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Sexual Orientation and Gender Identity (SOGI) Laws Are Not Fairness for All

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Current proposals to create sexual orientation and gender identity (SOGI) laws with varying types of religious exemptions would not result in fairness for all.[1] Instead, they would penalize many Americans who believe that we are created male and female and that male and female are created for each other. They would violate the privacy and safety of women and girls, the conscience rights of doctors and other medical professionals, and the free speech and religious liberty rights of countless professionals. Establishing bad public policy and then exempting select religious institutions is not acting for the common good—and is certainly not fair for all.

What SOGI Laws Do

SOGI laws ban disagreement on LGBT issues by enforcing a sexual orthodoxy. Of course, those are not the exact words used, but when "sexual orientation" and "gender identity" are elevated to protected classes in antidiscrimination law, that is the effect the government policy has.[2] But not every disagreement is discrimination, and our laws should not presume otherwise.[3]

Heritage Foundation experts have long opposed the expansion of antidiscrimination laws to elevate "sexual orientation" and "gender identity" as protected classes.[4] Where enacted, SOGI laws are frequently used as swords to persecute people with unpopular beliefs, rather than as shields to protect people from unjust discrimination.[5]

SOGI laws treat reasonable actions as if discriminatory.[6] So, for example, if a baker creates custom wedding cakes for marriages, but will not design or create them for same-sex unions, that is considered "discrimination" on the basis of "sexual orientation."[7] If a Catholic adoption agency works to find permanent homes for orphans where they will be raised by a married mom and dad, but will not place children with two moms and no dad, or two dads and no mom, that is considered "discrimination" on the basis of "sexual orientation."[8]

If a small business provides health insurance that covers a double mastectomy in the case of breast cancer, but not for women who want to transition and identify as men, that is considered "discrimination" on the basis of "gender identity."[9] If a school provides separate bathrooms and locker rooms for male and female students, but will not let male students who identify as women into the female places, that is considered "discrimination" on the basis of "gender identity."[10]

Under SOGI laws, the government penalizes these reasonable policies on disputed questions as if they were discriminatory.

The Problems with SOGIs

Of course, business owners should respect the intrinsic dignity of all of their employees and customers—but this is not what laws on sexual orientation and gender identity entail. Their threats to our freedoms unite civil libertarians concerned about

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free speech and religious liberty, free-market proponents concerned about freedom of contract and governmental overregulation, and social conservatives concerned about marriage and culture.

Trampling Civil Liberties. America is dedicated to protecting the freedoms guaranteed under the First Amendment to the Constitution, while respecting citizens' equality before the law. None of these freedoms is absolute. Compelling governmental interests can at times trump fundamental civil liberties, but sexual orientation and gender identity laws do not pass this test.

Rather, they trample fundamental liberties and unnecessarily impinge on citizens' right to run their local schools, charities, and businesses in ways consistent with their values. SOGI laws do not protect equality before the law; instead, they grant special privileges that are enforceable against private actors.

Unintended Consequences. SOGI laws could also have serious unintended consequences. These laws tend to be vague and overly broad, lacking clear definitions of what discrimination on the basis of "sexual orientation" and "gender identity" mean and what conduct can and cannot be penalized.

These laws would impose ruinous liability on innocent citizens for alleged "discrimination" based on subjective and unverifiable identities, not on objective traits. SOGI laws would further increase government interference in markets, potentially discouraging economic growth and job creation.

Penalizing Beliefs. SOGI laws threaten the freedom of citizens, individually and in associations, to affirm their religious or moral convictions—convictions such as that marriage is the union of one man and one woman or that maleness and femaleness are objective biological realities to be valued and affirmed, not rejected or altered. Under SOGI laws, acting on these beliefs in a charitable, educational, or commercial context could be actionable discrimination.

SOGI laws are the ones that have been used to penalize bakers, florists, photographers, schools, and adoption agencies when they declined to act against their convictions concerning marriage and sexuality. Such laws *do not* adequately protect religious liberty or freedom of speech.

In short, SOGI laws seek to regulate decisions that are best handled by private actors without government interference. SOGI laws disregard the conscience and liberty of people of good will who happen not to share the government's opinions about issues of marriage and sexuality based on a reasonable worldview, moral code, or religious faith. Accordingly, these laws risk becoming sources of social tension rather than unity.

