

# Report and Analysis on Religious Freedom Measures Impacting Prayer and Faith in America

| 2018-19 Version |

-  Legislation
-  Proclamations
-  Talking Points
-  Notes
-  Fact Sheets



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## Forward

This is the 2018 – 2019 version of the Religious Freedom Measures Impacting Prayer and Faith in America. It is the third annual report. Following distribution of the first two versions of this report CPCF tracked approximately 60 separate pieces of legislation passed in the 2017 and 2018 terms of the various state legislatures that were favorable to prayer and the free exercise of religion in our country. That compares to only six passed during 2016, by our count.

The purpose of this report is to give you, as legislators, the benefit of good work done by others and model legislation on various related topics for your consideration and potential use. We have expanded the analysis and “talking points” to provide “defensive” talking points to counter proposed legislation antagonistic to religious freedom. This report reflects the collective wisdom and experience of individual legislators and legal teams who have worked with various pieces of legislation, as well as groups who have or will support such legislation, and the strategic analysis of a great many organizations, teams, and individuals who have studied these measures. This is not an exhaustive collection of model acts, resolutions, and proclamations on the topic, but it addresses most areas of recent interest.

The following principles apply to all of the measures and should be considered early on:

1. Nothing is more important than learning to tell a story that shows why the legislation is needed. Although the text of legislation is critical, it can become sterile without painting a picture of “why” it says it. When you have limited time, tell the story and let the legislation speak for itself.
2. Never forget that you often communicate more with your actions than your words. Tone and temperament are vital.
3. The name matters. For example, “Protecting Religious Freedom in Private Homes Act” is not nearly as powerful as the “Home Privacy Protection Act.”
4. Do not let the perfect be the enemy of the good.

The Congressional Prayer Caucus Foundation does not advocate for or against any piece of legislation. That decision must be made by individual legislators.

Thank you for serving your country and protecting our First Amendment rights. We stand with you and support your efforts in prayer and with resources. These resources include lawyers trained in constitutional law who can help you to draft legislative language and to defend the bills if challenged. If we can provide you with any additional information, please feel free to contact us at:

Congressional Prayer Caucus Foundation, 524 Johnstown Road, Chesapeake, VA 23322  
757-546-2190, [www.CPCFoundation.com](http://www.CPCFoundation.com)

May God bless you richly as you work to protect our first freedom—religious liberty with its rights of religious conscience and free exercise.

Substantial contribution to the content of this Report and Analysis was provided by the Congressional Prayer Caucus Foundation, National Legal Foundation, Claybrook LLC, and ProFamily Legislative Network.

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## Overview of Religious Liberty Measures for States

Historically, Republicans and Democrats agreed that religious liberty is a central American principle that should be protected, but over the past decade this conviction has weakened and come under increasing attack. It is tempting to look to the federal government for solutions to this threat, but under our system of federalism states can and must play a crucial role in protecting religious freedom.

This report presents religious liberty laws, resolutions, and proclamations that are often modeled on those that have been proposed or passed in different states over the past few years. The model measures are divided into three categories based on type and subtype. Please note that this does not mean that items in Category 1 are more important than those in Category 2, and so forth.

Religious liberty conditions differ from state to state, so legislators usually consider which of the measures they believe will have the best chance of passing in their state and which will do the most good. In some states, it may be most effective to convert a model law into a regulation, a constitutional amendment, or a resolution. These measures provide only general language/subjects that have been used across the country as a starting point for drafting state-specific legislation.

Having said this, in some situations identified below, introducing a bill can have very positive effects, even if the bill is not ultimately passed. It is critical to think strategically. Part of that effort is not to let those who want to run roughshod over religious liberty dictate the terms of the discussion, but to be ready to engage them with facts and figures and research that challenge their assumptions, as Americans United For Life has done well over the last decade in the abortion rights area (which this report does not directly cover). To this end, last year we introduced model public policy resolutions that rely heavily on the research that demonstrates the deleterious physical and mental health effects of same-sex intercourse and gender identity “transformation” (found in Category #3(a)).

New this year is a section giving talking points to counter anti-religious freedom legislation (found in Category #4). Finally, we have added this year three “Prime Focus” pieces of legislation, which we will discuss after giving an overview of the four categories.

### Category #1: Legislation Regarding Our Country's Religious Heritage

Measures in Category #1 mainly recognize the place of Christian principles in our nation's history and heritage. They deal broadly with our national motto, history, and civics, including their Judeo-Christian dimensions.

Despite arguments that this type of legislation is not needed, measures such as the “In God We Trust” bill can have enormous impact. Even if it does not become law, it can still provide the basis to shore up later support for other governmental entities to support religious displays. For example, the U.S. House passed “In God We Trust” legislation in November 2011; even though it never passed the Senate nor was signed into law by the President, it still had a significant ripple effect on subsequent measures, policies, and agency actions.

The remaining measures promote religious liberty by informing students and the general public about America's historic commitment to constitutional government and protecting basic rights—including religious liberty. Furthermore, they can also attract support from organizations that are not necessarily religious but which feel that we no longer teach accurate history and that the lack of this teaching is having an adverse impact on the citizenry.

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The measures in Category #1 include:

1. National Motto Display Act
2. National Motto License Plate Act
3. Civic Literacy Act
4. Religion in Legal History Act
5. Bible Literacy Act

## **Category #2: Resolutions and Proclamations Recognizing the Importance of Religious History and Freedom**

The measures in Category #2 focus on our country's Judeo-Christian heritage. They are stated as proclamations, but in some states they are often crafted as resolutions.

Even though proclamations and resolutions are largely symbolic, they can still be used for positive purposes. For example, the passage of a proclamation or resolution is a statement of public policy. And resolutions and proclamations can also be used for educational purposes—to be distributed to schools and teachers, or churches and pastors, encouraging them to observe the call in the measure or to educate their groups about its content and purpose.

Most legislatures are accustomed to passing proclamations and resolutions, and advocates in most states can point to proclamations honoring Women's History, Irish-American Heritage, Jewish American Heritage, Gay and Lesbian History, and so forth. If proclamations and resolutions recognizing these groups are appropriate, it is also reasonable to honor America's Christian (or Judeo-Christian) heritage in the same way. So, in this category are examples of various proclamations pertaining to the importance of the heritage and also of religious freedom. Passage of such proclamations and resolutions can also potentially be useful for building support for specific legislation in Category #3.

Measures in Category #2 include:

1. Proclamation Recognizing Religious Freedom Day
2. Proclamation Recognizing Christian Heritage Week
3. Proclamation Recognizing the Importance of the Bible in History
4. Proclamation Recognizing Christmas Day

## **Category #3: Religious Liberty Protection Legislation**

The measures in Category #3 include legislation that protects the ability of citizens to speak and act upon their religious convictions. These measures will have the greatest immediate impact on protecting religious liberties, but some of them also are the most hotly contested.

