GREAT LAKES
JUSTICE CENTER

ISSUE BRIEF

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MICHIGAN FAMILY FORUM
CITIZENS FOR TRADITIONAL VALUES

NEW SEXUAL ORIENTATION/TRANSGENDER LAWS

The Detrimental Effect on the Business and Religious Community

INTRODUCTION

Proposed amendments to the Michigan Elliott-Larsen Civil Rights Act (MCL 37.2101 et. seq.) seek to increase regulation of business, religious organizations and citizens. The proposed amendments create new protected classes of individuals, giving new legal causes of action on the basis of "sexual orientation," "sexual identity," "gender identity and expression," "family responsibilities," etc. These laws are commonly referred to as SOGI (Sexual Orientation/Gender Identity) Laws. It is the job of lawmakers to affirm and uphold constitutionally-protected freedoms, not pass laws granting special protections for some, while coercing others to comply with a political agenda.

When a state makes such changes to existing law, numerous problems inevitably arise. This issue brief seeks to fully inform the public of these concerns by presenting a complete and truthful understanding of the issues. In doing so, this paper informs the reader of a number of practical business, constitutional, legal, and economic concerns that will impact many citizens, businesses, and religious and charitable organizations in our state if these amendments are passed.

Preliminarily, we do not condone discriminatory actions toward any person and hold no animus toward anyone. All viewpoints are entitled to respectful consideration. To honestly disagree with the proponents of these changes is not hate-speech or bigotry. To make such a claim is itself intolerant and close-minded.

- **NO DEMONSTRATED REASON FOR THE NEW CATEGORIES:** The proposed amendments are a solution searching for a problem. No documented history of ongoing, extensive, and pervasive discrimination against the proponents of the amendments exists. No proof exists that in the State of Michigan gay individuals are routinely fired from jobs just for being gay. No proof exists of gay individuals systemically being denied access to educational or employment opportunities, being forced to sit in the back of a bus, being forced to use separate but equal public accommodations like bathrooms, being harmed economically, etc. Occasional, anecdotal stories do not justify such sweeping changes to the law, particularly ones that will infringe on everyone's freedom, even those who identify as gay or lesbian. The amendments are not being promoted to cure a demonstrated problem, but rather to coerce adherence to a particular agenda.

- **CREATES AN INTERNAL CONFLICT IN THE LAW:** The proposed amendments create an internal conflict within the Elliott-Larsen Act itself. Religion is already a protected class under the civil rights law. More importantly, the free exercise of religious conscience is a constitutional right. If the Legislature adds these additional categories, a clear conflict will exist between the two classes. This will lead to more divisiveness and litigation over which category prevails. Does a constitutional right prevail over a statutory class? Michigan's Constitution states in Article I, Section 4:

> *The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.*

- **LOSS OF LEGISLATIVE AUTHORITY:** The Elliott-Larsen Civil Rights Act is generally enforced through the Civil Rights Commission. The Commission is constitutionally created (MI Const. 1963, Article V, Section 29) and has authority over discrimination based upon "religion, race, color or national origin." A question exists, therefore, as to whether the Legislature has the authority to add additional categories beyond those listed explicitly in the Constitution. Depending on the answer to the above question, the people's representatives in the Legislature may not have direct power or oversight over the Commission's exercise of its power regarding the new categories. It appears to be necessary to amend the Michigan Constitution in order to grant such authority to the Commission.

The Michigan Attorney General has ruled:

> *The Legislature is without authority to abrogate or limit the power of the Civil Rights Commission in the fields of employment, education, housing, and public accommodations. . . . The Legislature is without power to set aside the rules of the Civil Rights Commission. (1963 OAG 4161).*

As a result, once the Legislature amends the Elliot Larson Act to include these new categories, it may have no authority to control how the Commission interprets and enforces these categories. The inclusion of these new categories may give full authority to the unelected Commission to investigate, charge, adjudicate, and impose financial penalties and other harsh sanctions against any business, religious organization, or citizen based solely on its interpretation and implementation of this law.

