From:	David Kallman
To:	MCRC-Comments
Subject:	ACLU/Equality Michigan Request to Amend the Elliott-Larson Act
Date:	Tuesday, August 15, 2017 11:26:49 AM
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To the Michigan Civil Rights Commission:

Please review the attached public comment being submitted by the Great Lakes Justice Center on behalf of Senator Patrick Colbeck, Senator Judy Emmons, Senator Michael Green, Senator David Robertson, Senator Michael Shirkey, Representative Thomas Barrett, Representative Lee Chatfield, Represetative Gary Glenn, Representative Jeff Noble, and Representative Jim Ruenstad. If you have any questions please contact me at the number below. Thank you.

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GREAT LAKES
—JUSTICE CENTER—

ISSUE BRIEF
AUGUST 15, 2017

RESPONSE TO EQUALITY MICHIGAN'S REQUEST FOR INTERPRETIVE STATEMENT

INTRODUCTION

The News Release and legal memo submitted by Equality Michigan (EM) to the Michigan Civil Rights Commission (MCRC) on July 24, 2017 is legally incorrect and misleading. It exposes a transparent attempt by the authors to circumvent politically accountable, elected legislators who hold the constitutional authority to enact and amend laws in our state. The Great Lakes Justice Center offers this response on behalf of the legislators named below.

EM requests the MCRC to "issue an interpretative (sic) statement" to expand the categories prohibiting discrimination contained in the Elliott-Larsen Civil Rights Act (hereinafter ELCRA)(MCL 37.2101 et seq.).[1] EM requests that "gender identity and sexual orientation" be added to the protected categories. EM falsely claims the MCRC has the authority to add the new categories through an interpretative (sic) statement pursuant to MCL 37.2601, MCL 24.201 et seq., and Rule 37.23 of the Michigan Administrative Code. EM's news release further claims that the MCRC should issue this statement because the Michigan Legislature has declined to amend ELCRA to add these new categories numerous times over the past thirty years and because Federal Law requires such an interpretation. Its news release further claims that such an interpretative statement would change the law in Michigan to add the new LGBT classifications and thereby provide special protection and "remedies" for those claiming to fall within the new categories.

A simple review of the cited law demonstrates that the above claims are incorrect and misleading.

I. MICHIGAN LAW

Although the MCRC holds some authority to issue an interpretive statement on issues under its purview (R37.23 of the Michigan Administrative Code), the Commission does not have the authority to change a statute or amend ELCRA. Article IV, Section 1 of the Michigan Constitution provides that "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives," not the MCRC. EM admits that the Legislature has declined to add these categories numerous times over the past thirty years. The MCRC is not the Legislature and is not politically accountable to the people.

An interpretive statement is not binding law. It would not, therefore, make LGBT discrimination "unlawful in Michigan," would not be legally binding on employers and individuals in our state, and would not give any legal remedies to alleged victims of discrimination. The following review and analysis of the statutes negates EM's claims.

First, contrary to the claims in EM's news release, MCL 37.2601 says nothing about the authority of the MCRC to enact legislation or interpretive statements that carry the force of law. In fact, it clearly states the opposite. **The MCRC can only make**

[1] The term "interpretative statement" is found nowhere in the cited statutes. The proper term is "interpretive statement."

"recommendations" to the Governor "for legislative or other action necessary to effectuate" its constitutional mandate (MCL 37.2601(1)(e)). It holds no independent power or authority to enforce its recommendations in any way. Since the MCRC can only make recommendations to the Governor for legislation, it clearly does not have the right to amend statutes and enact new legislation on its own authority.

Second, EM misleadingly cites the Administrative Procedures Act (APA) as a source of authority for the requested interpretive statement (MCL 24.201 et seq.). The phrase "interpretive statement" is only used in two sections of the APA.

MCL 24.207 defines "Rules" which are binding law on businesses and individuals. MCL 24.207(h) states that **an "interpretive statement . . . in itself does not have the force and effect of law** but is merely explanatory." (emphasis added). This refutes EM's claim that an interpretive statement passed by the MCRC to add the new categories would make such actions "unlawful," or that businesses and individuals would be legally responsible to comply with such a statement, or that the statement would provide new legal remedies to anyone. This claim is simply not true.

MCL 24.232(5) also directly refutes EM's claims. This section of the APA states that **an "interpretive statement . . . is not enforceable by an agency, is considered merely advisory, and shall not be given the force and effect of law. . . . A court shall not rely upon a(n) . . . interpretive statement . . . to uphold an agency decision** to act or refuse to act." (emphasis added). Once again, this demonstrates that EM's claim of the binding authority of an interpretive statement is clearly incorrect.

Nothing in Michigan law supports EM's broad claim that an interpretive statement would be legally binding and enforceable against Michigan businesses and citizens if passed by the MCRC. Any attempt to enact and enforce such legislation under the guise of an interpretive statement will be rejected as unlawful by our courts.

II. Federal Law

EM's claim that Title VII case law interpretations by federal courts around the country are binding and controlling law in Michigan is not accurate and is very misleading. None of the federal cases cited by EM deal with ELCRA and are not binding in Michigan. Its claim that these federal cases and interpretations are "equally applicable to Michigan's" Elliott-Larsen Act is also false.

EM argues that Title VII, a federal statute that covers only employment discrimination in a business with 15 or more employees (see 42 U.S.C. 2000e-2), is similar enough to ELCRA that the MCRC should disregard the differences and pretend they are the same law. Nothing in Title VII has anything to do with public accommodations or housing. The sexual harassment sections of ELCRA are different than Title VII. EM claims that since some federal courts have re-defined Title VII's definition of the word "sex" as applied to employment discrimination, that this new court-created definition must apply to Michigan's ELCRA as well. EM thereafter improperly concludes that these federal court opinions require enacting an interpretive statement adding the new categories.

