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The Utah Compromise: Needlessly Surrendering Freedom

The Utah compromise refers to legislation that elevates sexual orientation and gender identity to protected-class status under Utah's employment and housing nondiscrimination laws while including limited protections for religious freedom. The key feature of this compromise is that in exchange for the limited religious-liberty protections, people of faith provided *affirmative support* for adding sexual orientation and gender identity to the state's nondiscrimination laws. These sorts of compromise laws do not reflect sound public policy or sufficiently protect religious liberty. As explained below, sexual orientation and gender identity laws are unnecessary measures that significantly threaten freedom and subordinate the reasonable interests and concerns of many citizens. The minimal religious-liberty protections that may be obtained through a compromise approach do not come close to solving all the concerns created by including sexual orientation and gender identity in the law. In the end, pursuing compromise measures preemptively surrenders freedom, substantially advances the cause of sexual orientation and gender identity proponents, and undermines the ability of individuals with religious convictions on marriage and human sexuality to live out their faith in the public square.

Sexual Orientation and Gender Identity Laws: Unnecessary Threats to Freedom

Legislative proposals that, like the Utah compromise, add sexual orientation and gender identity as protected classifications in nondiscrimination laws are solutions in search of a problem. With very few exceptions, Americans simply do not refuse to hire, serve, or rent to people because they identify as gay, lesbian, or transgender. This is not only because Americans are tolerant and fair-minded, but also because the free market, through boycotts and public pressure, would swiftly impose substantial social costs on anyone engaged in baseless discrimination.

Indeed, the litigation that has taken place under existing sexual orientation and gender identity laws has *not* involved egregious discrimination of any sort—you will search in vain for a single example of a lawsuit filed by a person who identifies as gay, lesbian, or transgender who was turned away from a restaurant or denied necessary medical care. Those things simply do not happen. Rather, virtually all of the litigation under existing sexual orientation and gender identity laws has involved plaintiffs who demand that others engage in conduct that conflicts with their deeply held moral or religious convictions—such as providing services for a same-sex wedding or creating expression that conveys messages in conflict with one's beliefs. In other words, litigation to date demonstrates that these laws have not been used as defensive shields to protect people from discrimination, but as offensive weapons to suppress freedom of conscience with respect to marriage and human sexuality.

This is likely why people across the political spectrum agree that adding sexual orientation and gender identity to nondiscrimination laws imperils religious freedom by requiring citizens to act contrary to their religious and other sincerely held beliefs. If those

citizens decline to violate their conscience, they are exposed to ruinous fines and penalties. Just ask Melissa Klein, Barronelle Stutzman, Jack Phillips, and Cynthia Gifford. They are business owners that gladly serve people who identify as gay and lesbian, but are facing punishment because they declined to use their artistic talents to help celebrate same-sex weddings. And now, because of these laws, they risk losing their businesses and, in some instances, everything they own. For example, Melissa has already been ordered to pay $135,000, and Barronelle, if she does not prevail in the lawsuit brought against her, will be forced to pay hundreds of thousands of dollars to the attorneys who are prosecuting her.

As these examples demonstrate, sexual orientation and gender identity laws do not end discrimination. Rather, they use the power of government to discriminate against individuals and organizations that express or conduct themselves consistently with their religious and moral convictions about marriage and sexuality, effectively labeling and condemning all such religious convictions as arbitrary and bigoted. Sexual orientation and gender identity laws thus directly attack certain religious beliefs, people of faith, and freedom of conscience.

But the great harms that these laws inflict do not stop there. They also violate the privacy rights of individuals and present significant public-safety risks. Gender identity laws require that sex-segregated facilities, like bathrooms and locker rooms, admit individuals in accordance with their gender identity. This means that men who profess a female identity must be permitted to access women's bathrooms and locker rooms, and that women who profess a male identity must be permitted to access private facilities reserved only for men. Indeed, people have already used gender identity laws to gain this sort of access to private facilities, and courts have agreed that this is required. Many throughout the country are understandably troubled by this demonstrated effect of gender identity laws.