- **SPECIFIC CONCERNS:** Although this paper does not specifically address all of the political and moral issues raised, Christian people, as well as those of other faiths, strongly believe that God created all human life in His image and that every person has positive value and deserves respect. No true Christian would, therefore, ever discriminate, as that term is traditionally understood, against another human being. Unfortunately, these proposed amendments would be applied in a non-traditional manner.

This proposed exercise of governmental power:

1. is coercive in its application to businesses and citizens;
2. imposes burdensome regulatory, administrative, financial and other economic costs on the business community;
3. is unconstitutionally vague and overbroad;
4. unconstitutionally infringes upon a citizen's free speech and free exercise of religion; and
5. violates precepts of good governance.

As explained below, such action violates both the United States and Michigan Constitutions. These amendments, as enforced around the country, are not merely requests for fairness toward supposedly aggrieved individuals in these categories. Rather, they are being used as a club to bludgeon and bully into submission those who disagree with, and will not affirm, their conduct choices.

With so much at stake, it is important to point out the real world, constitutional and statutory deficiencies in adding these proposed new categories. It is important for

the Legislature and policy makers to take a serious look at the interests of all the citizens of this state before making such sweeping changes to Michigan law. These proposed amendments are wholly inconsistent with our fundamental principles of good government and the rule of law.

These extremely vague and overbroad categories, if enacted into law, actually encourage and enable discrimination to occur against citizens in a manner that policymakers may not have previously considered. It authorizes arbitrary government action forcing businesses and citizens of faith of all backgrounds (e.g., Muslim, Jewish, Christian, etc.), to make a terrible choice: act against their constitutionally protected consciences and their sincerely held religious beliefs, or face the full force of the state's governmental and regulatory power in protracted legal battles, both administratively and in the courts. The following discussion outlines how this law is both unconstitutional and divisive public policy, as well as how it will cost the State of Michigan, its businesses, religious institutions, and citizens' untold financial expenses and costs.

COERCION OF THE BUSINESS COMMUNITY

If enacted into Michigan law, the proposed new provisions empower the Commission to revoke or suspend a citizen's business license (MCL 37.2703). Thus, the potential for bullying and the loss of one's livelihood exists if a citizen has the courage to contest the new law. Is the current leadership of the State of Michigan truly prepared to give the proponents of these new categories the ability to use the full force of the State to financially destroy their victims in the business community?

Moreover, if the new categories are added, the existing law (MCL 37.2801) would give the well-funded proponents of the new categories the ability to sue their opponents for damages in circuit court, including paying all their attorney fees if they prevail. The small business community will be unable to defend itself against such litigation. Interestingly, no provision exists in the law permitting the small business owner to recover its attorney fees or litigation costs if it wins (see MCL 37.2802). The cost of just one such lawsuit could easily put a small business out of business. There is no penalty or repercussion of any kind against an accuser who frivolously files such a lawsuit.

Another argument by proponents of the new categories is that they are in the same position as African-Americans and the civil rights issues they faced. This argument is flawed on many levels. Comparing the dilemmas of the LGBTQ community to the centuries of discrimination faced by African-Americans is myopic and dismissive of our country's cultural and legal history.

The antidiscrimination laws of the Civil Rights Era were a direct response to the systemic discrimination required by law during the Jim Crow era. No similar laws mandating discrimination based upon sexual orientation, gender identity, etc., exist today.

The disgraces and unspeakable privations in our nation's history pertaining to the civil rights of African-Americans are unmatched under the law. No other class of individuals, including individuals who are same-sex attracted, have ever been enslaved, or lawfully viewed not as human, but as property. The Federal Government has never valued gay or transgendered persons as 3/5 of a person. None have ever lawfully been forced to attend different schools, walk on separate public sidewalks, sit at the back of the bus, drink out of separate drinking

fountains, denied their right to assemble, or denied their voting rights. The legal history of these disparate classifications, i.e., immutable racial discrimination and same-sex attraction, is incongruent.

