

**STATEMENT OF
COMMISSIONERS GAIL HERIOT AND PETER KIRSANOW**

Gail Heriot and Peter Kirsanow, speaking in our capacities as two individual members of the eight-member U.S. Commission on Civil Rights and not on behalf of the Commission as a whole, today ask our colleagues on the Commission to please take a deep breath.

We make this request in response to an overwrought statement that was adopted by majority vote on April 15th, entitled “*The U.S. Commission on Civil Rights Condemns Recent State Laws Targeting the Civil Rights of the LGBT Community.*”¹ That statement “strongly condemns” state legislation recently adopted or being considered in Tennessee, Mississippi, and North Carolina as well as an executive action in Kansas. Unfortunately, it is not entirely clear that the statement’s signatories have actually read the relevant legislation.

We have. Moreover, we have tried as best we can to reflect on the complexities of the policies they embody. We neither endorse nor oppose any of them and note that some could have benefitted from further word smithing in order to achieve their intended goals. But none of them deserves to be referred to in the derisive terms used by the Commission majority. Those that deal with religious liberty issues are not merely using religion as a “guise” or “excuse” as the Commission majority alleges. All of them address real issues in reasonable ways; none is simply an attack on the LGBT community. We discuss them one by one:

TENNESSEE: H.B. 1840, which has been unfairly called “Hate Bill 1840,” has passed the legislature and awaits action by the Governor. It would permit a counselor or therapist with sincerely held principles that conflict with a potential client’s “goals, outcomes or behaviors” to decline to offer counseling/therapy to that potential client, *provided that he or she refers the potential client to someone who will.* It does not apply if the potential client is in imminent danger of harming himself or others.

That anyone would object to this is curious. Few individuals would want a counselor or therapist who objects to their lifestyle. Should a Muslim be required to counsel a gay man who seeks to persuade another gay man to marry him? Should a Roman Catholic be required to help the owner of an abortion clinic work through the day-to-day stresses connected with his business? Should a Jainist be forced to provide therapy for the owner of a slaughterhouse as he discusses how he sends animal after animal to its death?

¹ Attached as Exhibit 1.

We can imagine a law that actually *forbids* such a counselor or therapist from working with such a client on the ground of conflict of interest. Under certain circumstances, for example, attorneys may be forbidden from representing a client with whom they may have a conflict of interest. But we have a harder time imagining a legitimate reason for wanting to compel counselors and therapists like those covered by this bill to take on a client whose “goals, outcomes or behaviors” conflict with their “sincerely held religious belief.” Our colleagues allege that this law “is part of an alarming trend to limit the civil rights of a class of people.” It seems just the opposite to us. This law decreases the likelihood that a gay individual in need of counseling or therapy will be saddled with a counselor or therapist who disapproves of him.

KANSAS: Kansas once allowed an individual to change the sex reported on his or her birth certificate *either* by signing an affidavit stating that the sex was incorrectly recorded *or* by submitting a medical certificate substantiating that a physiological or anatomical change occurred.

The Governor is now moving forward with a policy change that would allow such alterations only if the person signs an affidavit attesting that his or her sex was incorrectly indicated in the first place *and* provides medical records to back up that affidavit. This is thought by the Commission majority to be anti-transgender.

But these are *birth* certificates, not life-style certificates. Kansas has the right to keep records that accurately reflect the facts of a birth. It’s about truth. And truth cannot be pro- or anti-LGBT. It’s just truth. As much as some individuals born as males may identify psychologically with females, as much as they may exercise their right to adopt female habits and dress, as much as they may undergo surgery and other physiological treatments in order to cause their physical bodies to better resemble females ... indeed as much as we might even support them in those endeavors, they are not in fact members of the female sex (or vice versa). When every cell in an individual’s body contains chromosomes identifying that individual’s sex, Kansas is not required to pretend otherwise in its official records, especially not retroactively to birth. For our colleagues to suggest that Kansas is acting unconstitutionally is Orwellian.

This is not to say that another state could not *choose* to record on its birth certificates different information—such as what is typically called “gender.” While that individual may have been born into one biological sex, he may identify psychologically with the opposite sex (or even with some non-binary alternative) and may adopt its habits and traits. In doing so, he demonstrates that his “gender” is not the same as his biological sex.