"Gender Identity" as a Protected Class: Undermining the Common Good

By making "gender identity" a protected class, the government would force Americans to embrace transgender ideology in a variety of settings—with serious consequences for schools, locker rooms, hospitals, and workplace policies that undermine common sense.[11]

Schools would have to redo their bathroom, locker room, and dorm room policies to allow students access based on their subjective identity, rather than their objective biology.[12] Employers would have to do the same, force all employees to use "preferred pronouns,"[13] and cover hormonal and surgical transition procedures on their health care plans.[14] Hospitals would have to provide these procedures, and relevant physicians would have to perform them.[15]

In essence, elevating "gender identity" to a protected class across our federal antidiscrimination laws could impose a nationwide transgender bathroom policy, a nationwide pronoun policy, and a nationwide sex-reassignment health care mandate.[16]

Already the Department of Education is investigating a complaint from a five-year-old girl who says she was sexually assaulted by a male classmate who was allowed access to the girls' bathroom.[17] Last year, Melody Wood and I documented over 130 examples of men charged with using bathroom, locker room, and shower access to target women for voyeurism and sexual assault.[18]

Exemptions Do Not Make Bad Policy into Good Policy

SOGI laws with exemptions along the lines of the so-called Fairness for All (FFA) proposal would impose "sexual orientation and gender identity" laws on everyone, with all of the bad consequences for the common good noted above, while exempting certain religious institutions. As a result, proposals to create new LGBT policies with varying types of religious exemptions will not result in what advocates claim is fairness for all. Instead, they will penalize many Americans who believe that we are created male and

female and that male and female are created for each other.

The FFA approach creates bad public policy and then tries to forestall some of its worst consequences through limited religious exemptions. Exemptions, however, do not convert an otherwise bad policy into a good one, and the result here is not fairness for all, but unfairness for many with exemptions for a fortunate few. To impose bad public policy on one's neighbors while exempting oneself is not the way in which we serve the *common* good.

It is not fairness for all when one side uses the law to coerce the other side, and all the other side gets is limited exemptions. Nor is it a compromise—or at least not a good one—when one side gets special new legal privileges applicable almost everywhere, and in exchange the other side gets limited exemptions (which are not guaranteed to last) from this bad public policy. Compromise suggests that each side gets something that it wants, though less than everything, and that both sides stand roughly equal at the end of negotiations. In practice, FFA means that one side advances and the other is punished.

SOGIs, Including FFA, Are About Coercion, Not Freedom

In the United States of America, people who identify as LGBT are free to live as they want. But SOGI laws, including FFA, are not about freedom—they are about *coercion*. SOGI and FFA are about forcing all Americans to embrace—and live out—certain beliefs about human sexuality. They are not about protecting the freedom of people to live as LGBT, but about coercing everyone else to support, facilitate, and endorse such actions. This is one fundamental problem in equating *coercive* antidiscrimination laws with *permissive* religious freedom laws. And imposing a bad coercive policy on everyone while exempting select faith-based institutions is anything but fairness for all.

Antidiscrimination laws are about the government coercing people to live according to the majority's values. Religious liberty laws are about removing government coercion and allowing people to live by their own beliefs. While there can be good justifications for certain antidiscrimination policies, there is no human right to them. Religious freedom, however, *is* a human right. FFA mistakenly conflates these rather different concepts.

There Is a Better Way to Help People Who Identify as LGBT

Although SOGI antidiscrimination laws are unjustified, that does not exclude the idea of more tailored policies that would address the mistreatment of people who identify as LGBT and at the same time would leave all Americans—not just the lucky few who are sufficiently well-connected to be exempted from SOGI laws—free to act on their good-faith convictions.[19] Proponents argue that nothing short of elevating SOGI as protected classes in law is sufficient to address existing problems for people who identify as LGBT—but they provide no evidence to support such broad, wide-ranging laws.

Material Harms. In responding to the legitimate needs of people who identify as LGBT while also respecting the rights and interests of all, policymakers must first assess the nature and extent of the problem and then determine whether governmental intervention is required and, if it is, what the appropriate remedy should be. Advocates of SOGI laws must therefore provide evidence that they are facing material harms (in addition to dignitary harms) to show the need for a coercive governmental response—a requirement they have failed to meet.[20]

This is not to say conclusively that such a need does not exist or that we live in a country that is free from discrimination against people who identify as LGBT. It is to say, however, that evidence of discrimination comparable to the evidence used to justify passage of our civil rights laws on race and sex *has not been demonstrated*. Absent such demonstration, civil rights laws used to combat racism and sexism are not the proper models to use in addressing discrimination against those who identify themselves as LGBT.

