**M E M O R A N D U M**

TO: Orange County School Board Members

FROM: Roger K. Gannam, Esq.[1]

RE: **Summary and Legal Analysis in Opposition to Proposed Revisions to School Board Policies GBA and JB**

DATE: December 10, 2012

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## Introduction

"Sexual orientation" and "gender identity" nondiscrimination laws are troublesome legal measures that—among other things—threaten religious liberty, impose hard-to-determine obligations, expose individuals to unnecessary legal liability, and lead directly to forced governmental recognition of same-sex relationships. As a result, concerned legislators and citizens should oppose every attempt to enact these laws.

Orange County School Board's proposed revisions to School Board Policies GBA and JB (collectively, "Revised GBA/JB") is a prime example of this kind of bad law. Revised GBA/JB adds "sexual orientation" and "gender identity or expression" to the anti-discrimination provisions of the School Board Policies, labeling as "discrimination" decisions based on these new, infinitely subjective categories.

As detailed in the Legal Analysis below, Orange County citizens and School Board Members should be alarmed by Revised GBA/JB for the following reasons:

- **Revised GBA/JB will cause more discrimination than it will prevent.**
    - The constitutional Free Speech and Freedom of Religion of students, employees, and other individuals will be trampled by the Policy.
    - Teachers will be required to police and silence the Free Speech of students.
    - Administrators will be required to police and silence the Free Speech of students, teachers, and visitors to school facilities.
    - There is no evidence of any widespread problem justifying the burdening of constituents' religious and moral convictions with this kind of heavy-handed law.

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- **Revised GBA/JB will assault the privacy and modesty of students and employees.**

    - Women's and girls' bathrooms, dressing rooms, and locker rooms must be opened, without question, to biological men or boys claiming a female "gender identity or expression."

    - School administrators are powerless to protect the users of their bathroom and dressing facilities from the pervert or the pedophile hiding behind a claim of "gender identity or expression."

    - Schools will be forced to accept in their facilities every unusual or offensive behavior presented as "gender identity or expression."

## Legal Analysis

### I. Many applications of these nondiscrimination laws will violate the First Amendment rights of organizations and individuals.

The United States Supreme Court has repeatedly recognized that certain applications of nondiscrimination laws directly infringe on cherished First Amendment freedoms, such as freedom of speech and association. In one case, for example, the Massachusetts Supreme Judicial Court ruled that private individuals—the organizers of the St. Patrick's Day Parade in Boston—violated the prohibition against sexual orientation discrimination when they refused to allow a group advocating homosexual behavior to interject its message into the parade.[2] On appeal, the United States Supreme Court overruled that decision, declaring that the state court's application of the sexual orientation nondiscrimination law violated the constitutional free-speech rights of the parade organizers by compelling them to communicate an unwanted message in favor of homosexual behavior.[3]

In another case, the New Jersey Supreme Court ruled that a private organization, the Boy Scouts of America, violated the State's sexual orientation nondiscrimination law when it denied a scout-leader position to an outspoken practitioner of homosexual behavior.[4] Yet the United States Supreme Court disagreed, ruling that New Jersey's application of its sexual orientation nondiscrimination law infringed the constitutional free-association rights of the Boy Scouts to join together with those individuals who believe in, and seek to promote, the organization's core values.[5] These cases tangibly demonstrate the constitutional concerns that are needlessly created by these nondiscrimination laws.

The United States Supreme Court is not alone in acknowledging the constitutional violations that often result from the existence of exceedingly broad nondiscrimination laws.

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[2] *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293 (Mass. 1994).

[3] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557 (1995).

[4] *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

[5] *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Legal scholars have also remarked that the excessive and unnecessary expansion of nondiscrimination laws has emerged as a "serious threat" to constitutional rights and our nation's timeless civil liberties.[6]

What is more, the danger of these laws is not simply the denial of constitutional freedoms promised to all; the threat includes the chilling effect that these laws inflict on citizens who are unaware of their constitutional rights, unsure of the extent of their constitutional rights, or unwilling to endure the hardships and costs associated with vindicating those constitutional rights in courts. As one legal analyst has acknowledged: "[T]he fear of litigation [under these nondiscrimination laws]—fear not only of actually losing a lawsuit, but also fear of being vindicated only after a protracted, expensive legal battle—is having a profound chilling effect on the exercise of [constitutional] liberties in workplaces, universities, membership organizations, and churches throughout the United States."[7]

## II. These laws have had a widespread and pernicious impact on the religious liberty of individuals and organizations.

The direct conflict between sexual orientation nondiscrimination laws and religious liberty is plain to see.[8] On the one hand, most of the major religions in our nation—such as Christianity, Judaism, Mormonism, and Islam—hold certain precepts and convictions about sexual behavior, including the official belief that homosexual conduct is immoral.[9] On the other hand, these nondiscrimination laws prohibit any religious person who holds these beliefs about homosexual behavior from acting upon their moral convictions. It is no wonder, then, that when these two hands meet, a power struggle ensues, and, troublingly, when the force of law is behind the sexual orientation nondiscrimination side of the struggle, religious liberty is pummeled under its weight. Yet in light of our nation's overriding and enduring commitment to religious liberty, concerned citizens should reject an outcome that subverts religious freedom and thus oppose these laws.

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[6] David E. Bernstein, You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws 8 (Cato Inst. 2003); *see also* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155, 1200 (2005) ("[T]he broadening of antidiscrimination law . . . creates substantial . . . costs to private actors' freedom from government restraint").

[7] David E. Bernstein, You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws 8 (Cato Inst. 2003); *see also* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155, 1200 (2005) ("[T]he broadening of antidiscrimination law . . . creates substantial . . . litigation avoidance costs[] and costs to private actors' freedom from government restraint").

[8] Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 43-44 (2000) (noting that legal issues involving sexual orientation "feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality").

[9] Joseph Card. Ratzinger, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons*, Congregation for the Doctrine of the Faith, June 3, 2003, *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (last visited Jan. 14, 2010) ("Sacred Scripture condemns homosexual acts as a serious depravity . . . (cf. *Rom* 1:24-27; *1 Cor* 6:10; *1 Tim* 1:10). This judgment of Scripture . . . does attest to the fact that homosexual acts are intrinsically disordered.") (internal quotation marks omitted); The Book of Discipline of the United Methodist Church ¶161(G) (2004) ("The United Methodist Church does not condone the practice of homosexuality and consider[s] this practice incompatible with Christian teaching.").

### A. Religious liberty and freedom of conscience are paramount in our nation's history and the legal regime designed by our Founders.

Our nation's legal traditions 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.[10] Madison thus stated: "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."[11] 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 civil law.[12]

Realizing the value and significance of religious liberty, our nation's Founders included robust protection for the free exercise of religion in the Bill of Rights.[13] 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."[14] And by selecting the phrase "free exercise" of religion for inclusion in the Constitution, the Founders showed that religious freedom does not only include a religious adherent's right to hold his or her beliefs or opinions; it also guards his or her religiously motivated conduct against government punishment or coercion.[15]

Government officials, then, should refrain from burdening their constituents' religious exercise. As a matter of political theory, such officials lack legitimate authority to enact laws intruding upon this inalienable right; indeed, James Madison declared that politicians "who are guilty" of encroaching on religious liberty "exceed the commission from which they derive their authority."[16] Government officials, moreover, should respect religious liberty for pragmatic reasons too: as George Washington stated, the "[p]olitician, equally with the pious man[,] ought to respect and cherish" religion (and the free exercise thereof) because it is an "indispensable

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[10] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* The Sacred Rights of Conscience 309, 309 (Dreisback & Hall eds., 2009).

[11] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* The Sacred Rights of Conscience 309, 309 (Dreisback & Hall eds., 2009); *see also* Va. Const. art. 1, § 16 ("[R]eligion . . . can be dictated only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience[.]").

[12] Joseph Story, Commentaries on the Constitution of the United States § 1870 (1833).

[13] U.S. Const. amend. I.

[14] Letter from James Madison to Thomas Jefferson (Oct 17, 1788), *reprinted in* The Sacred Rights of Conscience 413, 414 (Dreisback & Hall eds., 2009).

[15] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488-90 (May 1990). "As defined by dictionaries at the time of the framing, the word 'exercise' strongly connoted action." *Id.* at 1489.

[16] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* The Sacred Rights of Conscience 309, 309 (Dreisback & Hall eds., 2009).

support[]" that "lead[s] to political prosperity."[17] Society, therefore, should be wary of any measure, like sexual orientation nondiscrimination laws, that threatens the principles of religious liberty upon which our nation was founded.