But it is not so easy to record “gender” rather than sex, precisely because it is so variable. At birth, only sex is revealed. And even after an individual’s

gender asserts itself, it can change. Some identify as having “two spirits”; others say there are neither male nor female in gender.² Given that, it is doubtful a state would be interested in recording gender rather than sex on its birth certificates.

Moreover, it is not clear why anyone should be dismayed by any of this. *Note that nothing turns on what one’s birth certificate says about one’s sex in Kansas.* It does not determine what restroom one can use. It does not determine what school athletic teams one can join or what jail cell one should occupy in the event of arrest. Those are questions that are left for another day. Nor does it determine whether an individual should be treated with courtesy and respect when they have chosen to lead their lives in a transgender manner. That is a question that must be answered by each individual American.

There may well be circumstances, for example, under which transsexuals (those who have had surgery) may wish to have some way to identify their status to others. But in Kansas at least birth certificates are not the way to do that.

MISSISSIPPI: H.B. 1523, which was signed into law by the Governor on April 5th, does several things. First, it seeks to ensure that those who have religious or moral objections to same-sex marriage are not forced to participate in same-sex weddings as wedding planners, photographers, cake designers, etc.³ This includes state employees with responsibilities for issuing marriage licenses or officiating at weddings (although the bill additionally requires all necessary steps be taken to ensure that the couple’s wedding not be imperiled or delayed by such recusals). The Act also reaffirms the First Amendment rights of such employees and also adoptive and foster parents to express their views on same-sex marriage, sex outside marriage and the immutability of biological sex.

Note that the purpose of this legislation is not to deny same-sex couples the opportunity to celebrate their weddings. Such couples have many alternative sources for wedding services. The purpose is to avoid coercing unwilling individuals into participating in something they do not believe in. As Nelson Mandela once said, “When

² According to the National Transgender Discrimination Survey conducted by UCLA’s Williams Institute, 31% of transgender respondents identified either strongly (10%) or somewhat (21%) with the identity “Third Gender,” while 38% identified either strongly (15%) or somewhat (23%) with the identity “Two Spirit.” See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 6* (January 2014). See also Sam Escobar, *I’m Not Male I’m Not Female. Please Don’t Ask Me About My Junk*, Esquire (March 31, 2016); Ernie Grimm, *My Gender is Bunny*, San Diego Reader (March 25, 2009).

³ Similar dispensations (with appropriate limitations) were given to persons with religious and moral objections to participating in sex reassignment surgery, treatment and related therapy.

a man is denied the right to live the life he believes in, he has no choice but to become an outlaw.” There are many in this nation with sincere religious and moral objections to same-sex marriage. Denying that, as our colleagues do, is simply a way to pretend the issues that face us as a nation are easy. Toleration is all about leaving people alone to live their lives as they see fit; it is not about forcing people to take part in other people’s lives. Whatever it is that our Commission colleagues are standing up for, it is not toleration.

Another part of the new Mississippi law gives protection to churches and other religious institutions that, out of religious or moral conviction, opt not to perform same-sex marriages or not to hire individuals who do not share their religious or moral convictions on same-sex marriage, sex outside marriage and the immutability of biological sex. Included among the religious institutions covered are those that provide adoption services.

There is a tragic story behind Mississippi’s decision to specifically cover adoption agencies run by religious organizations. A decade ago, Catholic Charities of Boston was forced to close down its adoption service as a result of the lack of such a law in Massachusetts.⁴

Catholic Charities was well-known in New England for its success in placing hard-to-place children—those with physical handicaps or behavioral problems—in loving homes. But in 2003, the Vatican prohibited the practice of allowing gay couples to adopt children, calling it "gravely immoral." This conflicted with Massachusetts law, which prohibited organizations that work under contract with the state, presumably including adoption agencies, from discriminating in any way on the basis of sexual orientation.

Catholic Charities sought a statutory dispensation for faith-based adoption services. The Massachusetts legislature, having been heavily lobbied by LGBT advocacy groups, refused to grant such a dispensation. We have a hard time understanding why—at least if the Massachusetts Legislature’s priority was rescuing children from foster care rather than benefitting adults.