In addition, sexual orientation and gender identity laws threaten small-business owners with devastating financial liability for actions based not on objective traits, but on subjective and unverifiable identities. The concept of gender identity, in particular, is so fluid and ill-defined that even its proponents admit that it may vary by time and place for a particular person. Due to their vague language, broad reach, and inclusion of unverifiable traits, these laws may be used to punish small-business owners even when they do not intend to discriminate against anyone—indeed, even if they are trying to prevent men who profess a female identity from entering private facilities (like bathrooms) reserved for women.

It is also important to note that there is nothing inevitable about the spread of sexual orientation and gender identity laws. Indeed, the people and their elected officials are rejecting these laws throughout the country. In 2015 alone, the legislatures of Idaho, Wyoming, North Dakota, and numerous cities—including large cities like Charlotte, North Carolina—declined to pass these laws. And since December 2014, voters in at least two cities—Houston, Texas and Springfield, Missouri—have repealed their previously enacted sexual orientation and gender identity laws.

The Utah Compromise: Costly and Needless Preemptive Surrender

As mentioned, the Utah compromise creates limited religious-freedom protection while adding sexual orientation and gender identity as protected classifications to the state's employment and housing nondiscrimination statutes. But under Utah's law, religious freedom advocates gained next to nothing and in fact lost much of the freedom that existed before the law's enactment, while sexual orientation and gender identity proponents gained much and promise to seek even more. In short, Utah forfeited far too much freedom and obtained almost no meaningful protection for religious liberty in return. Other states and municipalities would do well *not* to follow Utah's lead.

Utah's law sacrifices liberty by requiring its citizens to act contrary to their religious beliefs on marriage and human sexuality. For example, it overrides the religious freedom of many landlords who believe that marriage is the union of a man and a woman and who object to hosting sexual conduct that they consider immoral. Similarly, much like the ObamaCare HHS mandate, the Utah law requires numerous religiously minded business owners to afford marriage benefits based on relationships that they cannot in good conscience recognize as marriages.

Some of the law's supporters want to excuse these and other violations of conscience by noting that very small employers and landlords are exempted from the law. This was part of the compromise package. But these small-business carve-outs do not justify what Utah did. Rather, the very attempt to invoke these exemptions as a justification for the law admits that the religious freedom of some is compromised and that the basis for retaining freedom is the size of an employer's or landlord's operations. Yet how is it just for conscience rights to hinge on such an arbitrary line? From the perspective of those whose liberty is forfeited, the bargain struck doesn't seem at all fair.

Utah's law also jeopardizes privacy interests of people throughout the state. It purports to provide employers with flexibility when regulating employees' use of private facilities like bathrooms and locker rooms. But an employer must "afford reasonable accommodations based on gender identity to all employees." Because the Utah law does not clarify what qualifies as a reasonable accommodation, a significant risk exists that Utah courts will follow the example of courts in other states and force employers to permit men who profess a female identity to access private facilities reserved for women or require those business owners to allow women who profess a male identity to enter men's private facilities.

In addition, the Utah law subordinates other reasonable concerns of parents and interests of children. Specifically, it requires daycare centers and private schools to hire caregivers and teachers who present themselves as members of the opposite sex. This

compromises the interests of young children who are likely to be confused by this, and it overrides the reasonable objections of their parents.

Moreover, Utah's law does not materially add to the existing religious-freedom protection already available to people attempting to live consistent with their faith at work and in the public square.

- That law prohibits the state from retaliating against religious officials and organizations that engage in expression or conduct otherwise protected by law. Yet the Constitution already forbids government retaliation against persons who exercise their constitutional rights.

- The Utah law also protects religious officials and organizations that decline to recognize, solemnize, or provide services for a marriage. But the Constitution already prohibits the government from punishing churches or clergy that decline to recognize or solemnize marriages that conflict with their religious beliefs.