The cited federal court decisions do not control the interpretation of Michigan statutes. Indeed, the cases EM cites come from other states or from non-binding federal jurisdictions interpreting other state or federal statutes relating only to employment discrimination. Further, the Equal Employment Opportunity Commission (EEOC) recommendations and decisions cited by EM explicitly pertain to employer/employee relationships, not housing or public accommodations. To claim

that everything a federal agency recommends is always true, lawful, and in the best interest of society ignores our nation's history and negates any need for judicial review.

In fact, the federal Department of Justice (DOJ) is currently arguing in *Zarda v. Altitude Express*, an appeal being heard at the 2nd U.S. Circuit Court of Appeals, that Title VII does not include sexual orientation or gender identity. The DOJ brief states: "Moreover, whatever this court would say about the question were it writing on a blank slate, Congress has made clear through its actions and inactions in this area that Title VII's prohibition of sex discrimination does not encompass sexual orientation discrimination. . . . The question presented is not whether, as a matter of policy, sexual orientation discrimination should be prohibited by statute, regulations, or employer action. . . . The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. . . . Judges in the past, in fact, have decided that in common, ordinary usage in 1964 – and now, for that matter – the word 'sex' means biologically *male* or *female*."

The DOJ further argues in its brief that "the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade. The theories advanced by the EEOC and the Seventh Circuit lack merit, and these theories are inconsistent with Congress's clear ratification of the overwhelming judicial consensus that Title VII does not prohibit sexual orientation discrimination." DOJ also notes pointedly that "every subsequent Congress since 1991 … has declined to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation." Congress has consistently declined to amend Title VII despite having been repeatedly presented with opportunities to do so.

EM cannot rely upon inapplicable out-of-state cases, federal cases, or EEOC recommendations to override the clear parameters of ELCRA. Moreover, EM has failed to cite mandatory United States and Michigan Supreme Court precedent which control this issue.

The United States Supreme Court "repeatedly has held that state courts are the ultimate expositors of state law, see, e.g., *Murdock v. City of Memphis*, 20 Wall. 590 (1875) …." *Mullaney v Wilbur*, 421 U.S. 684, 691 (1975). Further, the Court has held that "Congress has explicitly disclaimed any intent categorically to preempt state law or to 'occupy the field' of employment discrimination law. See 42 U.S.C. §§ 2000e-7 and 2000h-4." *California Federal Savings & Loan Assn v Guerra*, 479 U.S. 272, 281 (1987).

42 U.S.C. 2000e-7 (Title VII, Section 708, Effect on State Laws) states:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Congress implemented Title VII with the explicit intent to not limit state law.

The Michigan Supreme Court has ruled multiple times on the issue of interpreting ELCRA in light of federal interpretations of Title VII. In *Chambers v Trettco, Inc*, 463 Mich 297 (2000), the Michigan Supreme Court reversed the Michigan Court of

Appeals when it relied on federal interpretations of ELCRA. The Michigan Supreme Court stated:

> *We hold that the principles stated in the federal cases relied on by the Court of Appeals* ***do not apply*** *to claims brought under Michigan's Civil Rights Act. Instead,* ***we adhere to prior Michigan precedent and the specific language of the Michigan statute.***

Id. at 303 (emphasis added). The opinion further held that although the Court can sometimes look at federal interpretations, Michigan courts are not compelled to do so.

> *However, we have generally been careful to make it clear that we are* ***not compelled to follow those federal interpretations.*** *See, e.g., Radtke, supra at 381-382, 501 N.W.2d 155. Instead,* ***our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent of the Legislature,*** *... 'as gathered from the act itself.' " McJunkin v. Cellasto Plastic Corp., 461 Mich. 590, 598, 608 N.W.2d 57 (2000). . . . [W]e* ***cannot defer to federal interpretations if doing so would nullify a portion of the Legislature's enactment.***

Id. at 313-314 (emphasis added).

In *Haynie v State*, 468 Mich 302 (2003), the dissenting opinion made a nearly identical argument as EM claims here. The dissent made the same comparisons and cited many of the same cases EM cites. The dissent stated that "[b]ecause Michigan's employment-discrimination statute so closely mirrors federal law, we often rely on federal precedent for guidance." *Id.* at 325. The majority opinion explicitly rejected the dissent's arguments when it held:

> *Even if, as the dissent states, the Michigan Legislature relied heavily on the federal civil rights act in drafting Michigan's Civil Rights Act, the Michigan Legislature was clearly not bound by the federal civil rights act.* ***That is, the Michigan Legislature was free to adopt a civil rights act that differed from the federal civil rights act, and although, as the dissent points out, there are many similarities between the two acts, the Michigan Legislature did, in fact, choose to adopt an act that is different from the federal act. Despite the dissent's determination not to allow them to do so, the Michigan Legislature is allowed to determine for itself the extent to which it wishes to track the language of the federal law.*** *In particular, Michigan's Civil Rights Act is different from the federal civil rights act with regard to its treatment of sexual harassment.* ***The dissent fails to respect this difference and, instead, concludes that because these acts are nearly identical they must be construed to mean exactly the same thing. We cannot agree that any time the Michigan Legislature creates a law that is "similar" to a federal law, it must be made identical, and the two laws must be interpreted to mean exactly the same thing.***

Id. at 319-320 (emphasis added).