Is the State of Michigan really prepared to take sides in this social debate to the extent that it will hand over to one side the ability to financially destroy the other? It would be ironic after just recently passing the school bullying amendments (MCL 380.1310b) for the State to actually codify the legal bullying of businesses, religious institutions, and citizens who believe in traditional ideas of family and human sexuality. The ramifications of such a position should be carefully considered.

EXCESSIVE REGULATION, LITIGATION, AND COSTS TO BUSINESS

As seen elsewhere around the country, passage of laws adding the proposed new categories markedly increase litigation and other costs for the business community. From increased regulation to administrative hearings to lawsuits over bathroom accommodations, businesses are being barraged by attacks from the proponents of the new categories. This is much more than trying to prevent a member of some particular group from being fired from his or her job. In fact, no evidence exists that such discriminatory terminations happen in Michigan on a regular basis.

From bed and breakfast owners to bakers to florists to counselors to photographers, small business owners are under assault for having the courage to stand up for their beliefs. The government in these states have given their citizens a choice no one should ever have to make: either violate their religious conscience or close their business. Proponents use these additional categories as a sword, not a shield. The following examples provide just a small sampling of the exploding litigation concerning this issue:

- **CITY THREATENS TO PROSECUTE, JAIL AND FINE PASTORS – IDAHO – 2014:**
  - Two ordained ministers who run a wedding chapel in Coeur d'Alene, Idaho, were threatened by city officials to either marry same-sex couples under that city's SOGI law or face prosecution for violating the law.
  - If convicted, they would face up to 180 days in jail and a fine of $1,000.00 per day for each "violation." If the pastors refused to perform the same-sex marriage for one week they would face over three years in jail and $7,000.00 in criminal fines.
  - The pastors have filed a federal lawsuit seeking a restraining order preventing the city from forcing them to violate their religious conscience.

Is the State of Michigan prepared to force ministers, priests, rabbis, and imams to violate their faith and conscience by threat of prosecution, jail, and fines?

- **HOUSTON SOGI LAW SUBPOENAS TO PASTORS – TEXAS – 2014:**
  - Attorneys for the Mayor of Houston subpoenaed the sermons and other religious materials of numerous local pastors who opposed its SOGI law.
  - The city subpoena demanded all speeches, presentations, or sermons related to the City of Houston SOGI Law, Mayor Annise Parker, homosexuality, or

gender identity prepared by, delivered by, revised by, or approved the pastors.

- The Subpoena further demanded from the pastors all e-mails, text messages, instant messages, videos, tape recordings, diaries, calendars, checkbooks, all communications with church members, and all communications with their attorneys regarding possible SOGI information.

Is the State of Michigan prepared to interfere in the religious life of the citizens of Michigan by subpoenaing sermons in order to enforce this SOGI law?

Is the State of Michigan willing to subpoena pastors to turn over all of their sermons and other religious materials for inspection by Government officials?

- **JUST COOKIES – INDIANAPOLIS, INDIANA – 2010:**
  - Just Cookies, Inc. was a family owned business which David and Lily Stockton operated with their daughters.
  - The family business was found to be in violation of a SOGI law when the owners declined to make cupcakes for "National Coming Out Day" because they didn't want to support an event with which they disagreed.

If a Jewish bakery refused to make cupcakes with swastikas on them for an Anti-Israel Rally, would anyone believe they should be forced by the State to violate their beliefs and make the cupcakes?

- **ELANE PHOTOGRAPHY – NEW MEXICO – 2013**
  - Elaine and Jonathan Huguenin operated a photography business and declined to photograph a lesbian commitment ceremony because to participate in such an event would violate their sincerely held religious beliefs regarding marriage. Even though the business did photography for the LGBTQ community in the past and even though the couple found another photographer who did the shoot for less money, the couple still sued Elane Photography.
  - The New Mexico Human Rights Commission found that the business violated the law and ordered the business to pay nearly $7,000.00 in attorney fees to the couple.
  - The case went all the way to the New Mexico Supreme Court where the Court ruled that religious rights must yield to any "anti-discrimination" rights. The Court stated that the business owners must surrender their right to freely exercise their religion as "the price of citizenship."