We begin this category with three model resolutions to define public policies of the state in favor of biblical values concerning marriage and sexuality. These provisions are supported by multiple facts about the enormous costs of homosexual intercourse and gender confusion, mainly from federal and state survey information readily accessible. These types of provisions can help change the terms of the debate, whether or not the provisions are passed.

We continue this category with religious freedom protection measures. After the Supreme Court declared the federal Religious Freedom Restoration Act (RFRA) to be unconstitutional with respect to

state legislation, about half of the states passed their own RFRA. At first, these bills were supported by both Democrats and Republicans, but this has changed over the past decade. States without RFRA should consider passing them if feasible, but it may be more profitable to focus on narrowly crafted legislation in this category that protects small business owners, government employees, health care providers, pastors, adoption agencies, and so on from being forced to choose between their religious convictions and their vocations.

Please be aware that opposition to the measures in this category will often be well-organized and well-financed. More care must be taken to avoid bringing this legislation to a vote unless the vote can be won. A defeated measure can often hurt more than help and will put allies and leadership in a difficult position.

Measures in this category are divided into three subcategories, and include:

**(a) Public Policy Resolutions**

1. Resolution Establishing Public Policy Favoring Intimate Sexual Relations Only Between Married, Heterosexual Couples
2. Resolution Establishing Public Policy Favoring Reliance on and Maintenance of Birth Gender
3. Resolution Establishing Public Policy Favoring Adoption by Intact Heterosexual, Marriage-based Families

**(b) Protection for Professionals and Individuals**

1. Marriage Tolerance Act (a/k/a/ First Amendment Defense Act)
2. Preserving Religious Freedom Act (a/k/a/ Religious Freedom Restoration Act or “State RFRA”)
3. Child Protection Act
4. Clergy Protection Act
5. Licensed Professional Civil Rights Act

**(c) Protection for Teachers and Students**

1. Student Prayer Certification Act
2. Teacher Protection Act
3. Preserving Religious Freedom in School Act

**Category #4: Talking Points to Counter Anti-Religious Freedom Legislation**

Legislation is being introduced in states around the country to try to limit religious opposition to the lesbian-gay-bisexual-transgender (“LGBT”) lifestyle. It is often supported by pseudo-science claims like those passed in some states outlawing transgender conversion therapy. The proper social science research, however, does not support the claims that LGBT behavior has no deleterious effect on the individuals involved and society in general. The talking points gather that information. (It largely replicates information collected in Category #3(a), but has additional information as well.)

Talking Points in this category include:

1. Countering adding “sexual orientation” as a civil rights category
2. Countering adding “gender identity” as a civil rights category
3. Countering conversion therapy prohibitions

#### 4. Countering repeals of state RFRAs

### Prime Focus Recommendations

We recommend three particular pieces of legislation for the upcoming legislative term for your particular attention. The first two should foster little resistance. The third likely will, but will help to begin an important debate that is currently being lost by the truth not being proclaimed.

#### Prime Focus #1: National Motto License Plates

Legislation to permit car owners to choose “In God We Trust” license plates is already on the books in several states. Whether considered government or private speech, it is appropriate and constitutional to put the national motto on these “moving billboards.” However, we recommend that the legislation identify the speech as private speech selected by the owner, just like the owner can select other messages. Model legislation for this is on page [14](#).

#### Prime Focus #2: Public Policy Resolution Favoring Sexual Intercourse Only Between a Married Man and Woman

The Supreme Court has dictated that states must allow private homosexual intercourse and same-sex marriage – but that does not mean that states must prefer that conduct. Many states have already stated their public policy in favor of heterosexual marriages, and the Supreme Court did not overturn that policy when it mandated toleration of same-sex marriage. But every state would benefit from a resolution affirming or establishing the public policy preference that sexual intercourse take place only between a married, heterosexual couple.

We support this model resolution with copious social science data and research. Even if the resolution does not pass, there are great advantages in airing this information. The benefits of monogamous, heterosexual, conjugal intercourse are well documented, including the avoidance of enormously expensive disease, the cost of which is largely borne by the public. The model resolution is on page [38](#).

#### Prime Focus #3: Enforcing Federal Law Mandating Compliance by Public Schools with Free Speech Guidelines

Federal law already requires the public schools of every state to certify compliance with Department of Education guidelines (“DoE Guidelines”) for free speech and the free exercise of religion by students and teachers. However, many states lack compliance procedures. The model legislation provides such procedures.

Many school district officials seem unaware of this federal requirement, which threatens federal funding if there is not compliance (the prior federal administration took no steps to enforce this federal law). More important, many school officials seem ignorant of the substance of the DoE Guidelines, which provide a fair appraisal of the current state of the law, contrary to what organizations like Freedom from Religion Foundation frequently tell public school officials in letters complaining of any recognition of religion in the schools. The model legislation begins on page [109](#).

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## Stylistic Notes

Because this report contains model bills intended for all jurisdictions, certain stylistic conventions used in the model acts may not be appropriate for your state or Commonwealth. Therefore, you will need to adjust some bills to fit your state's common practice. The following are some examples:

1. Whether your state has requirements or conventions relating to titles of bills and other introductory material. Certain model bills use a generic "An act relating to . . ." paragraph as introductory material, while others do not. This must be added if your state requires it. We have not included the "Be it enacted . . ." or similar phraseology that some states commonly use, so this should be added if needed.
2. Whether and how the model act will be included in your state's code. The language in these model acts assumes a freestanding act.
3. Whether your state usually, always, or never includes "Whereas" or purpose clauses at the beginning of its bills. The model acts do not use the "Whereas" phraseology, and some will have purpose clauses and some not. When including such clauses, take care with them. Courts typically look at legislative history when adjudicating challenges to legislation. Although committee hearings and floor debate are routinely examined, "Whereas" or purpose clauses are given even more weight, as they are part of the enactment itself.
4. Whether you will need to address repealing or amending existing code provisions or whether you can simply introduce this proposed bill independently. In some states, simply including language such as "any statutes previously enacted notwithstanding . . ." or the like may suffice to address prior inconsistent statutes. The language in some model acts addresses repeal or amendment, but some model acts do not, and therefore must be added if appropriate in your particular circumstance.
5. Whether the bill will or can go into effect immediately upon passage, whether this depends on certain circumstances, whether an automatic delay applies, or whether a specific date must be stated. The model bills sometimes include an effective date provision, which is common in some states but not in others. Other model acts do not contain a provision addressing its effective date and must be added if desired. Typically, the model acts state that the law will go into effect immediately.
6. Whether your state has rules or conventions regarding the amount of material contained in sections, sub-sections, etc. The model acts will contain logical divisions which may need to be adjusted for your state. Internal cross-references will also need to be altered if the subdivisions suggested are altered and/or if references to existing statutes are required.

