

June 21, 2018

**Testimony of Noel León, Counsel
On Behalf of National Women's Law Center
In Support of
B22-0571, the Abortion Provider Non-Discrimination Amendment Act of 2017
District of Columbia Council Committee on Judiciary Affairs**

Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center (the "Law Center") in support of Bill 22-0571, the Abortion Provider Non-Discrimination Amendment Act of 2017. The Law Center has worked for over 45 years to protect and advance the progress of women and their families in core aspects of their lives, including employment, family and economic security, education, and health and reproductive rights, with an emphasis on the needs of low-income women and those who face multiple forms of discrimination.

The Law Center supports the Abortion Provider Non-Discrimination Amendment Act. Firing or retaliating against a health care professional for participating in abortion care or for making public statements about abortion is unfair and discriminatory. Federal law already protects health care professionals who participate in abortion and sterilization care, but more is needed. This bill would grant needed protections for the 45,000 people employed in the health industry in D.C.

I. B22-0571 addresses a real problem facing health care professionals who want to participate in abortion or sterilization procedures.

Health care professionals across the country, including in the District of Columbia, report hostility and outright discrimination from their employers due to their support for abortion access or participation in abortion care. The Law Center has heard from dozens of health care professionals who have been fired, threatened, demoted, denied opportunities, and otherwise punished for providing abortion services, seeking abortion training, or engaging in advocacy around abortion. The Law Center released a report in April 2018 describing the breadth of that discrimination, which has been submitted to the Council.

Health care professionals' jobs and careers are threatened because they participate in abortion care. One doctor who spoke to the Law Center had worked for many years at a small private practice and provided abortions once a week at a clinic nearby. The doctor's practice was then purchased by a new owner who opposed abortion. The new owner told the doctor to stop providing abortions at the local clinic or else the doctor would be fired from the private practice. The doctor was forced to choose between the career they had built and the abortion care they were committed to providing, simply because an employer disliked the fact the physician treated patients seeking abortion at a completely separate facility.¹ In another example, a physician told

¹ NOEL LEÓN, NAT'L WOMEN'S L. CTR., DIAGNOSING DISCRIMINATION: BARRIERS FACING HEALTH CARE PROVIDERS WHO SUPPORT AND PERFORM ABORTION 3 (2018).

researchers that they had been directly threatened by a senior partner of a private OB/GYN practice during a job interview: “If I ever find out you did elective abortion any time in your professional life, you’ll never practice medicine in [this state] again.”²

Doctors are being blocked by hospital employers when they provide abortion as the standard of care in life-threatening situations. This happens despite the fact that federal law requires hospitals with emergency medical departments to provide stabilizing care to patients experiencing emergency medical conditions.³ And doctors in that situation fear retaliation for simply providing accurate medical information and referrals to a patient.⁴ For example, an OB/GYN resident was directed by her attending physician to send home a patient whose water had broken at 18 or 19 weeks and who was at risk of serious infection if she did not receive an abortion. The resident did provide the patient with information about a nearby hospital where she could receive the abortion care she needed, but because of fear of retaliation from her employer, the resident did not record that information in the patient’s chart.⁵ A doctor should never be punished for treating patients as required by law and as indicated by best medical practice.

Medical students and residents are threatened or punished by their institutions for seeking to learn about abortion or engage in advocacy around abortion. Medical students and residents have reported that they face roadblocks and admonishment when they pursue education and training around abortion services, even when they shoulder the burden of locating and facilitating that training themselves. This happens despite a national accreditation requirement that OB/GYN residency programs integrate access to abortion training into their curricula.⁶

Health care professionals are threatened or fired when they speak publicly about abortion. Here in the District, Dr. Diane Horvath-Cosper was threatened with the termination of her job simply because she engaged in media advocacy in her personal capacity.⁷ Another physician told the Law Center that they were threatened with termination because the physician planned to testify before a state legislature about a bill that would affect abortion care.⁸ That individual clinicians could be fired for simply engaging with a public forum, to weigh in on issues that directly affect their lives and their ability to practice their profession, is unacceptable. And it demonstrates the need for a bill like the Abortion Provider Nondiscrimination Amendment Act.

² *Id.* (citing Lori Freedman, Uta Landy, Philip Darney, & Jody Steinauer, *Obstacles to the Integration of Abortion Into Obstetrics and Gynecology Practice*, 42 PERSP. SEXUAL & REPROD. HEALTH 148 (May 2010)).

³ Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C.A. § 1395dd (West 2018).

⁴ NOEL LEÓN, NAT’L WOMEN’S L. CTR., DIAGNOSING DISCRIMINATION: BARRIERS FACING HEALTH CARE PROVIDERS WHO SUPPORT AND PERFORM ABORTION (2018).

⁵ Amy Littlefield, *Catholic Rules Forced This Doctor to Watch Her Patient Sicken—Now, She’s Speaking Out*, REWIRE (Sep. 7, 2017),

<https://rewire.news/article/2017/09/07/catholic-rules-forced-doctor-watch-patient-sicken-now-shes-speaking/>.

