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APPEAL NO. 21-7108

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREDERICK DOUGLASS FOUNDATION, INC.; STUDENTS FOR LIFE OF AMERICA; WILLIAM CLEVELAND; ROBERT L. GURLEY, JR.; AND ANGELA WHITTINGTON,

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee.

On Appeal from the United States District Court

for the District of Columbia

Case No. 1:20-cv-03346-JEB / Hon. James E. Boasberg

AMICUS CURIAE BRIEF OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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DISCLOSURE STATEMENT AND CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for *Amicus Curiae* Americans United for Life, all parties, intervenors, and *amici* appearing before the District Court and in this court are listed in the Brief for Plaintiffs-Appellants. *Amicus Curiae* Americans United for Life has no parent corporations or stock that a publicly held corporation can hold.

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

Related cases appear in the Brief for Plaintiffs-Appellants.

All applicable statutes and rules are contained in the Brief for Plaintiffs-Appellants, although additional statutory material cited in this brief is included in an addendum.

/s/ Samuel J. Salario, Jr.
Counsel for *Amicus Curiae*

Dated: February 24, 2022

CERTIFICATE REGARDING SEPARATE BRIEF

Under Circuit Rule 29(d), "[a]mici curiae on the same side must join in a single brief to the extent practicable." Counsel for *amicus curiae* Americans United for Life certifies that a separate brief by AUL is necessary because, as the country's oldest and most active pro-life advocacy organization, its interests are peculiarly affected by government conduct that intentionally discriminates against pro-life views. Given its mission as a pro-life advocacy organization, AUL has a specific perspective on the ways, both subtle and overt, in which governments discriminate against pro-life views that is addressed by this brief. Counsel for amici is unaware of any other *amicus curiae* that intends to advance the same perspective.

/s/ Samuel J. Salario, Jr.
Counsel for *Amicus Curiae*

Dated: February 24, 2022

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STATEMENT OF *AMICUS CURIAE*'S IDENTITY AND INTEREST IN THE CASE

Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), Americans United for Life is the nation's oldest and most active pro-life, non-profit advocacy organization. Briefs authored by AUL have been cited in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429 n.9 (1983), *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment), and *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103, 2156 n.3 (2020) (Alito, J., dissenting). AUL attorneys are highly regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country. As a pro-life advocacy organization, AUL is uniquely interested in governmental efforts to restrict pro-life advocacy.

STATEMENT OF AUTHORSHIP, FINANCIAL CONTRIBUTIONS, AND SOURCE OF AUTHORITY TO FILE

No party's counsel has authored this brief in whole or in part. No party or party's counsel has contributed money intended to fund preparing or submitting this brief. No person other than AUL, its members, or its counsel has contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this *amicus* brief.

SUMMARY OF THE ARGUMENT

The District Court held that the Amended Complaint was legally insufficient because it lacked factual allegations that made its central claim that D.C. has a custom or practice of intentional discrimination against pro-life views plausible. That was error.

When it analyzed the questions of improper motive and municipal liability, the District Court contravened settled law by failing to identify and consider all of the relevant factual allegations contained in the Amended Complaint. As a result, it overlooked critical facts, and thus failed to make inferences from those facts, that had a direct bearing on those questions. For example, the District Court did not consider the alleged facts that D.C. Mayor Muriel Bowser attended the opening gala of the Planned Parenthood facility where the protests occurred and, on a separate occasion, hosted a bill signing there. Nor did it consider the alleged fact Mayor Bowser had advance knowledge of—and thus the opportunity to halt—the protesters' plans to paint a "Black Pre-Born Lives Matter" mural in front of the facility. Because the District Court's cramped interpretation of the Amended Complaint excluded these and many other relevant facts, its conclusion that the Amended Complaint failed to allege a plausible claim that D.C. discriminates against pro-life viewpoints was destined to be wrong.

Furthermore, the District Court read the Amended Complaint in isolation from the context of the abortion debate and D.C.'s place in it. It

is common knowledge that the D.C. government has picked a side in the abortion controversy. Months before the first of the protests at issue in this case, it adopted a law protecting an unqualified "right . . . to have an abortion." And D.C.'s top officials are openly hostile to pro-life views. Its Mayor has declared that unfettered access to abortion "is not up for debate," and its Attorney General has threatened to prosecute anti-abortion advocates when he considers a pro-life protest "aggressive and unnecessarily inflammatory."