## **Category #1 - Legislation Regarding Our Country's Religious Heritage**

The measures in this category recognize that religion, and particularly our Judeo-Christian heritage, have played a large part in the founding and history of this country. To this end, it is important for our citizenry, including especially young students, to be educated about those topics. Without that education, we are sorely lacking in appreciation and understanding of the principles on which this country was based.

We emphasize that this is not an attempt at proselytization. It is only an attempt to redress what has become a serious shortfall in many educational systems by ignoring this critical aspect of our country's intellectual history and underpinnings. Without this education in the basic religious dimension of our history and civics, our citizens are not as able to assess and act on the various public policy concerns that we all face now and will face in the future.

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## **National Motto Display Act**

An act providing for display of the National Motto, “In God We Trust,” in public buildings and on license plates.

### **Section 1. Title**

This act shall be known as the National Motto Display Act.

### **Section 2. Display of National Motto in Public Buildings**

- (a) The National Motto of the United States, “In God We Trust,” shall be prominently displayed in a conspicuous place in all public elementary and secondary school classrooms and libraries in this state, in all public colleges and universities in this state, and in each government building or facility in this state.
- (b) The display must be easily readable and on a durable poster or framed copy of at least [specify dimensions, e.g., 11 inches by 14 inches] and must include a true and correct representation of the American flag centered under the National Motto.
- (c) Responsibility for implementing this requirement rests with the superintendents of the public schools in this state and the appropriate administrative officials of the various institutions and agencies of this state.
- (d) Definitions.
  - (i) “Government building or facility” means any building or facility in this state that is maintained or operated by state funds.
  - (ii) “Classroom” means any room that is used for instruction.

### **Section 3. Funding for Display of National Motto in Public Buildings**

The copies or posters authorized under section 2 of this act shall either be donated or shall be purchased solely with funds made available through voluntary contributions to the local school boards, the State, or the [appropriate state agency].

### **Section 4. Display of National Motto on License Plates**

- (a) An owner or lessee of a motor vehicle who has been issued, or is entitled to be issued, a registration plate, may elect in the alternative for the issuance of a registration plate that is designed in a manner to have engraved or embossed on it the language “In God We Trust,” as provided in subsection (b).
- (b) Beginning [date], the [appropriate government official] shall cause to be issued registration plates issued or reissued pursuant to this section that display the language “In God We Trust” if requested pursuant to subsection (a).

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## NOTES

Other states have adopted legislation similar to this model. For example:

- Alabama enacted legislation (HB 228) in 2018 authorizing display of the national motto in and on public buildings and public vehicles.  
<http://alisondb.legislature.state.al.us/alison/searchableinstruments/2018RS/bills/HB228.htm>
- Arizona enacted legislation (SB 1289) in 2018 authorizing display of the national motto in public schools. <https://www.azleg.gov/legtext/53leg/2R/bills/sb1289s.htm>
- Arkansas enacted legislation in 2017, HB 1980, authorizing display of the National Motto in public buildings and public schools, if the display items are donated or paid for entirely by private voluntary donations.  
<http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act911.pdf>
- Louisiana enacted legislation (SB 224) in 2018 requiring instruction on and display of the national motto. <http://www.legis.la.gov/legis/ViewDocument.aspx?d=1096138>
- Tennessee enacted legislation in 2017, SB 1355, permitting owners or lessees to request addition of the National Motto to newly issued license plates.  
<http://www.capitol.tn.gov/Bills/110/Amend/SA0447.pdf>  
In 2018, Tennessee enacted legislation (SB 266) requiring local schools to display the national motto. <https://publications.tnsosfiles.com/acts/110/pub/pc0640.pdf>
- West Virginia enacted legislation in 2017, HB 2180, permitting vanity plates with the National Motto displayed.  
[http://www.legis.state.wv.us/Bill\\_Status/bills\\_text.cfm?billdoc=HB2180%20SUB%20ENR.htm&yr=2017&sesstype=RS&i=2180](http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=HB2180%20SUB%20ENR.htm&yr=2017&sesstype=RS&i=2180)
- Utah enacted legislation in 2016, HB 127, making “In God We Trust” a standard option that motorists may select. <https://le.utah.gov/~2016/bills/static/HB0127.html>
- In its 2013-2014 legislative session, Pennsylvania authorized an “In God We Trust” license plate, SB 1187, as an option that motorists may select (for a fee).  
<http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=109>

## TALKING POINTS

- In 2011, the House of Representatives reaffirmed “In God We Trust” as our National Motto by a landslide bipartisan vote of 396 to 9 and encouraged its display in public buildings throughout America. This congressional reaffirmation solidifies the foundation set by the Founding Fathers, who established this nation on the belief that we have certain inalienable rights that are endowed by our Creator.
- On July 30, 1956, President Eisenhower signed into law a congressional joint resolution making “In God We Trust” our National Motto. More than just a motto, though, it is our country’s foundation and an important part of our identity as Americans.
- “In God We Trust” has been referenced by our Presidents, written on our money since 1864, and “In God is our trust” is in the fourth verse of our National Anthem. God is acknowledged in our Pledge of Allegiance and has been the source of America’s hope since its founding.

- This legislative measure preserves and reinforces what our country has recognized for years, that our National Motto, which neither recognizes any specific religion nor establishes any individual or corporate requirement related thereto, may and should continue to be freely displayed as an acknowledgement of our country’s history and founding principles. Although some may object to legislation on this topic because they are offended by references to God, the model legislation does not require their assent to the National Motto or that they take any particular action that might reasonably be construed as assent. The incidental contact they may have with respect to the National Motto (e.g., using U.S. currency, entering a public building, seeing a license plate in front of them in traffic) is not a substantial burden.
- All of the U.S. Circuit Courts of Appeal that have decided cases where use of the National Motto on U.S. coins and currency was attacked as an unconstitutional violation of the First Amendment’s requirement that Congress “make no law respecting an establishment of religion . . .” have upheld the constitutionality of the motto’s use. Those cases include the following:
  - *New Doe Child #1, et al. v. United States*, 2018 WL 4088462 (8th Cir. 2018);
  - *Mayle v. United States*, 891 F.3d 680, 684-86 (7th Cir. 2018);
  - *Newdow v. Peterson*, 753 F.3d 105, 108 (2d Cir. 2014) (per curiam);
  - *Newdow v. Lefevre*, 598 F.3d 638, 645 (9th Cir. 2010);
  - *Kidd v. Obama*, 387 F. App’x 2 (D.C. Cir. 2010) (per curiam);
  - *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); and
  - *O’Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1979) (per curiam).