### B. These laws are a demonstrated threat to religious liberty.

These laws threaten to inflict widespread and pervasive harm on religious liberty, affecting—among others—employers, employees, businesses, professionals, membership organizations, community groups, religious entities, and educational institutions. This threat to religious freedom is no mere speculation. On the contrary, this subverting of religion has been demonstrated in the jurisdictions that have already enacted such measures. And the story that their experiences tell is a tale of religious liberty plundered.

#### 1. Religious liberty in the workplace.

These nondiscrimination laws generally prohibit sexual orientation discrimination in the employment context.[18] This aspect of these laws does not merely impose, as some might suspect, obligations on employers; it threatens the religious liberty of both employers and employees. These laws require all employers to prevent employees or customers from engaging in conduct that other employees might view as discriminating on the basis of sexual orientation.[19] These policies, regardless of whether employers intend them to, significantly affect religious liberty in the workplace.

**Similarly, Revised GBA/JB will require principals to police and silence the Free Speech of teachers and other employees. Under current law, a teacher may share a religious viewpoint with a coworker during non-instructional time, such as before school or during a lunch break. Under Revised GBA/JB, however, a teacher with a sincerely held religious belief affirming traditional marriage as between a man and a woman could be the target of a discrimination complaint and investigation for expressing that viewpoint to another teacher during break time.**

These nondiscrimination policies affect religiously motivated employees who address issues involving families, relationship, or sexual conduct (e.g., counselors, doctors, lawyers, psychologists), by forcing them to either engage in conduct that affirms homosexual behavior, or face punishment for refusing to violate their religious tenets. The real-life story of what happened to a licensed counselor in Georgia demonstrates this far-reaching threat to religious liberty. Like many people of faith, the counselor holds religious beliefs about homosexual behavior, and those beliefs prohibit her from using her skills as a counselor to encourage or

[17] George Washington's Farewell Address (Sept. 19, 1796), *reprinted in* The Sacred Rights of Conscience 468, 468 (Dreisback & Hall eds., 2009).

[18] Employers of fewer than 15 employees are exempt from the employment nondiscrimination provisions of the Jacksonville Ordinance Code, including the new categories in Ordinance 296.

[19] Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1, 50 (Laycock et al. eds., 2008) ("[E]mployers have a two-sided obligation with regard to harassment. The employer may not itself engage in harassment and it may not allow employees or customers to create an intolerable environment for an employee based on one of the prohibited bases of discrimination.").

promote same-sex relationships.[20] At work one day, due to her religious convictions, she politely referred a prospective client seeking same-sex-relationship counseling to a colleague, who within minutes provided the referred client with the counseling she sought.[21] That same day, however, the referred client complained to the counselor's employer, citing a sexual orientation nondiscrimination policy as support for her claim that the counselor should not have referred her, and threatening to file a complaint under the employer's nondiscrimination policy.[22] At that point, the employer took swift action against the counselor, suspending her within days and terminating her soon thereafter.[23]

Government entities have declared that licensed counselors and counseling students engage in sexual orientation discrimination when their religious convictions prohibit them from affirming homosexual behavior in their counseling. Indeed, public universities have dismissed counseling students where their religious beliefs forbid them from providing counseling that affirms homosexual behavior.[24]

The threat to religious liberty in the workplace extends beyond punishing employees for refusing to engage in conduct forbidden by their religious conviction; it also includes suppressing the expression and ostracizing the views of religious employees.[25] A few examples illustrate this point. First, the City of Oakland, California, despite generally allowing its employees to advertise their political views and activities on a bulletin board, prohibited religious employees from posting a flier advertising their discussion group—a flier that included the statement that "marriage is the foundation of the natural family and sustains family values"—because, the City claimed, the flier's statement about marriage promoted harassment based on sexual orientation.[26] Second, as experience has shown, many employers try to promote compliance with these laws by implementing "diversity" or "sensitivity" training about sexual

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[20] *Walden v. Centers for Disease Control and Prevention*, Case No. 1:08-CV-2278-JEC-WEJ, Magistrate Judge's Final Report and Recommendation, Doc. No. 111, at 16 (N.D. Ga. Nov. 20, 2009).

[21] *Walden v. Centers for Disease Control and Prevention*, Case No. 1:08-CV-2278-JEC-WEJ, Magistrate Judge's Final Report and Recommendation, Doc. No. 111, at 19-22 (N.D. Ga. Nov. 20, 2009).

[22] *Walden v. Centers for Disease Control and Prevention*, Case No. 1:08-CV-2278-JEC-WEJ, Magistrate Judge's Final Report and Recommendation, Doc. No. 111, at 40-41 (N.D. Ga. Nov. 20, 2009).

[23] *Walden v. Centers for Disease Control and Prevention*, Case No. 1:08-CV-2278-JEC-WEJ, Magistrate Judge's Final Report and Recommendation, Doc. No. 111, at 25-28 (N.D. Ga. Nov. 20, 2009).

[24] *Ward v. Wilbanks*, Case No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010) (affirming a public university's dismissal of a counseling student because, according to the university, her religious need to refer prospective clients who sought counseling affirming their homosexual behavior amounted to "discrimination based on . . . sexual orientation"); Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1, 24 (Laycock et al. eds., 2008) ("How will providers . . . deal with same-sex couples who come for marriage counseling? . . . Would a refusal [to provide such counseling] violate public accommodation [nondiscrimination] laws? Probably.").

[25] Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1, 51 (Laycock et al. eds., 2008) ([M]ost employers . . . are likely to enact their own rules on impermissible speech in the workplace. These are likely to suppress any speech that some other protected class of employee finds hurtful[.]").

[26] George F. Will, *Speech Police, Riding High in Oakland*, Washington Post, June 24, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/22/AR2007062201704.html (last visited Jan. 5, 2011).

orientation;[27] these programs, unfortunately, often disparage the religious adherent's views about homosexual behavior, effectively marginalizing and shunning those employees and their deeply held beliefs.[28]

Professionals and other employees—many of whom carry out their professions as an extension of their moral or religious beliefs—are faced with a difficult choice, one that should never be imposed in a nation like ours that cherishes religious liberty: either violate their religious precepts and retain their livelihood, or adhere to their closely held convictions and forfeit their right to participate in employment. Given the importance and centrality of religious faith to these individuals, many of them are unwilling to violate their conscience, and thus they will choose the latter option, needlessly decreasing their employment opportunities and the supply of talented employees.

### C. These laws cause public and private discrimination against individuals and organizations that express or adhere to their religious views concerning homosexual behavior.

These nondiscrimination laws, in addition to inflicting the immediate harm to religious liberty discussed above, threaten religious freedom in other ways. Experience has shown that sexual orientation nondiscrimination laws lead to additional government discrimination against individuals and organizations that hold sincere religious beliefs concerning homosexual behavior. This consequent governmental shunning of those religious individuals and organizations is readily foreseeable; after all, sexual orientation nondiscrimination laws brand those individuals and organizations as "discriminatory" simply for abiding by their religious precepts concerning sexual morality. Here are some examples of the government discrimination against religion that typically result from these laws:

- Government entities refuse to contract with individuals and organizations that conduct themselves in accordance with their religious beliefs concerning homosexual behavior.[29]

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[27] *Diversity Training on Sexual Orientation and Gender Identity*, Human Rights Campaign, *available at* http://www.hrc.org/issues/7019.htm (last visited Jan. 11, 2011) (noting that "more than half of the Fortune 500 provide some form of diversity training that includes sexual orientation" and "most of all the employers that prohibit discrimination based on gender identity have some form of related diversity training").

[28] *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199 (8th Cir. 2001) ("[Employees] reviewed the training materials for the gays-and-lesbians-in-the-workplace program and concluded the training would be, in the words of their complaint, 'state-sponsored indoctrination designed to sanction, condone, promote, and otherwise approve behavior and a style of life [the employees] believe to be immoral, sinful, perverse, and contrary to the teachings of the Bible."); David M. Kaplan, *Can Diversity Training Discriminate? Backlash to Lesbian, Gay, and Bisexual Diversity Initiatives*, 18(1) Employee Responsibilities and Rights Journal 61 (2006) (noting that employers that implement diversity training on the topic of sexual orientation often face "backlash [that] is not without some merit . . . based on sincere religious beliefs").

[29] *Cradle of Liberty Council, Inc. v. City of Philadelphia*, Case No. 08-2429, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (upholding the City of Philadelphia's decision to terminate a property arrangement that had lasted over 70 years between the City and the Boy Scouts because that organization's refusal to allow leaders or members who openly engage in homosexual behavior was, in the City's words, "directly contrary to the principles of equal access and opportunity enshrined in Philadelphia [nondiscrimination] law").

- Government entities withhold benefits from individuals and organizations that refuse to abandon their religiously grounded policies and practices concerning homosexual behavior.[30]

And perhaps unintentionally, but no less perniciously, these laws engender public and private discrimination against individuals and organizations that express (or conduct themselves consistently with) their religious precepts about homosexual behavior. By branding them as "discriminatory," these laws encourage public and private contempt against those individuals and organizations and the expression of their views and beliefs. Undoubtedly over time, those individuals and organizations will stop communicating their religious beliefs for fear that they might be viewed or treated with scorn by their neighbors and colleagues. This government-induced ostracizing of core religious beliefs and expression is deeply unsettling.

