ISSUE BRIEF

Can There Be "Compromise" Between Sexual Orientation/Gender Identity Non-Discrimination Laws and Religious Liberty Protections?

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"Sexual Orientation" and "Gender Identity" in "Non-Discrimination" ("SOGI") Laws

Those in the LGBT (lesbian, gay, bisexual, and transgender) movement lament that neither the federal government nor a majority of the states has yet adopted legislation to add "sexual orientation" and "gender identity" to the list of protected categories in laws prohibiting discrimination in markets for employment, housing, and public accommodations. One criticism that has often stood in the way of such laws is that they could threaten the religious liberty of churches, religious organizations or corporations, or individual believers who have moral objections to homosexual and transgender conduct. These concerns have grown in the wake of the Supreme Court's June 2015 opinion in support of redefining marriage to include same-sex couples.

This tension between non-discrimination laws and religious liberty concerns has led some legal scholars and legislators to propose a sort of grand compromise, in which legislation outlawing discrimination and legislation protecting religious liberty is passed simultaneously.

Michigan: A Both-And Approach

In 2014 and again in 2015, legislators in Michigan introduced competing legislation on religious liberty (a Religious Freedom Restoration Act, or RFRA) and special protections based on sexual orientation and gender identity (SOGI) under the state's Civil Rights Act.

- The state RFRA, like the federal law it is based on, does not grant a blanket exemption from any law, but provides a balancing test to be used by courts: If someone can demonstrate that government action places a "substantial burden" on his or her "free exercise" of a (sincere) religious practice, the state must demonstrate a "compelling governmental interest" for its action, and show it has furthered that interest using "the least restrictive means."
- Democrats pushed for an amendment to the state's 1967 Civil Rights Act that would extend protected categories to "sexual orientation" and "gender identity." (In 2014, Republican Rep. Frank Foster proposed a bill that included protections only for sexual orientation [the "SO" in SOGI] and not the more controversial gender identity protections which could result in some biological males being permitted to use female restrooms, locker rooms, and showers.)

By enacting special protections based on sexual orientation, Michigan's legislature would upset RFRA's balancing test by undermining both restraints that RFRA imposes on government action. Regarding the first test, liberal courts may very well find that special statutory protections based on sexual orientation

and gender identity create a new "compelling governmental interest." If so, the first justification for placing a "substantial burden" on religious exercise would be met. If the courts adopt this view, it is also difficult to see how a religious actor would be able to successfully challenge the government's actions under the second test, on the grounds it could have accomplished its goals by some less restrictive means. The bill favored by LGBT activists in Michigan (House Bill No. 4538, Senate Bill No. 315) seeks to eradicate "discrimination" based on sexual orientation or gender identity by outlawing it in employment, housing, and/or public accommodations. Such activists would likely argue (and liberal judges may well agree) that allowing some employers, landlords, or businesses to make decisions based on their religious evaluation of sexual conduct under certain circumstances is not an alternative means of *accomplishing* the government's interest, but rather is a means of *undermining* it. Instead of allowing application of the fact-specific "balancing test" envisioned by RFRA, the existence of a SOGI law would place a weight on the scales against religious actors.

Republican Gov. Rick Snyder has steadfastly insisted that he will only sign a RFRA if it comes to his desk at the same time as a SOGI. LGBT groups have refused to endorse legislation that omits gender identity—and Rep. Foster was defeated for re-election in a 2014 primary. At this writing, Michigan has not taken final action on either a RFRA or SOGI.

Utah: SOGI, with Exceptions

Advocates of a non-discrimination/religious liberty compromise had more success in the Utah legislature—largely because the Church of Jesus Christ of Latter Day Saints (LDS Church, or Mormons) endorsed the concept in January 2015. In March 2015, both houses of the legislature approved by large margins, and Republican Gov. Gary Herbert signed, S.B. 296. It added sexual orientation and gender identity as protected categories in the state's nondiscrimination laws regarding employment and housing; public accommodations were not addressed, according to bill sponsors, because of their controversial nature. At the same time, the bill exempted from its provisions non-profit religious organizations, profit-making businesses that contract with such organizations to provide housing, and the Boy Scouts of America. It also gives some protection for employee speech—including speech expressing "convictions about marriage, family, or sexuality"—inside and outside the workplace, regardless of the type of employer.

The "Utah Compromise," as S.B. 296 has come to be called, failed to provide adequate protections for religious liberty; for example, it includes detailed enforcement mechanisms for the nondiscrimination provisions, but spells out no means of enforcing the employee speech protections it purports to provide. It also provided no clear protections for businesses that may be faith-based. On the other hand, even LGBT organizations that supported the bill are now claiming it goes too far. Pragmatically, it is hard to envision such a law passing elsewhere in the absence of a strong, centralizing religious entity like the LDS Church striking a grand bargain with LGBT activists—a bargain that does not appear to be on the table any longer for any other state.

Family Research Council Opposes Special Protections for Sexual Orientation and Gender Identity, and Opposes "Compromising" Religious Liberty

Family Research Council believes the approaches proposed in Michigan and adopted in Utah are unwise and profoundly damaging to religious liberty. Combining religious liberty and special protections for sexual orientation and/or gender identity (SOGI) is unsustainable, for three primary reasons.

1) It is wrong, in principle, to include sexual orientation and gender identity as protected categories, because they are unlike historically protected categories such as race. True "civil rights"—such as the right to vote, and freedoms of speech, press, and religion—are those that protect all citizens from oppression by their *government*. "Non-discrimination" laws, on the other hand, place restrictions on the actions of *private* entities—and thus take away freedom whenever they are expanded. That is why, historically, such protections were reserved for characteristics that are inborn, involuntary, immutable, and innocuous, such as race, and/or in the U.S. Constitution. None of these criteria apply to the choice to engage in homosexual conduct or the choice to present one's self as the opposite of one's biological sex.

2) There is no religious exemption that would be acceptable to LGBT activists and would also be adequate to fully protect against all the likely threats to religious freedom. The "exemption" approach, as was used in the Utah law, has the advantage of giving a clear-cut, blanket exemption to some groups (in Utah's case, to religious non-profits, to those who contract with religious non-profits to provide housing, and to the Boy Scouts). However, the exemption approach has the disadvantage of not covering every situation in which religious liberty might be threatened. For example, a profit-making corporation that has a religious character—such as a Christian publisher not affiliated with any church or denomination—may not qualify for one of the bill's exemptions.

   The RFRA approach, on the other hand (as has been proposed in Michigan) has the advantage of providing a defense that may be available whenever religious freedom is threatened, but the disadvantage of leaving ambiguity as to which religious practices will be protected (this would be sorted out by courts, some of which may construe religious freedom very narrowly). Only a broad conscience exemption regarding marriage and human sexuality, which applies to profit-making businesses and individuals as well as to religious ministries and churches, would be adequate. Yet such a limitation on the scope of the law would be strongly resisted by LGBT advocates.

   The free exercise of religion is a fundamental liberty under our Constitution—quite literally our first freedom under the First Amendment. It is not something to be traded away or cut up into pieces in a process of legislative log-rolling.

3) Non-discrimination laws always implicate moral beliefs. They send the message that it is morally wrong to *disapprove of* homosexual or transgender conduct. For such laws to be endorsed by citizens who believe that it is morally wrong to *engage in* homosexual or transgender conduct is a logical contradiction. The law is a teacher, and it is fundamentally unloving to "teach" our neighbors that they will find happiness by engaging in unnatural sexual conduct or by adopting a gender identity inconsistent with their biology and genetics.

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