In addition, although not ruling directly on the issue, in *dicta*, the Supreme Court has repeatedly suggested the same. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 676, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 602-03, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

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## National Motto License Plate Act

An Act to Add a “National Motto” Registration Plate as an Option for Registration Plates that are Furnished by the [name of Agency] for a Private Passenger Vehicle

### Section 1. Title

This act shall be known as the National Motto License Plate Act.

### Section 2. Authorization of a “National Motto” License Plate

A “National Motto” plate shall (i) be a [color] plate, (ii) have above all other letters and numerals the motto of the United States "In God We Trust" printed in [color] lettering over a background containing the American flag, (iii) have the letters and numerals of the plate number in [color] lettering, and (iv) have below the plate number [state name] printed in [color] [font].

### Section 3. Option to Request a “National Motto” License Plate

(a) An owner or lessee of a motor vehicle who has been issued, or is entitled to be issued, a registration plate, may elect in the alternative for the issuance of a registration plate that is designed in a manner to have engraved or embossed on it the language “In God We Trust,” as provided in subsection (b).

(b) Beginning [date], the [appropriate government official] shall cause to be issued registration plates issued or reissued pursuant to this section that display the language “In God We Trust” if requested pursuant to subsection (a).

### Section 4. [Additional Conforming Language]

[Provide amendment of existing statutory text governing the issuance of motor vehicle license plates inserting the appropriate text to indicate that a National Motto license plate is a standard option that drivers applying for license plates may select. For example: “A registration plate issued by the [Agency name] for a private passenger vehicle or for a private hauler vehicle licensed for [insert pounds limit] shall be, at the option of the owner, either (i) a [option 1]’ plate, (ii) a [option 2]’ plate, or (iii) a ‘National Motto’ plate.”]

## NOTES

This model bill is based on a bill (HB 564) introduced in the 2018 session of the North Carolina State General Assembly. <https://webservices.ncleg.net/ViewBillDocument/2017/6021/0/DRH10442-MWa-18>

Other states have adopted legislation similar to this model. See examples listed under the previous model bill (“National Motto Display Act”).

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## Civic Literacy Act

An act providing for instruction in the content and meaning of the documents that form the foundation of our country's Constitutional Republic.

### Section 1. Title

This act shall be known and may be cited as the Civic Literacy Act.

### Section 2. Legislative Findings

- (a) Basic civic literacy is required for an effective and responsible citizenry.
- (b) Civic literacy includes familiarity with and understanding of the major principles in this country's foundational and historical documents and subsequent development of those basic principles that are the basis of this country's representative form of limited government.
- (c) The period of secondary education is a critical time for teaching and developing civic literacy.

### Section 3. American Heritage Education

- (a) Local boards of education shall require during the high school years the teaching of the nation's founding and related documents, which shall include the major principles in the Declaration of Independence, the United States Constitution and its amendments, and representative readings from *The Federalist Papers* so as to understand America's representative form of limited government, liberties secured in the Bill of Rights, federalism, and other basic principles that are essential to the stability and endurance our Constitutional Republic.
- (b) Local boards of education shall require that high school students demonstrate knowledge and understanding of the nation's founding and related documents in order to receive a certificate or diploma of graduation from high school.
- (c) Local boards of education shall include among the requirements for graduation from high school a passing grade in all courses that include primary instruction in the Declaration of Independence, the United States Constitution and its amendments, and representative readings from *The Federalist Papers* so as to understand America's representative form of limited government, liberties secured in the Bill of Rights, federalism, and other basic principles that are essential to the stability and endurance our Constitutional Republic.
- (d) Local boards of education shall allow and may encourage any public school teacher or administrator to read or post in a public school building, classroom, or event, excerpts or portions of writings, documents, and records that reflect the history of the United States, including, but not limited to, (i) the preamble to the Constitution of this state; (ii) the Declaration of Independence; (iii) the United States Constitution; (iv) the Mayflower Compact; (v) the Northwest Ordinance; (vi) George Washington's Farewell Address; (vii) the Emancipation Proclamation; (viii) the Gettysburg Address; (ix) the National Motto; (x) the National Anthem; (xi) the Pledge of

Allegiance; and (xii) the writings, speeches, documents, and proclamations of the Founding Fathers and Presidents of the United States.

- (e) No state official or entity may limit or restrain instruction in American or state history or heritage based on religious references in documents, writings, speeches, proclamations, or other historic records.
- (f) The State Board of Education shall require that any high school level curriculum-based tests developed and administered statewide include questions related to the Declaration of Independence, the United States Constitution and its amendments, and representative readings from *The Federalist Papers* so as to demonstrate understanding of America's representative form of limited government, liberties secured in the Bill of Rights, federalism, and other basic principles that are essential to the stability and endurance our Constitutional Republic.
- (g) The [appropriate state agency] and the local boards of education, as appropriate, shall establish curriculum content and provide for teacher training to ensure that the intent and provisions of this section are carried out.
- (h) The [appropriate state agency] shall report [annually, biennially] to the [legislature, or appropriate committee/subcommittee], in both qualitative terms and quantitative measures, what has been achieved with respect to implementing the requirements of this act and achieving the stated goal of ensuring students know and understand the fundamental principles that are the foundation of our Constitutional Republic.

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## NOTES

States that have adopted legislation similar to this model include:

- North Carolina has enacted civic literacy legislation (N.C. Gen Stat section 115C-81.(g)). [http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter\\_115c/gs\\_115c-81.html](http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_115c/gs_115c-81.html)
- California enacted legislation requiring the Instructional Quality Commission to ensure historical documents (e.g., the Declaration of Independence, the Bill of Rights, the Federalist Papers) are included in the history-social science framework when revising that framework as required by law (California Education Code, section 33540.(b) (4)-(6)). [http://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=33540.&lawCode=EDC](http://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=33540.&lawCode=EDC)
- A civic literacy bill, HB 5665, was introduced in the Rhode Island legislature in 2017, but was tabled for further study. <http://webserver.rilin.state.ri.us/BillText/BillText17/HouseText17/H5665.pdf>
- In 2016, South Carolina passed the Founding Principles Act, which reinforces Code Section 59-29-120. <http://dailysignal.com/2016/06/17/this-new-law-ensures-south-carolina-students-will-study-the-founding-documents/>

## TALKING POINTS

- This legislation recognizes the importance of basic civic literacy for an effective and responsible citizenry. This includes familiarity with and understanding of the major principles in the Declaration of Independence, the United States Constitution and its amendments, and representative readings from *The Federalist Papers*, and other foundational and historical documents to promote understanding of America's representative form of limited government, liberties secured in the Bill of Rights, federalism, and other basic principles that are essential to the stability and endurance of our Constitutional Republic.
- The next generation, to have any hope of maintaining their heritage of liberty and self-government, must understand important historical documents that represent the moral, philosophical, traditional, and political foundations on which our nation was built.
- The American form of government is based on core principles related to the inherent dignity and freedom of individuals, balanced by what is necessary to promote the common welfare of the governed. To fully grasp the importance of these founding principles (and why they should be defended), it is necessary to understand their source and how the Framers of our government understood and were motivated by these principles, such as “unalienable rights” endowed by a Creator.
- Government is designed to secure our rights, but it is difficult to maintain and safeguard these rights without understanding the documents upon which these rights are based.