When Appellants' allegations are read in that context, it does not come as a surprise that 32 D.C. Police officers descended on a small pro-life protest expected to garner only 49 attendees—a ratio of one officer to every 1.5 protesters. It is to be expected that, even though the Police Department had advised protesters that they could paint a mural, police officers would nonetheless arrive at the protest for the purpose of prohibiting that expression. And it is predictable that D.C. Police arrested two protesters for trying to write a pro-life message in chalk on the sidewalk.

A key question in this case is whether this excessive response to a peaceful pro-life protest could plausibly have been the result of a custom or practice of discrimination on account of the protesters' pro-life viewpoints. The answer is unquestionably yes.

ARGUMENT

I. The Amended Complaint Arises in the Context of D.C. Having Taken Sides in the Abortion Debate.

The District Court deemed the Amended Complaint's claims of viewpoint discrimination implausible without considering the context in which they arose—namely, the abortion debate and D.C.'s place in it. That was a mistake, because when a district court reviews a motion to dismiss, it should consider the claimant's allegations in their particular context and evaluate them with the benefit of experience and common sense. *See Humane Soc. of the U.S. v. Vilsack*, 797 F.3d 4, 6 (D.C. Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

When the District Court suggested that the protests here were different from the Summer 2020 protests, for example, it judicially noticed the "size and prominence" of the Summer 2020 protests on its own motion. (JA 149 at 19). But when it analyzed the allegations that D.C. intentionally discriminates against pro-life viewpoints, it did not attempt to place them in the context of the D.C. government's stated attitudes about abortion. That omission is important because that context makes Appellants' allegations much more than plausible.

To begin, the public expression of pro-life views has been and will continue to be controversial. And there is a long history of state and local governments taking sides in that controversy and discriminating against pro-life advocacy. *See, e.g.*, Lynn D. Wardle, *The Quandary of Pro-Life*

Free Speech: A Lesson from the Abolitionists, 62 Alb. L. Rev. 853, 884–94 (1999). Some such efforts have gone so far as to require people who hold pro-life beliefs "to promote the State's own preferred message" in favor of unfettered access to abortion. *Nat'l. Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) ("And the history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their [pro-life] beliefs.").

Because we live in a time of intense polarization over political and social issues, the risk that government officials with strong pro-abortion views will intentionally discriminate against those holding pro-life views is acute. One need not look far to find examples of people losing a job or a social media platform merely for expressing a pro-life opinion in public. *See, e.g.*, Shannon Liao, *CEO of Video Game Company Steps Down After Tweet Supporting Texas Abortion Law,* THE WASH. POST (Sept. 7, 2021), https://www.washingtonpost.com/video-games/2021/09/07/tripwire-ceo-abortion-law-twitter/; Kelly Ranttila, *Social Media and Monopoly*, 46 Ohio N.U. L. Rev. 161, 162–63 (2020). Thus, experience and common sense teach that it is plausible that some local governments will take sides in the abortion debate and enforce facially neutral laws in a manner that discriminates against pro-life viewpoints. *Cf.* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 75–76 (2003)

(discussing the problem of legislatures enacting facially neutral laws intended "solely to restrict anti-abortion protesters").

It is common knowledge that the D.C. government has taken sides in the abortion debate. In fact, one would be hard pressed to find a local government more publicly committed to the goal of unfettered abortion access. Just five months before the first pro-life protest at issue in this case, Mayor Bowser signed legislation enshrining an unqualified "right of every individual . . . to have an abortion" in D.C. law. *See* D.C. Law. 23-90, 67 D.C. Reg. 3537 (2020). And the Mayor and other D.C. officials frequently publish statements that demonstrate hostility to pro-life viewpoints. The examples that follow—drawn from proposed and enacted legislation and statements on the official websites of D.C. leaders—would have been known to or readily knowable by the District Court when it ruled on the motion to dismiss. *See Momenian v. Davidson*, 878 F.3d 381, 390 (D.C. Cir. 2017) (considering matters of "common knowledge" in considering plausibility of legal malpractice allegations); *Stewart v. Nat'l. Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006) (holding that a court considering a motion to dismiss may consider matters that may be judicially noticed).

