

Kansas SOGI Testimony

- Thank you and good afternoon Mr. Chairman, and Members of the Committee. My name is Kellie Fiedorek, and I am Legal Counsel with Alliance Defending Freedom, which litigates and provides legal advice to legislative bodies such as yourself on civil rights issues throughout the country. I appreciate the opportunity to speak with you today regarding the legal problems and other shortcomings of HB 2323.
- I want to start today by telling you the stories of one of my clients who is currently being punished and sued as a result of laws like HB 2323.
- **Barronelle Stutzman**, a 72 year old grandmother and mother of eight—owns a floral shop called Arlene's Flowers. For 40 years, she has welcomed lovingly everyone into her store—regardless of who they are. Barronelle has had designers and friends and customers who are gay and straight, and each one of them always receives her warm smile, caring attitude, and exceptional floral skills.
- A small business woman, she's also provided jobs to the Tri-Cities community—and has employed those who are gay, straight, and bisexual.
- This is because for Barronelle, sexual orientation doesn't matter.
- But she's being sued by the State of Washington's Attorney General, and, if she loses her case, she won't just lose her business, she could lose almost everything she owns—her home, her life savings, everything.
- What happened? Barronelle met Rob Ingersoll nearly 10 years ago. Barronelle enjoyed Rob and knew he identified as gay; Rob enjoyed Barronelle and knew she was a woman of faith. She has created arrangements for Rob and his partner, Curt, for all kinds of occasions—anniversaries, birthdays, Valentine's Day. . .
- In 2013, a couple months after Washington redefined marriage, Rob asked Barronelle to create floral arrangements for his same-sex wedding. But Barronelle believes that marriage is a sacred covenant. To use her artistic

talents to participate in and celebrate a same-sex ceremony would violate her religious convictions.

- So Barronelle referred him to another florist whom she knew would do a good job. The two then talked about how Rob became engaged and his desire for his mom to walk him down the aisle. When he left, they hugged, and she thought they were still friends.
- She had no idea that following her conscience and referring her friend to another florist was breaking the law until a complaint showed up from the state Attorney General claiming she violated a law in Washington that is nearly identical to HB 2323.
- **This came as a shock to Barronelle who believes all people should be treated with dignity and respect. She employs and serves everyone, including those who identify as gay, lesbian and bi-sexual. Her problem wasn't Rob's sexual orientation; it was her belief about marriage.**
- **But the attorney general turned her decision to refer Rob to another florist into a mission to publicly denounce her and has invoked the full power of his office to force her to not only lose her business, but everything she owns as well**
- But even amidst such government oppression, I was particularly touched at a recent dinner when Barronelle remarked, I really love Rob; I'm worried about him and miss seeing him in the shop. I don't understand why we can't just have our own perspectives. Rob can get married and have his beliefs, I can have my convictions, and we can all get along. Isn't that what America is about? Freedom, respect, fairness, diversity?
- The problem is laws like HB 2323 advance the exact opposite: intolerance, disrespect, and conflict.

- While laws that are supposed to prohibit discrimination might sound good, they're really being used by the government to hurt people – to force them to conform – to silence – to punish – to destroy.
- Our clients are facing fines, bankruptcy, criminal prosecution, potential jail time . . . under these laws. These laws do not protect everyone's constitutional freedoms to be free from government coercion to speak, think, and participate in messages or events consistent with their beliefs. Instead, they stifle diversity and allow the government to punish good people rather than ensure freedom and tolerance thrives in America.
- *When did we decide it was okay to marginalize and shun and personally and professionally destroy those who happen to have a different perspective?*
- As if this were not enough, HB 2323 creates an atmosphere of **excessive regulation, uncertainty, and impossibly conflicting legal mandates**, which in a time of economic uncertainty, promises to saddle businesses and the government alike with significant financial burdens.
- HB 2323, in many applications, will violate the **free exercise of religion and free speech guarantees** of both the United States and Kansas Constitutions. The state will have to defend against those legal challenges, which will prove costly and time consuming. Perhaps most important, the state will have to pay the **attorneys' fees** of each litigant who successfully challenges the law. That could very well reach into the hundreds of thousands for each case, further burdening the state treasury.
- Moreover, small businesses are the lifeblood of the Kansas economy, and they will be particularly hurt by the increased regulatory burden and compliance costs of HB 2323.
 - The lawsuits I described at the outset are difficult to defend and require substantial time and resources to combat, **time and resources business owners need to devote to actually running their business and serving the community**—not defending against lawsuits.