If a gay photographer did not want to participate in a Traditional Marriage Rally, would anyone believe that he should be forced by the state to participate in that event in violation of his conscience?

Is the State prepared to enact new legislation that requires Michigan residents to surrender their right to live according to their conscience as a price of Michigan citizenship?

- **SWEET CAKES – OREGON – 2013**
  - Sweet Cakes declined to make a wedding cake for a lesbian couple because of their sincerely held belief that marriage is the union of one man and one woman. Even though the lesbian couple found multiple other bakeries eager to celebrate their union, the Oregon Bureau of Labor and Industries found "substantial evidence" that the bakery violated the law.
  - The baker is now facing hundreds of thousands of dollars in fines. The bakery had to close its doors and the owner's children received death threats.
  - Labor Commissioner, Brad Avakian, stated that it is the State's desire to "rehabilitate" the owner's personal religious views so that they could be allowed to re-open.

Does the State of Michigan want to become the arbiter of which religious views are permissible and allowed? Is Michigan prepared to force its citizens to be "rehabilitated" in such a manner?

- **HANDS ON ORIGINALS – KENTUCKY – 2012**
  - Hands On Originals, a local T-Shirt printing small business, was found by the Kentucky Human Rights Commission to have violated the law when the business declined to print T-Shirts endorsing a Gay Pride Festival. The owner could not in good conscience celebrate homosexual conduct.
  - It should be noted that Hands On Originals employs gay workers and had filled past orders (which didn't violate its religious conscience) for customers who it knew identified as homosexual.
  - The Kentucky Human Rights Commission ruled that the small business owner, whose religious views were found to violate the Kentucky SOGI law, be ordered to attend re-education training (Frequently referred to as diversity training).

If an African-American printer declined to print T-Shirts for a Jim Crow rally, should the printer be forced to violate his or her beliefs?

If a Muslim printer declined to print T-Shirts with an image of Mohammad, should the Muslim be forced to violate his or her religious beliefs?

- **BAKER V. WILDFLOWER INN – VERMONT – 2011:**
  - A private bed and breakfast/reception hall declined to allow their property to be used for a lesbian marriage reception based on their religious beliefs.
  - As part of a settlement agreement to dismiss the lawsuit, the bed and breakfast was forced to pay $10,000.00 to the Vermont Human Rights Commission and $20,000.00 to a charitable trust to be dispersed by the lesbian couple.

If a Muslim declined to allow his property to be used for a NAMBLA (North American Man/Boy Love Association) reception because he disagreed with a man having a "sexual orientation" for young boys, should he be forced to violate his religious conscience?

This is just a small sampling of the proliferation of lawsuits around the country based on such laws. All the above illustrates the tremendous cost to the State of Michigan, the business community, religious institutions, and citizens, that will occur if the new categories are enacted. It is interesting to note that the vast majority of the cases brought by the LGBTQ community against businesses, individuals and religious organizations have nothing to do with them being fired from their jobs. The few cases that do involve a job termination are usually when a religious institution attempts to apply its religious tenets upon employees that typically have agreed that he or she will adhere to the religious tenets of the employer.

All these cases demonstrate their true intention to attack the business and religious community under the guise of nondiscrimination in order to silence them and force great financial hardship upon them, simply for disagreeing with their conduct.

If enacted, the State of Michigan will inevitably promulgate and enforce administrative rules implementing the new standards against businesses, religious institutions and other alleged violators of the new categories. This will entail messy entanglements between the state and religious organizations who will vehemently challenge a law that violates their religious rights and freedoms. Beside the added expense to the state of such regulatory requirements (more investigators, more administrative hearings, more administrative law judges, more attorney general time to prosecute the cases, etc.), there will be a great expense and cost to the business community when it is attacked by proponents claiming the protection of these new categories. The impact will be especially great on small businesses in our state who will not have the financial wherewithal to withstand such attacks. Many small business owners will face the choice of either submitting to the demands of the offended, or face years of litigation expenses and the potential loss of their business to fines and other costs associated with such a fight. Moreover, they also face the revocation of any state license associated with their business (MCL 37.2703). Is it fair to a small business owner to permanently lose his or her license and business over, for example, alleged hurt feelings?