Abortion and D.C. statehood. D.C. officials have repeatedly cited their desire for the City to be a pro-abortion jurisdiction in support of the City's decades-long goal of becoming a state. In 2015, Mayor Bowser responded to a congressional resolution disapproving a pro-

abortion D.C. law with a statement describing the action as "a reminder that tax-paying residents deserve the same rights that residents in every state enjoy—the right to self-govern." *Statement from Mayor Bowser on House Oversight and Government Reform Committee Markup* (Apr. 21, 2015), https://mayor.dc.gov/release/statement-mayor-bowser-house-oversight-and-government-reform-committee-markup. In an "opening argument for D.C. statehood" the Mayor made in 2019, she asserted that statehood was necessary "to fend off Congressional efforts to interfere with . . . reproductive rights for D.C. residents . . . ." *See Mayor Bowser Delivers Georgetown Law's 2019 Philip A. Hart Memorial Lecture: The Opening Argument for D.C. Statehood* (Sept. 4, 2019), https://mayor.dc.gov/release/mayor-bowser-delivers-georgetown-law%E2%80%99s-2019-philip-hart-memorial-lecture-opening-argument-dc. That same year, D.C.'s Attorney General, Karl Racine, made the connection between abortion and statehood plain, writing in an op-ed published on his official website that "[t]he mounting national assault on the right of a woman to choose provides yet another urgent reason why we all must fight for statehood. . . ." *DC Statehood Is Necessary to Fully Secure Right for Women to Choose* (July 22, 2019), https://oag.dc.gov/blog/op-ed-dc-statehood-necessary-fully-secure-right.

Abortion and employment, housing, and public accommodation. In 2015, D.C. passed legislation making the decision to have an abortion a protected characteristic in laws that prohibit

discrimination in employment, housing, and public accommodation. *See* D.C. Law 20-261 §2, 62 D.C. Reg. 1337 (2015). This legislation contained no provision to accommodate the religious or moral beliefs of those with pro-life views. *See id.* In a statement published on his official website, the legislation's sponsor explained why: Abortion "is a woman's personal right, and she should not be discriminated against just because her employer holds a particular religious belief." David Grosso, *Grosso Takes Stand for Women to Make Own Reproductive Health Decisions* (June 30, 2014), https://www.davidgrosso.org/grosso-analysis/2014/6/30/grosso-takes-stand-for-women-to-make-own-reproductive-health-decisions. In a separate statement posted on her official website, Mayor Bowser called the legislation "a human rights issue *that is not up for debate*." *Statement from Mayor Bowser on House Oversight and Government Reform Committee Markup*, *supra* (emphasis added).

Abortion and healthcare providers. In 2017 and 2018, the D.C. Council considered legislation that would require hospitals, clinics, and pregnancy centers with pro-life principles to hire and retain employees who provide and publicly advocate for abortions. *See Abortion Provider Non-Discrimination Amendment Act of 2017*, B22-0571, https://lims.dccouncil.us/Legislation/B22-0571. In an official statement, one sponsor made the bill's purpose to favor pro-abortion viewpoints over pro-life ones unambiguous: "We pride ourselves as a jurisdiction that staunchly defends the right to an abortion, and we should ensure that no

nurse or doctor fears that they will lose their jobs or careers because of participation in abortion services or advocacy." David Grosso, *Councilmember Grosso's Introduction Statement* (Nov. 7, 2017), https://www.davidgrosso.org/grosso-analysis/2017/11/7/abortion-provider-non-discrimination-amendment-act-of-2017. Perhaps because the Supreme Court decided *National Institute of Family Life Advocates*, which invalidated a California law that would have required pro-life pregnancy centers to provide information about abortion, while this legislation was pending, it was not voted on by the full D.C. Council. *See id.* But in 2020, the D.C. Council passed a new law that requires health care providers with pro-life views to hire and refrain from discharging employees who participate in providing abortions or are willing to do so. *See* D.C. Law. 23-90 § 2, 67 D.C. Reg. 3537.

