



MEMORANDUM

TO: Colorado State Legislature

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RE: Senate Bill 08-200, Proposed Anti-Discrimination Law Amendments

DATE: April 30, 2008

Introduction

Bill 08-200 purports to inject the concept “sexual orientation,” as a protected category in the State’s nondiscrimination laws, into privately owned businesses, realtors, schools, ministries, and places of public accommodations. “Sexual orientation” is defined as “a person’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or as another person’s perception thereof.” Colo. Rev. Stat. § 24-34-401(7.5). This definition, which uses subjective and ambiguous terms such as “perception,” presents serious legal problems.

The majority of American states do not embrace the legal protections contained in Bill 08-200. Bill 08-200 is a response to a political agenda and does not address a demonstrated need for government intervention. Bill 08-200 will create a multitude of legal problems for the State of Colorado, wherever it is applied, and it will jeopardize the First Amendment rights of all of Colorado citizens.

The adoption of Bill 08-200 runs counter to Colorado cultural, business, social, and religious interests. Bill 08-200 is broad enough to touch and concern all aspects of life for the citizens of Colorado. Yet the State has not fully considered Bill 08-200’s breadth, the impact on commerce, and the potential costs to the State in defending its constitutionality.

Protecting “Sexual Orientation” Is Unnecessary

Bill 08-200 departs from mainstream American government as less than half of the United States include “sexual orientation” in their nondiscrimination statutes.¹ This is because governmental entities generally enact laws necessary to remedy actual problems, but nothing in Bill 08-200 demonstrates the existence of any problem needing a solution, and the Bill contains

¹ http://thetaskforce.org/reports_and_research/nondiscrimination_laws (last visited April 30, 2008).

no legislative showing of any evidence that “sexual orientation discrimination” is an actual problem.

Current federal and state law already prohibits sex discrimination and sexual harassment. Thus, under current federal and state law, realtors, schools, and owners of public accommodations generally may not consider sex or sexuality when making decisions or offering their services. In other words, current law prohibits business owners from allowing issues of sexuality to become relevant in the workplace. Thus, Bill 08-200 is redundant of already-governing federal and state laws. Bill 08-200 removes elements of common sense from the treatment of the sexes as unique and different, and businesses will suffer should Bill 08-200 pass.

In a free-market system, businesses, realtors, and owners of public accommodations will respond to market pressures and adopt policies when needs for those policies arise. The State should follow this precept and enact laws only to remedy a demonstrated problem or concern. For example, “sexual orientation” has no relevance, currently or historically, regarding the providing of funeral services. Adding “sexual orientation” in this context is nonsensical and demonstrates that Bill 08-200 is a response to a political agenda and not a legitimate government interest.

Protecting “Transgender Status” Will Cause Public Harm

By including “transgender status” in the definition of “sexual orientation”, the State is including Gender Identity Disorder (GID) (a clear and diagnosable mental disorder)² into the anti-discrimination statutes. “Gender Identity” protections are included in even fewer state’s anti-discrimination laws than mere “sexual orientation.” Moreover, GID policies are problematic. There have already been lawsuits by confused individuals claiming the right to use restrooms reserved for members of the opposite sex. Bill 08-200 presents very specific problems with places of public accommodations. For example, a health club or gym would have no way to shield its female patrons from men who enter their locker room because they chose to self-identify as a women on any given day. From a law enforcement standpoint, police officers would not be able to discern whether a man who is in a public women’s restroom is a sexual predator or one who sincerely believes that he is a woman.

In addition, notwithstanding all of these clear and inevitable problems, the State has wholly failed to identify how it plans to implement these new laws with appropriate consideration for the concerns of those who are not confused about their own sex. Because the citizens of Colorado possess unequivocal rights of privacy, as well as the right to enforce their entitlement to privacy, this is an important, yet ignored, consideration.³ Privacy rights specifically protect individuals in their use of restroom facilities and having their bodies exposed to members of the opposite sex.⁴ Accordingly, it is disturbing to know that the legislature of Colorado would place the desires of those suffering from GID before the constitutional rights and safety of the majority of their citizens. There exists no compelling interest that justifies

² “Gender Identity Disorder,” University of Maryland Medical Center, (<http://www.umm.edu/ency/article/001527.htm>) (last visited April 30, 2008).

³ Restatement (Second) of Torts § 652(B).

⁴ *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981).

Colorado endangering the health, welfare, and safety of its own citizens in order to acquiesce to a political agenda.

Bill 08-200 Lacks Scientific Support

“Sexual orientation” protection is unlike traditional protected categories in nondiscrimination statutes. Traditional protected categories — such as race, nationality, and sex — are innate, immutable characteristics, which cannot be altered or changed in an instant. In contrast, “sexual orientation” and GID are ever-fluid concepts based on one’s behavioral preference (*i.e.*, the category of people with whom one wants to engage in sexual activity or intimate relations). Defining legal protections based on individual behaviors or perceptions — something that is within an individual’s control — radically departs from traditional nondiscrimination law and creates a system subject to manipulation.

