ALLIANCE DEFENDING FREEDOM

# LEGAL MEMORANDUM

DATE: February 2, 2016
RE: Legal Analysis of HB 45

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## Introduction

Alliance Defending Freedom is a nonprofit legal organization that advocates for life, religious liberty, marriage, and the family. On request, we regularly provide legal analysis of proposed laws, including bills like HB 45, and evaluate how they impact these important issues.

HB 45 would add sexual orientation and gender identity to the State's nondiscrimination laws. But laws like HB 45 that threaten constitutional freedoms, subordinate the privacy and safety interests of citizens, and expose governments to significant legal and financial liability.

Supporters of this bill claim that it will end, or at least significantly reduce, discrimination in the State. In fact, however, the opposite is true. There is no evidence of a pattern or practice of sexual orientation or gender identity discrimination that would justify HB 45, which threatens with fines and punishment unsuspecting citizens who are trying to live consistent with their deeply held convictions about marriage and human sexuality—people who are happy to serve or employ individuals who identify as gay, lesbian, or transgender, but cannot promote messages or participate in events that contradict their beliefs. These laws ensure that those individuals will be driven from the marketplace and denied their rightful place in the public square. HB 45 thus retreats from our nation's longstanding commitment to upholding diversity and respecting the differing viewpoint of all Americans.

The analysis below explains some of the HB 45's infirmities, which include the following:

I. HB 45 threatens people's freedom to live and work according to their convictions.

II. HB 45's addition of gender identity jeopardizes citizens' privacy rights and safety interests, particularly those of women and young girls.

III. HB 45's inclusion of gender identity fosters costly and unfair litigation for employers and business owners.

IV. HB 45 is unnecessary because the people of Florida already respect each other and value the diverse views of their neighbors.

## I. HB 45 threatens people's freedom to live and work according to their convictions.

Adding sexual orientation and gender identity to nondiscrimination laws imperils freedom by requiring citizens to act contrary to their sincerely held beliefs about marriage and human sexuality.[1]

[1] *See, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 43-44 (2000) (noting that legal issues involving sexual orientation "feature a seemingly irreconcilable clash between those who believe that

The people whose freedom is forfeited by laws like HB 45 are happy to serve and employ all individuals, including those who identify as gay, lesbian, or transgender, but they cannot promote messages or participate in events that contradict their convictions. Yet laws like HB 45 do not simply require businesses or other entities to serve and hire individuals who identify as gay, lesbian, or transgender. Those laws actually require business owners and other citizens to advance messages and participate in events that conflict with their core beliefs (and subject them to severe government punishment if they refuse to do so). This is why HB 45 poses such a major threat to freedom of conscience.

A key distinction exists between serving and employing everyone, regardless of whether they identify as a member of the LGBT community, and celebrating every event or promoting every message. A unanimous decision of the U.S. Supreme Court recognized this distinction in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[2] In that case, individuals organizing a parade did not want to admit a group with a pro-LGBT message, but they otherwise gladly welcomed people who identified as gay, lesbian, or transgender to participate. The Court recognized that this message-based decision did not discriminate against "homosexual as such,"[3] and upheld the constitutional rights of the parade organizers to decline to promote a message that they did not want to support. It is understandable that some people, like the parade organizers in the *Hurley* case, are unable in good conscience to facilitate, celebrate, or promote certain messages or expressive events. Those individuals should be free to determine which events or messages they will support. But HB 45 would prevent them from doing that.

Laws like HB 45 stigmatize and punish people who do not harbor any animus but simply want to live and work consistent with their deeply held religious beliefs. Here are a few examples:

- In Washington, the State is using a law like HB 45 to sue florist Barronelle Stuztman because she could not in good conscience create floral arrangements to celebrate a same-sex wedding. Notably, Barronelle serves and employs gays and lesbians, and has happily served this particular couple for ten years, including providing flowers for them for Valentine's Day. But the government seeks to punish Barronelle because she declined to violate her religious beliefs about marriage. Now she might lose her businesses, her life-savings, and everything she owns simply because she believes that marriage is the union of a man and a woman and that her faith forbids her from celebrating any other view of marriage. Indeed, if she does not prevail in the lawsuit brought against her, Barronelle will be forced to pay hundreds of thousands of dollars to the attorneys who have been prosecuting her.[4]

- In New Mexico, a law like HB 45 authorized a lawsuit against Elaine Huguenin, a young photographer, when she respectfully declined to photograph a same-sex couple's commitment

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homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality.").