- One of our other clients, **Elaine Huguenin**, can attest to the toll HB 2323 will likely take on businesses in Kansas. Elaine was sued under the New Mexico Human Rights Act for referring a potential client to another photographer to shoot their same-sex commitment ceremony. For simply opting not to use her expressive skills to promote an understanding of marriage that conflicted with her religious beliefs, she had to **endure some 7 years of protracted litigation, almost a quarter of her life**. Needless to say, cases like these hardly stand as a testament to a welcoming business environment.

In closing I would note that **tolerance must be a two-way street**. HB 2323 rejects respect and diversity in favor of government coercion, and **would require Kansans to sacrifice their conscience as the price of citizenship**. This is not the freedom contemplated by either the United States or Kansas Constitutions, and it is not the freedom each member of this Committee has sworn to uphold.

I appreciate the opportunity to speak with you today, and would be happy to answer any questions you might have.

Thank You.

Questions

1. Is it right that I can be fired simply for who I am?

- Do I think it is right that you can be fired solely because you identify as gay?
Absolutely not. I think that would be terrible if anyone were to do that. And I think we can all agree everyone should be treated with dignity and respect—my own religion teaches that. But there are significant costs associated with this bill that the legislature needs to take into consideration—costs to religious freedom and costs to businesses, which I outlined in my testimony.
- Do you think someone should be put out of business for simply abiding by their religious beliefs? I would hope that you would agree with me that they should not. Therefore, I trust that you, as a fair-minded person, would see the danger of enacting HB 2323.
- We've represented a Catholic school for instance, where a teacher decided one day that he was no longer a man. And the school was sued under the nondiscrimination law for not renewing his contract.
- What's more fair, that a customer have to make one more phone call to obtain goods and services, or that we put people out of business for following their consciences? The question answers itself.

Mission

- And there is a larger and more important principle at work here, and that is the freedom of employers to hire employees who share their mission or vision. HB 2323 interferes with the freedom of an employer to hire who he or she wants to hire. That's bad for businesses and bad for the economy.
- Should a **gay newspaper have to hire a heterosexual editor**, even when it would prefer not to? Because under HB 2323 the newspaper could be liable for discrimination and criminal sanctions, merely for preferring individuals uniquely committed to the purpose of the organization. If the law is applied consistently, both religious and LGBT business owners would be caught in this trap—neither could hire those who are like-minded under the law as written.

- I'm assuming members of this Committee hire staffers based upon their political inclinations? If political affiliation were a protected class (and only legislative grace is needed to provide for that), that too would be illegal under HB 2323.

2. Don't you think everyone should be treated fairly?

Of course I do. My own religion teaches that. But that's exactly why I oppose HB 2323. It picks winners and losers and treats freedom as a zero sum game. Particular sexual choices and lifestyles trump religious liberty. But that is not what the Constitution requires. Religion is our first liberty, and it is especially protected by the First Amendment. That is precisely because this country has always recognized that freedom is not granted by the government but merely protected by it. In the end it's not a legislator's job to pass laws that give some groups special favors at the expense of the constitutional rights of all.

3. But doesn't this Bill have robust religious exemptions?

It has better protections than some bills in other states, but it still has significant shortcomings as I noted in my testimony. For instance, it does appear to have adequate protections in the employment context. But its protections in the public accommodations and housing contexts are woefully inadequate, where it protects only with respect to admission to places of worship or parochial schools.

4. Isn't this just like racial bigotry?

- No. I think even a cursory review of history reveals that comparison to be very poorly drawn. The historical experience of African-Americans in this country included the **evil of slavery**, not to mention the **officially sanctioned segregation** that followed the abolition of slavery. None of that is present here.
- In fact, HB 2323 threatens the religious freedom of adherents of most of the country's major religions. There was no conflict between the Civil Rights Movement and religious believers. That movement would have been impossible without the dedication, bravery, and sacrifice of religious believers. **The faithful moved the state to action with respect to the Civil Rights Movement, whereas here the state would be overstepping its proper sphere of authority to punish religious believers for their beliefs.**

5. Once you enter the marketplace you have no right to pick and choose whom you will serve. Isn't your business license a contract with the state to serve the public without question?