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## **Religion in Legal History Act**

An act providing for display of religious documents that have been instrumental in the development of law in the United States and this state.

### **Section 1. Title**

This act shall be known as the Religion in Legal History Act.

### **Section 2. Legislative Findings**

- (a) There is a need to educate and inform the public as to the history and background of the law of the United States and this state.
- (b) Religious history plays an important role in the background of the history and background of the law of the United States and this state.
- (c) The role of religion in the constitutional history of both the United States and this state is acknowledged by historians.
- (d) A basic knowledge of American legal history is important to the formation of civic virtue in our society.
- (e) The courts have provided vital direction on how to approach the display of historical documents consistently with constitutional protections.
- (f) This state now endorses a uniform, sound, distinct, and appropriate presentation of the story of the role of religion in the constitutional history of the United States and this state, which may be publicly displayed in courthouses and other state and local buildings throughout this state.

### **Section 3. Public Displays of Religious History Affecting the Law**

Public displays with acknowledged religious history may include, but shall not be limited to, the items in this section.

- (a) The Mayflower Compact, written and adopted in 1620.
- (b) The Declaration of Independence, adopted by Congress on July 4, 1776.
- (c) Articles I through VI of the Northwest Ordinance enacted by Congress on July 13, 1787.
- (d) Washington's Farewell Address, published September 26, 1796.

### **Section 4. Context of Public Displays**

Public displays set forth in section 3 of this act shall be accompanied by a document entitled "Context for Acknowledging America's Religious History," which shall read as follows:

- (a) Some documents stand out as pivotal in the religious history of the legal systems of the United States and this state, among which are the Mayflower Compact, The Declaration of Independence as a legal precursor for the United States Constitution, and the Northwest Ordinance, which was the first congressional act legally prohibiting slavery. It is hoped that their study and relation to each other and the history of our state and America will foster an understanding of the role that religion has played in the legal history of the United States and this state and prompt further public and private study.
- (b) American law, constitutionalism, and political theory have deep roots in religion. American ideals about liberty, freedom, equality, legal responsibility, and codes of law, to mention a few, have roots and underpinnings in religion and biblical literacy.

### **Section 5. Funding and Production of Historical Documents, Display**

- (a) The documents and displays authorized in section 3 of this act shall either be donated or shall be purchased solely with funds made available through voluntary contributions to the [appropriate state organization].
- (b) The [appropriate state organization] shall, upon request, prepare and distribute to state offices, clerks of court and judges, and the local governing authorities in the state copies of the documents set forth in section 3 suitable for framing and display, upon receipt of donated documents or voluntarily contributed funds to pay for the actual cost of the preparation and delivery of the documents.
- (c) Each state office, clerk of court, judge, and local governing authority is authorized to post the documents for display provided by the [appropriate state official] in a visible public location, along with other historical documents.
- (d) Nothing herein shall prohibit the state or local governing officers, judges, or clerks of court from reprinting the documents in section 3 above or accepting a donation of already printed documents for display in public buildings.

### **NOTES**

- Other states have adopted legislation similar to this model. For example:
  - In 2018, Alabama's legislature passed an act proposing (for public referendum) an amendment to the Constitution of Alabama of 1901 that, among other things, would authorize display of the Ten Commandments on public property.  
<http://alisondb.legislature.state.al.us/alison/searchableinstruments/2018RS/bills/SB181.htm>
  - In 2006, Louisiana enacted SB 476 to allow the display of important historical documents.  
<http://legis.la.gov/Legis/ViewDocument.aspx?d=402951>
  - In 2006, Kentucky enacted HB 277 related to display of historic religious items on public property.  
<http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2006-Reg-HB-0277-443.pdf>

- The Mayflower Compact includes, *inter alia*, this text: “Having undertaken for the Glory of God and advancement of the Christian Faith and Honour of our King and Country, a Voyage to plant the First Colony in the Northern Parts of Virginia, do by these presents solemnly and mutually in the presence of God and one of another, Covenant and Combine ourselves together in a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.”

Full text of the Compact: <https://www.plimoth.org/learn/just-kids/homework-help/mayflower-and-mayflower-compact#mayflower%20compact>

- The Declaration of Independence includes, *inter alia*, this text: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .”

Full text of the Declaration: <https://www.archives.gov/founding-docs/declaration-transcript>

- Articles I through VI of the Northwest Ordinance, which prohibited slavery in the new territories, included this text in Article 3: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind . . . .”

The full text of the Ordinance is found here:

<https://www.ourdocuments.gov/doc.php?flash=false&doc=8&page=transcript>

- Washington’s Farewell Address includes, *inter alia*, this text: “Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

“It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?”

Full text of the address: <http://www.ushistory.org/documents/farewelladdress.htm>

**TALKING POINTS**

- Citizens should understand these important historical documents, which present the philosophical, traditional, and political foundation upon which our nation is built.
- Our form of government is based on core principles related to the inherent dignity and freedom of individuals, balanced by what is necessary to promote the common welfare of the governed. To fully grasp the importance of these founding principles (and why they should be defended), it is necessary for the citizens of this state to have ready access to the documents that informed the framers of our government as they developed the founding documents that underlie our constitutional government, as well as to the founding documents themselves.
- These legislative measures ensure the needful and appropriate public display of replicas and representations of our founding documents, along with other documents that were the source and inspiration of our founding principles, or are therein explained or exemplified; regardless of whether such other documents be political, religious, philosophical, contractual, or mere proclamations.
- Government is designed to secure our rights, but it is difficult to maintain and safeguard these rights without understanding the documents upon which these rights are based.
- Per section 5 in the model legislation, no expenditure of state funds is required to implement this legislation.

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## Bible Literacy Act

An act relating to public school elective courses in the history and literature of the Old and New Testaments eras.

### Section 1. Title

This act shall be known as the Bible Literacy Act.

