



ISSUE BRIEF

“Sexual Orientation” and “Gender Identity” (“SOGI”) Laws: A Threat to Free Markets and Freedom of Conscience and Religion

Local, state and federal governments are being urged by activists to expand the protected categories under existing civil rights laws to bar “discrimination” in employment, housing, and/or public accommodations on the basis of

- sexual orientation (which includes voluntary homosexual conduct); and
- gender identity (referring not to one’s biological sex, but typically to “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth” [H.R. 1755/S.815: Employment Non-Discrimination Act of 2013]). “Gender identity” provisions are intended to protect transgender individuals – an umbrella category that includes:
 - transsexuals (people who have had sex-change surgery),
 - transvestites (cross-dressers),
 - drag queens and drag kings (people who cross-dress for entertainment purposes only).

For convenience, we will refer to this general category of non-discrimination laws based on sexual orientation (SO) and gender identity (GI) as “SOGI” laws.

Such laws should be opposed by anyone who believes in freedom of speech, freedom of association, freedom of conscience and religion, and a free market economy. Here are some reasons why:

Sexual orientation and gender identity are unlike most other characteristics protected in civil rights laws. The federal Civil Rights Act of 1964, for example, bars discrimination based on “race, color, national origin, sex, and religion.” The first four of these are included largely because they are intrinsic to the individual, are received involuntarily and are immutable. (Religion, while voluntary, is explicitly protected by the First Amendment to the U.S. Constitution.) While sexual *attractions* may be involuntary, neither homosexual conduct nor transgender behavior meets any of the other criteria. Skin complexion, ethnicity, and gender cannot be changed (so-called transgender surgery is superficial; it does not change the genetic and thus defining characteristics of the person’s gender).

SOGI laws increase government interference in the free market. They would substitute the judgment of government officials for that of private businesses and organizations regarding what qualities or characteristics are most relevant to a particular job, and regarding how to operate their businesses.

FAMILY RESEARCH COUNCIL

801 G STREET NW, WASHINGTON, D.C. 20001
202-393-2100 • fax 202-393-2134 • (800) 225-4008 order line
www.frc.org

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SOGI laws would mandate the employment of homosexual and transgendered persons in inappropriate occupations. Sexual conduct can be relevant to employment. Under such legislation, for example, employers in the area of education and childcare would be required to hire homosexual or transgendered teachers, even if they consider them inappropriate role models for children and youth.

SOGI laws force some businesses to violate their moral and religious convictions. These include those which provide products, services, or catering for weddings, or groups and businesses providing dating services. They could be forced under employment provisions of such laws to hire homosexuals, and under the public accommodations provisions they could be forced to participate in the celebration of same-sex “weddings,” even though homosexual behavior and same-sex “marriage” are expressly contrary to their religious convictions.

Religious exemptions do not adequately protect people of faith. While such laws sometimes contain “religious exemptions” (for example, to prevent churches from being forced to hire homosexual clergy), these may not protect the conscience rights of individual Christians, Jews, Muslims and others. Profit-making corporations may not qualify for the exemption, so Christian bookstores, religious publishing houses, and religious television and radio stations could all be forced to compromise their faith-based principles.

Gender identity laws undermine the rights of businesses to set dress and grooming standards. Such bills sometimes purport to protect such rights. However, dressing and grooming in a way that is culturally appropriate for the individual’s biological sex is the most fundamental such standard there can be. This is particularly relevant for situations involving customer service or contact with other clients, because the adoption of the “gender identity” of the opposite sex is often highly unconvincing and therefore disturbing to others.

Gender identity laws would violate the privacy of others. Because transgender status is not dependent on having sex-change surgery, such laws allow some biological males (who claim to be female) to appear nude before females (and vice versa) in bathrooms, locker rooms, and showers (this is why some critics have dubbed such laws “bathroom bills”). This could be very disturbing to those exposed to, or exposed before, such individuals. It also conceivably could be exploited by a “peeping tom,” a rapist or a pedophile as a way to gain access to women and girls in a vulnerable situation.

SOGI laws can lead to costly lawsuits against businesses. They invite disgruntled employees to sue for discrimination over a characteristic (in the case of sexual orientation) which is not even visible and of which the employer may have been unaware. In the case of public employers, such laws at the local and state level have led to large settlements being paid at taxpayers' expense. Disgruntled customers have sued businesses in the wedding industry under such laws for declining to participate in same-sex “weddings” (even when the business made clear that they would serve individual homosexual customers in other ways that would not involve celebration of their homosexual partnership).

SOGI laws are unnecessary. One irony is that advocates of such laws place great emphasis on the large number (and percentage) of corporations that already have internal policies prohibiting discrimination based on sexual orientation and/or gender identity. That fact,

however, undermines any suggestion that such discrimination is endemic, or that government action is required to arrest the problem. A business that places unfounded prejudice ahead of legitimate qualifications will be punished by market forces. For example, an employer who rejects better-qualified applicants for arbitrary and irrelevant reasons will end up with an inferior workforce that is less competent, productive, or effective in meeting the needs of their customers – all of which will result in a decline in sales.

Sexual orientation laws pave the way for legalization of counterfeit same-sex “marriage.”

Courts that have redefined “marriage” to include homosexual couples have cited the existence of “non-discrimination” laws at the state level as establishing a precedent that “discrimination” based on “sexual orientation” is impermissible, which they have then applied to the institution of marriage.

SOGI laws “legislate morality” – the “morality” of the sexual revolution. Often, social conservatives are accused of trying to “legislate morality.” Yet SOGI laws themselves are fraught with moral significance. From time immemorial human societies have used legal and cultural means to encourage the traditional family because of its unique and far-reaching benefits to society. SOGI laws, on the other hand, would be an official government declaration that homosexual behavior is the equivalent of heterosexual behavior in every way, and that those who believe otherwise are simply bigoted. A majority of Americans reject this view.

SOGI laws prepare the way for reverse discrimination. The more open homosexuals and transgendered people become, the more people who hold traditional values will be forced to conceal their views – or face punishment for expressing them. This can happen even if the employee's views are expressed outside of work, and when no reference is made to sexual orientation or gender identity.