⁶ *Sec. IV.A.d).(1)*, ACCREDITATION COUNCIL GRADUATE MED. EDUC., ACGME PROGRAM REQUIREMENTS FOR GRADUATE MEDICAL EDUCATION IN OBSTETRICS AND GYNECOLOGY 17 (2017),

https://www.acgme.org/Portals/0/PFAssets/ProgramRequirements/220_obstetrics_and_gynecology_2017-07-01.pdf.

⁷ Erik Eckholm, *Doctor, Warned to Be Silent on Abortions, Files Civil Rights Complaint*, NYTIMES.COM (May 2, 2016), https://www.nytimes.com/2016/05/03/us/doctor-warned-to-be-silent-on-abortion-files-civil-rights-complaint.html?_r=0.

⁸ NOEL LEÓN, NAT’L WOMEN’S L. CTR., DIAGNOSING DISCRIMINATION: BARRIERS FACING HEALTH CARE PROVIDERS WHO SUPPORT AND PERFORM ABORTION 7 (2018).

These varied forms of discrimination have far-reaching effects. Clinicians, residents, and students in D.C. and across the country may be afraid to get involved with abortion care, even when they are deeply committed to abortion access, because they fear retaliation that could derail their careers. One study found that hostile work environments were a greater deterrent to OB/GYNs becoming abortion providers than the threat of clinic violence.⁹

The Abortion Provider Non-Discrimination Amendment Act would address these forms of discrimination. It specifies that health care entities cannot discriminate against health care professionals based on the health care professional's participation in abortion or sterilization procedures or based on the fact that the health care professional is willing to participate in abortion or sterilization procedures. It also provides a general requirement that health care entities not prohibit health care professionals from making public statements related to abortion or sterilization.

This bill is needed not only to provide redress for those who experience outright discrimination, but also to assure clinicians who work in D.C. – or who are considering working in the District – that they would be protected from such discrimination.

II. B22-0571 would reinforce existing legal protections that are currently being ignored, fill gaps in existing law, and is supported by voters.

The D.C. Council has been at the forefront of protecting employees from discrimination, including passing the Reproductive Health Nondiscrimination Act in 2015, ensuring that employees would not face discrimination based on their reproductive health decisions.¹⁰ The Abortion Provider Non-Discrimination Amendment Act is another way the D.C. Council can protect against employment discrimination. It would reinforce current protections and fill gaps in existing law to ensure that health care professionals can pursue the careers of their choice and serve the patients they are committed to serving without fear of retaliation or mistreatment.

Currently, a federal law known as the Church Amendments protects those who are willing to perform abortion or sterilization. This law also protects individuals from discrimination based on their moral convictions regarding abortion and sterilization.¹¹ However, the Trump-Pence Administration has made clear that it intends to protect only those who would refuse to provide services, not those who are willing to provide them. For example, in January 2018, the U.S. Department of Health & Human Services created a new division dedicated solely to protecting those who refuse to provide health care services, and released a proposed rule that would expand protections for health care providers that refuse to provide abortion and other services.¹² In those actions, HHS has been unwilling to even acknowledge its obligation to protect those willing to provide abortion or sterilization, signaling a lack of federal enforcement of the Church Amendment protections for those individuals. The D.C. Council should step in to help those who

⁹ Lori Freedman, Uta Landy, Philip Darney, & Jody Steinauer, *Obstacles to the Integration of Abortion Into Obstetrics and Gynecology Practice*, 42 PERSP. SEXUAL & REPROD. HEALTH 148 (May 2010).

¹⁰ Reproductive Health Non-Discrimination Amendment Act of 2014, D.C. CODE ANN. § 2-1401.05 (West 2018).

¹¹ Church Amendments, 42 U.S. Code § 300a-7 (West 2018).

¹² NAT'L WOMEN'S L. CTR., FACT SHEET: TRUMP ADMINISTRATION PROPOSES SWEEPING RULE TO PERMIT PERSONAL BELIEFS TO DICTATE HEALTH CARE (Feb 2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/02/Proposed-Rule-FS-2.pdf>.

can no longer rely on enforcement of federal protections. The Abortion Provider Nondiscrimination Amendment Act would enshrine protections in state law and ensure that health care professionals have access to the same enforcement mechanisms that other employees in D.C. have when making discrimination claims.

D.C. would not be an outlier in passing protections for those who want to perform abortion. Already, nine states have laws on the books that provide similar protection for health care professionals. This bill would build on those protections by reaching a wide range of health care professionals in a multitude of situations, pushing D.C. to the forefront of an effort to protect health care professionals from discrimination for their willingness to participate in reproductive health care.