Michigan courts are not bound by federal interpretations that might be analogously applied to ELCRA but are instead bound to comply with the Michigan Legislature's intent when it enacted ELCRA. It is for the Michigan Legislature to establish public policy for Michigan, not other state or federal court interpretations of a different statute.

In its strained attempt to tie federal Title VII to ELCRA, EM argues that the federal courts' re-definition of the word "sex" must

be imposed on Michigan law. It appears that EM is arguing that the Michigan Legislature actually intended that those additional classifications (i.e. sex stereotypes, gender identity, sexual orientation, etc.) must now be protected under ELCRA. However, in *Bush v Shabahang*, 484 Mich 156, 173 (2009), the Supreme Court held:

> *"Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to authorize what the Legislature explicitly rejected."*

The Michigan Legislature has considered legislation *eleven times* since 1999 to add additional classifications to ELCRA such as gender identity, sexual orientation, etc. All eleven times, those bills have been rejected by our legislature. See Michigan Legislature HB 5959 (2014), HB 5804 (2014), SB 1053 (2014), SB 1063 (2012), HB 4192 (2009), HB 4160 (2007), SB 0787 (2005), HB 4956 (2005), SB 0609 (2003), HB 4850 (2003), and HB 5107 (1999). As EM admits, our legislature has clearly refused to add to ELCRA the additional classifications that EM now suggests the MCRC should sneak in through the back door as an alleged interpretation of the Legislature's intent. The MCRC must reject EM's invitation to "interpret" ELCRA to mean things our legislature has explicitly rejected. Despite how other state or federal courts may re-define the word "sex" for other statutes, our legislature has made its intent clear. Michigan courts, and the MCRC, are bound to enforce that intent. Even if the MCRC agrees with EM's request, the MCRC has the constitutional duty to enforce the laws passed by the legislature, not make up its own laws. Having repeatedly failed to persuade the Legislature to amend ELCRA, EM should not be permitted to do an end run around the Legislature by improperly asking the MCRC to implement the requested amendments.

III. Other Considerations

Beyond the clear legal principles delineated above that argue against the MCRC passing the requested interpretive statement, there are other public policy reasons to oppose expanding the categories currently protected under ELCRA. See the attached Issue Brief from the Great Lakes Justice Center, Citizens for Traditional Values and the Michigan Family Forum.

Conclusion

For all the above reasons, we respectfully urge the Michigan Civil Rights Commission to not act outside its constitutional and statutory authority by enacting the requested interpretive statement. This issue is solely within the constitutional authority of the Michigan Legislature, not this Commission.

Legislators:

Senator Patrick Colbeck
Senator Judy Emmons
Senator Michael Green
Senator David Robertson
Senator Michael Shirkey
Representative Thomas Barrett
Representative Lee Chatfield
Representative Gary Glenn
Representative Jeff Noble
Representative Jim Runestad

Great Lakes Justice Center:

David A. Kallman, J.D.
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GREAT LAKES
—JUSTICE CENTER—

ISSUE BRIEF
OCTOBER 24, 2014

NEW SEXUAL ORIENTATION/TRANSGENDER LAWS

The Detrimental Effect on the Business and Religious Community

INTRODUCTION

Proposed laws extending civil rights protections to LGBTQ individuals seek to increase regulation of business, religious organizations and citizens. The proposed laws create new protected classes of individuals, giving new legal causes of action on the basis of "sexual orientation," "sexual identity," "gender identity and expression," "family responsibilities," etc. These laws are commonly referred to as SOGI (Sexual Orientation/Gender Identity) Laws. It is the job of lawmakers to affirm and uphold constitutionally-protected freedoms, not pass laws granting special protections for some, while coercing others to comply with a political agenda.

When a state makes such changes to existing law, numerous problems inevitably arise. This issue brief seeks to fully inform the public of these concerns by presenting a complete and truthful understanding of the issues. In doing so, this paper informs the reader of a number of practical business, constitutional, legal, and economic concerns that will impact many citizens, businesses, and religious and charitable organizations if these amendments are passed in your state.

Preliminarily, we do not condone discriminatory actions toward any person and hold no animus toward anyone. All viewpoints are entitled to respectful consideration. To honestly disagree with the proponents of these laws is not hate-speech or bigotry. To make such a claim is itself intolerant and close-minded.

- **NO DEMONSTRATED REASON FOR THE NEW CATEGORIES:** The proposed laws are a solution searching for a problem. No documented history of ongoing, extensive, and pervasive discrimination against the proponents of the laws exists. No proof exists that gay individuals are routinely fired from jobs just for being gay. No proof exists of gay individuals systemically being denied access to educational or employment opportunities, being forced to sit in the back of a bus, being forced to use separate but equal public accommodations like bathrooms, being harmed economically, etc. Occasional, anecdotal stories do not justify such sweeping changes to the law, particularly ones that will infringe on everyone's freedom, even those who identify as gay or lesbian. The laws are not being promoted to cure a demonstrated problem, but rather to coerce adherence to a particular agenda.

- **CREATES AN INTERNAL CONFLICT IN THE LAW:** The proposed laws create an internal conflict within the law itself. Religion is already a protected class under existing civil rights laws. More importantly, the free exercise of religious conscience is a constitutional right. If a state legislature adds these new categories, a clear conflict will exist between the two classes. This will lead to more divisiveness and litigation over which category prevails. Does a constitutional right prevail over a statutory class? Many state constitutions provide additional protection. For example, Michigan's Constitution states in Article I, Section 4:

> *The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.*

- LOSS OF LEGISLATIVE AUTHORITY: Numerous states enforce their Civil Rights laws through a Civil Rights Commission. The Commission is usually constitutionally created and is given authority over discrimination based upon stated categories such as "religion, race, color or national origin." A question exists, therefore, as to whether a Legislature has the authority to add additional categories beyond those listed explicitly in their state Constitution. Depending on the answer to the above question, the people's representatives in the Legislature may not have direct power or oversight over the Commission's exercise of its power regarding the categories.