### Section 2. Elective Courses in History and Literature of the Old and New Testament Eras

- (a) A school district shall offer to students in grades nine or above an elective course in the history and literature of the Old Testament era and an elective course in the history and literature of the New Testament era.
- (b) The purpose of a course under this section is to:
  - a. Teach students knowledge of biblical content, characters, poetry, and narratives that are prerequisites to understanding contemporary society and culture, including literature, art, music, mores, oratory, and public policy; and
  - b. Familiarize students with, as applicable:
    - (i) the contents of the Old Testament (Hebrew Scriptures) or New Testament;
    - (ii) the history of the Old or New Testament;
    - (iii) the literary style and structure of the Old or New Testament; and
    - (iv) the influence of the Old or New Testament on law, history, government, literature, art, music, customs, morals, values, and culture.
- (c) [Insert this section if relevant: Notwithstanding [relevant statutory reference(s)], respectively, for a course under this section, the [relevant state government organization] may not:
  - a. identify the essential knowledge and skills; or
  - b. adopt textbooks under [relevant statutory reference].
- (d) The book or collection of books commonly known as the Old and New Testaments shall be used as the basic textbook for a course in the history and literature of the Old or New Testament era. In addition to the basic textbooks, students may be assigned a range of reading materials for the courses, including selections from secular historical and cultural works and selections from religious and cultural traditions other than the Judeo-Christian tradition.
- (e) A course under this section must familiarize students with, as applicable:
  - a. the contents of the Old or New Testament;
  - b. the literary style and structure of the Old or New Testament;
  - c. the customs, cultures, and religions of the peoples and societies recorded in the Old or New Testament;
  - d. the history and geography of the times and places referred to in the Old or New Testament;
  - e. the influence of the Old or New Testament on law, history, government, literature, art, music, customs, morals, values, and culture.
  - f. the methods and tools of writing during the period when the Old or New Testament was written;
  - g. the means by which the Old or New Testament book was preserved;
  - h. the languages in which the Old or New Testament book was written; and
  - i. the historical and cultural events that led to the translation of the Old or New Testament book into English.

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- (f) The [title of relevant local school organization] of a school district may recommend a version of the Old or New Testament to be used in a course offered by the district under this section, except that:
- a. the teacher of the course may not be required to adopt the board's recommendation and may use the recommended version or another version; and
  - b. a student may not be required to use a specific version as the sole text of the Old or New Testament and may use as the basic textbook a different version of the Old or New Testament from that recommended by the [title of relevant local school organization] or chosen by the teacher.
- (g) A course offered under this section:
- a. must be taught in an objective and non-proselytizing manner that does not attempt to indoctrinate students as to either the truth or falsity of the Judeo-Christian biblical materials or the truth or falsity of texts from other religious or cultural traditions other than the Judeo-Christian tradition;
  - b. may not include teaching that favors a religious doctrine or a sectarian interpretation of the Old or New Testament or of texts from other religious or cultural traditions other than the Judeo-Christian tradition;
  - c. may not disparage or encourage a commitment to a set of religious beliefs; and
  - d. shall follow applicable law and all federal and state guidelines in maintaining religious neutrality and accommodating the diverse religious views, traditions, and perspectives of students in the school. A course under this section shall not endorse, favor, or promote, or disfavor or show hostility toward, any particular religion or nonreligious faith or religious perspective. The [relevant state organization], in complying with this section, shall not violate any provision of the United States Constitution or federal law, this state's Constitution or any state law, or any administrative regulations of the United States Department of Education or the [relevant state organization].
- (h) The [title of relevant local school organization] of a school district shall determine the qualifications, assignment, and training of teachers of a course under this section, except that:
- a. the teacher must be certified as provided by [relevant statutory reference], unless an exception to that requirement exists under [relevant statutory reference]; and
  - b. the board may not assign a person to teach a course under this section based in whole or in part on any religious test, profession of faith or lack of faith, prior or present religious affiliation or lack of affiliation, or criteria involving particular beliefs or lack of beliefs about the Old or New Testament.
- (i) For the purpose of awarding credit for high school graduation, a school district shall grant [desired amount] academic elective credit for satisfactory completion of a course in the history and literature of the Old Testament era and [desired amount] academic elective credit for satisfactory completion of a course in the history and literature of the New Testament era. This subsection applies only to a course that is taught in strict compliance with this section.
- (j) The [title of relevant local school organization] of a school district may, as it determines appropriate, monitor the content and teaching of a course offered under this section.
- (k) This section does not limit the authority of the [title of relevant local school organization] of a school district to offer a course regarding the Old Testament or the New Testament that does not comply with this section, except that the district may not spend state funds distributed under this title in connection with a course that does not meet the requirements of this section.
- (l) This section does not prohibit the [title of relevant local school organization] of a school district from offering an elective course based on the books of a religion or society other than one with Judeo-
-

Christian traditions. In determining whether to offer such a course, the board may consider various factors including student and parent demand for such a course and the impact such books have had on history and culture. In order for such a course to qualify for award of academic elective credit and for use of state funds, it must be in strict compliance with the requirements of this section, except that the books of a religion or society other than one with Judeo-Christian traditions are substituted in place of the Old or New Testament.

### Section 3. Guidance for Implementation

No later than [date], the [appropriate state government organization] shall develop and issue guidance for local school districts on the implementation of this act.

### Section 4. Effective Date of Requirement

- (b) A school district shall offer a course in the history and literature of the Old Testament era and a course in the history and literature of the New Testament era that comply with [appropriate statutory reference], as added by this act, beginning with the first school year beginning at least one year after this act becomes effective.
- (c) A school district shall offer a course in the history and literature of another non-Judeo-Christian tradition book era as the need for such a course is determined by the school district.

## NOTES

In 2007, Texas enacted SB 1287.

<http://www.capitol.state.tx.us/Search/DocViewer.aspx?ID=80RHB012875B&QueryText=%22Old+Testament%22&DocType=B>

In 2017, Kentucky enacted HB 128.

<http://www.lrc.ky.gov/recorddocuments/bill/17RS/HB128/bill.pdf>.

In 2006, Georgia passed SB 79.

<http://www.newsweek.com/see-you-bible-class-107495>

<http://onlineathens.com/local-news/2011-10-22/less-interest-bible-classes>

In 2018, Tennessee enacted HB 2174

<https://publications.tnsosfiles.com/acts/110/pub/pc0775.pdf>

## TALKING POINTS

- The American form of government is based on core principles related to the inherent dignity and freedom of individuals, balanced by what is necessary to promote the common welfare of the governed. To fully grasp the importance of these founding principles (and why they should be defended), it is necessary to understand their source and how the Framers of our government understood and were motivated by these principles, such as “unalienable rights” endowed by a Creator.

