



January 14, 2016

Chairman John Barker
Judiciary Committee
Kansas Legislature
Topeka Kansas

Mr. Chairman and Committee,

Introduction

House bill 2323 seeks to add ambiguous concepts such as “sexual orientation” and “gender identity” (SOGI) as protected categories in Kansas’ existing statutes. This would represent an unprecedented change in Kansas law, assigning legal protections to individuals who are inclined, practice, or express themselves in an actual or perceived particular sexual orientation, or express themselves in a way that is “non traditional” as it relates to their gender.

The other categories currently protected from discrimination are typically easy to visually discern, or verifiable with past evidence. Neither sexual orientation or gender identity are immutable, or can be discerned or perceived by appearances.

While it is appropriate to protect men and women as a class from discrimination, it is inappropriate to protect their particular behavior, practice, expression or self image. Actions, practices and expressions are personal preferences that are subject to change by a person’s will and are not immutable.

The inclusion of these personal preferences as protected classes **lacks any scientific or statistical support, is not necessary, and creates a serious legal concern** for business owners as well as the state, and is **contrary to the First Amendment of the U.S. Constitution.**

Lacks Scientific Support

“Sexual Orientation” is a construct that includes attractions, thoughts, desires, intentions, fantasies, actions and identity. “Gender identity” should be as simple as whether people describe themselves as male or female. Today, however, it can include combinations of the two primary genders and an infinite number of other “genders” in-between. For example: It has been reported on the popular social media site Facebook that more than 50 identities exist based on

4021 SW 10th Street, Suite 311
Topeka, KS 66604

P 316.993.3900

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combinations of sexual orientation and gender identity that people can choose to self-identify as. No scientific test can distinguish a person's self described gender identity or sexual orientation as can be done with gender, race, nationality or even age.

Defining legal protections based on individual behaviors or perceptions greatly departs from traditional nondiscrimination law and creates a system subject to easy manipulation. By including "gender identity" as a protected class in anti-discrimination statutes, Kansas would also be including "Gender Dysphoria," also known as "Gender Identity Disorder" (GID), into the statutes. Gender Dysphoria is a clear and diagnosable mental disorder¹ and its inclusion as a protected class has created legal, safety and privacy problems for those areas that have passed SOGI protections. For example:

1. In Washington State, a high school girls' swim team was using the pool and other facilities at Evergreen State College. There, they encountered a naked man who identifies as transgender yet still possesses a male's anatomy. The college's non-discrimination policy keeps them from barring the man from the women's facilities. As a result, the girls' swim team was relegated to using a smaller, auxiliary locker and changing room.
2. In Maine, another biological male, wearing women's clothing, makeup and jewelry started using the women's restroom at a Denny's. After patrons complained and he was told to use the men's room, he sued and won the right for himself – and any person who claims to be transgendered – to use whatever bathroom was consistent with his gender identity at a particular time.
3. In New York, a woman on hormone therapy who had been living as a man attempted to use the men's locker room at a public pool in Staten Island. When asked to leave, she claimed she was "harassed and humiliated" and filed suit against the city.

Evidence demonstrates that some individuals change their "sexual orientation" over the course of a lifetime, both spontaneously and deliberately. Again, there is no scientific test or outward indication that would alert anyone as to another person's sexual orientation or gender identity, either in practice or in court, making it impossible to discern or perceive their preferred sexual orientation.

There is also a decided lack of scientific evidence to provide a basis for sexual orientation protection. In 2008, the American Psychological Association acknowledged the absence of a biological link to homosexual behavior, and admitted that such behavior is a choice that is impacted by many factors.² To include such fluid and malleable categories in discrimination law is an invitation to abuse and manipulation by any individual. This further opens up the state and businesses to lawsuits by offended individuals whose privacy and safety have been violated.

Amending the Statutes is Not Necessary

There is no evidence of a problem that needs a statutory solution through this bill. Kansas is a highly tolerant and accepting state. There is no preponderance of evidence that “sexual orientation discrimination” is a problem in our state. As demonstrated earlier, however, the mere inclusion of this language into the Kansas statutes would open the door to such legal and legislative issues, forcing business owners and state agencies to go on the defensive against alleged offenses. Current law already prohibits sex discrimination and sexual harassment. Current law prohibits business owners from allowing issues of sexuality to become relevant in the workplace. This bill would therefore be redundant of existing protections, while removing common sense elements from the treatment of sexes as unique and different.