It didn’t matter to the Massachusetts Legislature that anyone who couldn’t adopt through Catholic Charities could easily go to one of the other adoption agencies or that Catholic Charities did not have the option of ignoring a directive from the Vatican. Mississippi took a different approach as it has the authority to do.

⁴ See Jeff Jacoby, *Adoption Flap a Tragedy for Children*, Boston Globe (March 5, 2006); Jeff Jacoby, *Kids Take Backseat to Gay Agenda*, Boston Globe (March 15, 2006).

A third area addressed by the legislation permits (but does not require) persons to establish for their students or employees sex-specific restrooms, showers, locker rooms, rules of dress, etc. (based on, or in a manner consistent with, their sincerely held religious or moral convictions of the immutability of biological sex).

On the general issue of restroom assignment, we wonder why LGBT advocates find it okay to classify people by gender for restroom assignment, but offensive to classify people by actual sex (whether biological or anatomical). It seems to us that what is needed here is a clear rule. Anything short of that would only encourage voyeurs and pranksters. There are thus three possible solutions—classify by biological sex (i.e. sex at birth), classify by anatomical sex (i.e. allow surgically altered individuals to be grouped with the biological sex their bodies now resemble) or classify by gender (i.e. what advocates for transgenders now argue for).

As we noted above at Footnote 1, the latter rule—classification by gender—is too variable and changing to work. Moreover, it will never be possible to gainsay a voyeur who enters a restroom for nefarious reasons claiming to be transgender. Who can prove that he is a liar? In addition, not every transgender, even full-time transgenders, will prefer the gender solution. Consider, for example, the case of an anatomical male who psychologically identifies with females and prefers the use of female pronouns, *but who nevertheless prefers to use the men's room for practical reasons*.⁵

Two things are worth remembering about the Mississippi statute: First, it is not clear that it changed Mississippi law one iota. There does not appear to be anything in Mississippi law that, for example, would have required wedding planners to accept all customers or prohibited wedding planners to decline to accept same-sex couples as customers. **Second, the law applies only to the tiny minority of persons who have religious or moral convictions on same-sex marriage, sex outside marriage and the immutability of biological sex.** Thus, in the event there were some Mississippi law allowing transgenders to use the public restroom of their choice, it would still apply in the overwhelming majority of cases.

⁵ As an anatomical male, should this male-to-female transgender be able to use the men's room? Or should all transgenders be required to use the restroom assigned to their gender (rather than their anatomical sex)? If the answer is that transgenders should have their choice of restrooms, what does that do to the notion of equality? Cisgenders (i.e. individuals who identify psychologically with their actual sex) do not get to choose which restrooms they get to use, why should transgenders have options when cisgenders do not?

NORTH CAROLINA: H.B. 2 was signed into law by the Governor on March 23.⁶ To understand it, one must first understand something about North Carolina’s system of local government and its Constitution, which was adopted in 1971, much too early to be a deliberate effort to thwart the policy objectives of LGBT advocacy organizations.

North Carolina is one of the few non-home rule states.⁷ Among other things, the North Carolina Constitution does not permit the state or local governments to enact ordinances governing labor and employment in a local area. See N.C. Const. art. II, § 24.⁸ This was an effort—by creating a single set of laws governing employment—to create a business climate that would produce more jobs for North Carolinians. In the past, some local governments made efforts to circumvent the policy by imposing labor and employment requirements on their public contractors. That practice was then prohibited by the North Carolina legislature, which was also keen to prevent North Carolina from becoming a patchwork of different ordinances.

The City of Charlotte ordinance that triggered H.R. 2 was seen as another effort by a local government to create that patchwork. Adding to North Carolina’s discomfort was the fact that the ordinance passed at the same time that city governments in other parts of the country were raising the minimum wage to what many regard as unsustainable levels. The legislature feared that this could result in substantial job loss to North Carolinians.

Interestingly, the Charlotte City Council had not attempted to prohibit discrimination in employment, since it was fairly clear it had no such power. Nor did it attempt to circumvent that policy by imposing labor and employment requirements on their public contractors, since it was fairly clear it had been statutorily prohibited from that too. Instead, it came in at a slightly different angle by attempting to impose requirements that its contractors refrain from discriminating on the basis of “marital status, familial status, sexual orientation, gender identity, and gender expression” in their other business dealings, including their dealings with their suppliers and other customers (regardless of whether those contractors were located in Charlotte or elsewhere).⁹ It also

⁶ Tal Kopan and Eugene Scott, *North Carolina governor signs controversial transgender bill*, CNN.com (Mar. 24, 2016), <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/>.