These new categories will cause further complications. For example, California recently passed AB – 1266 which stated:

> *A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.*

This would allow an 18-year-old male high-school student to use the same locker-rooms, bathrooms, and showers as the girls, based upon his own self-defined gender identity. Imagine the potential liability such laws create for businesses, churches, and schools.

Likewise, the Maine Supreme Judicial Court ruled that it is a violation of a self-identified, transgender, 6-year-old boy's rights to ban "him" from using a girls' bathroom. (*Doe v. Regional School Unit 26*, 86 A.3d 600 (Me. 2014)). This case was brought by the Maine Human Rights Commission.

Similarly, the Colorado Rights Division ruled in favor of another self-identified, transgender, 6-year-old boy. The family brought suit against the school district

under Colorado's Anti-Discrimination Act (C.R.S. 24-34-402). The Colorado Rights Commission held that the ban "creates an environment that is objectively and subjectively hostile, intimidating or offensive."

There are further complications that arise when enforcing such a law against charities and religious institutions that fail to embrace the LGBTQ orthodoxy. For example, current Michigan law provides favorable sales-tax and property-tax treatment to such organizations. However, this treatment is premised on the idea that the charity or religious organization promotes the public good. That may not be the case if a charity or religious organization becomes "discriminatory" because of changes to the Elliot-Larsen Act.

All of the above examples in this section demonstrate how proponents are not using these types of laws as a shield, but rather are using the new laws to attack those with whom they disagree.

UNCONSTITUTIONAL VAGUENESS

The Due Process Clauses of the United States and Michigan Constitutions guarantee individuals the right to prior notice of what constitutes prohibited conduct. If a law is vague, ambiguous, or indefinite so that it is impossible to determine what it requires or to determine the legislative intent, the courts will hold the law unconstitutionally void for vagueness, and therefore unenforceable. The meaning of a law must be clear enough so that ordinary persons who are subject to its provisions can determine what acts will violate it and so they do not need to guess at its meaning. See e.g., *People of Dearborn Heights v Bellock*, 17 Mich App 163, 166, 169 NW2d 347 (1969); *People v Wiegand*, 369 Mich 204, 119 NW2d 545 (1963); *People v Thompson*, 259 Mich 109, 242 NW 857 (1932). An unambiguously drafted law affords prior notice to the citizenry of conduct proscribed. In this way the rule of law provides predictability for individuals in their personal and professional behavior. A fundamental principle of due process, embodied in the right to prior notice, is that a law is void for vagueness where its prohibitions are not clearly defined. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly.

Individuals, business people and religious organizations in our state would be in an impossibly precarious position to try to discern what constituted discrimination under these new categories. Because accusers with an agenda can use the ambiguity of the proposed categories to decide, after the fact, what is prohibited or what offends them, the possibility of people of faith facing oppressive civil charges and litigation is limitless. The accusers are only limited by their own imagination and ability to come up with new ways to charge someone under the new categories.

The proposed new, protected categories are incapable of clear definition. A person can be accused and charged under the vague terms of such categories for merely expressing a religious belief that another individual internally defines as being offensive to him or her. The determination of the "wrongful act" is subjective and in the eyes of the beholder. The determination of whether a person is a member of one of the new protected classes is subjective and in the eyes of the beholder. A person cannot know if their conduct is prohibited until after the fact. Thus, even if a person or business possesses no intent to offend or discriminate, the alleged victim can commence legal action

pursuant to this law and subject the accused to astronomical legal costs and possible unlimited fines, costs and confiscation of their property and state licenses, to the point of destroying their business or family finances.