[2] 515 U.S. 557 (1995).

[3] *Hurley*, 515 U.S. at 572.

[4] See http://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman (last visited Jan. 7, 2016) for more information about Barronelle Stutzman and Arlene's Flowers, including links to relevant legal documents. The case is currently on direct appeal to the Washington State Supreme Court.

ceremony because of her religious beliefs that marriage is the union of a man and a woman. Although the couple easily found another photographer, they took legal action against Elaine, seeking to compel her to commemorate their event. The New Mexico Human Rights Commission reviewed the case and declared that Elaine must violate her faith. The New Mexico Supreme Court then upheld that decision.[5]

- In Oregon, the State used a law like HB 45 to punish Melissa and Aaron Klein, owners of Sweet Cakes by Melissa. Although the Kleins are more than willing to provide services to all customers, they cannot design a wedding cake that celebrates a same-sex marriage because of their belief that marriage is the union of a man and a woman. Yet because of that conviction on marriage, the Kleins have been sued, and the government has ordered them to pay $135,000 to the couple who sued them.[6]

- In Colorado, the state government applied a law like HB 45 to punish a cake artist named Jack Phillips, owner of Masterpiece Cakeshop. Jack serves all customers, including members of the LGBT community, but over the years, he has regularly declined to custom-create cakes that celebrate events in conflict with his beliefs (such as cakes for a Halloween party or a same-sex marriage). Because he is unable to help celebrate certain events, the State of Colorado has declared him in violation of the law. Notably, the government persists in punishing him while at the same time declaring that other cake artists may refuse to design cakes with messages criticizing same-sex marriage. Unfortunately, laws like HB 45 encourage the government to engage in this sort of blatant discrimination against people like Jack.[7]

- In New York, as a result of a law like HB 45, the State ordered Cynthia Gifford, a woman who personally coordinates weddings on her farm, to pay $13,000 because she cannot in good conscience coordinate a same-sex ceremony. Even though Cynthia gladly hosts same-sex wedding *receptions* (just not the wedding *ceremonies*) and otherwise welcomes all people to visit the farm for its fall festival and other programs, she has been punished by the government for living consistent with her beliefs about marriage.[8]

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[5] See http://www.adflegal.org/detailspages/case-details/elane-photography-v.-willock (last visited Jan. 7, 2016) for more information about Elaine Huguenin and her case, including links to relevant legal documents. Litigation in Elaine's case concluded in 2014. *See Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014), *available at* https://adflegal.blob.core.windows.net/web-content-dev/documents/elane-photography-v-willock---new-mexico-supreme-court-opinion.pdf?sfvrsn=6 (last visited Aug. 8, 2015).

[6] *See* Valerie Richardson, "Sweet Cakes by Melissa owners owe $135,000 in damages for gay wedding refusal," Washington Times, July 2, 2015, *available at* http://www.washingtontimes.com/news/2015/jul/2/sweet-cakes-melissa-owners-owe-135000-damages-gay-/ (last visited Jan. 19, 2016). The Kleins' case is currently on appeal to the Oregon Court of Appeals.

[7] See http://www.adflegal.org/detailspages/case-details/masterpiece-cakeshop-v.-craig (last visited Aug. 9, 2015) for more information about Jack and his case, including links to relevant legal documents. Jack's case is currently pending appeal to the Colorado Supreme Court.