Furthermore, in passing the Abortion Provider Non-Discrimination Amendment Act, the D.C. Council would be doing what voters want. A nationwide survey conducted in March 2017 on behalf of the National Women’s Law Center found that a majority of voters favor policies that stop hospitals from firing, demoting, or otherwise retaliating against doctors or nurses because they treated a woman seeking an abortion or gave her information or referrals for abortion.¹³

III. Despite claims to the contrary, B22-0571 is consistent with the First Amendment and no exemptions are needed.

Despite claims by certain witnesses in testimony before the D.C. Council, the Abortion Provider Nondiscrimination Amendment Act is entirely consistent with the First Amendment. It sets forth a general requirement that health care entities not discriminate against individual health care professionals who participate in abortion-related services, who are willing to participate in those services, or who speak publicly about abortion. It does not require any health care provider to do anything, and it does not penalize individuals who object to providing care. It does not target religious entities or religious practices at all. In fact, abortion providers have faced discrimination from entities that do not have religious objections to abortion.¹⁴ And providers with different religious beliefs and backgrounds are willing to assist a patient seeking abortion.¹⁵

The Abortion Provider Nondiscrimination Amendment Act also does not restrict speech. It does not limit, punish, or compel speech. In fact, most of the provisions in the bill are not speech at all. The only provision that discusses speech extends a protection to individuals *without regard to their viewpoint*.¹⁶

¹³ GREENBERG QUINLAN ROSNER RESEARCH, VOTERS OPPOSE RELIGIOUS EXEMPTION LAWS: FINDINGS FROM A NATIONAL SURVEY OF VOTERS (May 11, 2017), <https://nwlc.org/wp-content/uploads/2017/05/NWLC-Refusals-Memo-May-11-2017.pdf>.

¹⁴ NOEL LEÓN, NAT’L WOMEN’S L. CTR., DIAGNOSING DISCRIMINATION: BARRIERS FACING HEALTH CARE PROVIDERS WHO SUPPORT AND PERFORM ABORTION 7 (2018).

¹⁵ Lisa Harris, Alexandra Cooper, Kenneth Rasinski, Farr Curlin, and Anne Drapkin Lyerly, *Obstetrician-Gynecologists; Objections to and Willingness to Help Patients Obtain an Abortion*, 118 *Obstet Gynecol* 905 (2011).

¹⁶ “It shall be an unlawful discriminatory practice for a health care provider to prohibit public statements or manifestations of attitudes or views related to abortion or sterilization procedures that are made outside the scope of employment by an individual who is employed, enrolled in a training program, has an academic appointment, or who has staff privileges with that health care provider.” Abortion Provider Nondiscrimination Amendment Act, B22-0571, Council Pd. 22 (D.C. 2017).

Additionally, despite certain witness's claims, the Abortion Provider Non-Discrimination Amendment Act does not need any exceptions. Any employer who believes it should be exempted from this bill's requirements in a particular situation can avail itself of the D.C. Human Rights Act's existing exceptions for which it qualifies, including the exception for religious organizations and the "business necessity" defense.¹⁷ The "ministerial exception" courts have recognized in the U.S. Constitution can also serve as an affirmative defense for any religious employers in D.C. with respect to decisions made about "ministers."¹⁸ These exceptions remain in effect and are unchanged by the Abortion Provider Non-Discrimination Amendment Act. No further exemption is required by the First Amendment, nor should it be included, in the Act.

IV. B22-0571 is good for D.C. patients.

The Abortion Provider Non-Discrimination Amendment Act is good for patients in the District of Columbia, because by protecting providers of reproductive health care, it would ultimately protect patients' access to abortion services, sterilization, and treatment for pregnancy complications such as miscarriage.¹⁹ One in four women have an abortion by age 45,²⁰ and nearly 1 in 4 women will experience at least one diagnosed miscarriage in their lifetime.²¹ When health care employers prohibit or deter their employees from taking secondary employment as abortion providers, punish employees or students for seeking abortion training, or otherwise threaten or punish health care professionals who provide abortion, patients lose access to the care they need.

The Abortion Provider Non-Discrimination Amendment Act helps guarantee that pregnant patients in D.C. are not denied access to the providers who want to treat them, by ensuring that:

- individuals are not jeopardizing their future careers by seeking opportunities for training in abortion;
- health care providers are not putting their jobs at risk when they give patients information or life-saving care when they need abortion; and
- clinicians are not punished when they want to speak to the media about their commitment to providing full spectrum reproductive health care that includes abortion.

¹⁷ D.C. Code § 2-1401.03(b).

¹⁸ See *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996) (affirming dismissal of a claim of sex discrimination against a Catholic University under Title VII on the grounds that the plaintiff employee, a Catholic nun, was a "minister"). This principle was affirmed by the U.S. Supreme Court in 2012 in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.* by a unanimous decision. 565 U.S. 171 (2012).

¹⁹ Because treatment for miscarriage often involves abortion procedures, employer restrictions on abortion training and practice affect patients experiencing miscarriage in addition to those seeking abortion.

²⁰ GUTTMACHER INST., FACT SHEET: INDUCED ABORTION IN THE UNITED STATES (Oct. 2017), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf.

²¹ Linda Prine, Honor Macnaughton, *Office Management of Early Pregnancy Loss*, AM. ACAD. OF FAMILY PHYSICIANS (2011), <http://www.aafp.org/afp/2011/0701/p75.pdf>.

V. Conclusion

The National Women's Law Center strongly supports Bill 22-0571. We urge the Council to pass this commonsense solution that protects health care professionals and patients in D.C.

Sincerely,

A handwritten signature in black ink, appearing to read "Noel León". The signature is written in a cursive, fluid style.

Noel León
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