For example, the Michigan Attorney General has ruled:

> *The Legislature is without authority to abrogate or limit the power of the Civil Rights Commission in the fields of employment, education, housing, and public accommodations. . . . The Legislature is without power to set aside the rules of the Civil Rights Commission. (1963 OAG 4161).*

As a result, once a Legislature amends its Civil Rights Act to include these new categories, it may have no authority to control how the Commission interprets and enforces these categories. The inclusion of these new categories may give full authority to an unelected Commission to investigate, charge, adjudicate, and impose financial penalties and other harsh sanctions against any business, religious organization, or citizen based solely on its interpretation and implementation of the law.

- SPECIFIC CONCERNS: Although this paper does not specifically address all of the political and moral issues raised, Christian people, as well as those of other faiths, strongly believe that God created all human life in His image and that every person has positive value and deserves respect. No true Christian would, therefore, ever discriminate, as that term is traditionally understood, against another human being. Unfortunately, these proposed laws would be applied in a non-traditional manner.

This proposed exercise of governmental power:

1. is coercive in its application to businesses and citizens;
2. imposes burdensome regulatory, administrative, financial and other economic costs on the business community;
3. is unconstitutionally vague and overbroad;
4. unconstitutionally infringes upon a citizen's free speech and free exercise of religion; and
5. violates precepts of good governance.

As explained below, such action violates both the United States and most state Constitutions. These laws, as enforced around the country, are not merely requests for fairness toward supposedly aggrieved individuals in these categories. Rather, they are being used as a club to bludgeon and bully into submission those who disagree with, and will not affirm, their conduct choices.

With so much at stake, it is important to point out the real world, constitutional and statutory deficiencies in adding these proposed new categories. It is important for a Legislature and policy makers to take a serious look at the interests of all the citizens of a state before making such sweeping changes to the law. These proposed laws are wholly inconsistent with our fundamental

principles of good government and the rule of law.

These extremely vague and overbroad categories, if enacted into a state law, actually encourage and enable discrimination to occur against citizens in a manner that policymakers may not have previously considered. It authorizes arbitrary government action forcing businesses and citizens of faith of all backgrounds (e.g., Muslim, Jewish, Christian, etc.), to make a terrible choice: act against their constitutionally protected consciences and their sincerely held religious beliefs, or face the full force of the state's governmental and regulatory power in protracted legal battles, both administratively and in the courts. The following discussion outlines how this law is both unconstitutional and divisive public policy, as well as how it will cost each State, its businesses, religious institutions, and citizens' untold financial expenses and costs.

Coercion of the Business Community

If enacted, the proposed new laws may empower the Commission/State to revoke or suspend a citizen's business license (i.e., see Michigan Compiled Law 37.2703). Thus, the potential for bullying and the loss of one's livelihood exists if a citizen has the courage to contest the new law. Is the current leadership of your State truly prepared to give the proponents of these new categories the ability to use the full force of the State to financially destroy their victims in the business community?

Moreover, if the new categories are added, many existing civil rights laws would give the well-funded proponents of the new categories the ability to sue their opponents for damages in circuit court, including paying all their attorney fees if they prevail. The small business community will be unable to defend itself against such litigation. Interestingly, many times no provision exists in the law permitting the small business owner to recover its attorney fees or litigation costs if it wins. The cost of just one such lawsuit could easily put a small business out of business. There is no penalty or repercussion of any kind against an accuser who frivolously files such a lawsuit.

Another argument by proponents of the new categories is that they are in the same position as African-Americans and the civil rights issues they faced. This argument is flawed on many levels. Comparing the dilemmas of the LGBTQ community to the centuries of discrimination faced by African-Americans is myopic and dismissive of our country's cultural and legal history.

The antidiscrimination laws of the Civil Rights Era were a direct response to the systemic discrimination required by law during the Jim Crow era. No similar laws mandating discrimination based upon sexual orientation, gender identity, etc., exist today.

The disgraces and unspeakable privations in our nation's history pertaining to the civil rights of African-Americans are unmatched under the law. No other class of individuals, including individuals who are same-sex attracted, have ever been enslaved, or lawfully viewed not as human, but as property. The Federal Government has never valued gay or transgendered persons as 3/5 of a person. None have ever lawfully been forced to attend different schools, walk on separate public sidewalks, sit at the back of the bus, drink out of separate drinking fountains, denied their right to assemble, or denied their voting rights. The legal history of these disparate classifications, i.e., immutable racial discrimination and same-sex attraction, is incongruent.

Is your State really prepared to take sides in this social debate to the extent that it

will hand over to one side the ability to financially destroy the other? Is your State actually prepared to codify the legal bullying of businesses, religious institutions, and citizens who believe in traditional ideas of family and human sexuality? The ramifications of such a position should be carefully considered.

Excessive Regulation, Litigation, and Costs to Business

As seen everywhere around the country, passage of laws adding the new categories markedly increase litigation and other costs for the business community. From increased regulation to administrative hearings to lawsuits over bathroom accommodations, businesses are being barraged by attacks from the proponents of the new categories. This is much more than trying to prevent a member of some particular group from being fired from his or her job. In fact, no evidence exists that such discriminatory terminations happen on a regular basis.