Analysis. Once a legitimate need has been identified, policymakers must ask several questions: Is a governmental response appropriate? Are the needs of such a magnitude and extent as to warrant government attention? Are social, economic, and cultural forces sufficient to address these needs on their own? If a government response is judged necessary, it must be tailored to address the documented need at the appropriate level of government (federal, state, or local) while doing everything possible to avoid burdening such rights as the freedoms of contract, conscience, religion, and speech.

Definitions. Most important, any such policy must define what constitutes "discrimination" accurately. Part of the problem with SOGIs, including FFA, is that they leave it entirely at the whim of hostile bureaucrats and judges to declare that commonsense actions are "discrimination." SOGI laws treat reasonable actions as if discriminatory. A better approach would define specifically what constitutes "discrimination" and target a legal response at that.

Conclusion

In the midst of the redefinitions of marriage, sex, and gender, all Americans—wherever they fall on the political spectrum and whether they are religious, secular, or agnostic—should join the effort to find ways to coexist peacefully. SOGI laws, including FFA, do not achieve this goal.

Instead they penalize disagreement as if discrimination, impose sexual orthodoxy, and coerce dissenters. SOGI antidiscrimination laws are unjustified, but if other policies are adopted to address the mistreatment of people who identify as LGBT, they must leave people free to engage in legitimate actions based on the conviction that we are created male and female and that male and female are created for each other.

Any such laws must protect the privacy and safety of women and girls, the conscience rights of doctors and other medical professionals, and the free speech and religious liberty rights of countless professionals. This would leave all Americans—not just the lucky few who are sufficiently well-connected to be exempted from SOGI laws—free to act on those convictions. This would also protect diversity and promote tolerance; this would promote true fairness for all.