In the free-market system, businesses respond to market pressures and adopt policies as needs arise. I would encourage the Kansas legislature to do the same, and not pass laws or amend them without a clear and present need to do so.

In addition, there is a complete failure to identify how the state would plan to implement these new categories into law, while giving appropriate consideration for the concerns of others whose rights to privacy and other freedoms will be impacted. The citizens possess unequivocal rights of privacy as well as the right to enforce their entitlement to privacy; this is an important yet ignored consideration in the bill.

Creates Serious Legal Concern for Business Owners

By example, personal privacy rights specifically protect individuals in restrooms facilities from having their bodies exposed to members of the opposite sex.³ The bill purports to protect everyone on the basis of numerous sexual inclinations including that which is perceived to be their sex at any given time. This qualifies everyone as a potential victim and potential plaintiff with or without verifiable cause. If this bill becomes law, employers must be cognizant of their employees' varying sexual preferences or perceived sexual identity in order to stay vigilant with regard to potential "sexual orientation" claims. This is an impossible task.

Given that sexual orientation and gender identity are neither immutable nor uniform; neither measurable nor discernable by physical characteristic; all private and public entities that are subject to this bill will have absolutely no method for objectively assessing an individual's "sexual orientation or gender identity." As a result, business and state entities will be exposed to unfounded charges of discrimination.

Beyond opening the door to any number of potential lawsuits, amending these statutes to include SOGI protections would severely disadvantage employers and others trying to defend against such claims. An employer who has a biologically male employee who self-identifies as "bi-gender"⁴ must allow him to use any restroom or locker room he pleases or face a discrimination lawsuit. At the same time, that employer could find itself fending off a lawsuit from female employees who object to having to expose their bodies before a man. Before attempting to provide unnecessary protections for "gender identity" and "sexual orientation" in the state's anti-discrimination statutes, the legislature should carefully consider an answer to such legal conundrums that are likely to arise as a result.

Inclusion of SOGI in Anti-Discrimination Runs Afoul of the First Amendment

The First Amendment of the U.S. Constitution protects freedom of religion, speech and association. Section 60-5302 and 5303 of the Kansas statutes provides an even greater guarantee of religious liberty. Including SOGI protections into anti-discrimination law would infringe on those rights. The United States Supreme Court has overruled decisions of states who claimed that private organizations have engaged in sexual orientation discrimination.⁵

There are many religious individuals who adhere to certain moral precepts regarding sexual behavior. Most of these belong to the largest religious groups in the world comprising more than 3-4 billion individuals. Accordingly, religiously motivated business owners and individuals are constitutionally and statutorily protected from having to hire particular individuals to do certain tasks and to refrain from offering their services under particular circumstances. An example would include protecting store owners who refuse to sell sexually explicit magazines which violate their religious beliefs. We have all heard about the cake bakers, florists, photographers, and others who have lost their businesses and their life savings by simply adhering to their sincerely held religious beliefs. Amending Kansas anti-discrimination statutes would bring these religious values into direct conflict with the law, and create a fundamental clash with the state's own constitution which states

6“We, the people of Kansas, grateful to Almighty God for our civil and religious privileges, in order to insure the full enjoyment of our rights as American citizens, do ordain and establish this constitution of the state of Kansas,”

¹ “Gender dysphoria,” National Institutes of Health, (<http://www.nlm.nih.gov/medlineplus/ency/article/001527.htm>)(from January 23, 2015).

² ; <http://www.apa.org/topics/orientation.pdf> <http://www.narth.com/docs/deemphasizes.html>

³ Lee v. Downs, 641 F.2d 1117 (4th Cir. 1981)

⁴ “Here’s a list of 58 Gender Options for Facebook Users” ABC News, <http://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users/>(from January 23, 2015)

⁵ Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

⁶ Preamble to the Kansas Constitution

some information provided by Citizenlink, Focus on the Family, Alliance Defending Freedom, Family Research Council