**Revised GBA/JB can be used to silence students' Free Speech by labeling as "discriminatory" any expression of a sincerely held religious belief against homosexual conduct, even during non-instructional time when students are free to have conversations about any topic. Furthermore, community religious groups previously able to use school facilities on the same terms as non-religious organizations could be deemed to be "discriminating" and restricted from their constitutionally required equal access to facilities.**

These nondiscrimination laws thus present an ironic twist: while purporting to discourage discrimination against a small segment of our society, they actually encourage discrimination against the religious community—a very large group of citizens—and as a result create far more discrimination than they prevent. And most troublesome of all, by enacting these laws, the government will be complicit in—and, indeed, a direct cause of—this religious discrimination.

It is therefore not correct to say, as supporters of these laws do, that a vote in favor of a sexual orientation nondiscrimination law opposes discrimination, while a vote against such a measure supports discrimination. As much as supporters of these laws wish it were so, such a neat distinction cannot be drawn. A "yes" vote may purport to resist sexual orientation and gender identity discrimination, but make no mistake, it approves discrimination of another kind—far-reaching discrimination against people of faith. As shown above, these laws will infringe upon religious liberty by elevating the demands of few over the religious-liberty

[30] *Evans* v. *City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (upholding the City of Berkeley's decision to revoke the Sea Scouts' free use of boat berths at the public marina, a benefit that had been afforded for 60 years, because the "city attorney conclud[ed] that continuation of the free berth subsidy to the Sea Scouts would violate . . . the Berkeley Municipal Code, which prohibit[ed] discrimination based on sexual orientation"); *Boy Scouts of Am.* v. *Wyman*, 335 F.3d 80 (2d Cir. 2003) (upholding the State of Connecticut's decision to stop allowing state employees to direct their workplace-charitable contributions to the Boy Scouts, a benefit that the organization received for over 30 years, because the State determined that directing contributions to an organization, like the Boy Scouts, that refused to allow leaders or members who openly engage in homosexual behavior would violate the State's sexual-orientation nondiscrimination law); *see also* Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1, 19-22 (Laycock et al. eds., 2008) (noting that many state regulators condition government licenses on nondiscrimination requirements).

interests of many. Elected officials should refuse to impose this needless discrimination on their religious citizens, choosing instead to promote our nation's timeless commitment to religious liberty by protecting the people's freedom to live consistently with their faith.[31]

Finally, these laws force the government to take sides in a profound moral debate and, for that additional reason, should be rejected. These measures embody an official and unyielding government stance on the moral questions surrounding homosexuality and homosexual behavior—declaring that any citizen who acts consistently with his or her belief that a moral distinction exists between heterosexual and homosexual conduct is evidencing irrational and unlawful prejudice. But this "moral issue is not for the government to decide," and thus the government should refrain from imposing, as these laws do, "a penalty on practices associated with or compelled by any of the various views of homosexuality" or "using its power to favor, promote, or advance one [moral] position over the other."[32] In short, elected officials should steer clear of the moral debate regarding homosexuality and refuse to impose the weight of the law against individuals living consistently with their faith's teachings about sexual morality.

### D. Current constitutional law insufficiently protects religious freedom.

In 1990, the United States Supreme Court significantly—and, in many commentators' opinion, wrongly—[33]curtailed the religious-liberty protection available under the Free Exercise Clause of the First Amendment to the United States Constitution.[34] At that time, the high court said that the Free Exercise Clause does not guard against burdens on religion imposed by neutral and generally applicable laws,[35] and that, unfortunately, will continue to be the law until the Supreme Court revisits its decision. Furthermore, in the wake of that decision, some courts, employing a questionable interpretation of the governing legal decisions, have found that these nondiscrimination laws are neutral and generally applicable laws, and they have thus concluded that the Free Exercise Clause, as it is currently interpreted, does not protect against the religious

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[31] Viewing the underlying question as one of human dignity (rather than a question of discrimination, as discussed above), the scales still weigh decidedly against adopting these laws. These provisions attack the dignity of all persons who affirm religious beliefs against homosexual behavior, by (1) labeling as "discriminatory" their closely held religious convictions—a very core essence of their being, (2) outlawing their attempts to live according to those beliefs, (3) and pushing them, their beliefs, and their actions to the outer fringes of society. This dignitary harm to those citizens' conscience and their ability to live as they feel compelled by their Creator and God far outweighs the isolated incidents of lost jobs or denied services targeted by these laws.

[32] Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 44 (2000).

[33] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990) ("There are many ways in which to criticize the *Smith* decision."); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91, 96-97 (1991) (arguing that *Smith* mischaracterized precedent and applied flawed reasoning); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. Rev. 591, 592-93 (1991) (disagreeing with the *Smith* decision and the Court's reasoning); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 Geo. Wash. L. Rev. 841, 848 (1992) (characterizing *Smith* as the "near total loss of any substantive constitutional right to practice religion"); *see also* Chris Day, *Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote*, 43 Baylor L. Rev. 577, 599 (1991) ("[The *Smith* decision] has drastically departed from the Court's traditional analysis of free exercise claims.").

[34] *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

[35] *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).

burdens imposed by those laws.[36] This means that, regardless of whether those courts are correct, it does not appears that the United States Constitution currently provides a ready refuge for individuals whose religious liberties are trampled by these laws.

At bottom, then, these laws significantly undermine religious liberty, and current constitutional jurisprudence does not adequately guard against that damage. Consequently, these measures should be opposed by any government official who believes, in the words of James Madison, that "it is the right of every [citizen] to exercise [his or her religion] as [conviction and conscience] may dictate."[37]

## III. Codifying the concept of gender identity radically transforms the law's understanding of maleness and femaleness, creates myriad problems for organizations and individuals, and endorses the conduct caused by an established mental disorder.

Federal law governing throughout the country currently forbids discrimination on the basis of sex.[38] Sex is determined by a person's biology and anatomy;[39] it is an objectively verifiable characteristic that is familiar throughout the legal system. These nondiscrimination laws, however, seek to supplement the existing legal regime with the novel concept of gender identity. Gender identity, unlike sex, is determined by a person's subjective "conception of oneself" as "male, female, or intersex";[40] it is an internally conceived and objectively unverifiable characteristic with no legal foundation. Placing gender identity in the law, as these laws attempt to do, permits people to self-determine whether they will identify as male or female in many social situations.[41] Simply put, they radically change the law's—and, in turn, society's—view of maleness and femaleness, by transforming a person's status as male or female from a reality determined by biology to a preference determined by internal reflection.

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[36] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279-80 (Ala. 1994); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909, 921 (Cal. 1996).

[37] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* The Sacred Rights of Conscience 309, 309 (Dreisback & Hall eds., 2009).

[38] 42 U.S.C. § 2000e-2 ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex").

[39] Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine, *available at* http://emedicine.medscape.com/article/917990-overview (last visited Jan. 10, 2011) ("Sex . . . is defined by the gonads, or potential gonads, either phenotypically or genotypically.").

[40] Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine, *available at* http://emedicine.medscape.com/article/917990-overview (last visited Jan. 10, 2011).

[41] Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392, 395-96 (2001) (noting that one goal of this recent push for the law to embrace the concept of gender identity is to "encourag[e] courts and society to conclude that the determination of one's sex should rest with the individual and not the state").

### A. Gender identity nondiscrimination provisions impose absurd obligations on businesses and other organizations, expose those entities to unnecessary liability, and trample the rights, interest, and dignity of unsuspecting citizens.

Not only do these laws enable people to self-determine their status as male or female—a troublesome change that will have untold effects throughout law and society—[42]they mandate that employers, businesses, organizations, and the government affirm those choices, regardless of their effects on other citizens. Such radical measures impact many businesses and organizations, impose absurd obligations on those entities, expose those entities to needless liability, and trample the rights, interests, and dignity of unsuspecting citizens.

The reach of these gender identity provisions is sweeping. They impact all businesses, organizations, and government agencies handling any matter that takes account of a person's sex. This includes not only schools, universities, and government offices that deal with public records, but every organization that hires employees or maintains a public restroom. Indeed, this broad scope impacts most organizations one way or another.

These laws, moreover, affect organizations in myriad ways, producing bizarre results. Consider the following examples:

- Organizations must allow persons to access sex-segregated programs, activities, and facilities in accordance with the sex they choose.[43] This means that a school must allow a biological male who professes a female identity to attend an all-girls school or participate in an all-girls class or program.
- Organizations must allow persons to access bathrooms, showers, and locker-room facilities in accordance with the sex they choose.[44]

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[42] Embracing the concept of gender identity in the law would not only allow all individuals to self-determine whether they are male or female, it will also give them the right to "identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities." Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. C.L. & C.R. 101, 104 (2006).

