ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

LEGAL MEMORANDUM

DATE: January 14, 2016
RE: Legal Analysis of HB 2323

Introduction

Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for life, religious liberty, marriage, and the family. We regularly offer legal analysis of proposed laws and their effect on these areas of interest, including bills such as House Bill 2323 ("HB 2323"). As explained below, HB 2323 poses significant threats to Kansans' constitutional freedoms, as well as their privacy and safety, and exposes the State to legal and financial liability.

While originally designed to thwart invidious discrimination, many nondiscrimination laws are now being leveraged by the government to coerce compliance with a political agenda and force Americans to participate in or support events and ideas in conflict with their convictions. Ironically, few vehicles *instigate* discrimination as significantly as nondiscrimination laws that add these new classifications.

HB 2323's proposal to add sexual orientation and gender identity to protected-class status under Kansas' nondiscrimination law would unconstitutionally punish individuals and organizations that express or conduct themselves according to their beliefs, particularly their convictions about marriage or human sexuality. While some might suggest that the bill adds new language stating that citizens' religious practices should be reasonably accommodated in the employment context, this language is merely a restatement of existing employment law protections, and adds no new protections for conscience. Passage of HB 2323 would thus mark a step backwards from our nation's commitment to ensuring that freedom flourishes, and the viewpoints of all Americans are respected. Accordingly, these types of proposals do not reflect sound public policy, but instead undermine the diversity and pluralism that makes our nation unique.

The analysis below explains some of HB 2323's infirmities and the risks it poses to Kansans, which include the following:

I. HB 2323 threatens Kansans' freedom to live and work according to their convictions.

II. HB 2323's addition of "gender identity" jeopardizes citizens' constitutional privacy rights and safety, particularly for women and girls.

III. HB 2323's inclusion of "gender identity" creates a difficult and nebulous situation for employers because "gender identity" is a fluid and complex concept.

IV. HB 2323 is unnecessary because no pattern and practice of invidious discrimination toward the LGBT community exists in Kansas, and Kansans already respect each other and value the State's diversity.

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I. HB 2323 threatens Kansans' freedom to live and work according to their convictions.

People across the political spectrum agree that adding sexual orientation and gender identity to the law imperils freedom by requiring citizens to act contrary to their religious and other sincerely held beliefs regarding marriage or sexuality. If those citizens act consistently with their conscience, the government subjects them to fines, penalties, and, in some jurisdictions, jail time. Just ask Elaine Huguenin, Barronelle Stutzman, Jack Phillips, Blaine Adamson, or Cynthia Gifford. They are small-business owners that gladly serve all people, including those who identify as gay, lesbian, and transgender, but are facing government punishment because they declined to participate in or celebrate events (like weddings) that violate their conscience. And now, because of laws like HB 2323, they risk losing their businesses and, in some instances, everything they own. For example, Elaine had to close her photography business, and Barronelle, if she does not prevail in the lawsuits brought against her, will be forced to pay hundreds of thousands of dollars to the attorneys who have been prosecuting her.

If enacted, HB 2323 could be used to prosecute and punish Kansans for simply exercising their First Amendment freedom to express or conduct themselves consistently with their religious or moral beliefs, particularly their beliefs about marriage and sexuality.[1] Yet freedom of speech, freedom of association, and the free exercise of religion are the very bedrock of our peaceful and pluralistic nation.

This is why both the United States and the Kansas Constitutions protect these freedoms.[2] A long line of U.S. Supreme Court precedent establishes that the government cannot force citizens or organizations to convey or participate in messages that they deem objectionable, particularly when those messages contradict their religious convictions; nor may the government punish its citizens for declining to convey such messages.[3] Indeed, the constitutional right to free speech "includes both the right to speak freely *and the right to refrain from speaking*."[4] And the U.S. Supreme Court is not alone in acknowledging that constitutional violations often result from the extension of nondiscrimination laws. Legal scholars have also explained that the expansion of nondiscrimination laws poses a "serious threat" to constitutional rights and our nation's timeless civil liberties.[5]

That laws like HB 2323 punish those who simply seek to live and work consistent with their deeply held religious beliefs is not mere speculation. Other jurisdictions that have passed laws like

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[1] Most of the major religions in America — including many Christian denominations, Judaism, and Islam—have doctrinal beliefs about marriage and sexual behavior.

[2] *See* U.S. Const. amend. I; Kan. Const. B. of R. § 7.