For example, a category like "family responsibilities" is beyond understanding legally. It is impossible to know what such language, however it is defined, truly means. Categories like "sexual identity," "gender identity/expression," and "sexual orientation" have meaning way beyond just adult homosexuality. Therefore, an accuser gets to define what this language means without limit by simply filing charges alleging some statement or action violates the law. Then the authority of the Civil Rights Commission takes over. Moreover, these categories would appear to protect any relationship or grouping of people, in any combination, in any amount. Would this include Polygamy? Incest? Ten people living together? These are not rhetorical questions. The plain language used by proponents of the new categories appears to protect any living arrangement of any kind. It essentially redefines family to mean any grouping of people living together in a dependent relationship. The proponents' true purpose is to redefine the deeply rooted legal and constitutional understanding of what constitutes a family.

Some local ordinances enacted in a few communities in Michigan have nebulous definitions. For example, the definition of "sexual orientation" routinely lists different lifestyles and then qualifies the list by stating, "by orientation or practice, whether past or present." Because the sexual orientation of the relevant group is vaguely defined, no reasonable person can understand what it means. Sexual orientation comes in many forms. Does the law cover groups of people with various sexual orientations? Does it cover, for example, a sermon about the conduct of a group of people whose sexual orientation is for extramarital sex (swingers/adulterers)? Does it cover the conduct of a group of people whose sexual orientation is for multiple partners within a marital relationship (polygamists)? What about a group of people whose sexual orientation is for young children (pedophiles)? Does it cover numerous other groups whose activities are currently illegal?

Given the absence of any clear definition, the ambiguous language of the law arguably could include any and all such groups. Will an otherwise law abiding citizen, therefore, face legal action for calling pedophilia or polygamy bad or for refusing to hire or accommodate such a person? An individual's inalienable right to due process and notice forbids such government-imposed guessing games, especially when, as here, the public has no way of predicting what morally-relative choice the proponents will choose when making a decision to take legal action against an alleged perpetrator. Thus, the conduct prohibited by such proposed categories wholly depends on the whim of the accuser, based upon their perceived feelings—rather than a clearly expressed standard articulated in the law. Again, who determines this? Such language is nebulous at best and citizens are left to guess at the meaning.

Under the definition of "gender identity/expression," the usual definitions include "A person's actual or perceived gender," their "self-image," and "expression." This is internal to the person. How is an accused supposed to know how someone else perceives their own gender? Such categories literally require mind reading on the part of the accused. It is unconstitutionally vague and overbroad. Reasonable people will not be able to agree on what such a category in the law means.

The potential means by which government authorities can apply the law to selectively challenge a business or citizen's actions vividly illustrates why the United States and Michigan Constitutions prohibit such legislative ambiguity. Here the inherent vagueness enables a government entity to make a personal choice to elevate the right of one protected group (with a particular sexual orientation, gender identity, etc.), over the right of another protected group (with a sincerely held religious conscience). In using the inherent vagueness of the law to make a morally-relative determination, government authorities at any time can arbitrarily transform a business and citizen's protected expression of sincerely held faith-based beliefs, into an actionable case. Discerning prohibited conduct in such a manner, *after* a citizen's act, violates the citizen's Constitutional right to prior notice of prohibited conduct.

FREE SPEECH/FREE EXERCISE OF RELIGION

The proposed new categories have so many potential free speech and free exercise of religion violations it goes beyond the scope of this short paper. In effect, the proposed new categories will prohibit persons with traditional views of family and sexuality from exercising their constitutionally protected free speech and free exercise rights. The First Amendment and the Michigan Constitution (Art. I, Sections 4, 5) bar the state from "prohibiting the free exercise [of religion]; or abridging the freedom of speech…" Further, the Michigan Constitution in Article I, Section 4 (as quoted above) provides additional protection.

The proposed new categories violate these rights. It prohibits the free exercise of religion by restricting, regulating, and discriminating against persons with traditional views on sexuality and family. It abridges the freedom of speech in a content based way for all the reasons stated below.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the U.S. Supreme Court struck down a city law that levied special restrictions on individuals who expressed views on the subjects of race, color, creed, or gender. The Supreme Court held that such a law facially violates the First Amendment right to freedom of speech because "the First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects. *Id.* at 391. The Court further pointed out that the law displayed the "city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. *Id*. at 396. The St. Paul law struck down by the Supreme Court and the proposed new categories share the same unconstitutional features.