[43] Maine Human Rights Commission, Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities, *available at* http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf (last visited Jan. 11, 2011) ("In general, students . . . must be allowed access to gender-segregated programs, activities, and facilities in accordance with their gender identity . . . , and they must be addressed by their chosen names and pronouns.").

[44] U.S. Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, *available at* http://www.opm.gov/diversity/Transgender/Guidance.asp (last visited June 1, 2011) (noting the following regarding "a non-discriminatory working environment to employees irrespective of their gender identity": "[O]nce [an employee] has begun living and working full-time in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity. While a reasonable temporary compromise may be appropriate in some circumstances, transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender."); Maine Human Rights Commission, Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities, *available at* http://www.foxnews.com/projects/pdf/2-08-

- Schools must allow students to participate in sex-segregated sports in accordance with the sex they choose.[45] This requires schools to allow, for instance, a biological female to play on the boy's wrestling team, or a biological male to join the girls' basketball team.
- Employers, schools, and other organizations must allow employees, students, and patrons to dress in accordance with the sex they choose.[46] This means that employers will no longer be allowed to maintain a reasonable dress code,[47] which they are currently able to do under federal law.[48] It also means that schools must allow biological males who profess a female identity to wear dresses, skirts, and earrings to class and other school functions.[49]
- Employers, schools, and other organizations must refer to employees, students, and patrons by the name and pronoun of the sex they choose.[50] By way of example, this requires an employer, when interacting with a long-time male employee who decides to

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2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf (last visited Jan. 11, 2011) ("[S]tudents must be allowed access to the bathrooms that correspond with their gender identity").

[45] Maine Human Rights Commission, Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities, *available at* http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf (last visited Jan. 11, 2011) ("[S]tudents must be permitted to participate in gender-segregated sports in accordance with their gender identity").

[46] U.S. Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, *available at* http://www.opm.gov/diversity/Transgender/Guidance.asp (last visited June 1, 2011) ("Once an employee has informed management that he or she is transitioning [to a different gender], the employee will begin wearing the clothes associated with the gender to which the person is transitioning. Agency dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender. Dress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity.").

[47] *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 38 (2007) (statement of Lawrence Z. Lorber, partner, Proskauer Rose, LLP, an attorney with more than 30 years of experience with labor and employment law), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 26, 2011) (opposing a federal gender identity nondiscrimination law and noting that "[i]t is simply unclear how a reasonable dress code can coexist with the . . . indefinite classification of self-perceived gender identity").

[48] *Jepperson v. Harrah's Operating Company, Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (upholding a sex-specific dress code and grooming policy); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998) (similar); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2d Cir. 1996) (similar); *Carroll v. Talman Federal Savings & Loan Assoc.*, 604 F.2d 1028 (7th Cir. 1980) (similar); *Willingham v. Macon Telegraph Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (similar); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973) (similar); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) (similar); *Knott v. Missouri Pacific Ry. Co.*, 527 F.2d 1249 (8th Cir. 1975) (similar); *Barker v. Taft Broad Co.*, 549 F.2d 400 (6th Cir. 1977) (similar); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976) (similar).

[49] Maine Human Rights Commission, Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities, *available at* http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf (last visited Jan. 11, 2011) ("[S]tudents must be permitted to dress in accordance with their gender identity").

[50] U.S. Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, *available at* http://www.opm.gov/diversity/Transgender/Guidance.asp (last visited June 1, 2011) ("Managers, supervisors, and coworkers should use the name and pronouns appropriate to the employee's new gender. Further, managers, supervisors, and coworkers should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee.").

present himself as a woman, to use that person's self-selected female name and female pronouns.

**These absurd—but real and demonstrated—scenarios highlight two practical problems with these laws. First, they disregard the rights, interests, and dignity of the unsuspecting citizens who are exposed to the individuals that profess a sex contrary to biological reality. This includes (1) women and girls in restrooms, showers, and locker rooms when a biological male who professes a female identity accesses those facilities, (2) boys on a wrestling or football team when a biological female who professes a male identity wants to participate, and (3) girls on a basketball team that must compete against a biological male who professes a female identity. These nondiscrimination laws, in short, toss aside the rights, interests, and dignity of all these individuals. Revised GBA/JB is no different.**

Second, these laws expose employers, businesses, organizations, schools, and government agencies to unnecessary liability. By forcing these entities to allow biological males access to women's restrooms and showers based solely on their self-professions, these laws leave these organizations at the mercy of—with no reasonable means of excluding—opportunistic perverts and predators seeking entry to these sensitive areas. This, in turn, subjects those organizations to legal liability for violating their common-law duty of care to coworkers, patrons, and students.[51] Moreover, third parties will be understandably offended when they are forced to share a government-operated restroom, shower or locker room with a person of the opposite biological sex—whether an opportunistic pervert or an individual who is genuinely confused about his or her sex. Those offended third parties can sue the government for violating their constitutional right to privacy.[52] Indeed, courts have held that a person's right to privacy may be violated when a government's conduct enables members of the opposite sex to observe that person while he or she is undressing, using restroom facilities, or showering.[53] Similar legal claims might also exist against the intruding individual of the opposite sex for violating an employee's, patron's, student's, or other third party's common-law right to privacy.[54]

In sum, these laws seek to introduce a radical concept into the law: the notion that people can self-determine whether they will identify as a male or female in many social settings.

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[51] Restatement (Second) of Torts § 343 (1965) (noting that an organization that invites persons onto its premises owes a duty, and "is subject to liability for physical harm," to those invitees if certain conditions are satisfied).

[52] *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) ("There is a constitutional right to privacy.").

[53] *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (noting that a person's constitutional right to privacy is violated where a government policy or conduct allows a member of the opposite sex to view him or her while "engag[ing] in personal activities, such as undressing, using toilet facilities, or showering"); *see also Lee v. Downs*, 641 F.2d 1117, 1119-20 (4th Cir. 1981) (noting that men are "entitled to judicial protection of their right of privacy denied by the presence of female[s] . . . in positions to observe the men while undressed or using toilets"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from . . . strangers of the opposite sex[] is impelled by elementary self-respect and personal dignity.").

[54] Restatement (Second) of Torts § 652(B) (1965) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy.").

Codifying that novel idea, as shown above, has many dangerous side-effects, and thus these laws should be rejected.

## IV. These laws are substantial and demonstrated stepping-stones toward forcing government recognition of same-sex relationships.

History and experience have shown that sexual orientation nondiscrimination laws directly contribute to subsequent judicial and legislative decisions redefining marriage to include same-sex couples.[55] At least three factors demonstrate the connection between these laws and redefining marriage. First, legal scholars who outline the roadmap for redefining marriage candidly acknowledge that enacting sexual orientation nondiscrimination laws is a necessary and important step toward the "legal recognition of same-sex marriage."[56] Second, every state court that has imposed a redefined understanding of marriage on its citizens discussed and relied upon sexual orientation nondiscrimination laws as part of their basis for doing so.[57] Third, of the few States where the legislature has redefined marriage to include same-sex couples, every one of those States first codified a sexual orientation nondiscrimination law.[58]

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[55] For a complete and detailed discussion of this topic, please see Thomas M. Messner, *ENDA and the Path to Same-Sex Marriage*, Heritage Foundation Backgrounder No. 2317 (September 18, 2009), *available at* http://s3.amazonaws.com/thf_media/2009/pdf/bg2317.pdf (last visited Jan. 12, 2011).

[56] William N. Eskridge, Jr., Equality Practice: Civil Unions and the Future of Gay Rights 154 (2002) (describing sexual-orientation nondiscrimination laws as important progress toward the "legal recognition of same-sex marriage"); Yuval Merin, Equality for Same-Sex Couples 309 (2002) (describing sexual-orientation nondiscrimination laws as an essential part of the "necessary process" for obtaining legal recognition of same-sex unions).