[3] *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995) (government may not require a public-accommodation parade organization to facilitate the message of a gay advocacy group); *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality) (government may not require a business to include a third party's expression in its billing envelope); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (government may not require citizens to display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not require a newspaper to include a third party's writings in its editorial page).

[4] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added).

[5] *See* 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").

HB 2323 have used them as swords to force many business owners and individuals[6] to deny their convictions and comply with the government's dictates. Examples include:

- In Washington State, the State and a same-sex couple used a law like HB 2323 to sue florist Barronelle Stuztman for declining to participate in and create the floral arrangements for a same-sex couple's wedding because of her deeply held religious beliefs about marriage. Notably, Ms. Stuztman serves and employs gays and lesbians, and has happily served this particular couple for ten years, including providing flowers for them for Valentine's Day. But she is being sued under a law like HB 2323 to force her to violate her religious beliefs about marriage, even though the couple easily found many other florists eager to assist them. Barronelle now stands to lose everything she owns and her life savings simply because she was unable to support one expressive event.[7]

- A law like HB 2323 permitted a same-sex couple to sue Elaine Huguenin, a young photographer in New Mexico, when she respectfully declined to photograph a same-sex couple's commitment ceremony because of her religious beliefs about marriage. Although the couple easily found another photographer, they took legal action against this young woman, seeking to compel her to commemorate their event. The government declared that Elaine must violate her faith, and the New Mexico Supreme Court upheld that decision.[8]

- A law like HB 2323 enabled a same-sex couple to successfully sue a Colorado cake artist because his religious beliefs prevent him from creating and designing a cake to celebrate their wedding.[9]

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[6] People of faith who operate for-profit businesses are religious actors entitled to legal protection. *See generally* Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. (forthcoming fall 2013), *available at* Social Science Research Network, http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2244611_code290226.pdf?abstractid=2229632&mirid=1 (last visited Aug. 9, 2015) ("Denying religious liberty rights in the profit-making context requires treating religion as a special and disfavored activity at every turn. Businesses would have to be deemed able to act on subjective motivations about ethics, the environment and other non-financial beliefs, but unable to act on beliefs about religion. . . . There is no principled or permissible reason to treat religious exercise in this specially disfavored manner. Doing so turns religious liberty law on its head, singling out religious exercise for special burdens rather than special protections. The government has no such power to discriminate against acts on the basis of the religious motivation behind those acts."); Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 217-18 (2010) ("[Religious adherents] cannot live out the all-encompassing commitment of belief simply in private worship. . . . Nor can committed religious believers easily leave their faith behind when they enter the economic marketplace. As Eugene Volokh has argued, 'people spend more of their waking hours [in the workplace] than anywhere else except (possibly) their homes'; to block religious moral precepts and influences from operating in this arena 'ignores the reality of people's social and political lives.' I have discussed elsewhere how government must be careful not to act on the premise, explicit or implicit, that 'religion should not be part of business affairs.'"); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (finding that a family-owned for-profit corporation "has standing to assert the free exercise rights of its owners").

[7] *See* http://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman (last visited Jan. 7, 2016) for more information about Barronelle Stutzman and Arlene's Flowers, including links to relevant legal documents. The case is currently on direct appeal to the Washington State Supreme Court.

[8] *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014), *available at* https://adflegal.blob.core.windows.net/web-content-dev/documents/elane-photography-v-willock---new-mexico-supreme-court-opinion.pdf?sfvrsn=6 (last visited Aug. 8, 2015).

[9] *See* http://www.adflegal.org/detailspages/case-details/masterpiece-cakeshop-v.-craig (last visited Aug. 9, 2015) for more information and relevant legal documents.

- Landlords and bed-and-breakfast owners who believe that they would violate their religious beliefs if they allowed unmarried couples to cohabitate on their property have been sued under laws like HB 2323.[10]

- A California court found that physicians whose religious beliefs forbid them from providing an elective fertility procedure for an unmarried woman in a same-sex relationship violated a law like HB 2323.[11]

- Government officials who have adopted laws and policies like HB 2323 have declared that counseling students may not decline to provide counseling that affirms same-sex relationships, even if providing counseling under those circumstances would violate their religious beliefs.[12]

- Statutory provisions like HB 2323 have forced child-welfare and adoption organizations to close simply because they place children only with a married mother and father.[13] These actions harmed the community by reducing the pool of qualified adoption service providers.[14]

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[10] *See State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (analyzing a marital-status-discrimination claim against a landlord who refused to rent to unmarried couples because of a religious conviction against allowing unmarried cohabitation on the property); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same); *McCready v. Hoffius*, Case Nos. 94-69473-CH, 94-69472-CH, Opinion and Order (Mich. Cir. Ct. Dec. 6, 2000) (same).