- The First Amendment applies to all Americans, including businesses, whether engaged in profit-making activities or charitable endeavors. **No one forfeits his or her First Amendment rights by merely entering the marketplace.**
- It is simply not true that businesses and business owners cannot exercise religion. ***See Hobby Lobby***. Businesses invoke a whole host of ethical considerations to justify their corporate decisions
 - Think of **Whole Foods** with regard to the environment and animal welfare
 - Or **Chipotle**, which touts its "respect for the animals, the environment, and the farmers."
 - Or **General Mills**, which took a very public stance in favor of same-sex marriage when Minnesota was considering a constitutional amendment to define marriage as it has always been defined.
- Surely you are not suggesting that all these companies can invoke their own ethics, but that businesses in Kansas have to just fall in line and think the way you want them to think, and believe what you want them to believe. **It seems to me that if you believe that your tolerance is actually a soft form of tyranny.**

6. Won't all businesses be able to discriminate if HB 2323 is not passed?

There is no indication that gays and lesbians are being denied basic services in the Kansas economy. I would not think you have heard much evidence of that today. **The basic economic reality is that businesses have important incentives to serve, not turn away, customers.** The type of religious liberty concerns I have been discussing do not arise for all businesses, only those that engage in expression or work in event services. Public accommodations laws were designed to prevent merchants from denying essential goods and services to people for irrelevant reasons. But HB 2323 would force business owners to violate their religious beliefs merely to provide non-essential services. That's not fair, and it's not constitutional.

Are we just supposed to ignore the problem?

No. But the real question here is whether HB 2323 will remedy the type of issues you have heard about today. And clearly it will not! It will put religious liberty in jeopardy, endanger businesses, and expose the state to liability as well. The default position of this Committee, and every legislator, should be this: It is not necessary to pass a sweeping law which remedies no pervasive wrong, especially where that law promises harm to many citizens and will be unconstitutional in many applications.

7. There's no difference between the orientation of gays and lesbians and the activity or conduct they engage in. *CLS v. Martinez* confirmed this didn't it?

I'm not distinguishing between orientation and conduct, but between expression and nonexpression. The First Amendment **protects the free exercise of religion**. That means that no one can force anyone to believe or condone activity or messages they find offensive as a result of their religious beliefs. The **same goes for speech**—no one can compel another to speak, think, or accept a message they find offensive or untrue. HB 2323 takes sides in a political debate and tramples on these guaranteed freedoms. But it is a lawmaker's duty to affirm and defend the Constitution.

8. What have you to say about the epidemic of teen suicide?

- I've worked as a youth counselor with court-adjudicated teens from the NYC area, as a high school English teacher, and as a Marine Corps officer in charge of platoons and detachments full of young men. So as someone who has spent much of his adult life counseling, teaching, and leading adolescents and young adults, I can tell you that there is really nothing more tragic than hearing that a young person has committed suicide. Obviously this is something adults should strive with all their might to prevent.
- But the problems that precipitate suicide are deep-seated and complicated, and often involve psychological issues that require professional treatment. Parents and families, school officials, medical personnel, and the religious all have a role to play in shepherding kids through what can often seem to them to be an impossible journey. HB 2323 provides none of the understanding, guidance, and sense of perspective struggling kids need. It is rather a piece of legislation that will cause a lot of constitutional mischief.

9. Where do you suggest a transgender individual go to the bathroom?

I don't deny that there may be individuals who are truly struggling with their gender identities, but it also must be recognized that every human being, including those who are forced to share a restroom with a person of a different biological sex, is on his or her own journey of figuring out who they are and what they are comfortable with—they have their own modesty and privacy concerns and those should be respected. **There is such a thing as a constitutional right to privacy, after all.** This question involves a balancing of interests, and it seems to me that it is **unfair and disruptive to sacrifice the privacy and safety of a majority of Kansans,** most notably young girls and women, to accommodate the relatively few individuals struggling with their gender identity.

10. Exemptions?

- These would help to some degree but would not change in kind the unconstitutional dynamic which forces religious believers to defend first, and enjoy unfettered belief later.
- But if you consider robust exemptions, history demonstrates that even in areas of utmost significance, such as war, medicine, education, oaths of office, and alcohol and drug laws, accommodations of religious citizens have routinely been made and these have not prevented the nation or individual states from meeting important policy goals.