[8] See http://www.adflegal.org/detailspages/case-details/gifford-v.-erwin (last visited Jan. 19, 2016) for more information about Cynthia and her case. An appellate court in New York recently ruled against Cynthia and upheld the government's punishment of her. *See Gifford v. McCarthy*, No. 520410, 2016 WL 155543 (N.Y. App. Div. Jan. 14, 2016).

- In Kentucky, the City of Lexington declared Blaine Adamson, managing owner of a promotional print shop named Hands On Originals, in violation of a law like HB 45 because he declined to print shirts with a message promoting a local gay pride festival. Blaine regularly works with and employs members of the LGBT community, but because he was unable to print a message that conflicts with his beliefs, the government punished him and ordered him to attend "diversity training."[9]

- In California, the state's highest court found that physicians whose religious beliefs forbid them from providing an elective fertility procedure for an unmarried woman in a same-sex relationship violated a law like HB 45.[10]

- In Michigan, government officials who have adopted policies like HB 45 have declared that counseling students may not decline to provide counseling that affirms same-sex relationships, even if providing counseling under those circumstances would violate their religious beliefs.[11]

As these real-life stories and cases illustrate, laws like HB 45 result in government discrimination against people who have sincere convictions on important moral issues like marriage and human sexuality. Those people are punished for declining to promote messages or events that they consider objectionable, while other business owners with different beliefs and convictions are able to refuse their support for messages or events that they disagree with. For example, a gay business owner may refuse to print messages that denounce same-sex marriage; a Democrat who owns a hotel or other event venue may decline to host a conference for a Republican group; and a vegan marketer may refuse to create an ad campaign promoting meat consumption. Yet it is patently unjust for the government to allow those business owners to live according to their values, while telling the people discussed in the stories above that they cannot live consistent with theirs.

Laws like HB 45 target small-business owners for these crises of conscience. But there is no need to do this. Most large corporations already have policies that mirror HB 45,[12] and many small businesses (driven primarily by a profit motive) are more than happy to promote any message and participate in any event. So there are more than enough businesses willing and able to provide services to everyone, and the government need not override the consciences of small-business owners. HB 45 is thus an effort by its proponents to stigmatize and impose their values on small-business owners. But no legislative body should support a law that makes the cost of operating a small business the conscience of its owners.

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[9] See http://www.adflegal.org/detailspages/case-details/hands-on-originals-v.-lexington-fayette-urban-county-human-rights-commission (last visited Jan. 19, 2016) for more information about Blaine and his case, including links to relevant legal documents.

[10] *See North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959 (Cal. 2008).

[11] *See Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012) (ruling against a public university that dismissed a counseling student because, according to the university, her religious need to refer prospective clients who sought counseling affirming their same-sex relationships amounted to discrimination based on sexual orientation).

[12] *See* Human Rights Campaign, "LGBT Equality at the Fortune 500," http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500 (last visited Nov. 13, 2015) (reporting that 89% of Fortune 500 companies include sexual orientation in its nondiscrimination policies and that 66% of those complies include gender identity).

Perhaps most troubling of all, HB 45 will violate the federal constitution whenever it is used to force people to promote messages or participate in events that they do not want to support. Indeed, a long line of cases from the U.S. Supreme Court establishes that the government may not require people or organizations to promote, host, or facilitate expression that they deem objectionable.[13] Notably, the Supreme Court has already declared unconstitutional particular applications of sexual-orientation nondiscrimination laws like HB 45. For instance, in *Hurley* (a case discussed above), the Court concluded that the Constitution forbids the government from requiring parade organizers to facilitate the message of a gay advocacy group.[14] And in *Boy Scouts of America v. Dale*, the Court held that the government may not apply a law like HB 45 to force an organization to accept a leader who does not adhere to its moral code.[15]

In addition, a Kentucky court recently concluded that the government may not apply a law like HB 45 to force a promotional printer[16] to produce shirts displaying a message that conflicts with his beliefs.[17] That case affirmed the constitutional rights of Blaine Adamson, managing owner of Hands On Originals, whose story is recounted above. HB 45 suffers from the same constitutional infirmities as the law declared unconstitutional in Blaine's case. This bill thus places the State at risk of lawsuits for which it may be liable to pay the attorneys' fees of the parties that sue it.[18]