[57] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (stating that "Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation" and citing the many state sexual-orientation nondiscrimination laws); *In re Marriage Cases*, 183 P.3d 384, 428 (Cal. 2008) ("There can be no question but that, in recent decades, there has been a fundamental and dramatic transformation in this state's understanding and legal treatment of gay individuals and gay couples. . . . This state's current policies and conduct regarding homosexuality recognize that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals and are protected from discrimination on the basis of their sexual orientation [citing the many state sexual-orientation nondiscrimination laws]"), *superseded by* Cal. Const. art. I, sec. 7.5; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 435 (Conn. 2008) (citing the State's sexual-orientation nondiscrimination laws as support for the statement that "it is the public policy of this state that sexual orientation bears no relation . . . to an individual's ability otherwise to participate fully in every important economic and social institution and activity that the government regulates"); *id.* at 447-48 ("In recent years, our legislature has taken substantial steps to address discrimination against gay persons."); *id.* at 451-52 ("The antidiscrimination provisions of our gay rights law . . . represent a legislative consensus that sexual orientation discrimination . . . is widespread, invidious and resistant to change."); *Varnum v. Brien*, 763 N.W.2d 862, 890-91 (Iowa 2009) ("[T]he Iowa legislature has recently declared as the public policy of this state that sexual orientation is not relevant to a person's ability to contribute to a number of societal institutions other than civil marriage. [citing the many state sexual-orientation nondiscrimination laws] Those statutes and regulations reflect at least some measure of legislative and executive awareness that discrimination based on sexual orientation is often predicated on prejudice and stereotype and further express a desire to remove sexual orientation as an obstacle to the ability of gay and lesbian people to achieve their full potential.").

[58] The few States that have redefined marriage through their legislatures are Vermont and New Hampshire, and while it is not a State, the District of Columbia, through its legislative body, has also redefined marriage. *See* Vt. Stat. Ann. tit. 15, § 8 (2009); N.H. Rev. Stat. Ann. § 457:1-a (2010); D.C. Code §46-401(a) (2010). All three of those jurisdictions enacted a sexual-orientation nondiscrimination provision before voting to redefine marriage. *See*

Even where sexual orientation nondiscrimination laws have not yet lead to the redefinition of marriage within a State, courts have nevertheless used those laws in other ways to force the government to recognize and grant benefits to same-sex relationships. For instance, some courts have relied on sexual orientation nondiscrimination laws to force the government to recognize "same sex marriages legally solemnized in other jurisdictions."[59] Additionally, other courts have used sexual orientation nondiscrimination laws as a basis for requiring the government to create a "marital substitute"—such as civil unions or domestic partnerships—for same-sex couples.[60]

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Vt. Stat. Ann. tit. 21, § 495; *id.* at tit. 9, § 4502; *id.* at tit. 9, § 4503; N.H. Rev. Stat. Ann. § 354-A:7; *id.* at § 354-A:10; *id.* at § 354-A:17; D.C. Code § 2-1402.11(a); *id.* at § 2-1402.21(a); *id.* at § 2-1402.31(a).

[59] *Golden v. Paterson*, 877 N.Y.S.2d 822, 833-34 (N.Y. Sup. Ct. 2008) (finding that government recognition of "same sex marriages legally solemnized in other jurisdictions" is consistent with the State's public policy because state law includes "prohibitions against discrimination based on sexual orientation"); *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) (requiring the government to recognize, and extend marital benefits based on, its employee's marriage to a person of the same sex in Canada because "by refusing to recognize [that] valid Canadian marriage, [the government] violated Executive Law § 296(1)(a), which forbids an employer from discriminating against an employee . . . because of the employee's sexual orientation"); Op. N.M. Att'y Gen. 11-01 (2011), *available at* http://www.nmag.gov/Opinions/Opinion.aspx?OpID=1131 (last visited Jan. 17, 2011) (opining that the New Mexico courts will recognize same-sex unions solemnized as marriages in other jurisdictions because, among other reasons, "the prohibition of discrimination based on sexual orientation" suggests that New Mexico's public policy favors the recognition of same-sex unions); 95 Op. Md. Att'y Gen. 3 (2010), *available at* http://www.oag.state.md.us/Opinions/2010/95oag3.pdf (last visited Jan. 17, 2011) (opining that the Maryland courts will recognize same-sex unions solemnized as marriages in other jurisdictions because, among other reasons, the State's sexual-orientation nondiscrimination laws "reflect[] a change in public policy concerning the acceptable treatment of gay and lesbian individuals," which, in turn, shows that Maryland's public policy favors the recognition of same-sex unions).

[60] *Baker v. State*, 744 A.2d 864, 885-86 (Vt. 1999) ("[W]hatever claim may be made in light of the undeniable fact that federal and state statutes—including those in Vermont—have historically disfavored same-sex relationships, more recent legislation plainly undermines the contention. [citation omitted] In 1992, Vermont was one of the first states to enact statewide legislation prohibiting discrimination in employment, housing, and other services based on sexual orientation. . . . Thus, . . . we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law. . . . We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate [remedy], other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as 'domestic partnership' or 'registered partnership' acts[.]"); *id.* at 902 n.5 (Johnson, J., concurring and dissenting) ("[B]oth the majority and concurrence acknowledge . . . [that] allowing same-sex couples to obtain the benefits and protections of marriage is *a logical extension of Vermont's legislatively enacted public policy prohibiting discrimination on the basis of sex and sexual orientation*") (emphasis added); *Lewis v. Harris*, 908 A.2d 196, 212-15 (N.J. 2006) ("[I]n New Jersey, it is just as unlawful to discriminate against individuals on the basis of sexual orientation as it is to discriminate against them on the basis of race, national origin, age, or sex. . . . In making sexual orientation a protected category, the Legislature committed New Jersey to the goal of eradicating discrimination against gays and lesbians. . . . [T]his State's . . . sweeping legislative enactments, which protect gays and lesbians from sexual orientation discrimination in all its virulent forms, provide committed same-sex couples with a strong interest in equality of treatment relative to comparable heterosexual couples."); *id.* at 218 ("In arguing to [defend the law defining marriage as the union of one man and one woman], the State offers as a justification the interest in uniformity with other states' laws. Unlike other states, however, New Jersey forbids sexual orientation discrimination[.]"); *id.* at 220-21 (requiring the State legislature to either redefine marriage to include same-sex couples or create "a civil union style structure").

Courts have thus consistently interpreted sexual orientation nondiscrimination laws—purportedly *protective* measures that outlaw discrimination—as mandates that the government must *promote* same-sex relationships by equating them with opposite-sex relationships.[61] So all concerned citizens should know that, even if they intend these nondiscrimination laws only as protective measures, courts have shown that they will use such laws to force the government to affirmatively promote same-sex relationships.

Although the definition of marriage as the union of one man and one woman is protected in Florida by Florida's Marriage Protection Amendment, Fla. Const. Art. I, Sec. 27 (the "Marriage Amendment"), Revised GBA/JB could undermine the Marriage Amendment by providing a stepping-stone towards marriage redefinition as the United States Supreme Court reviews cases involving California's marriage amendment and the federal Defense of Marriage Act.[62]

Experience has therefore shown that these laws, whether they lead first to the ultimate destination or just a significant stop along the road, are an indispensible step on the journey to redefine marriage. They provide a critical tool for a judge or subsequent legislator to use in accomplishing this drastic social overhaul.[63] And thus, in the words of another legal scholar, "the growing body of evidence demonstrating a connection between nondiscrimination laws and marriage redefinition provides solid grounds for lawmakers who support marriage as the union of husband and wife to be seriously concerned about [enacting such nondiscrimination measures]."[64]

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[61] *Baker v. State*, 744 A.2d 864, 902 n.5 (Vt. 1999) (Johnson, J., concurring and dissenting) ("[B]oth the majority and concurrence acknowledge . . . [that] allowing same-sex couples to obtain the benefits and protections of marriage is *a logical extension of Vermont's legislatively enacted public policy prohibiting discrimination on the basis of sex and sexual orientation*") (emphasis added); *Lewis v. Harris*, 908 A.2d 196, 212-15 (N.J. 2006).

[62] Jess Bravin, *High Court Will Rule on Gay Marriage*, Wall Street Journal (Dec. 8, 2012), *available at* http://online.wsj.com/article/SB10001424127887324640104578165363433361742.html (last visited Dec. 9, 2012).

[63] The logical reason for this close connection between sexual-orientation nondiscrimination laws and marriage redefinition is that the enactment of those laws suggests to some that "society has abandoned certain precepts undergirding a policy of defining marriage as the union of husband and wife or . . . that society has embraced an evolving public policy of protecting homosexuality, either of which . . . make it more difficult for [government] officials to defend marriage[.]" Thomas M. Messner, *ENDA and the Path to Same-Sex Marriage*, Heritage Foundation Backgrounder No. 2317, at 13 (September 18, 2009), *available at* http://s3.amazonaws.com/thf_media/2009/pdf/bg2317.pdf (last visited Jan. 12, 2011).

[64] Thomas M. Messner, *ENDA and the Path to Same-Sex Marriage*, Heritage Foundation Backgrounder No. 2317, at 15 (September 18, 2009), *available at* http://s3.amazonaws.com/thf_media/2009/pdf/bg2317.pdf (last visited Jan. 12, 2011).

## V. These laws significantly depart from traditional nondiscrimination laws by codifying statutory classifications that are vaguely defined, subjectively determined, and changeable; they thus create legal difficulties and spawn costly and difficult-to-defend litigation for employers and businesses.