[11] *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959 (Cal. 2008).

[12] *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012) (ruling against a public university that dismissed a counseling student because, according to the university, her religious need to refer prospective clients who sought counseling affirming their same-sex relationships 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.").

[13] *See, e.g.*, Father Robert J. Carr, *Boston's Catholic Charities to stop adoption service over same-sex law*, Catholic Online (Mar. 10, 2006), http://www.catholic.org/national/national_story.php?id= 19017 (last visited Dec. 3, 2015) ("Catholic Charities in Boston announced March 10 that it is getting out of the adoption business."); Laurie Goodstein, *Illinois Catholic Charities close over adoption rule*, The Boston Globe (Dec. 29, 2011), http://www.bostonglobe.com/news/nation/2011/12/29/illinois-catholic-charities-close-rather-than-allow-same-sex-couples-adopt-children/Km9RBLkpKzABNLJbUGhvJM/story.html (last visited Dec. 3, 2015) ("[M]ost of the Catholic Charities affiliates in Illinois are closing down rather than comply with a new requirement that says they can no longer receive state money if they turn away same-sex couples as potential foster care and adoptive parents."); Julia Duin, *Catholics end D.C. foster-care program*, Washington Times (Feb. 18, 2010), http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/ (last visited Dec. 3, 2015) ("The Archdiocese of Washington's decision to drop its foster care program is the first casualty of the District of Columbia's . . . same-sex marriage law."). *See also Butler* v. *Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1056-57 (N.D. Cal. 2007) (refusing to dismiss a sexual-orientation-discrimination claim against the largest online adoption website in the United States because the website's owners had a religiously based policy against placing children with unmarried couples); Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 77, 78-79 (Laycock et al. eds., 2008) ("In 2004, Adoption.com, the largest Internet adoption site in the United States, refused to post the profile of a same-sex couple seeking to adopt. . . . The couple sued, claiming the refusal violated California's nondiscrimination law . . . . The parties subsequently settled the private litigation between them. That settlement required in part that Adoption.com and its sister organizations[] would not post profiles of California residents . . . . Put to the choice to make its services available to all or none, Adoption.com chose to leave the California market."); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing in detail the Adoption.com case and other clashes between religious liberty and same-sex adoption).

[14] There is no need to force all child-welfare agencies to place children with same-sex couples because such organizations are already committed to doing so in Kansas. *See, e.g.*, Adoption and Counseling Services for Families

As these examples demonstrate, HB 2323 would violate constitutionally protected freedoms in many of its applications. Indeed, a Kentucky court recently held that a law similar to HB 2323 was unconstitutional when applied to a business owner who declined to promote a message in conflict with his conscience.[15] HB 2323 suffers from the same constitutional infirmities as the Lexington law because it too strips citizens of their constitutional freedoms and authorizes the government to coerce Kansans to create speech or participate in events against their conscience. HB 2323 thus places the State at risk of costly lawsuits for which it may be liable to pay the attorneys' fees of the parties that sue it.[16]

It is important to recognize that, contrary to the assertions of proponents of these types of laws, the vast majority of businesses, including those owned by people of faith, already happily serve all customers, including those who identify as gay, lesbian, and transgender. Indeed, Kansas does not have a pattern of invidious discrimination against such people. Equally as critical to recognize is the key distinction between serving everyone, on the one hand, and celebrating every event or promoting every message one is asked to facilitate on the other hand. Naturally, some business owners, because of their convictions, are unable to facilitate, celebrate, or promote certain messages or expressive events, such as a wedding ceremony. Every individual should be free to determine which events or messages they will support.

Yet HB 2323 would present many individuals and organizations with an untenable choice: violate your conscience, or close your doors. Given the importance and centrality of principles to these individuals, it is likely that most will be unwilling to violate their conscience, thereby eliminating business, revenue, tax dollars, and employment opportunities from Kansas. Accordingly, any measure that fails to be fair to all citizens and makes the cost of doing business in America the conscience of its owners should be rejected.[17]

(http://www.adoptionandcounselingservices.com/index.html) (last visited Jan. 13, 2016); and American Adoptions (http://www.americanadoptions.com/adoption_frequently_asked_questions#30) (last visited Jan. 13, 2016).

