



COUNCIL OF THE DISTRICT OF COLUMBIA  
THE JOHN A. WILSON BUILDING  
1350 PENNSYLVANIA AVENUE, NW  
WASHINGTON, D.C. 20004

DAVID A. CATANIA  
Councilmember, At - Large  
Chair, Committee on Health

Committee Member  
Finance and Revenue  
Libraries, Parks and Recreation  
Government Operations and the Environment

November 12, 2009

Professor Robin F. Wilson  
Washington & Lee University School of Law  
486 Sydney Lewis Hall  
Lexington, VA 24450

Dear Professor Wilson:

I am writing to express my concern about mischaracterizations and misstatements you made during your testimony before the Council of the District of Columbia (Council) on November 2, 2009. You addressed religious accommodations under Title VII of the Civil Rights Act of 1964<sup>1</sup> as they relate to the Religious Freedom and Civil Marriage Equality Amendment Act of 2009. In your testimony before the Council, you discussed two cases: Rodriguez v. City of Chicago (Rodriguez),<sup>2</sup> a case dealing with a police officer who refused to guard an abortion clinic, and Endres v. Indiana State Police (Endres),<sup>3</sup> a case dealing with a police officer who refused to protect a casino. In order to justify your position – that public employees should be exempted from the District of Columbia’s Human Rights Act when it conflicts with their deeply held religious beliefs – you inappropriately misconstrued the holdings of these cases.

Although you made several misstatements, what is most shocking to me was your blatant mischaracterization of Endres. At the hearing you stated that, “police officers and firefighters under Title VII have been exempted from two things, in specific cases, one is standing guard at casinos against their conscience. In one case called Endres, the person was actually a Baptist and I guess didn’t like gambling.”<sup>4</sup> **In fact, the court in Endres reached the exact opposite conclusion.**

The United States Court of Appeals for the Seventh Circuit (Seventh Circuit) held that police officers and firefighters “cannot choose which crimes they will investigate and

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<sup>1</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e (2006)).

<sup>2</sup> Rodriguez v. City of Chicago (Rodriguez), 156 F.3d 771 (7th Cir. 1999).

<sup>3</sup> Endres v. Ind. State Police (Endres), 349 F.3d 922 (7th Cir. 2003).

<sup>4</sup> Hearing on Religious Freedom and Civil Marriage Equality Amendment Act of 2009 on Nov. 2, 2009 [hereinafter Hearing] at 7:14.

which potential victims they will protect.”<sup>5</sup> The plaintiff refused to work at a casino because of his sincerely held religious beliefs.<sup>6</sup> The court upheld the city’s decision to fire the officer.<sup>7</sup> The court stated, in pertinent part:

Law-enforcement agencies need the cooperation of all members. Even if it proves possible to swap assignments on one occasion, another may arise when personnel are not available to cover for selective objectors, or when . . . seniority systems or limits on overtime curtail the options for shuffling personnel. Beyond all this is the need to hold police officers to their promise to enforce the law without favoritism—as judges take an oath to enforce all laws, without regard to their (or the litigants’) social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.<sup>8</sup>

The court then noted:

The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty—that Jewish policeman protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policeman protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases. . . . And, we add, Baptist policemen protect gamblers from theft and fraud (and casino operators from sticky-fingered gamblers and employees with falsified credentials).<sup>9</sup>

I am also troubled by your incorrect application of Rodriguez. In that case a police officer, Angelo Rodriguez, alleged that the City of Chicago discriminated against him by refusing to exempt him from an assignment to stand guard outside an abortion clinic. You indicated that the court upheld Rodriguez’s ability to exempt himself from clinic duty,<sup>10</sup> when in fact the court specifically rejected Rodriguez’s claim of discrimination under Title VII.<sup>11</sup> The court did not find that a police officer can refuse to guard an abortion clinic if it violates their deeply held religious belief. Indeed, the Seventh Circuit held that the pre-existence of a transfer option under the employee’s

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<sup>5</sup> Endres, 349 F.3d at 925.

<sup>6</sup> Id. at 924.

<sup>7</sup> Id. at 927.

<sup>8</sup> Id. at 927 (emphasis added).

<sup>9</sup> Id. (quoting Rodriguez, 156 F.3d at 779 (Posner, C.J., concurring)).

<sup>10</sup> Hearing at 6:56.