- Utah's compromise legislation additionally forbids employers from discriminating against employees because they engage in religious expression. This protection, however, is basically redundant of safeguards already guaranteed under Title VII, a federal law that requires employers to reasonably accommodate the religious expression and conduct of their employees.

More troublesome still is the fact that the significantly restricted religious-liberty protections in the Utah law actually create threats to freedom. For example, Utah's law implicitly authorizes government punishment of licensed professionals like counselors and lawyers. It expressly prohibits the government from retaliating against or revoking a license from a licensed professional or business that engages in religious expression in a nonprofessional setting. But by confining this protection to religious expression "in a nonprofessional setting," Utah opens the door for government entities and licensing bodies to discipline people of faith who express their beliefs in a professional setting or who conduct their professional practice consistent with their convictions. The Utah law thus leaves unprotected professional counselors who, because of their religious or moral beliefs about marriage, provide marital counseling only to a married husband and wife.

Even if it were theoretically possible to craft broad and non-duplicative exemptions that perfectly protect religious freedom, the proponents of sexual orientation and gender identity laws would not agree to them. Indeed, Lambda Legal, one of the nation's leading LGBT advocacy groups, has sharply denounced a compromise measure proposed in Indiana. Consequently, any set of exemptions and protections that could gain sufficient legislative support would leave some amount of religious liberty unprotected.

And whatever protections for religious liberty might be negotiated in a compromise like Utah's, those protections would not be durable. They would, in fact, contribute to the continued erosion of religious freedom because the adoption of additional proposals like the Utah legislation would create a trend, pressuring states that would not otherwise enact sexual orientation and gender identity laws to do so through compromise packages, thus threatening religious liberty in more and more jurisdictions. As the number of sexual orientation and gender identity laws increases, that would increase the likelihood that Congress will enact a nationwide sexual orientation and gender identity law. And the spread of these laws across the country would also increase the likelihood that the Supreme Court will recognize sexual orientation as a suspect classification under the federal constitution, a move that would not be accompanied by any explicit religious-liberty protections.

Supporters of the Utah law have celebrated that the legislation did not add sexual orientation or gender identity to the state's public-accommodations nondiscrimination statute (which prohibits certain forms of discrimination when a business provides services to the public). This is true, but it is nothing to tout as a long-term win for religious liberty. While the Utah legislation did not expand the public-accommodations law, it did add a new exemption to the state's public-accommodations law for religious officials and organizations that decline to solemnize or provide services for marriages that conflict with their faith. That exemption will have very little practical effect unless and until the public-accommodations statute is amended to add sexual orientation and gender identity. Accordingly, the inclusion of that exemption foreshadows the future expansion of Utah's public-accommodations law to include those classifications. But adding those classifications with only the existing narrow exemption for religious officials and organizations would leave virtually every person of faith who owns a private business without statutory protection and thus exposed to government coercion and ruinous punishment.

Any suggestion that Utah's compromise legislation ended the ongoing struggle in that state between religious-freedom advocates, on the one hand, and sexual orientation and gender identity proponents, on the other, is sorely mistaken. The legislation is not a final settlement of policy dispute. It is instead a significant step forward for sexual orientation and gender identity advocates, one that places them in a strong position to demand additional changes in the law and force religious-liberty advocates back to the bargaining table to make further concessions. After all, once the government has declared that it is illegitimate for business owners to make any distinction that implicates sexual orientation when dealing with their employees, there is no obvious justification for saying that it is appropriate for them to make those distinctions when interacting with their customers. Therefore, taking this step down the path of compromise appears to commence the inexorable spread of sexual orientation and gender identity throughout a state's nondiscrimination laws, regulations, rules, and policies. The Utah compromise is thus a needless and costly preemptive surrender in the continuing struggle to preserve religious freedom in our nation.