[15] *Hands On Originals v. Lexington-Fayette Urban County Human Rights Comm'n*, No. 14-CI-04474, slip op. (Fayette Cir. Ct. April 27, 2015).

[16] Federal law provides a civil action against state and local governments for the deprivation of federal constitutional rights. This means that private citizens may sue state and local governments in federal court when they believe their constitutional rights are being infringed. And when those lawsuits are successful, federal law allows courts to order the government to pay for the challengers' attorneys. *See* 42 U.S.C. §§ 1983, 1988 (providing that persons who successfully demonstrate that a state or local law is unconstitutional under the Constitution of the United States may recover costs and attorneys' fees). *See also* Martin A. Schwartz, *Attorney's Fees in Civil Rights Cases – October 2009 Term*, 27 TOURO L. REV. 1 (October 19, 2011), *available at* http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1041&context=lawreview (last visited Nov. 19, 2015). *See also Attorneys' Fees in Federal Civil Rights Lawsuits Part One*, 2011 (4) AELE MO. L. J. 101, 103-04 (April 2011) (noting that the U.S. Supreme Court upheld an attorney fee award of $245,456.25 in a fairly routine, "modest case"), *available at* http://www.aele.org/law/2011all04/2011-04MLJ101.pdf (last visited Nov. 19, 2015).

[17] 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.").

II. HB 2323's addition of "gender identity" jeopardizes citizens' constitutional privacy rights and safety, particularly for women and girls.

HB 2323 also would violate the privacy rights of individuals and present significant public-safety risks by placing into Kansas law the ambiguous legal concept of "gender identity."[18] According to the proposed legislation, gender identity is determined by a person's identity or self-image, regardless of the individual's designated sex at birth; it is thus an internally conceived and objectively unverifiable characteristic.[19] HB 2323 will require businesses and places open to the general public[20] to allow anyone to enter sex-specific facilities, regardless of whether they appear to be a member of the opposite biological sex. Even if a person appears to be a man, if that individual believes his "self image" is a woman—or even both a man and a woman at the same time—he could use the women's restroom, locker room, showers, etc. at any time if HB 2323 is enacted. And the business, school, or public place could face a lawsuit or punishment should it try to stop him, or protect the women and girls inside the bathroom.[21]

But laws that allow biological males into restrooms or locker rooms used by biological females likely violate constitutional privacy rights. While one of these laws has yet to be challenged in court, there are federal appellate court decisions holding that individuals in various states of undress have a constitutional right to privacy. The Second Circuit Court of Appeals, for example, has noted that "[t]he privacy interest entitled to protection concerns the involuntary viewing of private parts of the body by members of the opposite sex."[22] And many other courts have held that the government violates the right to privacy when its policies require someone to be undressed in the presence of members of the opposite biological sex.[23] For instance, the Tenth Circuit Court of Appeals has

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[18] HB 2323 defines "gender identity" as "having or expressing a self image or identity not traditionally associated with one's gender . . ."

[19] *See* Shuvo Ghosh, *Gender Identity*, eMedicine, http://emedicine.medscape.com/article/917990-overview (last visited Aug. 7, 2015).

[20] Courts have consistently construed "public accommodation" to include bathrooms, locker rooms, and similar facilities. *See, e.g.*, *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 601 (Me. 2014) (agreeing that Maine's public accommodation law includes public bathrooms, even though they are not mentioned in the statute); *Kalani v. Castle Vill. LLC*, 14 F. Supp. 3d 1359 (E.D. Cal. 2014) (construing "public accommodation" under the Americans With Disabilities Act (ADA) to include a business's restrooms); *Kreisler v. Second Ave. Diner Corp.*, No. 10 CIV. 7592 RJS, 2012 WL 3961304, at *7 (S.D.N.Y. Sept. 11, 2012) *aff'd*, 731 F.3d 184 (2d Cir. 2013) (noting that restrooms are within the public accommodation provision of the ADA); *Urhausen v. Longs Drug Stores California, Inc.*, 155 Cal. App. 4th 254, 65 Cal. Rptr. 3d 838 (2007) (construing the California Disabled Persons Act to include bathrooms within public accommodations); *Bilello v. Kum & Go, LLC*, 374 F.3d 656 (8th Cir. 2004) (dismissing plaintiff's claim arising under the state public accommodations nondiscrimination law for want of jurisdiction and lack of standing, while seemingly accepting plaintiff's contention that "facilities" includes "bathrooms"); *Small v. Dellis*, No. CIV. AMD 96-3190, 1997 WL 853515, at *1 (D. Md. Dec. 18, 1997) *aff'd*, 211 F.3d 1265 (4th Cir. 2000) (noting that APA applies to restrooms).