Nondiscrimination laws traditionally include well-defined, objectively determined, and unchangeable statutory classifications, such as race, sex, and national origin.[65] But the nondiscrimination laws under consideration are of a different nature: by including sexual orientation and gender identity, they codify vaguely defined, subjectively determined, and changeable statutory classifications. Yet the absence of clear definitions, objective determinations, and immutable classifications creates a legal regime that is unfair for employers and businesses.

### A. Sexual orientation and gender identity are vaguely defined, subjectively determined, and malleable classifications.

Sexual orientation is a vaguely defined and unsettled concept. Even scholars who regularly study sexual orientation cannot agree on a definition for it.[66] Some researchers, for example, believe that sexual orientation is determined by a person's self-identification; some think that it is established by sexual behavior; and others believe that it is dictated by mere sexual attraction.[67] Thus, "[t]here is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual."[68] If scientists who study this topic cannot agree on a definition, then it is surely

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[65] Traditional nondiscrimination laws also include religion as a protected classification. While some might argue that religion is not objectively determined or unchangeable, legislatures nevertheless have consistently included religion in nondiscrimination laws because of (1) religious liberty's protection in the constitutions of the federal government and the various States of our country and (2) our nation's deeply imbedded, historical respect for its citizens' religious convictions.

[66] Todd A. Salzman & Michael G. Lawler, The Sexual Person 150 (2008) ("The meaning of the phrase 'sexual orientation' is complex and not universally agreed upon."); Gail S. Bernstein, *Defining Sexual Orientation*, Selfhelp Magazine, May 28, 1998, *available at* http://www.selfhelpmagazine.com/article/sexual_orientation (last visited Jan. 7, 2011) ("Much of the confusion about sexual orientation occurs because there is no single agreed upon definition of the term."); Ilan H. Meyer & Patrick A. Wilson, *Sampling Lesbian, Gay, and Bisexual Populations*, 56 Journal of Counseling Psychology 23, 23 (2009) ("[H]ere lies the first problem for researchers of LGB populations: The population's definition is elusive.").

[67] Laura Dean, et al., *Lesbian, Gay, Bisexual, and Transgender Health: Findings and Concerns*, 4 Journal of the Gay and Lesbian Medical Association 102, 136 (2000) ("[T]here is still no general consensus on the definitions of the[] terms [heterosexual, homosexual, or bisexual], although each includes components of at least one of three dimensions: (1) sexual orientation identity, (2) sexual behavior, and/or (3) sexual attraction . . . . For example, one study might define sexual orientation as a form of identity . . . , while another defines it as gender choice in sexual partners, and yet another as the gender of those to whom one is sexually attracted"); Ilan H. Meyer & Patrick A. Wilson, *Sampling Lesbian, Gay, and Bisexual Populations*, 56 Journal of Counseling Psychology 23, 24 (2009) ("[D]efinitions of sexual [orientation] vary: Several populations may be defined. Researchers have distinguished among sexual identity, sexual behavior, and attraction . . . . Even within each of these categories, varied groups can be defined.").

[68] Lisa M. Diamond and Ritch C. Savin-Williams, *Gender and Sexual Identity*, *in* Handbook of Applied Developmental Science Vol. 1 at 102 (Richard M. Lerner et al. eds., 2002). Compounding this definitional problem is scholars' recognition that sexual orientation is not divided into clear compartments; instead, sexual orientation, in the words of the American Psychological Association, "ranges along a continuum, from exclusive attraction to the

unreasonable to expect employers and businesses—which face the burden of abiding by the law and defending against lawsuits—to assess and accommodate the sexual orientation of their employees and patrons.[69]

Neither is sexual orientation an objectively verifiable classification.[70] This means that a business or employer cannot discern a person's sexual orientation by objective means (e.g., by looking at the person or by checking his or her identification or work documentation). An employer or business thus cannot determine an employee's or customer's sexual orientation without asking invasive and inappropriate questions.

Nor is sexual orientation an immutable classification. The leading scientific and professional organizations recognize that no credible scientific studies indicate that a person's desire to engage in homosexual behavior is biologically determined.[71] In fact, the vast weight of scientific literature—including articles published in widely respected journals such as the Journal of Sex Research, the Journal of Clinical Psychology, and Developmental Psychology—concludes that homosexual behavior does not result from a biological trait, but from behavioral

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other sex to exclusive attraction to the same sex." American Psychological Association, Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality 1 (2008), *available at* http://www.apa.org/topics/sexuality/sorientation.pdf (last visited Jan. 10, 2011). Put differently, "no sharp line distinguishes homosexuality and heterosexuality." Declaration of Dr. Robert Galatzer-Levy in Support of City and County of San Francisco's Constitutional Challenge to Marriage Statutes, *In re Marriage Cases*, Case No. 429-539, at ¶ 10 (Cal. Super. Ct. Sept. 1, 2004) (on file with the author and the Superior Court of the State of California, County of San Francisco). Thus, "the concept of sexual orientation is not as straightforward as everyday conversations, media accounts, and political slogans would imply. Rather the topic is fraught with vagaries, the terminology is ambiguous and ill-defined, and the apparently exclusive and stable categories commonly employed actually disguise complex dimensionality and fluidity." Janis S. Bohan, Psychology and Sexual Orientation Coming to Terms 13 (1996).

[69] This definitional ambiguity is significant because the "overlap" between a person's professed "sexual identity, sexual behavior, and attraction"—the three conflicting methods for defining sexual orientation—is "not great": "only among 15% of women and 24% of men do the three categories overlap[.]" Ilan H. Meyer & Patrick A. Wilson, *Sampling Lesbian, Gay, and Bisexual Populations*, 56 Journal of Counseling Psychology 23, 24 (2009) (discussing Edward O. Laumann et al., The Social Organization of Sexuality: Sexual Practices in the United States 299 (1994)).

[70] M.V. Lee Badgett, Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men 47 (2001) ("Sexual orientation is not an observable characteristic of an individual, as sex and race usually are"); Deposition Transcript of Gregory M. Herek, *Perry v. Schwarzenegger*, Case No. 09-CV-2292, at 92 (N.D. Cal. Nov. 6, 2009) (on file with the author and the United States District Court for the Northern District of California) ("[A person's] sexual orientation is not readily apparent to other people just by looking at them").

[71] American Psychiatric Association, Sexual Orientation, *available at* http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx (last visited Jan. 10, 2011) ("[T]here are no replicated scientific studies supporting any specific biological etiology for homosexuality."); Council for Responsible Genetics, Brief on Sexual Orientation and Genetic Determinism (May 2006), *available at* http://www.councilforresponsiblegenetics.org/ViewPage.aspx?pageId=66 (last visited Jan. 10, 2011) ("[C]onclusive proof of a link between [people's sexual orientation] and their genes has yet to be found."); American Psychological Association, Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality 2 (2008), *available at* http://www.apa.org/topics/sexuality/sorientation.pdf (last visited Jan. 10, 2011) ("Although much research has examined the possible genetic . . . influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by [that] particular factor").

phases and/or social influences.[72] Scholars have thus acknowledged (and experience has shown) that a person's professed "sexual orientation is not static" and that he or she may change it multiple times throughout the course of a lifetime.[73] Indeed, research supports these conclusions,[74] including one study published by the American Psychological Association in 2008, which found that 67% of women changed their professed sexual orientation at least once