From bed and breakfast owners to bakers to florists to counselors to photographers, small business owners are under assault for having the courage to stand up for their beliefs. The government in these states have given their citizens a choice no one should ever have to make: either violate their religious conscience or close their business. Proponents use these additional categories as a sword, not a shield. The following examples provide just a small sampling of the exploding litigation concerning this issue:

- **City Threatens to Prosecute, Jail and Fine Pastors – Idaho – 2014:**
  - Two ordained ministers who run a wedding chapel in Coeur d'Alene, Idaho, were threatened by city officials to either marry same-sex couples under that city's SOGI law or face prosecution for violating the law.
  - If convicted, they would face up to 180 days in jail and a fine of $1,000.00 per day for each "violation." If the pastors refused to perform the same-sex marriage for one week they would face over three years in jail and $7,000.00 in criminal fines.
  - The pastors filed a federal lawsuit seeking a restraining order preventing the city from forcing them to violate their religious conscience.

Is your State prepared to force ministers, priests, rabbis, and imams to violate their faith and conscience by threat of prosecution, jail, and fines?

- **Houston SOGI Law Subpoenas to Pastors – Texas – 2014:**
  - Attorneys for the Mayor of Houston subpoenaed the sermons and other religious materials of numerous local pastors who opposed its SOGI law.
  - The city subpoena demanded all speeches, presentations, or sermons related to the City of Houston SOGI Law, Mayor Annise Parker, homosexuality, or gender identity prepared by, delivered by, revised by, or approved by the pastors.
  - The Subpoena further demanded from the pastors all e-mails, text messages, instant messages, videos, tape recordings, diaries, calendars, checkbooks, all communications with church members, and all communications with their

attorneys regarding possible SOGI information.

Is your State prepared to interfere in the religious life of its citizens by subpoenaing sermons in order to enforce a SOGI law?

Is your State willing to subpoena pastors to turn over all of their sermons and other religious materials for inspection by Government officials?

- **JUST COOKIES – INDIANAPOLIS, INDIANA – 2010:**
  - Just Cookies, Inc. was a family owned business which David and Lily Stockton operated with their daughters.
  - The family business was found to be in violation of a SOGI law when the owners declined to make cupcakes for "National Coming Out Day" because they didn't want to support an event with which they disagreed.

If a Jewish bakery refused to make cupcakes with swastikas on them for an Anti-Israel Rally, would anyone believe they should be forced by the State to violate their beliefs and make the cupcakes?

- **ELANE PHOTOGRAPHY – NEW MEXICO – 2013**
  - Elaine and Jonathan Huguenin operated a photography business and declined to photograph a lesbian commitment ceremony because to participate in such an event would violate their sincerely held religious beliefs regarding marriage. Even though the business did photography for the LGBTQ community in the past and even though the couple found another photographer who did the shoot for less money, the couple still sued Elane Photography.
  - The New Mexico Human Rights Commission found that the business violated the law and ordered the business to pay nearly $7,000.00 in attorney fees to the couple.
  - The case went all the way to the New Mexico Supreme Court where the Court ruled that religious rights must yield to any "anti-discrimination" rights. The Court stated that the business owners must surrender their right to freely exercise their religion as "the price of citizenship."

If a gay photographer did not want to participate in a Traditional Marriage Rally, would anyone believe that he should be forced by the state to participate in that event in violation of his conscience?

Is the State prepared to enact new legislation that requires its residents to surrender their right to live according to their conscience as a price of citizenship?

- **SWEET CAKES – OREGON – 2013**
  - Sweet Cakes declined to make a wedding cake for a lesbian couple because of their sincerely held belief that marriage is the union of one man and one woman. Even though the lesbian couple found multiple other bakeries eager to celebrate their union, the Oregon Bureau of Labor and Industries found "substantial evidence" that the bakery violated the law.

- The baker is now facing hundreds of thousands of dollars in fines. The bakery had to close its doors and the owner's children received death threats.
- Labor Commissioner, Brad Avakian, stated that it is the State's desire to "rehabilitate" the owner's personal religious views so that they could be allowed to re-open.

Does your State want to become the arbiter of which religious views are permissible and allowed? Is your State prepared to force its citizens to be "rehabilitated" in such a manner?

- **HANDS ON ORIGINALS – KENTUCKY – 2012**
  - Hands On Originals, a local T-Shirt printing small business, was found by the Kentucky Human Rights Commission to have violated the law when the business declined to print T-Shirts endorsing a Gay Pride Festival. The owner could not in good conscience celebrate homosexual conduct.
  - It should be noted that Hands On Originals employs gay workers and had filled past orders (which didn't violate its religious conscience) for customers who it knew identified as homosexual.
  - The Kentucky Human Rights Commission ruled that the small business owner, whose religious views were found to violate the Kentucky SOGI law, be ordered to attend re-education training (Frequently referred to as diversity training).

If an African-American printer declined to print T-Shirts for a Jim Crow rally, should the printer be forced to violate his or her beliefs?

If a Muslim printer declined to print T-Shirts with an image of Mohammad, should the Muslim be forced to violate his or her religious beliefs?

- **BAKER V. WILDFLOWER INN – VERMONT – 2011:**
  - A private bed and breakfast/reception hall declined to allow their property to be used for a lesbian marriage reception based on their religious beliefs.
  - As part of a settlement agreement to dismiss the lawsuit, the bed and breakfast was forced to pay $10,000.00 to the Vermont Human Rights Commission and $20,000.00 to a charitable trust to be dispersed by the lesbian couple.