[21] Sec. 7. K.S.A. 44-1009 (9)(B)(c) makes it unlawful for "the owner, operator, lessee, manager, agent or employee of any place of public accommodation to refuse, deny or make a distinction, directly or indirectly, in offering its goods, services, facilities, and accommodations to any person as covered by this act because of . . . sexual orientation or gender identity."

[22] *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980).

[23] *See, e.g.*, *Hill v. McKinley*, 311 F.3d 899 (8th Cir. 2002) (constitutional right to privacy violated when female prisoner was left unclothed and potentially could be viewed by male guards); *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993) (depending on the facts, a prisoner may state claim for violation of constitutional right to privacy where he is required to be nude in presence of female guards); *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992) (male prisoner states claim for violation of right to privacy when he was subjected to strip search in presence of female guards); *Johnathan Lee X v. Gulmatico*, 932 F.2d 963 (4th Cir. 1991) (prisoner states claim for violation of right to privacy when female guards are

recognized that the constitutional privacy rights of a male prisoner can be violated when prison officials allow female guards to view the prisoner showering and using the toilet.[24] Similarly, a federal district court held that female prisoners' privacy rights were violated when government officials allowed male prisoners and deputies to peer into the cells occupied by female prisoners and view their toilets.[25]

These cases are instructive because HB 2323 would almost certainly allow biological males to be in the presence of females while they are in partial or total states of undress (and vice versa). As the Ninth Circuit Court of Appeals explained, "[s]hielding one's unclothed figure from the view of strangers, *particularly strangers of the opposite sex*, is impelled by elementary self-respect and personal dignity."[26] Those who object to the presence of the other biological sex within facilities designated for their sex will likely be able to assert a claim against the State for violating their constitutional right to privacy.[27]

Furthermore, laws like HB 2323 jeopardize the safety interests of citizens, particularly women and children. Consider a disturbing incident that took place in Dallas in 2012. Paul Witherspoon, who now goes by "Paula," is a registered sex offender, and has been convicted of sexual assault against a young girl and indecency involving sexual contact with another girl. In 2012, Witherspoon was reported to the police in Dallas because he was in the women's bathroom, where he could have access to young girls. He was ticketed by a Dallas policeman. But because Witherspoon now presents as a woman, his Lambda Legal attorney asserted that, under the Dallas gender identity law very similar to HB 2323, Witherspoon had every right to use the bathroom with women and young girls.[28]

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stationed near showers and can observe the prisoner showering); *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987) (assuming without deciding that inmates retain a constitutional right to privacy and that an allegation that the prison allows females to observe males showering states such a claim); *Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982) (allowing female guards to view male prisoners showering and using the toilet may violate constitutional privacy rights); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (constitutional right to privacy violated where female inmate's undergarments were removed by female nurse but with male guard present); *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (constitutional right to privacy was violated where male police officer asked woman complaining of assault to undress, examined her, and photographed her in indecent positions); *In re Long*, 55 Cal. App. 3d 788, 127 Cal. Rptr. 732 (Ct. App. 1976) (state lacked sufficient justification for privacy violation that resulted from allowing females to observe male toilet and shower areas at a youth correctional facility). *But see Petty v. Johnson*, 193 F.3d 518 (5th Cir. 1999) (holding that there was no violation of male prisoners' right to privacy where prison allows female guards to observe them showering); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir.1985) (use of female guards to supervise showering does not violate male inmates' right to privacy).

[24] *Cumbey*, 684 F.2d 712.

[25] *Dawson v. Kendrick*, 527 F. Supp. 1252 (S.D.W. Va. 1981).

[26] *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (emphasis added). *See also York*, 324 F.2d at 455 ("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.").

[27] Even though the courts that have considered this issue in the prisoner context have noted that those who are incarcerated are not entitled to a full application of this constitutional right because their privacy interests must yield when necessary to maintain security, *see Cumbey*, 684 F.2d at 714, many of those courts have nevertheless concluded that the prisoners' privacy rights have been violated. This underscores the seriousness of this issue for the State. Indeed, courts will likely be far more sympathetic to non-incarcerated persons who have full privacy rights, such as an elderly woman who objects to encountering biological males in public restrooms or a teenage girl who does not want biological males showering with her at the local swimming pool.