Laws like HB 45 not only jeopardize the freedoms of business owners, they also harm social-service organizations, like child-welfare and adoption agencies, that hold particular views about marriage and family-related issues. Specifically, those laws have forced adoption and foster-care agencies with significant expertise helping marginalized and needy children to close simply because

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[13] *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995) (government may not require a public-accommodation parade organization to facilitate the message of a gay advocacy group); *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality) (government may not require a business to include a third party's expression in its billing envelope); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (government may not require citizens to display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not require a newspaper to include a third party's writings in its editorial page).

[14] *Hurley*, 515 U.S. at 572-73.

[15] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

[16] People of faith who operate for-profit businesses have the right to freely exercise their religion. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014) (finding that a law protecting the free exercise of religion applied to for-profit businesses); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (finding that a family-owned for-profit corporation "has standing to assert the free exercise rights of its owners"); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 Geo. Mason L. Rev. 59, 64 (2013) (explaining that for-profit businesses have the right to exercise religion).

[17] *Hands On Originals v. Lexington-Fayette Urban County Human Rights Comm'n*, No. 14-CI-04474, slip op. (Fayette Cir. Ct. April 27, 2015).

[18] Federal law permits private citizens to sue state and local governments in federal court when they believe that their constitutional rights have been violated, and when those lawsuits are successful, the government is generally required to pay the challengers for their attorneys' fees. *See* 42 U.S.C. §§ 1983, 1988 (providing that persons who successfully demonstrate that a state or local law is unconstitutional may recover costs and attorneys' fees). Those attorneys' fees awards are often many hundreds of thousands of dollars (and at times even more). *See, e.g.*, Zoe Tillman, "Kentucky Ordered to Pay $1.1M in Fees in Same-Sex Marriage Case," The National Law Journal, Jan. 13, 2016, *available at* http://www.nationallawjournal.com/home/id=1202747048894/Kentucky-Ordered-to-Pay-11M-in-Fees-in-SameSex-Marriage-Case?mcode=1202615432992&curindex=1&slreturn=20160020090416 (last visited Jan. 20, 2016).

their policy is to place children only with a married mother and father.[19] Pushing experienced social-service organizations out of the adoption and foster-care fields inflicts significant societal costs—indeed, it harms orphans in desperate need of homes by reducing the pool of qualified adoption service providers.[20]

By putting many business owners and nonprofit organizations to the choice between their convictions and continuing their operations, HB 45 will force many of these organizations to close their doors or limit their services. That, in turn, will decrease jobs, tax dollars, diversity in the marketplace, and the number of available social-service providers. Yet no one benefits from this, thus further confirming that HB 45 is bad policy for Florida.

## II. HB 45's addition of gender identity jeopardizes citizens' privacy rights and safety interests, particularly those of women and young girls.

HB 45 also threatens the privacy rights of individuals and presents significant public-safety risks by placing into state law the ambiguous legal concept of "gender identity."[21] According to HB 45, gender identity is determined by a person's identity, expression, appearance, or behavior regardless of his or her designated sex at birth; it is thus an internally conceived and objectively unverifiable characteristic.[22] This means that if HB 45 is enacted, men who profess a female identity will be permitted to access women's bathrooms, locker rooms, and other private facilities (and vice versa).

But laws that allow biological males into restrooms or locker rooms used by women likely violate constitutional privacy rights. As the Ninth Circuit Court of Appeals has observed, "[s]hielding one's unclothed figure from the view of strangers, *particularly strangers of the opposite sex*, is

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[19] *See, e.g.*, Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 299 (Aug. 2008) ("Massachusetts law prohibits discrimination based on sexual orientation . . . . Pursuant to this, Massachusetts Department of Social Services regulations forbid discrimination based on sexual orientation as a condition of licensing. Catholic Charities faced a Hobson's choice: either comply with [the] law and place children with gay couples or lose their license and end their ministry to needy children."); Sarah Torre and Ryan T. Anderson, "Adoption, Foster Care, and Conscience Protection," The Heritage Foundation Backgrounder, Jan. 15, 2014, at 6-7 *available at* http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection#_ftn29 (last visited Jan. 20, 2016) (recounting, among other examples, that the Evangelical Child and Family Agency in Illinois was forced to stop its adoption and foster services because of the State's sexual-orientation nondiscrimination law).

