See *Telescope Media Group v. Lindsey*, 2017 WL 4179899 (D. Minn. Sept. 20, 2017), <http://thecolu.mn/wp-content/uploads/2017/09/53-ORDER-on-MTD-and-PI.pdf>, *appeal filed*, No. 17-3352 (8th Cir. appeal filed Oct. 30, 2017).

claims a First Amendment religious freedom exemption from Colorado state anti-discrimination law for refusing to sell a wedding cake to a same-sex couple.⁹

Regardless of the outcome of these cases, there is every reason to believe that claims by corporations (as well as individuals) for religious freedom exemptions from federal and state anti-discrimination law will continue. For example, while *most* Americans oppose allowing businesses to refuse services on religious freedom grounds, significant minorities of Americans support allowing businesses to refuse service to gay or lesbian (16%), atheist (15%), Jewish (12%), and/or black (10%) people on religious freedom grounds.¹⁰ Furthermore, recent guidance from the U.S. Department of Justice suggests that the federal government will side with some of these claims.¹¹

2. Bill analysis

The object of H.767 is to prohibit business corporations from claiming corporate religious freedom as a basis for exemption from anti-discrimination law for allegedly discriminatory conduct that occurs in Massachusetts. To be sure, Massachusetts cannot decide how the federal courts will decide the scope of religious freedom exemptions from anti-discrimination law under the First Amendment (for state law) or RFRA (for federal law) *in general*. But H.767 is grounded in a strong, if underappreciated, source of the state's legal authority: its power to regulate the existence, powers, and conditions of operation of *corporations*.

Massachusetts corporations derive their very existence and power from grants of state authority—once granted through individual charters by specific acts of the legislature, now streamlined through an administrative process but reliant on the same fundamental legislative authority. And the state has undisputed power to limit the powers of its corporate creations,¹² and to condition the terms of admission of corporations incorporated in other states.¹³

⁹ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, *cert. granted*, 137 S. Ct. 2290 (2017) (No. 16-111, oral argument scheduled Dec. 5, 2017).

¹⁰ Public Religion Research Institute, *Americans Oppose Allowing Small Businesses to Refuse Services on Religious Grounds*, <http://bit.ly/PRRI2014> (June 2, 2014). Among some demographics, as many as 26% support allowing business owners to refuse service to gay or lesbian people. *Id.*

¹¹ See Attorney General Jeff Sessions, *Federal Law Protections for Religious Liberty*, <https://www.justice.gov/opa/press-release/file/1001891/download> (Oct. 6, 2017).

¹² See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (as a “mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence”) (quoting

The bill has three principal provisions. Sections 1 and 2 amend the defined general powers of a corporation incorporated in Massachusetts (to sue and be sued, buy and sell property, make contracts, etc.) to specify that these powers do *not* include “assertion, based on the purported religious belief or moral conviction on the part of the corporation, its officers, or directors, of exemptions from, or claims or defenses against, federal or state law prohibiting discrimination, as applied to conduct, activities, or transactions occurring wholly or partly within the commonwealth.” In other words, asserting a RFRA or First Amendment religious freedom claim against federal or state anti-discrimination law is simply *beyond the powers* (“*ultra vires*”) that the state grants to corporations.

In theory, simply specifying that such claims are *ultra vires* ought to stop such claims. However, in practice, existing law narrowly limits when corporate action may be challenged as *ultra vires*,¹⁴ and a victim of discrimination would rarely (if ever) be able to enforce this rule through a traditional *ultra vires* claim. Consequently, Section 2 of the bill also provides a special remedy.

This special remedy applies if a business corporation does in fact assert a religious freedom claim in a case that involves both federal and state anti-discrimination law. Massachusetts cannot dictate how a federal court would resolve a corporate RFRA or First Amendment defense filed in federal court. But the bill provides that, if the corporation makes such a claim, then—regardless of whether the corporate religious freedom defense, or the underlying discrimination claim, succeeds in federal court—the chief officers of the corporation are jointly and severally liable for any violations of *state* anti-discrimination law arising from the same conduct. In other words, if the company’s management chooses to blur the lines between the corporation (an artificial legal entity created by an act of the state) and the religious views of its managers or investors, then managers cannot rely on the legal distinction between themselves and the corporation to shield their choices from liability.¹⁵ (Of course, if a state law discrimination claim fails on its own merits, there is no liability for either the corporation or its management.)

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.).

¹³ See, e.g., Pac. Wool Growers v. Comm’r of Corps. & Taxation, 305 Mass. 197 (1940).

¹⁴ See G.L. ch. 156D, § 3.04.

¹⁵ This includes both situations where a policy of discrimination on religious grounds is set from the top, and situations where corporate upper management chooses to defend specific acts of discrimination by lower-level employees on corporate religious freedom grounds.

Finally, in order to ensure a level playing field, Section 3 of the bill provides that foreign (out-of-state) corporations admitted to do business in Massachusetts are subject to the same rules and restrictions as corporations incorporated here.

3. Conclusion

This bill is an important step in reasserting the state's interest in preventing discrimination, and ensuring that business corporations, which derive their existence and powers from the state, do not abuse these powers by asserting spurious corporate religious freedom claims as a license to discriminate.

If we may be of any further assistance, please do not hesitate to contact us.

Sincerely,

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