[72] Linda D. Garnets & Letitia Anne Peplau, *A New Look at Women's Sexuality & Sexual Orientation*, UCLA Center for the Study of Women Update, at 4 (Dec. 2006) ("Women's sexual orientation is shaped by such social and cultural factors as women's education, social status and power, economic opportunities, and attitudes about women's role."); Letitia Anne Peplau, et al., *The Development of Sexual Orientation in Women*, *in* 10 Annual Review of Sex Research 70, 87 (R.C. Rosen ed., 1999) ("[T]he impact of biological factors in determining women's sexual orientation appears to be weak or nonexistent."); *see also* Richard C. Friedman and Jennifer I. Downey, Sexual Orientation and Psychoanalysis: Sexual Science and Clinical Practice 39 (2002); Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women's Sexuality and Sexual Orientation*, 56 Journal of Social Issues 329, 332 (2000); Rosemary C. Veniegas & Terri D. Conley, *Biological Research on Women's Sexual Orientations: Evaluating the Scientific Evidence*, 56 Journal of Social Issues 267, 277 (2000); J.M. Bailey, et al., *Genetic and Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample*, 78(3) Journal of Personality and Social Psychology 524-536, 533 (2000); Scott L. Hershberger, *Biological Factors in the Development of Sexual Orientation*, *in* Lesbian, Gay, and Bisexual Identities and Youth: Psychological Perspectives 27, 40 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 2001); J.M. Bailey, et al., *Heritable Factors Influence Sexual Orientation in Women*, 50 Archives of General Psychiatry 217 (1993); J.M. Bailey & R.C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 Archives of General Psychiatry 1089 (1991); Janet R. Jakobsen & Ann Pelligrini, Love the Sin: Sexual Regulation and the Limits of Religious Tolerance 96 (2004); Joseph P. Stokes, et al., *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men*, 43 Journal of Sex Research 304, 305 (1997); Roy F. Baumeister, *Gender Differences in Erotic Plasticity: The Female Sex Drive as Socially Flexible and Responsive*, 126 Psychological Bulletin 347 (2000); Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 Journal of Social Issues 297 (2000); Karen L. Bridges & James M. Croteau, *Once-Married Lesbians: Facilitating Changing Life Patterns*, 73 Journal of Counseling and Development 134, 135 (1994) (describing C. Charbonneau and P.S. Lander, *Redefining Sexuality: Women Becoming Lesbian in Mid-Life*, Lesbians at Mid-Life, at 35 (B. Sang et al. eds., 1991)); Lisa M. Diamond, *Development of Sexual Orientation Among Adolescent and Young Adult Women*, 34 Development Psychology 1085 (1998); Susan Rosenbluth, *Is Sexual Orientation a Matter of Choice?*, 21 Psychology of Women Quarterly 595, 605-07 (1997); Sari H. Dworkin, *Treating the Bisexual Client*, 57 Journal of Clinical Psychology 671 (2001); Lisa M. Diamond, *Was It a Phase? Young Women's Relinquishment of Lesbian/Bisexual Identities Over a 5-Year Period*, 84 Journal of Personality and Social Psychology 352 (2003).

[73] Michael R. Kauth & Seth C. Kalichman, *Sexual Orientation and Devleopment: An Interactive Approach*, *in* The Psychology of Sexual Orientation, Behavior, and Identity 82 (Louis Diamant & Richard D. McAnulty eds., 1995) ("[S]exual orientation is not static and may vary throughout the course of a lifetime."); Linda D. Garnets & Letitia Anne Peplau, *A New Look at Women's Sexuality & Sexual Orientation*, UCLA Center for the Study of Women Update, at 5 (Dec. 2006) ("Women's sexuality tends to be fluid, malleable, shaped by life experiences, and capable of change over time. . . . [M]ultiple changes in sexual orientation are possible . . . [due] to a wide range of social, cognitive, and environmental influences. Women who have had exclusively heterosexual experiences may develop an attraction to other women and vice versa"); Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women's Sexuality and Sexual Orientation*, 56 Journal of Social Issues 329, 333 (2000) ("[W]omen's identification as lesbian, bisexual, or heterosexual and women's actual behavior can vary over time."); John C. Gonsiorek, et al., *Definition and measurement of sexual orientation*, 25 Suicide and Life-Threatening Behavior 40 (1995) ("[M]any lesbian women . . . perceive choice as an important element in their sexual orientations.").

[74] Gary J. Gates, et al., Marriage, Registration and Dissolution by Same-Sex Couples in the U.S. 10 (July 2008), *available at* http://www.law.ucla.edu/williamsinstitute/publications/Couples%20Marr%20Regis%20Diss.pdf (last visited Jan. 10, 2011) (concluding that 20% of men and 29% of women in same-sex domestic partnerships in California had previously been married to a person of the opposite sex).

during a ten-year period and 36% changed it two times or more.[75] Another study shows that 90% of women and 80% of men who have engaged in any homosexual behavior as adults have also engaged in sexual activity with persons of the opposite sex.[76] Thus, despite popular political perception, it is plain that sexual orientation is not biologically based and immutable, but instead is a changeable and nebulous concept.

Moreover, gender identity, like sexual orientation, is also vaguely defined, subjectively determined, and malleable. Gender identity is generally defined as "a personal conception of oneself as male or female" or "intersex."[77] The notion of a person's gender identity sharply contrasts with the well-established and long-recognized legal classification of a person's sex. Sex, on the one hand, is determined by a person's biology and anatomy;[78] it is thus clearly defined and objectively determined. Gender identity, in contrast, is determined by "one's own identification as male, female, or intersex";[79] it is therefore an ambiguous classification, determined by a person's subjective self-identification, and subject to unstable shifts at the whim of each person's internal feelings and perceptions.[80] **Revised GBA/JB's conception of "gender identity *or expression*" goes even further, essentially obliterating any boundaries to the identity, appearance, expression, or behavior for which a person can claim protection.**

### B. Codifying sexual orientation and gender identity creates a legal regime that is unfair for employers and businesses, that results in difficult-to-defend lawsuits, that will increase entities' litigation costs, and that will harm businesses.

Enacting these laws creates compliance difficulties for employers and businesses. As an employment lawyer with over 30 years of experience told Congress regarding a similar nondiscrimination law proposed at the federal level, "[e]mployers have to know what they are dealing with in order to comply with the law."[81] But the vague definitions, subjective

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[75] Lisa M. Diamond, *Female bisexuality from adolescence to adulthood: Results from a 10-year longitudinal study*, 44 Developmental Psychology 5, 9 (2008).

[76] Edward O. Laumann et al., The Social Organization of Sexuality: Sexual Practices in the United States 311 (1994).

[77] Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine, *available at* http://emedicine.medscape.com/article/917990-overview (last visited Jan. 10, 2011).

[78] Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine, *available at* http://emedicine.medscape.com/article/917990-overview (last visited Jan. 10, 2011) ("Sex . . . is defined by the gonads, or potential gonads, either phenotypically or genotypically.").

[79] Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine, *available at* http://emedicine.medscape.com/article/917990-overview (last visited Jan. 10, 2011).

[80] *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 46 (2007) (statement of Mark A. Fahleson, Rembolt Ludtke, LLP, and Adjunct Professor of Employment Law at the University of Nebraska College of Law), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 26, 2011) (noting that the concept of "gender identity" is "exceptionally vague and problematic" for employers).

[81] *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 34 (2007) (statement of Lawrence Z. Lorber, partner, Proskauer Rose, LLP, an attorney with more than 30 years of experience with labor

determinations, and variability inherent in the concepts of sexual orientation and gender identity make it impossible for employers even to assess their circumstances, much less to determine what the law requires of them in each situation potentially invoking these nebulous concepts. Imposing this burden on employers and businesses to deal with their employees' and patrons' subjective considerations about sex and sexuality places those entities in an "extraordinarily difficult position."[82]

A skeptic unfamiliar with nondiscrimination laws might think that compliance with these laws is straightforward: merely refrain from firing an employee or refusing services to a patron because of his or her sexual orientation or gender identity. But such a simplistic objection ignores that (1) employers and businesses can unwittingly violate nondiscrimination laws—for instance, disparate-impact claims allow employees or customers to argue that an entity, while not intending to discriminate against anyone, engaged in conduct that has the incidental effect of treating one class of individuals differently than another[83]—and (2) employers and businesses must take proactive measures to ensure compliance with the law. Thus, for employers and businesses adequately to protect themselves from liability, they must be aware of their employees' and patrons' (potentially varying) sexual orientations and gender identities. But as discussed above, the nature of these statutory classifications makes that task impossible, absent invasive and inappropriate questioning, thus placing an unreasonable and unfair burden on employers and businesses.

Legally conscientious employers and businesses cannot be expected to navigate alone the landmines raised by the "uncertainty and subjectivity" of these laws; thus, they will "be forced [to] spend scarce resources seeking legal guidance."[84] These laws raise for all organizations a

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and employment law), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 26, 2011).

[82] *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 34 (2007) (statement of Lawrence Z. Lorber, partner, Proskauer Rose, LLP, an attorney with more than 30 years of experience with labor and employment law), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 26, 2011) ("[T]o put a burden on an employer to deal with somebody's innate personal consideration of their gender identity, without any reference to any specific action or status, places that employer in an extraordinarily difficult position.").

[83] *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009) (noting that federal nondiscrimination law "prohibits both intentional discrimination (known as 'disparate treatment') as well as . . . practices that are not intended to discriminate but in fact have a disproportionately adverse effect on [a protected class] (known as 'disparate impact')"). A few examples demonstrate that an employer or business can violate these laws without harboring any discriminatory intent. For example, a company that has a policy of photographing weddings—and thus, by implication, will not photograph a same-sex commitment ceremony—might unwittingly violate a sexual-orientation nondiscrimination law, even though it is not the owners' intent to discriminate against people who identify as having a particular sexual orientation. *See Elane Photography, LLC v. Willock*, Case. No. CV-2008-06632, Memorandum Opinion and Order (N.M. Dist. Ct., Bernalillo County, Dec. 11, 2009). Similarly, an athletic club that has a policy of giving its "family" memberships only to individuals who are married might violate a sexual-orientation nondiscrimination law, even though the club does not intend to discriminate against people who identify as having a particular sexual orientation. *See Professor's complaint sparks change in YMCA policy definition of family*, Drake University News, Aug. 7, 2007, *available at* https://www.drake.edu/news/archive/index.php?article=1941 (last visited Jan. 6, 2011).