- Regardless of one's views regarding the truth or untruth of the Bible, it cannot be disputed that it was one of the most widely read and widely quoted books used by leaders in the formation and history of our government. To not discuss it or understand it would make it extremely difficult to understand the history of our nation. Justice Tom C. Clark, writing for the Court in *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) stated this well: "[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities."
- Literary references to the Bible are numerous and widespread. For example, one cannot understand many allusions of Shakespeare without have a basic appreciation of the Bible, much less Dante's work or Milton's. A grasp of the Bible's content and literary style is a critical element in understanding and appreciating literature written in English and other languages.
- Provision is made for elective courses that focus on the religious literature of non-Judeo-Christian religions and traditions, in recognition of the increasing diversity of our population and communities and to help students understand the respective contributions of religions and traditions.
- In 1988, Donald Lutz, a Louisiana State University professor, conducted a study to determine who most influenced the thinking of the Founding Fathers. He gathered documents that the Founders wrote to examine who was quoted most by them as authoritative sources that influenced their political philosophy. Of the 15,000 documents reviewed, Professor Lutz was able to isolate 3,154 direct quotes made by the Founders. The persons most quoted were Baron Charles Montesquieu, followed by Sir William Blackstone and John Locke. However, the chart developed by Lutz reveals that the Founders cited the Bible four times more often than Montesquieu or Blackstone and twelve times more often than Locke. This means that biblical references accounted for 34 percent of the total.

## **Category #2 - Resolutions and Proclamations Recognizing the Importance of Religious History and Freedom**

The model texts on the following pages are drawn from proclamations or resolutions adopted by the U.S. Congress and various states. For each topic, the source of the model text is noted following the list of items.

We have not presented this material in what some states use as an official format (e.g., the introductory “WHEREAS...” is omitted), assuming that those using this document are best able to conform it to their state’s preferred format. Instead, we have taken the substance of the proclamations and presented it as a list of items from which users can choose in crafting a proclamation or resolution that meets their goals. We have augmented these lists in a few instances, and in others we have edited language in a way that we think is likely to generate more support for adoption, without diluting the core meaning of the proclamation or resolution. Of course, the items listed are not meant to be exhaustive, but merely suggestions about what might be included based on others’ efforts.

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## Proclamation Recognizing Religious Freedom Day

United States democracy is rooted in the fundamental truth that all people are created equal, endowed by the Creator with certain inalienable rights, including life, liberty, and the pursuit of happiness.

The freedom of conscience was highly valued by:

- (1) Individuals seeking religious freedom who settled in the American colonies;
- (2) The Founders of the United States; and
- (3) Thomas Jefferson, who wrote in his letter to the Society of the Methodist Episcopal Church at New London, Connecticut, dated February 4, 1809: “No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprizes of the civil authority.”

The Virginia Statute for Religious Freedom was:

- (1) Drafted by Thomas Jefferson, who considered the Virginia Statute for Religious Freedom to be one of his greatest achievements;
- (2) Enacted on January 16, 1786; and
- (3) The forerunner to the Free Exercise Clause of the First Amendment to the Constitution of the United States.

The First Amendment to the Constitution of the United States protects:

- (1) The right of individuals to express freely and peacefully act on their religious beliefs and
- (2) Individuals from coercion to profess or act on a religious belief to which they do not adhere.

Thomas Jefferson wrote—

- (1) in 1798, that each right encompassed in the First Amendment to the United States Constitution is dependent on the other rights described in that Amendment, “thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violated either, throws down the sanctuary which covers the others;” and
- (2) in 1822, that the constitutional freedom of religion is “the most inalienable and sacred of all human rights.”

Individuals who have studied United States democracy from an international perspective, such as Alexis de Tocqueville, have noted that religion plays a central role in preserving the United States Government, because religion provides the moral base required for democracy to succeed.

After quoting George Mason’s statement from the Virginia Declaration of Rights that “all men are equally entitled to the free exercise of religion according to the dictates of conscience,” President Franklin D. Roosevelt went on to state, “In the conflict of policies and of political systems, which the world today witnesses, the United States has held forth for its own guidance and for the guidance of other nations, if they will accept it, this great torch of liberty of human thought, liberty of human conscience. We will never lower it.” (1935 speech delivered at the University of Notre Dame)

Religious freedom “has been integral to the preservation and development of the United States,” and “the free exercise of religion goes hand in hand with the preservation of our other rights,” as expressed by President George H. W. Bush in his Presidential proclamation on Religious Freedom Day in 1993.

“[O]ur laws and institutions should not impede or hinder but rather should protect and preserve fundamental religious liberties,” as expressed by President William Clinton in his remarks accompanying the signing (11/16/93) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.).

We “continue to proclaim the fundamental right of all peoples to believe and worship according to their own conscience, to affirm their beliefs openly and freely, and to practice their faith without fear or intimidation,” as expressed by President Clinton in his Presidential proclamation on Religious Freedom Day in 1998.

Section 2(a)(1) of the International Religious Freedom Act of 1998 (22 U.S.C. 6401(a)) states these findings by the Congress.

(1) “The right to freedom of religion undergirds the very origin and existence of the United States.”

(2) Religious freedom was established by the Founders of the United States “in law, as a fundamental right and as a pillar of our Nation.”

(3) “From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.”

“Freedom of religion is a fundamental human right that must be upheld by every nation and guaranteed by every government,” as expressed by President Clinton in his presidential proclamation on Religious Freedom Day in 1999.

“Religious faith has inspired many of our fellow citizens to help build a better Nation” in which “people of faith continue to wage a determined campaign to meet needs and fight suffering,” as expressed by President George W. Bush in his Presidential proclamation on Religious Freedom Day in 2003.

The principle of religious freedom “has guided our Nation forward” and “is a universal human right to be protected here at home and across the globe,” as expressed by President Barack Obama in his Presidential proclamations on Religious Freedom Day in 2011 and 2013, respectively.

In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the United States Supreme Court affirmed that “people of many faiths may be united in a community of tolerance and devotion.”

For countless people of the United States, faith is an integral part of every aspect of daily life and is not limited to their homes, houses of worship, or doctrinal creeds.

The role of religion in United States society and public life has a long and robust tradition.

Now, therefore, be it RESOLVED and AFFIRMED that this State:

(1) On Religious Freedom Day on January 16, [year], honors the [xxx] anniversary of the enactment of the Virginia Statute for Religious Freedom; and

(2) Affirms that—

(A) For individuals of any faith and individuals of no faith, religious freedom includes the right of an individual to live, work, associate, and worship in accordance with the beliefs of the individual;

(B) All people of the [state] can be unified in supporting religious freedom, regardless of differing individual beliefs, because religious freedom is a fundamental human right; and

(C) “[T]he American people will remain forever unshackled in matters of faith,” as expressed by President Obama in his Presidential proclamation on Religious Freedom Day in 2012.

## NOTES

Most of the preceding items are taken from the 2017 Congressional Proclamation for Religious Freedom Day. The list illustrates the long and continuous history of recognizing and protecting religious freedom in our country, but is certainly not exclusive.