[20] There is no need to force all child-welfare agencies to place children with same-sex couples because many such organizations in this State are already committed to doing so.

[21] HB 45 states that "gender identity or expression means gender-related identity, appearance, or behavior, whether such gender-related identity, appearance, or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence, including, but not limited to:

(a) Medical history, care, or treatment of the gender-related identity;

(b) Consistent and uniform assertion of the gender-related identity; or

(c) Other evidence that the gender-related identity is a sincerely held part of a person's core identity and is not being asserted for an improper purpose."

[22] *See* Shuvo Ghosh, *Gender Identity*, eMedicine, http://emedicine.medscape.com/article/917990-overview (last visited Aug. 7, 2015).

impelled by elementary self-respect and personal dignity."[23] Federal appellate courts have thus concluded that individuals in various states of undress have a constitutional right to privacy. The Second Circuit Court of Appeals, for example, has recognized a "privacy interest" in protecting against "the involuntary viewing of private parts of the body by members of the opposite sex."[24]

And many other courts have held that the government violates the privacy rights of its citizens when its policies require someone to be undressed in the presence of members of the opposite biological sex.[25] For instance, the Tenth Circuit Court of Appeals has recognized that the constitutional privacy rights of a male prisoner may be violated when prison officials allow female guards to view the prisoner showering and using the toilet.[26] Similarly, at least one federal district court has held that female prisoners' privacy rights were violated when government officials allowed male prisoners and deputies to peer into their cells and view their toilets.[27] Under the logic of these cases, those who object to the presence of the other biological sex in facilities where individuals are in states of partial or total undress will likely be able to assert a claim against the State for violating their privacy rights.[28]

Furthermore, laws like HB 45 increase the likelihood that victims of sexual abuse will be re-traumatized. Nearly one in four women has been sexually abused, mostly by males.[29] Requiring access to women's bathrooms and locker rooms by men who profess a female identity guarantees that victims of sexual abuse will be exposed to partially or fully unclothed male strangers. Thus, even

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[23] *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (emphasis added); *see also York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from . . . strangers of the opposite sex[] is impelled by elementary self-respect and personal dignity.").

[24] *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980).

[25] *See, e.g.*, *Hill v. McKinley*, 311 F.3d 899 (8th Cir. 2002) (constitutional right to privacy violated when female prisoner was left unclothed and potentially could be viewed by male guards); *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993) (male prisoner may state a valid privacy claim where he is required to be nude in the presence of female guards); *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992) (male prisoner states claim for a privacy violation when he was subjected to strip search in presence of female guards); *Johnathan Lee X v. Gulmatico*, 932 F.2d 963 (4th Cir. 1991) (male prisoner states claim for violation of privacy right when female guards are stationed near showers and can observe prisoner showering); *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987) (assuming without deciding that inmates retain a constitutional right to privacy and that male inmates state such a claim when prisons allow females to observe them showering); *Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982) (constitutional privacy rights may be violated where female guards are allowed to view male prisoners showering and using the toilet); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (constitutional privacy rights are violated where a female inmate's undergarments were removed by female nurse but with male guard present); *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (constitutional right to privacy violated where male police officer asked woman complaining of assault to undress, examined her, and photographed her in indecent positions). *But see Petty v. Johnson*, 193 F.3d 518 (5th Cir. 1999) (holding that there was no violation of male prisoners' right to privacy where prison allows female guards to observe them showering); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir.1985) (use of female guards to supervise showering does not violate male inmates' right to privacy).

[26] *Cumbey*, 684 F.2d 712.