[84] *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 47 (2007) (statement

host of difficult legal questions, which include: (1) whether all of the organization's current policies comply with these laws; (2) whether any of the organization's current policies has the incidental effect of affecting a person who professes to have a particular sexual orientation or gender identity differently from a person who professes to have a different one; and (3) whether the organization needs to enact any new policies to comply with these laws (e.g., policies relating to employment benefits or bathroom use). These are complex legal questions involving a vague and novel law; they do not have simple or definitive answers; and thus they will require substantial legal research and analysis. Obtaining this intricate and time-consuming legal advice will cost a significant amount of money. And worse yet, if the legal professionals determine that the organization must implement policy changes, those too may require a substantial investment of funds. The "difficult[y]" of "implement[ing]" measures like these laws has thus prompted communitywide business organizations to oppose past efforts to enact similar laws.[85]

Even the best legal advice, however, cannot prevent organizations from facing litigation under these laws—[86]litigation that, considering the vague, subjective, and changeable nature of sexual orientation and gender identity, will be difficult to defend. There are many reasons why this is true, but a few examples illustrate the point:

- Defending against these claims requires the defending entity to demonstrate what it and its employees subjectively "perceived" about a person's internally determined sexual orientation and gender identity. That task is not only burdensome; its results are inherently unreliable and thus subject to vigorous attack in the course of litigation.
- One of the primary defenses against a discrimination claim is that the complainant is not a member of a "protected class."[87] But an employer or business cannot reasonably assert that defense under these laws. Because a person's sexual orientation and gender identity are subjectively determined and changeable, the defending entity must accept, and cannot reasonably refute, a plaintiff's characterization of his or her sexual orientation or gender identity.

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of Mark A. Fahleson, Rembolt Ludtke, LLP, and Adjunct Professor of Employment Law at the University of Nebraska College of Law), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 26, 2011) (noting that a similar nondiscrimination law debated before Congress was packed with "uncertainty and subjectivity" and thus it would have forced organizations to "spend scarce resources seeking legal guidance").

[85] The Greater Omaha Chamber of Commerce wrote a letter opposing a similar nondiscrimination law because that measure would have "require[d] more regulations on Omaha businesses" and it was "ambiguous and therefore difficult to implement." Letter from David G. Brown, President and Chief Executive Officer of the Greater Omaha Chamber of Commerce, to Ben Gray, Omaha City Councilman, at 3 (Oct. 25, 2010) (on file with the author).

[86] Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 103-04 (2009) (noting that employment-law cases account for a large fraction of the cases filed in federal court).

[87] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (noting that discrimination complainants must show that they "belong[] to a . . . minority" group); *Schoonmaker v. Spartan Graphics Leasing, LLC*, 595 F.3d 261, 264 (6th Cir. 2010) (noting that discrimination complainants must show that they are "a member of a protected class").

- Complainants under these laws, even if their claims are baseless, will almost always satisfy their initial case for discrimination (known as their prima-facie case).[88] This shifts the burden to the defending entity to prove that it had a legitimate reason for acting as it did.[89]
- Once the burden shifts to the defending entity, the chances significantly increase that the complainant's case, even if ultimately lacking merit, will withstand summary judgment and proceed to a jury trial.[90] A jury trial, in turn, is far more burdensome and costly for the defending entity.
- As one employment-law professor has noted, the "fact-specific and subjective standards" inherent in these laws will make it "more difficult for [organizations] to have meritless litigation . . . dismissed prior to incurring the cost of a full-blown trial."[91]

These difficult-to-defend lawsuits will require substantial time and resources to combat, and thus they will be very costly for employers and businesses.[92] These increased legal costs, in the end, "could prove" to be "insurmountable" for small businesses.[93] These laws thus create a legal regime that jeopardizes the fiscal welfare and future existence of law-abiding employers and businesses. For this reason, they should be rejected.

## VI. The supporters of these laws have not shown a need for their enactment.

In light of the many problems created by these laws, one would assume that these measures are aimed at a significant and demonstrated problem in our country. But that is simply not true. Supporters have not introduced persuasive evidence showing a need for these laws; in

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[88] A prima-facie case requires the complainant to show that (1) they are a member of a protected class, (2) they are qualified to receive the job or the services, (3) they were denied the job or the services, and (4) the defending entity provided that job or those services to someone from a different class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Schoonmaker v. Spartan Graphics Leasing, LLC*, 595 F.3d 261, 264 (6th Cir. 2010) ("To state a *prima facie* case . . . a plaintiff must establish the four elements of the well-known *McDonnell Douglas* test: 1) that she was a member of a protected class; 2) that she was discharged; 3) that she was qualified for the position held; and 4) that she was replaced by someone outside of the protected class").

[89] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

[90] *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 452 (1st Cir. 2009) ("Evidence establishing a prima facie case, in combination with evidence of pretext, can be sufficient to defeat summary judgment" and require that a case proceed to a jury trial); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 393 n.6 (6th Cir. 2008) ("The question of whether the [organization's] judgment was reasonable or was instead motivated by improper considerations is for the *jury* to consider.").

[91] *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 47 (2007) (statement of Mark A. Fahleson, Rembolt Ludtke, LLP, and Adjunct Professor of Employment Law at the University of Nebraska College of Law), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 26, 2011).

[92] Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155, 1200 (2005) ("[T]he broadening of antidiscrimination law . . . creates substantial litigation costs").

[93] *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 47 (2007) (statement of Mark A. Fahleson, Rembolt Ludtke, LLP, and Adjunct Professor of Employment Law at the University of Nebraska College of Law), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 26, 2011).

fact, the statistics demonstrate that the alleged discrimination targeted by these laws is isolated and uncommon. Studies have shown that only 9% of self-identified homosexuals claim to have ever lost employment because of a decision that they thought was related to their professed sexual orientation.[94] And in jurisdictions that have enacted these laws, less than 4% of the total discrimination claims involve allegations of discrimination based on sexual orientation or gender identity.[95]

**Gender identity laws are particularly unwarranted. In 1989, the United States Supreme Court found that employees can sue their employers under federal law for engaging in what is known as "sex stereotyping," which occurs when employers take adverse actions against employees because they failed to conform to stereotypes associated with their biological sex.[96] Since then, a long line of cases has allowed claims of sex stereotyping when a person suffering from gender identity disorder (GID)—that is, a biological male who subjectively identifies as a woman or a biological female who subjectively identifies as a man—alleges that he or she was subject to an adverse employment action for failing to conform to sex stereotypes concerning how an individual of that biological sex should look and behave.[97] Those cases, regardless of whether they were correctly decided, hold that persons suffering from GID can assert a sex-stereotyping claim under federal law, and the availability of this cause of action significantly undercuts the need for enacting gender identity provisions.**

The supporters of these laws assume that the only way for citizens to treat each other fairly and with respect is if they are bludgeoned with the heavy hand of the law. But nothing could be further from the truth. Businesses and other organizations have significant interests in upholding their reputation as just and decent entities and in fostering goodwill and trust among their employees and patrons. In other words, within the free market there exist strong self-interests that encourage entities to engage in fair play with their employees and customers. And as others have remarked, it appears that "the free market . . . [is] already addressing" the issues raised by these measures,[98] thus further showing that these laws are not needed.

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[94] Jessica F. Morris & Kimberly F. Balsam, *Lesbian and Bisexual Women's Experiences of Victimization: Mental Health, Revictimization, and Sexual Identity Development*, 7(4) Journal of Lesbian Studies 67, 74 (2003) ("Many fewer participants report loss of employment (9.2%)").

[95] Letter from David G. Brown, President and Chief Executive Officer of the Greater Omaha Chamber of Commerce, to Ben Gray, Omaha City Councilman, at 3 (Oct. 25, 2010) (on file with the author).

[96] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality); *id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring).

[97] *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572, 575 (6th Cir. 2004); *Kastl v. Maricopa County Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D. D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 667-68 (S.D. Tex. 2008).

[98] *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 44 (2007) (statement of Mark A. Fahleson, Rembolt Ludtke, LLP, and Adjunct Professor of Employment Law at the University of Nebraska College of Law), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 26, 2011).

## Conclusion

In sum, the problems created by sexual orientation and gender identity nondiscrimination laws—the infringement on First Amendment rights, pummeling of religious liberty, and harm to businesses and other organizations—heavily outweighs any government interests supporting these unnecessary measures. Revised GBA/JB creates all of these problems for Orange County Public Schools. Concerned citizens and elected officials should thus oppose Revised GBA/JB and any similarly attempted legal enactments.

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