⁷ Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. Rev. 1983, 2003 (2006).

⁸ *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E. 2d 415 (2003).

⁹ Note the problem here: A contractor located in Raleigh or in Chicago could be required to follow Charlotte law. What happens if the local law in Raleigh or in Chicago requires something entirely different? What, for example, if another city requires family discounts while Charlotte law apparently forbids them?

required businesses open to the public to refrain from discriminating on the basis of “marital status, familial status, sexual orientation, gender identity, and gender expression.”

The patchwork that North Carolina wanted to avoid was re-asserting itself. Among other things, therefore, H.B. 2 re-asserted that the state legislature and not localities controlled labor and employment law, including wage and hour law and employment discrimination law. This was not a change in the law, except to clarify what was already obvious—that its previous law against sex discrimination concerned biologically defined sex.

Might North Carolina prohibit employment discrimination on the basis of “marital status, familial status, sexual orientation, gender identity, and gender expression” or some subset of those bases at some point in the future? It is always possible. Shortly after H.B. 2’s passage, the Governor, in what might have been intended as a gesture of good will given the panic in the LGBT community, issued an executive order banning sexual orientation and gender identity discrimination in state government employment. But first and foremost, H.B. 2 was about hurriedly re-asserting the state government’s authority and its policy against legal patchworks. In addition to re-asserting that local governments cannot regulate labor and employment either directly or through public contracts, the legislature pushed back on local governments’ efforts to regulate contractors’ other business dealings and its efforts to regulate the business dealings of businesses open to the public. (Note that the latter move actually expanded the reach of anti-discrimination law. Prior to that, there had been no North Carolina law requiring businesses open to the public to serve all comers, regardless of race, religion, color, national origin or biological sex.¹⁰ Now that H.B. 2 has passed there is.)

Part of the need for haste stemmed from the City of Charlotte’s strange treatment of restrooms in businesses open to the public. The Charlotte ordinance repealed a provision of the Charlotte Code that allowed businesses to maintain sex-segregated “[r]estrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private.” The intent seems to have been to allow transsexuals and perhaps transgenders to use the restrooms of their choice rather than the ones intended for members of their biological sex. In doing so, the City Council seems to have eliminated the ability of these businesses to maintain separate restrooms for men and women *at all*. This appears to be a case of very poor drafting.

Under H.B. 2, the maintenance of sex-specific multi- or single-occupancy restrooms and changing facilities by businesses open to the public is declared not to

¹⁰ Title II of the Civil Rights Act of 1964 prohibits discrimination by public accommodations on the basis of race, color, religion or national origin. But a “public accommodation” is defined narrowly to include such things as hotels, restaurants and places of public entertainment. The North Carolina law’s coverage is broader and includes ordinary retail establishments.

constitute illegal sex discrimination. Weirdly, few seem to have noticed that such businesses can still *choose* to designate its restrooms and changing rooms by “gender” rather than biological sex if they if what they desire to do. Because North Carolina doesn’t prohibit “gender identity” discrimination in the first place, there was no need to declare in H.B. 2 that the maintenance of separate restrooms and changing facilities based on gender identity does not constitute illegal gender identity discrimination.

For the reasons we discussed in the section on Mississippi law above, we do not believe gender-specific as opposed to sex-specific restrooms and changing facilities work well, since they make it difficult to prevent voyeurs and pranksters. But it’s not up to us. Under North Carolina law, business owners are not prevented from creating gender-specific facilities. (In other words, the law is back to where it was before the City of Charlotte effectively prohibited both sex-specific *and* gender-specific facilities.)