[27] *Dawson v. Kendrick*, 527 F. Supp. 1252 (S.D. W. Va. 1981).

[28] The courts that have considered this issue in the prison context have noted that incarcerated individuals do not enjoy full privacy rights. *See Cumbey*, 684 F.2d at 714. Courts will likely be far more sympathetic to non-incarcerated persons who have full privacy rights, such as an elderly woman who objects to encountering biological males in public restrooms or a teenage girl who does not want biological males showering with her at the local swimming pool.

[29] http://www.jimhopper.com/pdfs/Dube_(2005)_Childhood_sexual_abuse_by_gender_of_victim.pdf. (last viewed January 30, 2016.)

transgender males identifying as women who have no intention of sexually assaulting women and girls will cause enormous emotional harm to victims who deserve the greatest protection.[30]

But one must also consider the threat of male predators masquerading as transgender females. In Dallas, in 2012, Paul Witherspoon, who now goes by "Paula," is a registered sex offender, and has been convicted of sexual assault against a young girl and indecency involving sexual contact with another girl. In 2012, Witherspoon was reported to the police in Dallas because he was in the women's bathroom. He was ticketed by a Dallas policeman. But because Witherspoon now presents as a woman, his attorney at Lambda Legal (a nationwide advocacy group for LGBT issues) asserted that, under the Dallas gender-identity law, Witherspoon had every right to use the bathroom with women and young girls.[31]

HB 45 will create similar situations and, in that way, jeopardizes citizens' reasonable privacy interests and safety concerns. This is not the kind of policy that any state should create for the people whose rights and safety it is supposed to protect.

## III. HB 45's inclusion of gender identity fosters costly and unfair litigation for employers and business owners.

HB 45 is likely to lead to costly and unreasonable litigation because it implements standards that are impossible for employers and business owners to understand—let alone comply with. Organizations like Facebook recognize at least 58 different genders, which include designations like "Cis Man," "Cis Male," "Cisgender Male," "Bigender," "Agender," and "Androgynous."[32] Proponents of gender-identity theory also assert that gender varies for some people depending upon time and context.[33] Indeed, some individuals have even taken extreme steps to change their gender identity only to regret the change and seek to undo it.[34] But HB 45 will unfairly require employers to

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[30] http://dailysignal.com/2016/01/25/sexual-assault-victims-speak-out-against-washingtons-transgender-bathroom-policies/ (last viewed January 30, 2016.)

[31] *See* Ray Villeda, "Transgender Woman: Convictions Irrelevant to Citation: Witherspoon convicted in 1990 for sexual assault of child, indecency with child," NBCDFW, May 12, 2012, *available at* http://www.nbcdfw.com/news/local/Transgender-Woman-Convictions-Irrelevant-to-Citation-149923975.html (last visited Jan. 7, 2016).

[32] *See* Russell Goldman, "Here's a List of 58 Gender Options for Facebook Users," ABC News, Feb. 14, 2014, *available at* http://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users/ (last visited Nov. 19, 2015).

[33] *See* Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. CL. & CR. 101, 104 (2006) (noting that "individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.").

[34] *See* Jay Akbar, "The man who's had TWO sex changes," Daily Mail, Jan. 26, 2015, *available at* http://www.dailymail.co.uk/news/article-2921528/The-man-s-TWO-sex-changes-Incredible-story-Walt-Laura-REVERSED-operation-believes-surgeons-quick-operate.html (last visited Nov. 4, 2015); "MTV True Life: Transgender Teens change their minds as adults," GenderTrender, Apr. 5, 2013, *available at* https://gendertrender.wordpress.com/2013/04/05/mtv-true-life-transgender-teens-change-their-minds-as-adults/ (last visited Nov. 4, 2015); Grace Murana, "8 Amazing Stories of Reverse Sex Change," Oddee, Jan. 29, 2015, *available at* http://www.oddee.com/item_99220.aspx (last visited Nov. 4, 2015); Tara Palmeri, "I'm a guy again! ABC newsman who switched genders wants to switch back," NYPost, Aug. 6, 2013, *available at* http://nypost.com/2013/08/06/im-a-guy-again-abc-newsman-who-switched-genders-wants-to-switch-back/ (last visited Nov. 4, 2015); Helen Weathers, "A British tycoon and father of two has been a man and a woman . . . and a man again . . . and knows which sex he'd rather be," Daily Mail, *available at* http://www.dailymail.co.uk/femail/article-1026392/A-British-tycoon-father-man-woman---man---knows-hed-be.html (last visited Nov. 4, 2015).