In one particular study, a group of researchers claimed that they discovered a so-called “gay gene.” Soon after those researchers admitted that they did not discover a “gay gene” and that same-sex attraction is related in part to childhood environment.⁵ Moreover, in 2008, the American Psychological Association acknowledged the absence of a biological link to homosexual behavior, and admitted that such behavior is a choice, impacted by many factors, and not a characteristic with which one is born.⁶ Simply put, homosexual behavior is just that— a *behavioral* trait, not a *biological* one; a *choice*, not an immutable *characteristic*.

Furthermore, evidence demonstrates that individuals change their “sexual orientation” over the course of a lifetime, both spontaneously and deliberately. A recent Columbia University study published in the *American Journal of Sociology* concluded that the existence of any relationship between genes and hormones on “sexual orientation” is “inconclusive at best.”⁷ The University of Chicago conducted the most extensive random study of sexuality in America to date.⁸ In the chapter on homosexuality, the researchers exposed “assumptions” that, according to their study, were proven to be “patently false.” These assumptions include “[1] that homosexuality is a uniform attribute across individuals, [2] that it is stable over time, and [3] that it can be easily measured.”⁹ Even the psychiatrist who was primarily responsible for removing homosexuality from the list of mental illnesses, Dr. Robert Spitzer, has concluded that persons with same-sex desire can acquire opposite-sex desire.¹⁰ In sum, then, the ideological foundation for Bill 08-200 is not only unfounded, it is wholly contradicted by the wealth of available evidence.

⁵ For extensive information on this point, go to <http://www.narth.com>.

⁶ <http://www.narth.com/docs/deemphasizes.html>; <http://www.apa.org/topics/orientation.pdf>

⁷ Peter S. Bearman & Hannah Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 AMERICAN JOURNAL OF SOCIOLOGY 1179, 1180 (2002); *see also* <http://www.narth.com/docs/rekersrev.html>.

⁸ Lauman, et al., THE SOCIAL ORGANIZATION OF SEXUALITY (1994).

⁹ *Id.* at 283.

¹⁰ Robert L. Spitzer, M.D., *Can Some Gay Men and Lesbians Change Their Sexual Orientation?*, ARCHIVES OF SEXUAL BEHAVIOR 32:5, 412 (October 2003) (<http://www.narth.com/docs/evidencefound.html>).

Bill 08-200 Creates Serious Legal Concerns For Business Owners

The breadth of potential liability for businesses created by Bill 08-200 is disconcerting. By defining “sexual orientation” to include “homosexuality, heterosexuality, bisexuality or transgender status,” Bill 08-200 makes most everyone a potential plaintiff. Bill 08-200 purportedly protects everyone on the basis of numerous sexual proclivities, including that which is *perceived* to be their sexual inclination or *perceived* sex at any given time. In other words, everyone qualifies as a potential victim.

Organizations that want to follow current law, and avoid sexual harassment claims, must prohibit sexuality from becoming a part of their organization or workplace culture. Yet, Bill 08-200 runs contrary to current law by directly injecting sex, sexuality and sexual behavior into the Colorado business stream of commerce. So, on the one hand, an employer must suppress issues of sexuality to comply with governing law and prevent sexual harassment claims, but on the other hand, an employer must be cognizant of its employees’ (potentially varying) sexual preferences, or *perceived* sex in order to stay vigilant and informed regarding potential “sexual orientation” claims. This is an impossible task or balance for an employer to maintain.

Given that “sexual orientation” is neither immutable nor uniform, it is not measurable, and is not discernable by physical characteristics, entities that are subject to Bill 08-200 will have *absolutely no* method for objectively assessing an individual’s “sexual orientation.” As a result, Bill 08-200 will expose businesses and others to unfounded charges of discrimination. Since everyone possesses some semblance of “sexual orientation,” nothing will prevent anyone from making such claims in order to gain an unfair advantage, or otherwise abuse their relationship with businesses and others.

Not only would Bill 08-200 create fertile ground for a vast array of unfounded lawsuits, it would severely disadvantage employers and others trying to defend against such claims. One’s “sexual orientation,” as that term is defined, is subjective, changeable, and known only to the person expressing it. Given the absence of scientific or tangible proof distinguishing “homosexuals” from “heterosexuals,” no organization or individual could reasonably refute or defend any allegation of discrimination or unfair treatment. On the other hand, given the distinct differences between sexes, if an employer ignores those differences in providing restrooms or locker rooms, they are exposing themselves to invasion of privacy suits from employees. Moreover, because Bill 08-200 protects individuals on the basis of their *perceived* “sexual orientation,” the defending entity will be placed in the near impossible position of proving what its employees did and did not *perceive* regarding another’s sexual behavior. Thus, enactment of Bill 08-200 will increase litigation and legal costs for businesses.