Because D.C. government has so plainly taken sides in the abortion controversy, common sense makes it plausible to expect it to have a custom or practice of disfavoring the expression of pro-life ideas. For example, after a D.C. charter school sued anti-abortion advocates who staged provocative protests there, Attorney General Racine made an official statement inveighing against "aggressive and unnecessarily inflammatory protests that go beyond the protections of the First Amendment" and threatening to "investigate and prosecute conduct that violates applicable District of Columbia laws." *Statement on Anti-Abortion Protests at Two Rivers Public Charter School* (Dec. 9, 2015),

https://oag.dc.gov/release/attorney-general-racines-statement-anti-abortion. But when the Summer 2020 protests devolved into violence and looting, the Attorney General did not publish an official statement threatening to prosecute "protests that go beyond the protections of the First Amendment" and instead published one focused on ensuring that protesters who violated curfew had "calm, respectful police interactions." *Statement on President Trump's Unconscionable Order to Assault Peaceful Protesters Around Lafayette Square* (June 20, 2020), https://oag.dc.gov/release/statement-ag-racine-president-trumps.

Among other things, the Amended Complaint alleges that two pro-life advocates were arrested for writing in washable chalk on a City sidewalk. (JA 58 ¶¶ 5, 65-70). Yet during the Summer 2020 protests, the D.C. Police turned a blind eye to much more serious violations of its defacement ordinance. The Summer 2020 protesters repeatedly marked City streets and private property with messages the D.C. government approves. It is plausible in this context to think that the different treatment the pro-life protesters received has to do with a practice or custom of discrimination against pro-life views.

II. The District Court Failed to Consider Critical Factual Allegations Relevant to Discriminatory Intent and Municipal Liability.

To determine whether the Amended Complaint plausibly alleged a claim, the District Court had to identify the relevant allegations of fact, take them as true, and give Appellants the benefit of all inferences one

could reasonably take from them. *See Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 345 (D.C. Cir. 2018) (quoting *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002)). On the disputed issues of whether D.C. acted with discriminatory intent and pursuant to a municipal practice or custom, this exercise was critical. Because it will be the rare defendant who confesses bad intent or admits an unconstitutional practice or custom, both questions are highly dependent on the inferences that can be drawn from the specific facts of each case. *See Corrigan v. Dist. of Columbia*, 841 F.3d 1022, 1039 (D.C. Cir. 2016) (stating that the "custom, policy, or practice" question "is a fact-intensive inquiry"); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1294 n.9 (D.C. Cir. 1998) (stating in an employment case that discriminatory intent is "intensely fact bound" and that "it is improper to require direct proof of discriminatory intent").

Here, the District Court took an unusually narrow view of the Amended Complaint's allegations of discriminatory intent and practice or custom. On intent, it found only three allegations that it thought were relevant and discarded two as conclusory. (JA 149 at 20). Having done that, the District Court considered only the single allegation that Mayor Bowser "supports Planned Parenthood and its 'pro-choice' agenda" and held that it was insufficient to plausibly allege an improper motive. (*Id.*).

Similarly, on the question whether D.C. has a policy or custom of enforcing its defacement ordinance against speech it dislikes, the District

Court looked only at handful of allegations in the nature of "the District has a policy or practice" and disregarded them as conclusory. (JA 149 at 22). It concluded that "Plaintiffs have at most alleged that Mayor Bowser commissioned a Black Lives Matter mural, that she has supported Planned Parenthood, that MPD did not enforce the ordinance against certain [Summer 2020] protesters. . . , and that the District did not permit the Plaintiffs to paint or chalk their message." (*Id.* at 23).

Because its review of the Amended Complaint was so constricted, the District Court overlooked a wealth of factual matter that plausibly supported Appellants' assertions of discriminatory intent and a practice or custom of viewpoint discrimination.

The Mayor has a personal connection to the Planned Parenthood facility at issue. As evidence for its allegation that Mayor Bowser supports Planned Parenthood, the Amended Complaint cited press accounts that Mayor Bowser attended the opening gala for and later held a fundraiser at the Planned Parenthood facility at which the protests in this case were held. (JA 58 ¶ 6 n.9). The District Court analysis of intent and municipal liability neither identified nor considered this information, which permits the inference that the Mayor in particular had an especially strong motive to discriminate against the protesters' pro-life message at this specific site.

