November 6, 2013

RE: Oppose the Toomey Amendment

Dear Senator:

Americans United for Separation of Church and State writes to express our opposition to any amendment, such as the Toomey Amendment, that would expand the exemption for religious organizations in S. 815, the Employment Non-Discrimination Act. Although Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances, such accommodations must not be applied more broadly than is necessary to protect religious freedom. The Toomey Amendment to be considered on the Senate floor would expand the already existing religious exemption in ENDA in unnecessary and unprecedented ways.

As reported out of committee, ENDA already includes a very broad exemption for religious organizations. Indeed, it exempts the same category of religious organizations that are exempt from the religious discrimination prohibition in Title VII of the Civil Rights Act of 1964.1

Further expansion of the current exemption could threaten the exemption entirely. The government’s ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion.”2 For example, in Texas Monthly, Inc. v. Bullock,3 the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose “substantial burdens on nonbeneficiaries” or they are designed to prevent “potentially serious encroachments on protected religious freedoms.”

Thus, there is no justification for granting a religious exemption to a significantly broader category of organizations under ENDA than even under Title VII, as the Toomey Amendment would. Furthermore, the result would be absurd: an organization would be deemed “religious” and allowed to discriminate against LGBT employees and yet not be allowed to prefer co-religionists.

1 It is worth noting that the Title VII exemption grants this category of groups the ability to discriminate on the basis of religion, but not on the basis of race, color, sex, or national origin. The exemption in ENDA, therefore, is actually even broader than the exemption in Title VII, as it exempts the same category of organizations from the law altogether—giving them the right to discriminate without requiring a justification rooted in a religious belief. Religious exemptions, however, should be narrowly tailored to alleviate an actual and identified religious burden.2 Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).3 480 U.S. 1, 18 n. 8 (1989).
The Title VII religious organization definition, as applied by courts in hundreds of cases for decades, is also a known entity. It has been invoked regularly and successfully by a variety of religious organizations. It has been found to exempt organizations that define themselves broadly as Christian or Jewish, as well as organizations that identify themselves as part of specific denominations. There is no need to expand a standard that has been law and successfully invoked in hundreds of cases by religious corporations, associations, and educational institutions.

Nor is there a reason to introduce new and unclear standards and terms, as the Toomey Amendment would. No one can anticipate how this provision will be interpreted or applied. It is so vague it could open an expansive loophole for otherwise secular employers—possibly even to for-profit organizations—to evoke religion as a reason to discriminate under ENDA. And, the exemption could be interpreted so broadly that it virtually swallows the anti-discrimination protections all-together.

Accordingly, Americans United has serious and grave concerns about the Toomey Amendment. Thank you for considering our views and please contact me (202-466-3234 x226 or garrett@au.org) if you have any questions.

Sincerely,
Maggie Garrett
Legislative Director

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4 The Portman Amendment, which passed by voice vote earlier today, has similar problems. Its language is also vague and its consequences unclear.