New Mexico’s anti-discrimination laws contain a “sexual orientation” definition almost identical to Bill 08-200, and that law provides an example for the type of impact Bill 08-200 will have on Colorado businesses. In November of 2006, a photographer in New Mexico declined an offer to photograph a “commitment ceremony” of two women. *Willock v. Elane Photography, LLC.*, HRD No. 06-12-20-0685, ¶s 17-20 (2008).¹¹ The photographer only took photographs of

¹¹ The Alliance Defense Fund represents Elane Photography, LLC in this litigation.

traditional weddings in accordance with her religious beliefs. *Id.* at 20. Yet, after easily locating another photographer and having the ceremony adequately photographed, the same-sex couple still filed a complaint against the photographer. *Id.* at 20. The New Mexico Human Rights Commission found Elane Photography's actions in declining the offer of business to be illegal. *Id.* at 28.¹²

Accordingly, through the application of Bill 08-200, the government could tell a photographer what they will and will not photograph, regardless of the photographer's wishes or religious beliefs. Therefore, laws like Bill 08-200 not only infringe upon the constitutional rights of business owners, but they produce absurd results and consequences that will undoubtedly deter entrepreneurship and stifle business growth.

Bill 08-200 Runs Contrary To First Amendment Constitutional Principles

The First Amendment of the Constitution protects freedom of religion, freedom of speech, and freedom of association. But the application of Bill 08-200 directly infringes upon these rights. The United States Supreme Court has repeatedly recognized the dangerousness of laws like Bill 08-200. In one case, the Massachusetts Supreme Judicial Court ruled that a private organization — the organizers of the St. Patrick's Day Parade in Boston — engaged in "sexual orientation" discrimination when they excluded a group advocating homosexual behavior from interjecting their message into the parade.¹³ In another case, the New Jersey Supreme Court ruled that another private organization, the Boy Scouts of America, engaged in "sexual orientation" discrimination when they refused a request by an open practitioner of homosexual behavior to become a scout leader.¹⁴ However, the United States Supreme Court overruled both of those decisions,¹⁵ citing constitutional expression and association rights. Those cases plainly demonstrate the constitutional infringements that will undoubtedly occur if Bill 08-200 becomes law.

Many religious individuals adhere to certain moral precepts regarding sexual behavior. Accordingly, religiously motivated business owners and institutions are constitutionally entitled to refrain from hiring particular individuals to do certain tasks, and to refrain from offering their services under particular circumstances. This would include protecting a homeowner from renting a room to a person who engages in sexual behavior that violates their religious beliefs, or the owner of a magazine store from having to sell sexually explicate magazines against their religious beliefs. Yet, although these individuals and institutions are constitutionally entitled to conduct themselves in accordance with their religious convictions, under Bill 08-200, their actions would be characterized as illegal.

¹² Elane Photography intends to appeal this decision.

¹³ *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293 (Mass. 1994).

¹⁴ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

¹⁵ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Bill 08-200 Fails To Provide Proper Religious-Based Exceptions

The First Amendment of the United States Constitution states that the government “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” U.S. Const. amend. I. The Colorado Constitution states: “The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed.” Co. Const. art. II, § 4. Without an exception for religious beliefs, Bill 08-200 violates both the federal and state religion clauses.

The photographer case from New Mexico is a good example of the need for an exception for private business owners whose religious beliefs drive their actions. From Christians who avoid the practice of homosexual behavior, to the wearing of a kippah by Jews, to Muslims who fast during Ramadan, every organized religion and/or faith has tenets that are concerned with the conduct and behavior of its members. In addition, men and women are born biologically different, and that difference is permanent. These tenets of faith are well established. Yet, Bill 08-200 would require religious citizens to either violate their religious beliefs in their employment or face persecution by the government. Bill 08-200 fails to consider the countless employees in the State, all of whom might be found liable for “sexual orientation” discrimination simply because they express their sincerely held beliefs regarding the immorality of various kinds of sexual behavior or in the permanency of one’s sex being designated at birth. While sex and sexual behavior would normally not be an appropriate topic of workplace discussion, Bill 08-200 would change that, making all forms of sexual behavior distinct workplace considerations and increasing the overall likelihood of an occurrence of an offensive sexual discussion occurring in the workplace. Such disregard for the rights of business owners and employees sends the unconstitutional message that they must leave their deeply held beliefs at home before entering the marketplace.

If Bill 08-200 becomes law, it will communicate to the citizens that the political agenda of a few is more important than the time-honored and cherished First Amendment principles upon which our country was founded and promised to everyone. For the foregoing reasons, it is our considered legal opinion that the Colorado State Legislature should refuse to endorse the Bill 08-200.