Similar, recently enacted local ordinances around the state are clearly aimed at speech in that they give "harassment like a racial epithet" as an example to justify the imposition of a fine. It is obvious that free speech is to be sacrificed at the altar of political correctness. The First Amendment implications could not be clearer. Is it harassment to merely make a statement that someone else perceives as offensive because of their own internal definition of their sexuality? What does "harassment" mean? Is the State of Michigan really prepared to handle complaints against rabbis, imams, priests, and pastors in our state who preach on these issues from their place of worship in a manner that offends someone?

Imagine a conversation in a Christian book and coffee shop in Lansing where a sales assistant says that he believes that Jesus is the only way to God, or that he does not believe that civil partnerships are pleasing to

God, or that homosexual conduct is not condoned in the Bible. Someone in the store at the time hears this and files a complaint with the Michigan Civil Rights Commission for discrimination under the new categories if enacted into law. Imagine a Christian Minister expressing similar statements in a sermon or while at the church's homeless shelter or soup kitchen. Legal action is then filed under this law. Numerous cases have been filed all over the country based upon the type of new categories being requested.

Moreover, the U.S. Supreme Court struck down laws that infringed upon Freedom of Association based upon the expressive message of a group. Freedom of Association protects the right to exclude others where the exclusion is based upon the expressive message of the group. See e.g., *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. 557 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Freedom of association includes the right not to associate.

Our nation's legal traditions—including the Constitution itself—clearly affirm the importance and preeminence of religious liberty. James Madison, the drafter of the Bill of Rights, recognized that the duty to follow the dictates of one's conscience concerning religion is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society" and civil law. Madison thus stated that "Religion . . . must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." Thus, the right to free exercise of religious conscience must necessarily include the right to act pursuant to such conscience. Put differently by Joseph Story, one of our nation's earliest and most prominent Supreme Court justices: "The rights of conscience are . . . beyond the just reach of any human power. They . . . [must] not be encroached upon by human authority" such as that embodied in the civil law. Because they realized the value and significance of religious liberty, our nation's Founders included robust protection for the free exercise of religion in the First Amendment enshrined in the Bill of Rights. By doing so, they confirmed that religious liberty was a "fundamental maxim of free Government," which should (and eventually would) "become incorporated with the national sentiment."

By selecting the phrase "free exercise" of religion for inclusion in the Constitution, instead of a mere freedom to worship or believe, the Founders declared that religious freedom includes not only religious adherents' right to hold their beliefs or opinions; it also guards their religiously motivated conduct against government punishment or coercion. Government officials should therefore refrain from burdening their constituents' religious exercise, an inviolable and intensely personal right, through the passage and application of nondiscrimination laws. Indeed, James Madison declared that politicians "who are guilty" of encroaching upon religious liberty "exceed the commission from which they derive their authority."

While it is true that proponents of the new categories may be hurt or offended by the refusal of a person or business to participate in and endorse their particular conduct or event, the harm imposed upon the alleged violator of the new law is much greater and more concrete. The gay or transgendered person can easily go to the next business in the phone book or on-line. But the alleged business or individual "perpetrator" faces the pernicious choice to either capitulate and violate their sincerely held religious beliefs or lose their business/profession/license and all the time and energy put into building the business.

Their business can be destroyed with the resulting loss of employment for the employees of the business, the loss of tax revenue to the State, and the financial ruin of the "perpetrator." When weighing those competing interests, it is clear which side is the most significantly harmed.

The failure to protect citizen's free speech and free exercise rights will lead to more divisiveness and litigation in our state. It will further improperly elevate the new categories (and the political agenda of the proponents) over the rights of all the other citizens in Michigan with different religious beliefs or values. This is not fair and equal treatment. This is the granting of special rights at the expense of other citizen's rights.