<sup>11</sup> Rodriguez, 156 F.3d at 778.

collective bargaining agreement permitted the employee to transfer to another police district without an abortion clinic.<sup>12</sup> Thus, the court never addressed the issues of “reasonable accommodation” and “undue burden” in the manner in which you represented. And it is inexcusable that you failed to mention that the discussions of these issues in Rodriguez are not reflective of the current state of the law in light of the Seventh Circuit’s holding in Endres, which is discussed above.<sup>13</sup>

Your misunderstanding apparently led you to claim that “circuit after federal circuit” has found that Title VII requires that police departments allow police officers to refuse to guard places that violate their religious beliefs such as abortion clinics and casinos.<sup>14</sup> You even told Councilmember Jim Graham that this result “may be absurd, but it is the law under Title VII.”<sup>15</sup> Professor Wilson, this is clearly not the law in the Seventh Circuit, the only circuit on which your testimony at the hearing relied. Furthermore, the Supreme Court has made clear that the “undue burden” test you cite is a “de minimus” standard.<sup>16</sup> I find it outrageous that you would claim otherwise.

Your Curriculum Vitae states that you have previously participated in the legislative process regarding marriage equality in both New Hampshire and Connecticut. I am disturbed that you may use your misunderstanding of these cases in future testimony before legislative bodies. I am respectfully asking that you cease these misrepresentations in order to allow an honest discussion of the merits of present and future legislation.

I am further concerned that your misrepresentations may not have been accidental or inadvertent. Rather, your purported legal analysis and ethical judgment appear to be clouded by your political agenda. You are a member of the Virginia Marriage Commission,<sup>17</sup> an organ of the Family Foundation of Virginia.<sup>18</sup> The Family Foundation’s stated goal is to promote the ideal that marriage “is the union between one man and one woman, [and] is an institution of God and a foundation of civil society.”<sup>19</sup> One of your colleagues at the Foundation is Maggie Gallagher, one of this country’s most

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<sup>12</sup> Id. In fact, the court in Endres stated that even the offer to transfer to another precinct was not required, holding that, “Certainly nothing in *Ryan* or *Rodriguez* implies that there *must* be such an offer...Here, where no accommodation was attempted, we must decide whether the statute requires one, and we hold that it does not.” Endres, 349 F.3d at 926 (emphasis in original).

<sup>13</sup> This year, the Seventh Circuit further extended the rule articulated in Endres in 2003, stating that even in private employment with no public safety implications, “Title VII does not require employers to deny shift preferences of some employees in order to favor the religious needs of others.” Kevin Adams v. Retail Ventures, Inc., 2009 U.S. App. LEXIS 9222, \*\*6 (7<sup>th</sup> Cir. 2009).

<sup>14</sup> Id.

<sup>15</sup> Hearing at 7:15.

<sup>16</sup> 42 U.S.C. § 2000e(j) (2006); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (emphasis added); see Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67 (1986); see also 29 C.F.R. § 1605.2(e) (2009).

<sup>17</sup> Curriculum Vitae of Professor Robin F. Wilson at 19, available at <http://law.wlu.edu/faculty/links/wilsonrfcv.pdf>.

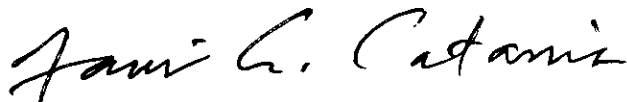
<sup>18</sup> Family Foundation of Virginia, Information Alert: Seek Solutions to Divorce, available at [http://www.familyfoundation.org/alert%207\\_12\\_07.htm](http://www.familyfoundation.org/alert%207_12_07.htm).

<sup>19</sup> Family Foundation of Virginia, Virginia Policy Issues, available at <http://www.familyfoundation.org/issues.html>.

virulent opponents of marriage equality.<sup>20</sup> The Foundation's partners include other well known right-wing organizations including the Family Research Council, Focus on the Family, and the Alliance Defense Fund. In addition to opposing marriage equality, the Foundation opposes embryonic stem cell research, opposes the use of emergency contraceptives, and promotes the defunding of Planned Parenthood. Your failure to disclose your involvement with this organization, combined with your blatant misrepresentations before the Council, leads me to question the independence of your analysis.

In closing, I am concerned about the ethical implications of your behavior and strongly caution you to consider your professional obligations of competency and candor. The democratic process depends upon an honest dialogue and open disclosure. As a professor of law, you should know better.

Sincerely,



David A. Catania  
Councilmember, At-Large  
Chair, Committee on Health

cc: Kenneth P. Ruscio, President, Washington & Lee University  
Rodney A. Smolla, Dean, Washington & Lee University School of Law  
Chief Disciplinary Counsel, State Bar of Texas

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<sup>20</sup> Family Foundation of Virginia, Information Alert: Seek Solutions to Divorce, available at [http://www.familyfoundation.org/alert%207\\_12\\_07.htm](http://www.familyfoundation.org/alert%207_12_07.htm).