The Mayor's and Police Chief had actual knowledge of Appellants' intent to paint a pro-life mural. The Amended Complaint

alleges that in advance of the August 2020 event, the protesters wrote to Mayor Bowser and the Police Chief to notify them of their request to paint a "Black Pre-Born Lives Matter" mural, of their intent to appeal to the Mayor's office if the police denied their permit request, and that viewpoint-neutral enforcement of the defacement ordinance required allowing them to paint their mural. (JA 58 ¶¶ 60-63). The District Court's analysis of intent and municipal liability neither identified nor considered these allegations, which permit the inference that the City's top policymakers with respect to enforcement of the defacement ordinance knew who the protesters were, what their pro-life message was, and what they intended to do.

The D.C. Police orally approved painting the mural because they knew viewpoint-neutrality required it. The Amended Complaint alleges that the D.C. Police at first advised Appellants that they could paint a mural on the street. (JA 58 ¶¶ 3, 59). The protest organizer was told that the police "would not be able to stop the attendees" because Mayor Bowser "had 'opened Pandora's Box'" by allowing street painting during the Summer 2020 protests. (*Id.* ¶ 59). The District Court's analysis of intent and municipal liability neither identified nor considered these allegations, which permit the inference that the D.C. Police knew that viewpoint-neutral enforcement of the defacement ordinance required allowing the pro-life protesters to paint their message. The description of the Mayor's decision to allow the same

conduct at the Summer 2020 protests as a "Pandora's Box"—a pejorative—permits the inference that the D.C. Police did not like the message the pro-life protesters planned to paint.

D.C. government ordered the police to halt the painting of the mural. The Amended Complaint alleges that "Mayor Bowser and/or District officials ordered the [D.C. Police] to be present" at the protest to stop Appellants from painting a mural. (JA 58 ¶ 66). The District Court improperly rejected this allegation as conclusory, when in fact it is an allegation of fact that must be taken as true at the motion to dismiss stage. Considered together with the allegation of Mayor Bowser's knowledge of the protesters' plans, this allegation permits the inference that the City's top policymaker ordered the police to prevent the protesters from painting their mural.

The police response was disproportionate to the protest. The Amended Complaint alleges that on the morning of the protest, the protesters were confronted by six police cars and myriad police officers and were threatened with arrest if they painted their mural or wrote in washable chalk on the sidewalk. (JA 58 ¶¶ 3, 65). Two protesters were arrested for writing in chalk on the sidewalk. The District Court's analysis of intent and municipal liability did not consider these allegations, which permit the inference that the D.C.'s conduct was motivated by hostility to the protesters' views. Why else would D.C. Police deploy a large force to a small protest to prevent a mural from

being painted on the street in washable paint—something it allowed Summer 2020 protesters to do weeks before? And why else would D.C. arrest two people for writing in chalk on a sidewalk?

Appellants were allowed to paint a "Black Preborn Lives Matter Mural" on a street in Baltimore. The Amended Complaint alleges that in a separate protest, the protesters were permitted to paint the same message they planned to paint in D.C. on a downtown Baltimore street. (JA 58 ¶ 57). The District Court's analysis did not consider these allegations. The fact that a nearby jurisdiction with its own defacement ordinance evidently recognized that the protesters enjoyed the right to paint a pro-life message on a city street supports their contention that D.C.'s conduct here was the product of discriminatory intent.

Because the District Court did not consider these allegations, it analyzed a vastly different complaint from the one that was actually pleaded. One result is that the District Court reached conclusions that are directly contrary to what the Amended Complaint shows. For example, the District Court concluded with respect to intent that "there [is not] any factual support from which to infer that the Mayor or another District official enforced the Ordinance against Plaintiffs because of a desire to block their message." (JA 149 at 20). Similarly, it concluded with respect to custom or practice that "to support the[] claim that Bowser or another official was acting as a 'policymaker' or was even aware of the decision to enforce the Ordinance against Plaintiffs and not

against racial-justice protesters." (*Id.* at 23). Had the District Court considered the allegations described above and the reasonable inferences to be drawn from them, it would have been unable to reach conclusions like these. That is because those allegations and inferences tell the story of a Mayor of a pro-abortion city with a strong motivation to prevent the expression of the protesters' views in general and at this specific site and who, with advance knowledge of their plans, ensured that the protesters would not be able to express their pro-life views in a mural painted on the street.