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Endnotes

1. The most prominent model for creating specific LGBT policies while showing concern for religious freedom is known as "fairness for all," a phrase used by proponents to describe a law first adopted in Utah and similar proposals in other states and potentially at the national level. The "Utah Compromise" was a law enacted in Utah in the spring of 2015 that created sexual orientation and gender identity antidiscrimination policy in employment and housing, while also creating certain religious liberty exemptions and protections. Indiana attempted (but failed) to pass similar legislation in January 2016. See Ryan T. Anderson and Robert P. George, "Liberty and SOGI Laws: An Impossible and Unsustainable 'Compromise,'" Witherspoon Institute *Public Discourse*, January 11, 2016, http://www.thepublicdiscourse.com/2016/01/16225/ (accessed November 28, 2018). Thus far, no fairness for all legislation has been introduced at the federal level, but there is discussion among advocates about doing so.
2. For example, the Equality Act, the centerpiece of the Human Rights Campaign's Beyond Marriage Equality Initiative, would add "sexual orientation" and "gender identity" to virtually all federal civil rights laws covering race—"Public Accommodations, Education, Federal Financial Assistance, Employment, Housing, Credit, and Federal Jury Service"—and expand them beyond their current reach. Moreover, it is *explicitly* designed to shrink existing religious liberty protections. It also would stretch the scope of "public accommodations" quite far. The Civil Rights Act of 1964—the purpose of which was to integrate half of the continental United States after centuries of race-based slavery and Jim Crow—covered entities like hotels, restaurants, theaters, and gas stations. The Equality Act would cover almost every business serving the public. See Equality Act, S. 1858, 114th Cong., 1st Sess., https://www.congress.gov/114/bills/s1858/BILLS-114s1858is.pdf (accessed February 7, 2017). The House version of the bill is Equality Act, H.R. 3185, 114th Cong., 1st Sess., https://www.congress.gov/bill/114th-congress/house-bill/3185 (accessed November 28, 2018). See also Human Rights Campaign, *Beyond Marriage Equality: A Blueprint for Federal Non-Discrimination Protections*, 2014, http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/documents/HRC-BeyondMarriageEquality-42015.pdf (accessed February 7, 2017), and Senators Jeff Merkley, Tammy Baldwin, and Cory Booker, "The Equality Act," 2015, p. 1, https://www.merkley.senate.gov/imo/media/doc/EqualityAct_OnePager.pdf (accessed February 7, 2017).
3. See, for example, Ryan T. Anderson, "Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage," *Georgetown Journal of Law & Public Policy*, Vol. 16, No. 1 (March 15, 2018), https://ssrn.com/abstract=3136750 (accessed November 28, 2018).
4. Ryan Messmore and James Sherk, "Freedom of Religious Schools and Employers Threatened by ENDA," Heritage Foundation *Issue Brief* No. 1677, October 24, 2007, https://www.heritage.org/jobs-and-labor/report/freedom-religious-schools-and-employers-threatened-enda (accessed November 28, 2018); Ryan T. Anderson, "ENDA Threatens Fundamental Civil Liberties," Heritage Foundation *Backgrounder* No. 2857, November 1, 2013, https://www.heritage.org/civil-society/report/enda-threatens-fundamental-civil-liberties (accessed November 28, 2018); Ryan T. Anderson, "Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom," Heritage Foundation *Backgrounder* No. 3082, November 30, 2015, https://www.heritage.org/civil-society/report/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom (accessed November 28, 2018); and Ryan T. Anderson, "How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom," Heritage Foundation *Backgrounder* No. 3194, February 13, 2017, https://www.heritage.org/marriage-and-family/report/how-think-about-sexual-orientation-and-gender-identity-sogi-policies-and (accessed November 28, 2018).
5. Ryan T. Anderson, "Shields, Not Swords," *National Affairs*, No. 35 (Spring 2018), https://ssrn.com/abstract=3141908 (accessed November 28, 2018).
6. Ryan T. Anderson, "Just Because Liberals Call Something 'Discrimination' Doesn't Mean It Actually Is," *The Daily Signal*, March 1, 2017, https://www.dailysignal.com/2017/03/01/just-because-liberals-call-something-discrimination-doesnt-mean-it-actually-is/ (accessed November 28, 2018).
7. See Anderson, "Disagreement Is Not Always Discrimination."
8. See Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington, DC: Regnery, 2015), and John Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (Oxford University Press, 2017).
9. See Ryan T. Anderson, *When Harry Became Sally: Responding to the Transgender Moment* (New York: Encounter Books, 2018).
10. See Ryan T. Anderson, "A Brave New World of Transgender Policy" *Harvard Journal of Law and Public Policy*, Vol. 41, No. 1 (January 1, 2018), https://ssrn.com/abstract=3113625 (accessed November 28, 2018).
11. See Anderson, *When Harry Became Sally*.
12. See Anderson, "A Brave New World of Transgender Policy."
13. Eugene Volokh, "You Can Be Fined for Not Calling People 'Ze' or 'Hir,' If That's the Pronoun They Demand That You Use," *The Washington Post*, May 17, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/you-can-be-fined-for-not-calling-people-ze-or-hir-if-thats-the-pronoun-they-demand-that-you-use/?noredirect=on&utm_term=.0e15223dfb97 (accessed November 27, 2018).
14. Ryan T. Anderson, "New Obamacare Transgender Regulations Threaten Freedom of Physicians," The Daily Signal, May 13, 2016, https://www.dailysignal.com/2016/05/13/new-obamacare-transgender-regulations-threaten-freedom-of-physicians/ (accessed November 28, 2018).
15. See Anderson, "A Brave New World of Transgender Policy."
16. See Anderson, *When Harry Became Sally*, chapter 8.
17. News release, "U.S. Opens Investigation into Sexual Assault of Minor Child in Georgia, Violation of Title IX," Alliance Defending Freedom, October 3, 2018, http://www.adfmedia.org/News/PRDetail/10619 (accessed November 27, 2018).

18. Ryan T. Anderson and Melody Wood, "Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do," Heritage Foundation *Backgrounder* No. 3201, March 23, 2017, https://www.heritage.org/education/report/gender-identity-policies-schools-what-congress-the-courts-and-the-trump.
19. See Anderson, "Shields, Not Swords."
20. Historically, courts have applied civil rights law to shield members of protected classes from discrimination that would have deprived them of access to material goods and services (restaurants, hotel rooms, and jobs). Courts have *not* applied civil rights laws to redress "dignitary harms" alone, because feelings of offense in interactions between citizens can go both ways. In addition, it would deprive citizens of their freedoms of speech and religion if courts were to draw lines on the basis of feelings of offense.