[28] *See* Ray Villeda, "Transgender Woman: Convictions Irrelevant to Citation: Witherspoon convicted in 1990 for sexual assault of child, indecency with child," *NBCDFW* (May 12, 2012), *available at*

HB 2323 would allow similar events to take place and, in that way, jeopardizes citizens' reasonable privacy interest and safety concerns. This is not the kind of policy that any state should create for its citizens.

III. HB 2323's inclusion of "gender identity" creates a difficult and nebulous situation for employers because "gender identity" is a fluid and complex concept.

HB 2323 requires employers to avoid doing anything that might disparately impact employees who have a "self-image" that does not correspond to their biological sex. If this law were enacted, for example, an employer could believe she is talking to a man based on his appearance, but if the man believes he's actually a woman, and the employer acts according to her belief that he is a man, she could face a lawsuit for discriminating based on gender identity. These laws thus threaten small-business owners with devastating financial liability for actions based not on objective traits, but on subjective and unverifiable identities. As explained below, this puts employers in compromising positions, which may result in unreasonable lawsuits that increase their cost of doing business.

Many people think that there are only two gender identities—male and female. But proponents of gender-identity theory recognize many more than that. For example, Facebook now lists 58 different options for gender. These include designations such as "Cis Man," "Cis Male," and "Cisgender Male" (as well as the female forms of these designations). One can also identify as "Trans Female," "Trans* Female," or Trans Woman (or the male forms of these designations). Or there is "Bigender," "Agender," "Androgynous," "Androgyne," "Neutrois," and "Two-Spirit."[29] Google has gone further, suggesting that there are an "infinite" number of possibilities for one's gender identity.[30]

Moreover, proponents of laws like HB 2323 believe that gender identity varies for some people over time.[31] There are even accounts of some individuals who have taken extreme steps to change their identity only to regret the change and seek to undo it.[32] HB 2323 will require employers to try to

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http://www.nbcdfw.com/news/local/Transgender-Woman-Convictions-Irrelevant-to-Citation-149923975.html (last visited Jan. 7, 2016).

[29] *See, e.g.*, Russell Goldman, "Here's a List of 58 Gender Options for Facebook Users," ABC News, February 14, 2014, *available at* http://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users/ (last visited Nov. 19, 2016) (listing the various gender identity options from which Facebook users may choose).

[30] Eliana Dockterman, "Google+ Offers Infinite Gender Options," Time, December 11, 2014, *available at* http://time.com/3630012/google-infinite-gender-options/ (last visited Jan. 8, 2016).

[31] *See* Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. CL. & CR. 101, 104 (2006) (noting that "individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.").

[32] *See* Jay Akbar, "The man who's had TWO sex changes," *Daily Mail*, January 26, 2015, *available at* http://www.dailymail.co.uk/news/article-2921528/The-man-s-TWO-sex-changes-Incredible-story-Walt-Laura-REVERSED-operation-believes-surgeons-quick-operate.html (last visited Nov. 4, 2015); "MTV True Life: Transgender Teens change their minds as adults," *GenderTrender*, April 5, 2013, *available at* https://gendertrender.wordpress.com/2013/04/05/mtv-true-life-transgender-teens-change-their-minds-as-adults/ (last visited Nov. 4, 2015); Peter Dyke, "'I feel like I'm about to explode:' Kellie Maloney admits she hates being a woman," *Daily Star*, August 23, 2014, *available at* http://www.dailystar.co.uk/tv/big-brother/395909/Kellie-Maloney-wants-to-change-back (last visited Nov. 4, 2015); Stelia Morabito, "Trouble in Transtopia: Murmurs of Sex Change Regret," *The Federalist.com*, November 11, 2014, *available at* http://thefederalist.com/2014/11/11/trouble-in-transtopia-murmurs-of-sex-change-regret/ (chronicling the stories of several who have regretted their sex reassignment surgeries) (last visited Nov.

discern, understand, and honor all of the many different genders with which their employees might identify, and to avoid making employees feel that they are being in any way discriminated against because of their identity. Yet few people know what the numerous gender identity terms mean or how to identify or even differentiate between them. Thus, enacting a law like HB 2323 is likely to lead to unreasonable litigation because it implements standards that are impossible for employers to understand—let alone comply.

