



November 24, 2020

Re: The Harms of Sexual Orientation and Gender Identity Ordinances

It was recently reported that Equality NC is lobbying several North Carolina cities to adopt local sexual orientation and gender identity (SOGI) ordinances given the imminent expiration of HB 142.¹ But such laws unconstitutionally threaten our First Amendment freedoms. If enacted, they would not only violate privacy rights and deprive women and girls of equal opportunities in sports and other areas, but they would also expose businesses, religious organizations, and ordinary citizens to significant legal and financial liability. Across the country, SOGI laws have advanced government discrimination against people of faith just for seeking to peacefully live and work consistent with their religious beliefs.

Harms to Small Business Owners, Their Employees, and Customers

SOGI laws 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.² And even after winning at the U.S. Supreme Court, Jack has subsequently been dragged into court for declining to create a custom cake celebrating a person's gender transition.³

SOGI laws subject 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

SOGI laws could even harm churches and faith-based organizations by stripping away their ability to make employment decisions based on the sexual conduct or identifications of applicants. If someone who identifies as a Baptist and is married to a person of the same sex applies to be the Baptist church's worship leader, the church could not consider the applicant's sexual relationship when making its hiring decision—even if church doctrine speaks directly to that issue. Alliance Defending Freedom recently sued Virginia over its enactment of a state SOGI law that violates church autonomy in this manner. The law even prohibits ministries from offering sex-specific classes for parenting and Christian discipleship, and it forces them to pay for medical procedures—such as “gender reassignment” procedures—that violate their beliefs.⁴ Local governments should reject any law that causes similar harms to churches and ministries in their communities.

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

SOGI laws harm women and girls in the community—the very malady that HB 2 and HB 142

¹ <https://www.wbtv.com/2020/10/26/city-charlotte-working-with-equality-nc-other-cities-craft-new-nondiscrimination-ordinance/>.

² <http://www.adfmedia.org/News/PRDetail/8608>.

³ <http://www.adfmedia.org/News/PRDetail/10799>.

⁴ <http://www.adfmedia.org/News/PRDetail/?CID=106108>.

sought to remedy. By adding gender identity to the public accommodation law,⁵ these laws 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 state SOGI law) repeatedly lost to two males who were allowed to compete in female track events because they identified as female.⁶ This seriously undermines the athletic opportunities available to females, and it could result in lost athletic scholarships as well. SOGI laws 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, SOGI laws 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 municipal SOGI ordinance 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.⁷ 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 SOGI laws like those pushed by Equality NC.

The *Bostock* Decision Does Not Require North Carolina 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 North Carolina 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 prejudge 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. North Carolina unfortunately has no RFRA or comparable statute to protect its citizens from the harms described above. Cities and counties should not codify the *Bostock* decision into local law.

Conclusion

SOGI laws raise many constitutional concerns. They 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. They compel businesspeople to speak messages against their will and to support expressive events in violation of their conscience. And they violate the freedom of faith-based organizations to operate consistent with their religious beliefs. These laws jeopardize the rights of everyone without the systemic pattern of invidious discrimination that might otherwise justify their enactment. North Carolina can respect the dignity of all of its citizens without enacting new ordinances that have devastating consequences for women, families, small businesses, and people of faith.

⁵ Equality NC promotes model ordinances from Charleston, SC and Columbia, SC that include broad definitions of public accommodation that cover "any place which serves the public and requires a license or permit." This would encompass youth recreation facilities, summer camps, women's shelters, and even churches and religious non-profits that serve their communities (and require fire permits to operate).

⁶ <http://www.adfmedia.org/News/PRDetail/10816>.

⁷ <http://www.adfmedia.org/News/PRDetail/10689>.