



November 17, 2020

Chairman Steve Hambley
Vice Chair Tom Patton
Ranking Member Richard Brown
Members of the House Civil Justice Committee

Re: Constitutional Issues with HB 369

Laws like HB 369 unconstitutionally threaten our First Amendment freedoms. If enacted, the bill would not only violate privacy rights and deprive women and girls of equal opportunities in sports and other areas, it would also expose businesses, religious organizations, and ordinary citizens to significant legal and financial liability. Across the country, sexual orientation and gender identity (SOGI) laws like HB 369 have advanced government discrimination against people of faith just for seeking to peacefully live and work consistent with their religious beliefs.

Harms to Women and Girls in Sports, Economic Opportunities, and Privacy

HB 369 would result in significant harm to women and girls in the community. By adding gender identity to the public accommodation law, it would mandate that men who identify as women be allowed to compete as women in female sports, including both community teams and those affiliated with local schools. For example, high school female athletes in Connecticut (which has a law like HB 369) repeatedly lost to two males who were allowed to compete in female track events because they identified as female.¹ This seriously undermines the athletic opportunities available to females, and it could undermine their opportunities for athletic scholarships as well. HB 369 would also allow men to participate in business opportunities created exclusively for women, such as government programs and loans that help female entrepreneurs launch new businesses.

Additionally, HB 369 would violate women's privacy and dignity by forcing women-only shelters and private spaces like locker rooms, showers, and changing facilities to be open to men. This happened in Anchorage, Alaska when a SOGI ordinance similar to HB 369 was interpreted to require a women's shelter, where women seek refuge from abusive situations often involving men, to open its communal sleeping space to men despite beds being just an arm's reach apart.² Women and girls should not be forced to sacrifice their privacy, dignity, safety, and emotional health like this. Yet that is the outcome required under HB 369.

Harms to Small Business Owners, Their Employees, and Customers

HB 369 would impose government punishment and crippling legal liability on small business owners. This happened to Washington floral designer Barronelle Stutzman and Colorado cake artist Jack Phillips, who serve everyone, but can't express every message or celebrate every event through their custom art. Barronelle is being sued after she declined, because of her faith, to create custom floral arrangements celebrating the same-sex wedding of a customer she had served for nearly 10 years.³ And even after winning at the U.S. Supreme Court, Jack has subsequently been dragged into

¹ <http://www.adfmedia.org/News/PRDetail/10816>.

² <http://www.adfmedia.org/News/PRDetail/10689>.

³ <http://www.adfmedia.org/News/PRDetail/8608>.

court for declining to create a custom cake celebrating a person's gender transition.⁴

The scope of HB 369 is incredibly broad. It applies to both for-profit businesses and nonprofit organizations whose “accommodations, advantages, facilities, or privileges are available to the public.” It would subject even small family-owned businesses to significant liability by requiring them to open up private, sex-specific spaces like dressing rooms and restrooms to members of the opposite sex. This would force their female employees and customers to share these private areas with men, exposing the business to sexual harassment lawsuits.

Harms to Churches, Ministries, and Faith-Based Nonprofit Organizations

HB 369 could even harm churches and faith-based organizations by prohibiting them from making employment decisions that help them advance their religious purpose. While the bill allows religious corporations to limit employment to persons “of a particular religion,” it inhibits these organizations from considering other aspects of an applicant that may undermine an organization's religious mission. Specifically, the bill strips away the ability of churches and religious organizations to make employment decisions based on the sexual conduct or identifications of its applicants or employees. So if an applicant who identifies as a Baptist and is married to a person of the same sex applies to be the Baptist church's worship minister, the church could not consider the applicant's sexual relationship when making its hiring decision—even if the church's religious doctrine speaks directly to that issue.

The *Bostock* Decision Does Not Require Ohio to Change Its Laws

Some advocates for SOGI laws claim that the U.S. Supreme Court's recent decision in *Bostock v. Clayton County, Georgia* requires Ohio to amend its employment non-discrimination laws. This is false, and the Supreme Court explicitly rejected this notion in its decision: “The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination.... But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudice any such question today.” 140 S. Ct. 1731, 1753 (2020) (emphasis added).

Additionally, the *Bostock* Court emphasized that federal law contains protections for religious liberty—such as the Religious Freedom Restoration Act that the Court described “as a kind of super statute” protecting against abuses of Title VII. *Id.* at 1754. Ohio unfortunately has no RFRA or comparable statute to protect its citizens from the harms of HB 369 described above. The Ohio Legislature should not codify the *Bostock* decision into state law by enacting HB 369.

Conclusion

SOGI laws raise many constitutional concerns. HB 369 will likely force schools, businesses, and other places to open women's sports teams, showers, locker rooms, and other facilities for use by men—creating unfair situations that violate the privacy and safety of women. It will compel businesspeople to speak messages against their will and to support expressive events in violation of their conscience. And it will violate the freedom of faith-based organizations to operate consistent with their religious beliefs. This law jeopardizes the rights of everyone without the systemic pattern of invidious discrimination that might otherwise justify a law like this. Ohio can respect the dignity of all of its citizens without enacting new laws that have devastating consequences for women, families, small businesses, and people of faith.

⁴ <http://www.adfmedia.org/News/PRDetail/10799>.