ENFORCEMENT OF THE PROPOSED LAW UNDERMINES PRECEPTS OF GOOD GOVERNANCE UNDER THE RULE OF LAW

Arbitrarily enforcing such a vague law undermines good governance under the rule of law. A principal precept of the rule of law is that it provides predictability for individuals in the conduct of their affairs. As discussed above, vague provisions provide no such predictability and opens the door for government authorities to decide what the law means *after* the conduct occurs. That which is prohibited becomes clear only *after* a government authority selectively enforces the vague law against a citizen—based upon the authority's own morally relative construal of the ambiguous language. To be sure, the exercise of such discretion provides the means for proponents of the new categories to efficiently advance a political agenda. The insidious consequences of doing so, however, include the deterioration of fundamental democratic principles and good governance under the rule of law.

In the case of a vaguely worded law, enforcement can, without prior notice of the conduct prohibited, lead to a citizen's loss of property and freedom. Moreover, if the law vaguely regulates free expression, an ominous chill on the exercise of fundamental freedoms accompanies its promulgation. The great potential for abuse through arbitrary enforcement of these new provisions is reason enough to oppose their enactment. Compelled by the piercing chill of an unpredictable potential legal action, citizens cease exercising their basic liberties. They fear to assemble, pray, worship, or even speak.

In a pluralistic society, numerous conflicting points of view exist. Historically, therefore, the perpetuation of a functional republic requires free and open debate. The current prosecution and persecution of Christians around the world illustrates, however, just how efficiently government can use a vague law to suppress free expression and the free exercise of religion.

The potential for unpredictable legal action chills future religious expression of Michigan citizens, businesses, and charitable and religious groups. Fearing legal action, citizens and religious leaders in Michigan will inevitably self-censor sincerely held faith-based beliefs—and may even cease expressing anything at all.

The proposed categories also communicate an ominous admonition to community business leaders, journalists, academics, and anyone expressing a point of view different from that held by the proponents. In order to maintain comity between those of differing viewpoints and ensure public order, all governments must first recognize these universal constitutional freedoms.

CONCLUSION

In a constitutional republic like ours, freedom of religion, freedom of speech and expression, and freedom of association are not needed to protect the ideas and rights of people with whom the government agrees – it is needed to protect those with whom the government does not agree. Make no mistake about it. Those groups with an agenda who are advocating for the enactment of new categories under the law will wield this law as a weapon capable of destroying their opponents in this cultural debate on these issues. Do not believe any protestations by them that this is not the case. One merely needs to look at the scores of cases being brought against churches, businesses and individuals around our country based upon these types of laws. These laws are being used to try and silence and financially cripple those who dare to adhere to a different viewpoint and oppose their agenda. The irony is that, while trumpeted as a non-discrimination law, this law would clearly discriminate against, and violate the conscience of, many of the citizens and business owners of Michigan.

The impetus for adding new categories isn't really about civil rights, rather, it is about civil acceptance of homosexual conduct through the force of law.

Even if the Legislature is in agreement with and supports those intent on enacting this law, that does not give it the right to trample on the Constitutional rights of Michigan's citizens. The test of a properly functioning republic is not whether the government protects the speech and religious rights with which it agrees – it is whether it will protect the speech, religious rights and the economic liberty of those citizens with whom it does not agree. Instead of censuring or punishing speech and religious rights, the answer is always to have more speech and the free exchange of ideas – at least in a republic that values true freedom, pluralism, and diversity. Selective enforcement and punishment of Michigan citizens under this proposed law sends a bitter chill throughout our State. Promulgating vague laws that allow for arbitrary and selective enforcement is never an appropriate public policy for any institution that values good governance under the rule of law.

For all the above-stated reasons, we urge that the State not create special classifications that unfairly and unconstitutionally increase regulation of business and deny constitutional rights to religious organizations and citizens in Michigan.

Signed:

Citizens for Traditional Values
Michigan Family Forum
Great Lakes Justice Center