discern, understand, and honor all of the many genders with which their employees and customers might identify, and avoid making them feel "discriminated" against because of their identity. Yet few people know what the numerous gender-identity terms mean, and even fewer know how to identify or differentiate between them. Requiring employers and business owners to consider such amorphous, subjective, and fluid concepts, and subjecting them to liability for missteps, is no way to treat the State's job and revenue creators.

In addition, the gender-identity provision of HB 45 creates a number of other unjust situations for employers and business owners. Employers could be subject to lawsuits under HB 45 for refusing to force their employees to address with male pronouns female coworkers who identify as men. Business owners who provide health-care coverage for their employees could be sued for declining to pay for "sex-reassignment" surgeries. A doctor or medical facility that generally performs hysterectomies could be sued for refusing to perform that procedure for someone seeking to "transition" from female to male. And a day-care center or school could face liability for declining to assign teachers who profess a gender different from their biological sex to oversee young children who might be confused by such things. No employer or business owner should face a lawsuit for taking any of these reasonable actions. Yet HB 45 would open the door to such costly lawsuits and potentially crippling liabilities.

## IV. HB 45 is unnecessary because the people of Florida already respect each other and value the diverse views of their neighbors.

Laws like HB 45 are supposed fixes in search of a problem. With very few exceptions, Americans simply do not refuse to hire, serve, or rent to people because they identify as gay, lesbian, or transgender. Indeed, there is no evidence that there is a systemic pattern and practice of invidious discrimination in this State that might justify this heavy-handed change to the state nondiscrimination laws. It would thus be imprudent to impose a law whose predecessors in other jurisdictions have a demonstrated history of overriding constitutional freedoms, privacy rights, and safety interests when no real problem needs to be addressed.

Historically, nondiscrimination laws in the United States have sought to address systemic and intractable instances of invidious discrimination. For example, Congress enacted the Civil Rights Act of 1964 because entire parts of the country were closed to African Americans.[35] As one legal scholar has noted, "[c]ivil rights laws were enacted against a background of devastating and widespread discrimination[.]"[36] Segregation, and institutionalized white-supremacy, was the law of the land in a number of states.[37] In large swaths of the nation, black Americans were denied the opportunity to

[35] *See, e.g.*, Steven G. Anderson, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1220 (1992) ("Prior to the passage of the Civil Rights Act of 1964, racial discrimination was widespread and seemingly overt."); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 425 (2010) (noting that at the time of the passage of the Civil Rights Act of 1964 and shortly thereafter, "the presumption was one of widespread discrimination").

[36] Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 406-07 (1994).

[37] *See* John Valery White, *Brown v. Board of Education and the Origins of the Activist Insecurity in Civil Rights Law*, 28 OHIO N.U. L. REV. 303, 361 (2002) ("[S]egregation was the widespread order, not only in the South where most black Americans still lived but everywhere substantial numbers of black Americans lived, some degree of separation of the races

vote, excluded from the skilled trades, and denied access to many hotels, restaurants, and theaters.[38] Their children were forced to attend inferior segregated schools.[39] They were met with attack dogs, cattle prods, and batons if they attempted to protest. The system of racial discrimination known as "Jim Crow" was pervasive, and it was designed to prevent black Americans from taking part in American society. It was against this backdrop, where "[i]nvidious discrimination was ubiquitous throughout the country," that Congress enacted the Civil Rights Act of 1964.[40]