If a Muslim declined to allow his property to be used for a NAMBLA (North American Man/Boy Love Association) reception because he disagreed with a man having a "sexual orientation" for young boys, should he be forced to violate his religious conscience?

This is just a small sampling of the proliferation of lawsuits around the country based on such laws. All the above illustrates the tremendous cost to each State, the business community, religious institutions, and citizens, that will occur if the new laws are enacted. It is interesting to note that the vast majority of the cases brought by the LGBTQ community against businesses, individuals and religious organizations have

nothing to do with them being fired from their jobs. The few cases that do involve a job termination are usually when a religious institution attempts to apply its religious tenets upon employees that typically have agreed that he or she will adhere to the religious tenets of the employer.

All these cases demonstrate their true intention to attack the business and religious community under the guise of nondiscrimination in order to silence them and force great financial hardship upon them, simply for disagreeing with their conduct.

If enacted, each State will inevitably promulgate and enforce administrative rules implementing the new standards against businesses, religious institutions and other alleged violators of the new categories. This will entail messy entanglements between the state and religious organizations who will vehemently challenge a law that violates their religious rights and freedoms. Beside the added expense to the state of such regulatory requirements (more investigators, more administrative hearings, more administrative law judges, more attorney general time to prosecute the cases, etc.), there will be a great expense and cost to the business community when it is attacked by proponents claiming the protection of these new categories. The impact will be especially great on small businesses in each state who will not have the financial wherewithal to withstand such attacks. Many small business owners will face the choice of either submitting to the demands of the offended, or face years of litigation expenses and the potential loss of their business to fines and other costs associated with such a fight. Moreover, they may also face the revocation of any state license associated with their business. Is it fair to a small business owner to permanently lose his or her license and business over, for example, alleged hurt feelings?

These new categories will cause further complications. For example, California recently passed AB – 1266 which stated:

> *A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.*

This would allow an 18-year-old male high-school student to use the same locker-rooms, bathrooms, and showers as the girls, based upon his own self-defined gender identity. Imagine the potential liability such laws create for businesses, churches, and schools.

Likewise, the Maine Supreme Judicial Court ruled that it is a violation of a self-identified, transgender, 6-year-old boy's rights to ban "him" from using a girls' bathroom. (*Doe v. Regional School Unit 26*, 86 A.3d 600 (Me. 2014)). This case was brought by the Maine Human Rights Commission.

Similarly, the Colorado Rights Division ruled in favor of another self-identified, transgender, 6-year-old boy. The family brought suit against the school district under Colorado's Anti-Discrimination Act (C.R.S. 24-34-402). The Colorado Rights Commission held that the ban "creates an environment that is objectively and subjectively hostile, intimidating or offensive."

Further complications arise when enforcing such a law against charities and religious institutions that fail to embrace the LGBTQ orthodoxy. For example, many State laws provide favorable sales-tax and

property-tax treatment to such organizations. However, this treatment is premised on the idea that the charity or religious organization promotes the public good. That may not be the case if a charity or religious organization becomes "discriminatory" because of changes to a state's Civil Rights Act.

All of the above examples in this section demonstrate how proponents are not using these types of laws as a shield, but rather are using the new laws to attack those with whom they disagree.

Unconstitutional Vagueness

The Due Process Clauses of the United States and State Constitutions guarantee individuals the right to prior notice of what constitutes prohibited conduct. If a law is vague, ambiguous, or indefinite so that it is impossible to determine what it requires or to determine the legislative intent, the courts will hold the law unconstitutionally void for vagueness, and therefore unenforceable. The meaning of a law must be clear enough so that ordinary persons who are subject to its provisions can determine what acts will violate it and so they do not need to guess at its meaning. An unambiguously drafted law affords prior notice to the citizenry of conduct proscribed. In this way the rule of law provides predictability for individuals in their personal and professional behavior. A fundamental principle of due process, embodied in the right to prior notice, is that a law is void for vagueness where its prohibitions are not clearly defined. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly.

Individuals, business people and religious organizations would be in an impossibly precarious position to try to discern what constituted discrimination under these new categories. Because accusers with an agenda can use the ambiguity of the proposed categories to decide, after the fact, what is prohibited or what offends them, the possibility of people of faith facing oppressive civil charges and litigation is limitless. The accusers are only limited by their own imagination and ability to come up with new ways to charge someone under the new categories.

The proposed new, protected categories are incapable of clear definition. A person can be accused and charged under the vague terms of such categories for merely expressing a religious belief that another individual internally defines as being offensive to him or her. The determination of the "wrongful act" is subjective and in the eyes of the beholder. The determination of whether a person is a member of one of the new protected classes is subjective and in the eye of the beholder. A person cannot know if their conduct is prohibited until after the fact. Thus, even if a person or business possesses no intent to offend or discriminate, the alleged victim can commence legal action pursuant to this law and subject the accused to astronomical legal costs and possible unlimited fines, costs and confiscation of their property and state licenses, to the point of destroying their business or family finances.

For example, a category like "family responsibilities" is beyond understanding legally. It is impossible to know what such language, however it is defined, truly means. Categories like "sexual identity," "gender identity/expression," and "sexual orientation" have meaning way beyond just adult homosexuality. Therefore, an accuser gets to define what this language means without limit by simply filing charges alleging some statement or action violates the

law. Then the authority of the Civil Rights Commission takes over. Moreover, these categories would appear to protect any relationship or grouping of people, in any combination, in any amount. Would this include Polygamy? Incest? Ten people living together? These are not rhetorical questions. The plain language used by proponents of the new categories appears to protect any living arrangement of any kind. It essentially redefines family to mean any grouping of people living together in a dependent relationship. The proponents' true purpose is to redefine the deeply rooted legal and constitutional understanding of what constitutes a family.