The fundamental flaw in the District Court's analysis is that it failed to consider the allegations of the Amended Complaint as a whole. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). When so considered, it becomes clear that, based on the legal arguments presented in the principal Brief, the Amended Complaint plausibly alleges both discriminatory intent and municipal liability.

CONCLUSION

The D.C. government has picked a side in the abortion debate. That does not, however, allow it to purposely squelch dissenting views. The Amended Complaint plausibly alleges that Appellants were prevented from expressing their pro-life views because the D.C. government is hostile to their message. The District Court's decision should be reversed because the Amended Complaint alleges "enough fact to raise a

reasonable expectation that discovery will reveal evidence" that the D.C. acted pursuant to a custom or practice of illegal viewpoint discrimination. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Dated: February 24, 2022

Respectfully submitted:

/s/ Samuel J. Salario, Jr.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because the brief contains 3,738 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using 14-point Century.

/s/ Samuel J. Salario, Jr.
Counsel for *Amicus Curiae*

Dated: February 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2022, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

s/ Samuel J. Salario, Jr.
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PERTINENT STATUTES AND REGULATIONS

D.C. LAW 23-90. STRENGTHENING REPRODUCTIVE HEALTH PROTECTIONS AMENDMENT ACT OF 2020.

Sec. 2. The Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq.*), is amended as follows:

(a) Title I is amended as follows:

(1) Section 102 (D.C. Official Code § 2-1401.02) is amended as follows:

Amend § 2-1401.02

(A) Designate the existing paragraph (27A) as paragraph (27B).

Amend § 2-1401.02

(B) A new paragraph (27A) is added to read as follows:

(27A) "Reproductive health decision" includes a decision by an individual, an individual's dependent, or an individual's spouse related to:

(A) The use or intended use of a particular drug, device, or medical service, including contraception or fertility control; or

(B) The planned initiation or termination of a pregnancy.".

(2) Section 105 (D.C. Official Code § 2-1401.05) is amended as follows:

Amend § 2-1401.05

(A) Subsection (a) is amended by striking the sentence "This section shall not be construed to require an employer to provide insurance coverage related to a reproductive health decision.".

Amend § 2-1401.05

(B) Subsections (b) and (c) are repealed.

(3) A new section 105a is added to read as follows:

New § [2-1401.06]

Sec. 105a. Government noninterference in reproductive health decisions.

(a) The District shall recognize the right of every individual to choose or refuse contraception or sterilization.

(b) The District shall recognize the right of every individual who becomes pregnant to decide whether to carry a pregnancy to term, to give birth, or to have an abortion.

(c) The District shall not:

(1) Deny, interfere with, or restrict, in the regulation or provision of benefits, facilities, services, or information, the right of an individual, including an individual under District control or supervision, to:

(A) Choose or refuse contraception or sterilization; or

(B) Choose or refuse to carry a pregnancy to term, to give birth, or to have an abortion;

(2) Interfere with or restrict in the regulation or provision of benefits, facilities, services, or information, the decision of a health care practitioner acting within the scope of the health care practitioner's license to participate in a consenting individual's prenatal care, labor, delivery, or abortion; or

(3) Penalize an individual for:

(A) Seeking, inducing, or attempting to induce, the individual's own abortion; or

(B) Any act or omission during the individual's pregnancy based on the potential or actual impact on the individual's health or pregnancy.

(d) For the purposes of this section, the term "health care practitioner" means an individual, groups of individuals, partnership, or corporation, including a health care facility, that is licensed, certified, or otherwise

authorized by law to provide professional health care services in the District to an individual.".

(b) Title II is amended as follows:

(1) Section 211(a)(1) (D.C. Official Code § 2-1402.11(a)(1)) is amended as follows:

Amend § 2-1402.11

(A) Designate the existing text as subparagraph (A).

(B) The newly designated subparagraph (A) is amended by striking the semicolon and inserting the phrase "; and" in its place.

Amend § 2-1402.11

(C) A new subparagraph (B) is added to read as follows:

(B) To fail to treat an employee affected by pregnancy, childbirth, a pregnancy-related or childbirth-related medical condition, breastfeeding, or a reproductive health decision, the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as an employee not so affected but similar in the employee's ability or inability to work, including the requirement that an employer shall treat an employee temporarily unable to perform the functions of the employee's job because of the employee's pregnancy-related condition in the same manner as it treats other employees with temporary disabilities; provided, that this subparagraph shall not be construed to require an employer to provide insurance coverage related to a reproductive health decision;".