For similar reasons, in 1990 Congress enacted the Americans With Disabilities Act (ADA), a law that prohibits employers and places of public accommodation from discriminating against people because of a disability. Congress enacted that law because it determined that there was a pattern of widespread invidious discrimination against people with disabilities.[41] "[W]ell-catalogued"[42] evidence demonstrated that such discrimination was occurring.[43] Congress found that 8.2 million disabled people wanted to work but had been excluded from the job market because of their disability.[44] And even those who were able to find work typically could not obtain employment on equal terms with the non-disabled. In fact, a 1989 U.S. Census Bureau study revealed that disabled men earned 36 percent less, and disabled women earned 38 percent less, than their non-disabled counterparts.[45] This discrimination was both "serious" and "pervasive."[46]

But discrimination of this nature towards those who identify as gay, lesbian, or transgender is simply absent in America, including in Florida.[47] All people, including members of the LGBT community, are welcome as neighbors, patrons, and friends. Indeed, the business community is voluntarily hiring and serving everyone. The people of this State are already treating one another with dignity and respect. This divisive change to the nondiscrimination law is not needed. Balancing the

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was memorialized in practice and law."). *See also Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 228 (1973) ("The history of state-imposed segregation is [] widespread in our country[.]")

[38] Michael J. Fellows, *Civil Rights – Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387, 395 (2004).

[39] Fellows, *Civil Rights – Shades of Race*, 26 W. NEW ENG. L. REV. at 395.

[40] Fellows, *Civil Rights – Shades of Race*, 26 W. NEW ENG. L. REV. at 397.

[41] Harvard Law Review, *I. Constitutional Law A. Constitutional Structure*, 114 HARV. L. REV. 179, 187 (2000).

[42] *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

[43] Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 390 (1991) (explaining that a 1986 Harris poll demonstrated widespread discrimination against disabled people).

[44] Molly M. Joyce, *Has the Americans with Disabilities Act Fallen on Deaf Ears? A Post-Sutton Analysis of Mitigating Measures in the Seventh Circuit*, 77 CHI.-KENT L. REV. 1389, 1393 (2002).

[45] Joyce, *Has the Americans with Disabilities Act Fallen on Deaf Ears?*, 77 CHI.-KENT L. REV. at 1393.

[46] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 416 (1991) (quoting U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983)). Note also that a similar history of pervasive age discrimination surrounded Congress's enactment of the Age Discrimination in Employment Act (ADEA). *See* Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 512 (1995) (noting that at the time of the passage of the ADEA, it was documented that there was "widespread age discrimination in the workplace").

[47] This is not to suggest that there might not be rare instances of real or apparent discrimination. But nondiscrimination laws, as discussed above, are intended to address instances of systemic and intractable discrimination.

absence of need against the demonstrable threat that laws like HB 45 pose to constitutional freedoms, privacy rights, and safety interests confirms that this law is bad policy for the people of Florida.

## Conclusion

Many cities and states that have recently considered adding sexual orientation and gender identity to their nondiscrimination statutes have declined to do so. In 2015 alone, the legislatures of Idaho, Wyoming, Missouri, Pennsylvania, Nebraska, and North Dakota declined to add these new categories. In 2014 and 2015, the same decision was made by the governments of at least eleven cities, including Charlotte, North Carolina, and Scottsdale and Glendale, Arizona (which hosted the Super Bowl in 2015).[48] Also, voters in many cities—including Springfield, Missouri (in April 2015), and Houston, Texas (in November 2015)—recently repealed laws like HB 45. In short, people across the nation, after considering many of the concerns raised in this memorandum, are recognizing that these laws do not reflect good public policy and thus are declining to enact them.

[48] Other cities include Owensboro, Kentucky (August 2014); Dillon, Montana (September 2014); Berea, Kentucky (October 2014); Fountain Hills, Arizona (November 2014); Beckley, West Virginia (December 2014); Bardstown, Kentucky (March 2015); Scottsdale, Arizona (March 2015); Elkhart, Indiana (July 2015); and Goshen, Indiana (August 2015).