By contrast, H.B. 2 does require multi-occupancy restrooms and changing facilities in public schools and government offices to be designated by “biological sex,” defined as “the physical condition of being male or female, which is stated on a person’s birth certificate,” rather than gender. Again, we believe there are good and sufficient reasons for designating private facilities in this manner (and it is certainly what most people understood the custom to have been for as far back as anyone can remember). The tough case is the transsexual—one whose anatomy has been altered to better reflect the individual’s preferred status. We note that, unlike Kansas, North Carolina does alter birth certificates after surgery of that kind has occurred.¹¹ Transsexuals (as opposed to transgenders who do not undergo surgery) can use the alteration procedure specified in North Carolina law if they so desire.

In addition, H.B. 2 specifically allows boards of education and government offices to accommodate special circumstances through means such as single-occupancy facilities. It also provides exceptions for such things as individuals in need of assistance.

We regret the level of hysteria that has accompanied H.B. 2, especially any contribution to that hysteria made by the Commission majority’s statement. We note that Cirque du Soleil has canceled its North Carolina performances on account of H.B. 2,¹² but has and will continue to perform in parts of the world where homosexuality is illegal

¹¹ Under N.C. Gen. Stat. § 130A-118(b)(4) a new birth certificate will issue when a “written request from an individual is received by the State Registrar to change the sex on that individual’s birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery.”

¹² Elahe Izadi, *Cirque du Soleil Cancels North Carolina Shows to Protest LGBT Law*, Wash. Post (April 15, 2016).

and punished harshly. The only possible explanation for this is that its employees misunderstand H.B. 2.

THE U.S. COMMISSION ON CIVIL RIGHTS CONDEMNS RECENT STATE LAWS AND PENDING PROPOSALS TARGETING THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITY

The United States Commission on Civil Rights strongly condemns recent state laws passed, and proposals being considered, under the guise of so-called “religious liberty” which target members of the lesbian, gay, bisexual, and transgender (“LGBT”) community for discrimination.

North Carolina Governor Pat McCrory recently signed into law H.B. 2, legislation blocking local governments from passing anti-discrimination rules that grant protections to gay and transgender persons. The law also repeals existing municipal anti-discrimination laws which protected LGBT people from bias in housing and employment. Critically, the new legislation also forces transgender people to utilize public bathrooms and changing facilities based on the sex issued on their birth certificates, and not according to their gender identities. This jeopardizes not only the dignity, but also the actual physical safety, of transgender people whose appearances may not match societal expectations of the sex specified on their identification documents.

In Mississippi, Governor Phil Bryant recently signed HB 1523 into law. The new statute is far-reaching and allows people with “religious objections” to deny wedding services to same-sex couples. It also clears the way for employers to cite religion in determining workplace policies on dress code, grooming and bathroom access. The physical safety concerns for transgender people are the same as in North Carolina.

The laws enacted in North Carolina and Mississippi are not isolated, but are part of a larger, alarming trend to limit the civil rights of a class of people using religious beliefs as the excuse. Similar laws were passed by the legislatures in Georgia and Virginia, but those were vetoed after significant public pressure. The Tennessee legislature just passed a bill which, if signed by Governor Bill Haslam, will permit mental health professionals to deny counseling services to LGBT people based upon “sincerely held religious beliefs.” Kansas is considering a non-legislative, administrative policy change which would make it more difficult for transgender people to change the sex listed on their birth certificates. These laws and policies can be found to violate the Equal Protection and Due Process clauses of the Fourteenth Amendment. These laws can also be found to violate Title IX of the Education Amendments of 1972, which forbids discrimination against transgender students in any school that receives federal funding.

The Commission recently approved a report, which will be released shortly, on the issue of religious liberty. In our findings and recommendations the Commission makes clear:

- Civil rights protections ensuring nondiscrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence.
- Religious exemptions to the protections of civil rights based upon classifications such as race, color, national origin, sex, disability status, sexual orientation, and gender identity, when they are permissible, significantly infringe upon these civil rights.
- Overly broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious

exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.

Commission Chairman Martin R. Castro stated on behalf of the Commission, "Religious freedom is an important foundation of our nation. However, in the past, 'religious liberty' has been used to block racial integration and anti-discrimination laws. Those past efforts failed and this new attempt to revive an old evasive tactic should be rejected as well. The North Carolina and Mississippi laws, and similar legislation proposed in other states, perverts the meaning of religious liberty and perpetuates homophobia, transphobia, marginalizes the transgender and gay community and has no place in our society."