New part J of subchapter II of Unit A of Chapter 14 of Title 2

(2) A new part J is added to read as follows:

Part J. Health Care Professionals

New § 2-1402.91

Sec. 291. Definitions.

For the purposes of *this part*:

(1) "Health care professional" means a physician, advance practice clinician, nurse, nurse's aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, medical researcher, medical or nursing school faculty, student, or employee, counselor, social worker, or any other individual involved in providing health care.

(2) "Health care provider" means:

(A) An individual, group of individuals, partnership, institution, corporation, organization, or board engaged in providing health care in any manner; or

(B) An individual, group of individuals, partnership, institution, corporation, organization, or board engaged, or authorized, in the credentialing or licensing of a health care professional.

New § 2-1402.92

Sec. 292. Prohibited discrimination.

(a) It shall be an unlawful discriminatory practice for a health care provider to do any of the following against a health care professional based on the health care professional's participation in an abortion or sterilization procedure, participation in abortion or sterilization training outside the course and scope of the health care professional's employment with that health care provider, or willingness to participate in an abortion or sterilization procedure:

(1) Fail or refuse to hire the health care professional;

(2) Discharge the health care professional from employment or a medical training program;

(3) Transfer the health care professional;

(4) Discriminate against the health care professional with respect to:

(A) Compensation or promotion;

(B) Residency or other medical training opportunity;

(C) Staff privileges, admitting privileges, or staff appointments; or

(D) Licensure or board certification;

(5) Take adverse administrative action against the health care professional;

(6) Harass the health care professional; or

(7) Otherwise penalize, discipline, or take adverse or retaliatory action against the health care professional."

(May 6, 2020, 67 D.C. Reg. 3537)

D.C. LAW 20-261. REPRODUCTIVE HEALTH NON-DISCRIMINATION AMENDMENT ACT OF 2014.

Sec. 2. Section 105 of the Human Rights Act of 1977, effective July 17, 1985 (D.C. Law 6-8; D.C. Official Code § 2-1401.05), is amended as follows:

(a) Subsection (a) is amended by striking the phrase "related medical conditions, or breastfeeding" and inserting the phrase "related medical conditions, breastfeeding, or reproductive health decisions" in its place.

(b) Subsection (b) is amended by striking the phrase "related medical conditions, or breastfeeding" and inserting the phrase "related medical conditions, breastfeeding, and employees affected by reproductive health decisions" in its place.

(c) A new subsection (c) is added to read as follows:

"(c) For the purposes of this section, the term "reproductive health decisions" includes a decision by an employee, an employee's dependent, or an employee's spouse related to the use or intended use of a particular drug, device, or medical service, including the use or intended use of contraception or fertility control or the planned or intended initiation or termination of a pregnancy."

(May 5, 2015, 62 D.C. Reg. 1337)

BILL 22-0571. ABORTION PROVIDER NON-DISCRIMINATION AMENDMENT ACT OF 2017.

Sec. 2. Title II of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1402.01 *et seq.*), is amended by adding a new section 291 to read as follows:

Sec. 291. Prohibition on discrimination against health care professionals.

(a) For the purposes of this section:

(1) "Health care professional" means a physician; advance practice clinical; nurse; nurse's aide; medical assistant; hospital employee; clinic employee; nursing home employee; pharmacist; pharmacy employee; medical researcher; medical or nursing school faculty, student, or employee; counselor or social worker; or any other individual involved in providing health care in any manner.

(2) "Health care provider" means:

(A) Any person, group of persons, institution, corporation, organization, or board engaged in the provision of health care in any manner;

(B) Any person, group of persons, institution, corporation, organization, or board engaged in, authorized for, credentialing or licensing of a health care professional.

(b) It shall be an unlawful discriminatory practice for a health care provider to do any of the following acts to a health care professional 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:

(1) Fail or refuse to hire, or discharge; transfer; discriminate with respect to compensation or promotion, or with respect to residency training opportunities, staff privileges, admitting privileges, staff appointments, or licensure or board certification; take adverse administrative action; cause loss of career specialty; harass or otherwise penalize, discipline, or take adverse action.

(c) 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 a health care provider.

(Introduced November 7, 2017)