Some local ordinances enacted in a few communities around the country have nebulous definitions. For example, the definition of "sexual orientation" routinely lists different lifestyles and then qualifies the list by stating, "by orientation or practice, whether past or present." Because the sexual orientation of the relevant group is vaguely defined, no reasonable person can understand what it means. Sexual orientation comes in many forms. Does the law cover groups of people with various sexual orientations? Does it cover, for example, a sermon about the conduct of a group of people whose sexual orientation is for extramarital sex (swingers/adulterers)? Does it cover the conduct of a group of people whose sexual orientation is for multiple partners within a marital relationship (polygamists)? What about a group of people whose sexual orientation is for young children (pedophiles)? Does it cover numerous other groups whose activities are currently illegal?

Given the absence of any clear definition, the ambiguous language of the law arguably could include any and all such groups. Will an otherwise law abiding citizen, therefore, face legal action for calling pedophilia or polygamy bad or for refusing to hire or accommodate such a person? An individual's inalienable right to due process and notice forbids such government-imposed guessing games, especially when, as here, the public has no way of predicting what morally-relative choice the proponents will choose when making a decision to take legal action against an alleged perpetrator. Thus, the conduct prohibited by such proposed categories wholly depends on the whim of the accuser, based upon their perceived feelings—rather than a clearly expressed standard articulated in the law. Again, who determines this? Such language is nebulous at best and citizens are left to guess at the meaning.

Under the definition of "gender identity/expression," the usual definitions include "A person's actual or perceived gender," their "self-image," and "expression." This is internal to the person. How is an accused supposed to know how someone else perceives their own gender? Such categories literally require mind reading on the part of the accused. It is unconstitutionally vague and overbroad. Reasonable people will not be able to agree on what such a category in the law means.

The potential means by which government authorities can apply the law to selectively challenge a business or citizen's actions vividly illustrates why the United States and State Constitutions prohibit such legislative ambiguity. Here the inherent vagueness enables a government entity to make a personal choice to elevate the right of one protected group (with a particular sexual orientation, gender identity, etc.), over the right of another protected group (with a sincerely held religious conscience). In using the inherent vagueness of the law to make a morally-relative determination, government authorities at any time can arbitrarily transform a business and citizen's protected expression of sincerely held faith-based

beliefs, into an actionable case. Discerning prohibited conduct in such a manner, *after* a citizen's act, violates the citizen's Constitutional right to prior notice of prohibited conduct.

FREE SPEECH/FREE EXERCISE OF RELIGION

The proposed new categories have so many potential free speech and free exercise of religion violations it goes beyond the scope of this short paper. In effect, the proposed new categories will prohibit persons with traditional views of family and sexuality from exercising their constitutionally protected free speech and free exercise rights. The First Amendment and most State Constitutions bar the state from "prohibiting the free exercise [of religion]; or abridging the freedom of speech…" Further, most State Constitutions provide additional protection.

The proposed new categories violate these rights. It prohibits the free exercise of religion by restricting, regulating, and discriminating against persons with traditional views on sexuality and family. It abridges the freedom of speech in a content based way for all the reasons stated below.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the U.S. Supreme Court struck down a city law that levied special restrictions on individuals who expressed views on the subjects of race, color, creed, or gender. The Supreme Court held that such a law facially violates the First Amendment right to freedom of speech because "the First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects. *Id.* at 391. The Court further pointed out that the law displayed the "city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. *Id.* at 396. The St. Paul law struck down by the Supreme Court and the proposed new categories share the same unconstitutional features.

Similar, recently enacted local ordinances around the country are clearly aimed at speech in that they give "harassment like a racial epithet" as an example to justify the imposition of a fine. It is obvious that free speech is to be sacrificed at the altar of political correctness. The First Amendment implications could not be clearer. Is it harassment to merely make a statement that someone else perceives as offensive because of their own internal definition of their sexuality? What does "harassment" mean? Is your State really prepared to handle complaints against rabbis, imams, priests, and pastors who preach on these issues from their place of worship in a manner that offends someone?

Imagine a conversation in a Christian book and coffee shop where a sales assistant says that he believes that Jesus is the only way to God, or that he does not believe that civil partnerships are pleasing to God, or that homosexual conduct is not condoned in the Bible. Someone in the store at the time hears this and files a complaint with the state Civil Rights Commission for discrimination under the new categories if enacted into law. Imagine a Christian Minister expressing similar statements in a sermon or while at the church's homeless shelter or soup kitchen. Legal action is then filed under this law. Numerous cases have been filed all over the country based upon the type of new categories being requested.

Moreover, the U.S. Supreme Court struck down laws that infringed upon Freedom of Association based upon the expressive message of a group. Freedom of Association protects the right to exclude others where the exclusion is based upon the

expressive message of the group. See e.g., *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. 557 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Freedom of association includes the right not to associate.

Our nation's legal traditions—including the Constitution itself—clearly affirm the importance and preeminence of religious liberty. James Madison, the drafter of the Bill of Rights, recognized that the duty to follow the dictates of one's conscience concerning religion is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society" and civil law. Madison thus stated that "Religion . . . must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." Thus, the right to free exercise of religious conscience must necessarily include the right to act pursuant to such conscience. Put differently by Joseph Story, one of our nation's earliest and most prominent Supreme Court justices: "The rights of conscience are . . . beyond the just reach of any human power. They . . . [must] not be encroached upon by human authority" such as that embodied in the civil law. Because they realized the value and significance of religious liberty, our nation's Founders included robust protection for the free exercise of religion in the First Amendment enshrined in the Bill of Rights. By doing so, they confirmed that religious liberty was a "fundamental maxim of free Government," which should (and eventually would) "become incorporated with the national sentiment."