IV. HB 2323 is unnecessary because no pattern and practice of invidious discrimination toward the LGBT community exists in Kansas, and Kansans already respect each other and value the State's diversity.

Laws like HB 2323 are supposed fixes 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. Indeed, no evidence indicates that there is a systemic pattern and practice of invidious discrimination in Kansas that might justify the addition of these classifications to its nondiscrimination law.[33] It would thus be imprudent to impose a law with a demonstrated history of overriding citizens' liberty and constitutional freedoms when no real problem needs to be addressed.

Historically, nondiscrimination laws in the United States have sought to address systemic and intractable instances of invidious discrimination. For example, Congress enacted the Civil Rights Act of 1964 because entire parts of the country were closed to African Americans.[34] As one legal scholar has noted: "Civil rights laws were enacted against a background of devastating and widespread discrimination[.]"[35] Segregation, and institutionalized white-supremacy, was the law of the land in a

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4, 2015); Grace Murana, "8 Amazing Stories of Reverse Sex Change," *Oddee*, January 29, 2015, *available at* http://www.oddee.com/item_99220.aspx (same) (last visited Nov. 4, 2015); Tara Palmeri, "I'm a guy again! ABC newsman who switched genders wants to switch back," *NYPost*, August 6, 2013, *available at* http://nypost.com/2013/08/06/im-a-guy-again-abc-newsman-who-switched-genders-wants-to-switch-back/ (last visited Nov. 4, 2015); Helen Weathers, "A British tycoon and father of two has been a man and a woman . . . and a man again . . . and knows which sex he'd rather be," *Daily Mail*, *available at* http://www.dailymail.co.uk/femail/article-1026392/A-British-tycoon-father-man-woman---man---knows-hed-be.html (last visited Nov. 4, 2015); Amanda Williams, "I want a sex change . . . again," *Daily Mail*, October 1, 2014, *available at* http://www.dailymail.co.uk/news/article-2776090/Transsexual-10-000-surgery-NHS-wants-man-again.html#ixzz3F1MqvaOt (last visited Nov. 4, 2015).

[33] For example, a recent public records request to the City of Bloomington, IN, which added sexual orientation and gender identity to its nondiscrimination law in 2010, found that from January 1, 2010 through November 1, 2015, the Bloomington Human Rights Commission received (1) one complaint alleging sexual orientation discrimination in employment but not supported by probable cause, (2) no complaints alleging sexual orientation discrimination in public accommodations, (3) one complaint alleging sexual orientation discrimination in housing but not supported by probable cause, (4) no complaints alleging gender identity discrimination in employment, and (5) one complaint alleging gender identity discrimination in public accommodations and housing but not supported by probable cause. These results are consistent with public records requests filed in other jurisdictions.

[34] *See, e.g.*, Steven G. Anderson, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1220 (1992) ("Prior to the passage of the Civil Rights Act of 1964, racial discrimination was widespread and seemingly overt."); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 425 (2010) (noting that at the time of the passage of the Civil Rights Act of 1964 and shortly thereafter, "the presumption was one of widespread discrimination"); Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 512 (1995) (noting that at the time of the passage of the Age Discrimination in Employment Act (ADEA), there was documented "widespread age discrimination in the workplace").

[35] Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 406-07 (1994).

number of states.[36] In large swaths of the nation, black Americans were denied the opportunity to vote, excluded from the skilled trades, and denied access to many hotels, restaurants, and theaters.[37] Their children were forced to attend inferior segregated schools.[38] They were met with attack dogs, cattle prods, and batons if they attempted to protest. The system of racial discrimination known as "Jim Crow" was pervasive, and it was designed to prevent black Americans from taking part in American society. It was against this backdrop, where "[i]nvidious discrimination was ubiquitous throughout the country," that Congress enacted the Civil Rights Act of 1964.[39]

For similar reasons, in 1990 Congress enacted the Americans With Disabilities Act, a law that prohibits employers and places of public accommodation from discriminating against people because of a disability. Congress enacted that law because it determined that there was a pattern of widespread invidious discrimination against people with disabilities.[40] "[W]ell-catalogued"[41] evidence demonstrated that such discrimination was occurring.[42] Congress found that 8.2 million disabled people wanted to work but had been excluded from the job market because of their disability.[43] And even those who were able to find work typically were unable to obtain employment on equal terms with the non-disabled. In fact, a 1989 U.S. Census Bureau study revealed that disabled men earned 36 percent less, and disabled women earned 38 percent less, than their non-disabled counterparts.[44] This discrimination was both "serious" and "pervasive."[45]

But discrimination of this nature towards those who identify as gay, lesbian, bisexual, or transgender is simply absent in America, including in Kansas. All people, including those who identify as gay, lesbian, bisexual, or transgender, are welcome as neighbors, patrons, and friends. Indeed, the business community is voluntarily hiring and serving everyone fairly and equally.[46] The

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[36] *See* John Valery White, *Brown v. Board of Education and the Origins of the Activist Insecurity in Civil Rights Law*, 28 OHIO N.U. L. REV. 303, 361 (2002) ("[S]egregation was the widespread order, not only in the South where most black Americans still lived but everywhere substantial numbers of black Americans lived, some degree of separation of the races was memorialized in practice and law."). *See also Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 228 (1973) ("The history of state-imposed segregation is [] widespread in our country[.]")

[37] Michael J. Fellows, *Civil Rights – Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387, 395 (2004).

[38] *Id*.

[39] Fellows, *Civil Rights – Shades of Race*, 26 W. NEW ENG. L. REV. at 397.

[40] Harvard Law Review, *I. Constitutional Law A. Constitutional Structure*, 114 HARV. L. REV. 179, 187 (2000).

[41] *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

[42] Lowell P.Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 390 (1991) (explaining that a 1986 Harris poll demonstrated widespread discrimination against disabled people).

[43] Molly M. Joyce, *Has the Americans with Disabilities Act Fallen on Deaf Ears? A Post-Sutton Analysis of Mitigating Measures in the Seventh Circuit*, 77 CHI.-KENT L. REV. 1389, 1393 (2002).

[44] *Id*.

[45] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 416 (1991) (*quoting* U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983) at 159).

[46] This is not to suggest that there might not be rare instances of real or apparent discrimination. But nondiscrimination laws are intended to address instances of systemic and intractable discrimination. Moreover, a survey of the Fortune 500 companies in Kansas, *see* Caitlin Dempsey Morais, "Fortune 500 List by State for 2015," *Geo Lounge* (Jul. 28, 2015), *available at* http://www.geolounge.com/fortune-500-list-by-state-for-2015/ (last visited Jan. 13, 2016), demonstrates that most companies voluntarily include sexual orientation and gender identity in their equal employment opportunity policies. See, *e.g.*, Sprint (https://careersearch.sprint.com/1033/ASP/TG/cim_home.asp?partnerid=11480&siteid=5138) (last visited Jan. 13, 2016); and Spirit AeroSystems (http://www.spiritaero.com/careers/u-s-jobs/) (last visited Jan. 13, 2016).

people of Kansas are already treating one another with dignity and respect. This change to the nondiscrimination law is simply not needed.

In light of this, many cities and states that have recently considered adding sexual orientation and gender identity to their nondiscrimination statutes have declined to do so. For example, in 2015 alone, the legislatures of Idaho, Wyoming, Missouri, Pennsylvania, Nebraska, and North Dakota declined to add these new categories because, among other things, they recognized that their states are already respectful places and that these laws threaten the freedoms of many. In 2014 and 2015, the same decision was made by at least eleven city governments, including Charlotte, North Carolina, and Glendale, Arizona (which hosted the Super Bowl in 2015).[47] Also, voters in many cities—including Springfield, Missouri (in April 2015), and Houston, Texas (in November 2015)—have recently repealed the addition of these classifications. In short, people across the nation are increasingly recognizing that these laws do not reflect wise public policy and thus declining to enact them.

Conclusion

HB 2323 raises many constitutional concerns. It could be used to compel individuals and businesses to speak messages and participate in events that violate their conscience. It will also force public businesses to open their bathrooms and other facilities to both sexes—creating situations that will violate citizens' privacy rights and endanger their safety. In short, it is a dangerous policy that addresses no real problem but instead invites the government to intrude on citizens' freedom to live and work according to their convictions. Elected leaders should be wary of chipping away at fundamental freedoms, for when one is undone, the others become all the more vulnerable.

[47] Other cities include Owensboro, Kentucky (August 2014); Dillon, Montana (September 2014); Berea, Kentucky (October 2014); Fountain Hills, Arizona (November 2014); Beckley, West Virginia (December 2014); Bardstown, Kentucky (March 2015); Scottsdale, Arizona (March 2015); Elkhart, Indiana (July 2015); and Goshen, Indiana (August 2015).