By selecting the phrase "free exercise" of religion for inclusion in the Constitution, instead of a mere freedom to worship or believe, the Founders declared that religious freedom includes not only religious adherents' right to hold their beliefs or opinions; it also guards their religiously motivated conduct against government punishment or coercion. Government officials should therefore refrain from burdening their constituents' religious exercise, an inviolable and intensely personal right, through the passage and application of nondiscrimination laws. Indeed, James Madison declared that politicians "who are guilty" of encroaching upon religious liberty "exceed the commission from which they derive their authority."

While it is true that proponents of the new categories may be hurt or offended by the refusal of a person or business to participate in and endorse their particular conduct or event, the harm imposed upon the alleged violator of the new law is much greater and more concrete. The gay or transgendered person can easily go to the next business in the phone book or on-line. But the alleged business or individual "perpetrator" faces the pernicious choice to either capitulate and violate their sincerely held religious beliefs or lose their business/profession/license and all the time and energy put into building the business. Their business can be destroyed with the resulting loss of employment for the employees of the business, the loss of tax revenue to the State, and the financial ruin of the "perpetrator." When weighing those competing interests, it is clear which side is the most significantly harmed.

The failure to protect citizen's free speech and free exercise rights will lead to more divisiveness and litigation. It will further improperly elevate the new categories (and the political agenda of the proponents) over the rights of all the other citizens with different religious beliefs or values. This is not fair and equal treatment. This is the granting of special rights at the expense of other citizen's rights.

Enforcement of the Proposed Law Undermines Precepts of Good Governance under the Rule of Law

Arbitrarily enforcing such a vague law undermines good governance under the rule of law. A principal precept of the rule of law is that it provides predictability for individuals in the conduct of their affairs. As discussed above, vague provisions provide no such predictability and opens the door for government authorities to decide what the law means *after* the conduct occurs. That which is prohibited becomes clear only *after* a government authority selectively enforces the vague law against a citizen—based upon the authority's own morally relative construal of the ambiguous language. To be sure, the exercise of such discretion provides the means for proponents of the new categories to efficiently advance a political agenda. The insidious consequences of doing so, however, include the deterioration of fundamental democratic principles and good governance under the rule of law.

In the case of a vaguely worded law, enforcement can, without prior notice of the conduct prohibited, lead to a citizen's loss of property and freedom. Moreover, if the law vaguely regulates free expression, an ominous chill on the exercise of fundamental freedoms accompanies its promulgation. The great potential for abuse through arbitrary enforcement of these new provisions is reason enough to oppose their enactment. Compelled by the piercing chill of an unpredictable potential legal action, citizens cease exercising their basic liberties. They fear to assemble, pray, worship, or even speak.

In a pluralistic society, numerous conflicting points of view exist. Historically, therefore, the perpetuation of a functional republic requires free and open debate. The current prosecution and persecution of Christians around the world illustrates, however, just how efficiently government can use a vague law to suppress free expression and the free exercise of religion.

The potential for unpredictable legal action chills future religious expression of citizens, businesses, and charitable and religious groups. Fearing legal action, citizens and religious leaders will inevitably self-censor sincerely held faith-based beliefs—and may even cease expressing anything at all.

The proposed categories also communicate an ominous admonition to community business leaders, journalists, academics, and anyone expressing a point of view different from that held by the proponents. In order to maintain comity between those of differing viewpoints and ensure public order, all governments must first recognize these universal constitutional freedoms.

Conclusion

In a constitutional republic like ours, freedom of religion, freedom of speech and expression, and freedom of association are not needed to protect the ideas and rights of people with whom the government agrees – it is needed to protect those with whom the government does not agree. Make no mistake about it. Those groups with an agenda who are advocating for the enactment of new categories under the law will wield this law as a weapon capable of destroying their opponents in this cultural debate on these issues. Do not believe any protestations by them that this is not the case. One merely needs to look at the scores of cases being brought against churches, businesses and individuals around our country based upon these types of laws. These laws are being used to try and silence and financially cripple

those who dare to adhere to a different viewpoint and oppose their agenda. The irony is that, while trumpeted as a non-discrimination law, this law would clearly discriminate against, and violate the conscience of, many of the citizens and business owners of your state.

The impetus for adding new categories isn't really about civil rights, rather, it is about civil acceptance of homosexual conduct through the force of law.

Even if a state Legislature is in agreement with and supports those intent on enacting this law, that does not give it the right to trample on the Constitutional rights of its citizens. The test of a properly functioning republic is not whether the government protects the speech and religious rights with which it agrees – it is whether it will protect the speech, religious rights and the economic liberty of those citizens with whom it does not agree. Instead of censuring or punishing speech and religious rights, the answer is always to have more speech and the free exchange of ideas – at least in a republic that values true freedom, pluralism, and diversity. Selective enforcement and punishment of citizens under these proposed laws sends a bitter chill throughout our country. Promulgating vague laws that allow for arbitrary and selective enforcement is never an appropriate public policy for any institution that values good governance under the rule of law.

For all the above-stated reasons, we urge that each State not create special classifications that unfairly and unconstitutionally increase regulation of business and deny constitutional rights to religious organizations and its citizens.

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