Examples of state resolutions regarding Religious Freedom Day include:

- Kentucky—both the State Senate and House of Representatives adopted a resolution recognizing January 16 as National Religious Freedom Day  
<http://www.lrc.ky.gov/recorddocuments/bill/18RS/HR37/bill.pdf>  
<http://www.lrc.ky.gov/recorddocuments/bill/18RS/SR63/bill.pdf>
- Michigan—House of Representatives adopted a resolution recognizing January 16 as National Religious Freedom Day.  
<http://www.legislature.mi.gov/documents/2017-2018/resolutionadopted/House/htm/2018-HAR-0223.htm>
- New York—the legislature adopted a resolution recognizing January 16 as National Religious Freedom Day.  
<https://www.nysenate.gov/legislation/resolutions/2017/j3448>
- Tennessee—the legislature adopted a resolution recognizing January 16 as National Religious Freedom Day.  
<http://www.capitol.tn.gov/Bills/110/Bill/SJR0472.pdf>
- Washington—the House of Representatives adopted a resolution recognizing January 16 as National Religious Freedom Day.  
<http://lawfilesexst.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Resolutions/4655-Religious%20Freedom%20Day.pdf>

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## Proclamation Recognizing Christian Heritage Week

Religious faith was not only important in official American life during the periods of discovery, exploration, colonization, and growth, but has also been acknowledged and incorporated into all three branches of American Federal Government from their very beginning.

This nation was founded on principles of religious freedom, and our Founding Fathers sought God, his blessings, and guidance as they established these United States of America as a free and independent nation.

The first act of America's first Congress in 1774 was to ask a minister to open with prayer and to lead Congress in the reading of four chapters of the Bible.

The Liberty Bell was named for the Biblical inscription from Leviticus 25:10, which passage of scripture is emblazoned around it: "Proclaim liberty throughout the land, to all the inhabitants thereof."

In 1782, Congress pursued a plan to print a Bible that would be "a neat edition of the Holy Scriptures for the use of schools" and therefore approved the production of the first English language Bible printed in America that contained the congressional endorsement that "the United States in Congress assembled . . . recommend this edition of the Bible to the inhabitants of the United States."

Benjamin Franklin, at the Constitutional Convention in 1787, stated, "It is impossible to build an empire without our Father's aid. I believe the sacred writings which say that 'Except the Lord build the house, they labor in vain that build it'" (quoting Psalm 127:1). He also declared, "God governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? . . . Without His concurring aid, we shall succeed in this political building no better than the builders of Babel."

Thomas Jefferson, principal author of the Declaration of Independence, wrote, "God who gave us life, gave us liberty. Can the liberties of a nation be thought secure when we have removed a conviction that these liberties are the Gift of God?"

James Madison, father of the United States Constitution, advocated "the diffusion of the light of Christianity in our nation" in his Memorial and Remonstrance.

Patrick Henry quoted Proverbs 14:34 for our nation: "Righteousness alone can exalt a nation, but sin is a disgrace to any people."

George Mason, in his Virginia Declaration of Rights, forerunner of our federal Bill of Rights, affirmed, "That it is the mutual duty of all to practice Christian forbearance, love and charity towards each other."

John Jay, an author of *The Federalist Papers* and first Chief Justice of the United States, urged, "The most effectual means of securing the continuance of our civil and religious liberties is always to remember with reverence and gratitude the Source from which they flow."

These and many other truly great men and women of America, giants in the structuring of American history, were statesmen of caliber and integrity who did not hesitate to express their faith.

The Christian heritage of our nation is recognized in the writings and accomplishments of such renowned individuals as Christopher Columbus, William Bradford, George Washington, John and Abigail Adams, James Madison, Patrick Henry, Andrew Jackson, Abraham Lincoln, Woodrow Wilson, Harry Truman, Dwight Eisenhower, and countless others, as well as in the constitutions of the several sovereign states and in innumerable public documents.

In 1853, the United States Senate declared that the Founding Fathers “had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people .... [T]hey did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.”

Beginning in 1904 and continuing for the next half-century, the Federal Government printed and distributed *The Life and Morals of Jesus of Nazareth* for the use of Members of Congress.

President Franklin D. Roosevelt not only led the nation in a six-minute prayer during D-Day on June 6, 1944, but he also declared, “If we will not prepare to give all that we have and all that we are to preserve Christian civilization in our land, we shall go to destruction.”

President John F. Kennedy declared, “The rights of man come not from the generosity of the state but from the hand of God.”

Every other President has similarly recognized the role of God and religious faith in the public life of America.

The history of Christian faith and tradition of our people is reflected in countless practices of the institutions and officials of our government, such as prayer and Scripture reading preceding each and every session of Congress, from its inception until this day.

All sessions of the United States Supreme Court begin with the Court's Marshal announcing, “God save the United States and this honorable court.”

Numerous others of the most important American government leaders, institutions, monuments, buildings, and landmarks both openly acknowledge and incorporate religious words, symbols, and imagery into official venues.

The importance of our Christian heritage to the institutions, values, and vision of our nation is immeasurable, and teaching our children about the spiritual values of our historical Christian heritage will help them understand and appreciate our nation's history.

It is fitting to recognize the Pilgrims' First Thanksgiving as a special time and reason for celebrating our families, health, love, and friendship, as well as acknowledging our nation's Christian heritage.

The constitutions of each of the 50 states, either in the preamble or body, explicitly recognize or express gratitude to God.

The Preamble to the Constitution of this state states that “[appropriate quote, e.g.: “Since through Divine Providence we enjoy the blessings of civil, political and religious liberty, we, the people of [state] . . . reaffirm our faith in and constant reliance upon God . . .].”

For many of this state’s citizens, public school days once began with a daily Pledge of Allegiance, prayer, and Bible reading.

[If relevant: The state song(s), [TBA] and [TBA], contain the lyrics, “[TBA]” and “[TBA].”]

The influence of Christianity in this state is evident by her many churches and Christian charities, ministries, missions, and schools; her cherished Christmas, Easter, and Thanksgiving holiday seasons; and a willingness of this state’s residents to love their neighbor as themselves.

RESOLVED, That the [legislative body] affirm the rich spiritual and diverse religious history of our nation from its founding to the current day; and be it further

RESOLVED, That the [legislative body] rejects, in the strongest possible terms, any effort to remove, obscure, or purposely omit such history from our nation’s public buildings and educational resources.

## NOTES

The items for this model proclamation were drawn from proclamations in Pennsylvania, Connecticut, and West Virginia. Those and other state proclamations may be found at <http://www.achw.org/html/twgovs.html>.

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## Proclamation Recognizing the Importance of the Bible in History

Johann Gutenberg, the man who changed the world with the invention of the printing press and who has been honored as the “Man of the Millennium,” chose the Bible as the first book to be printed.

The Bible is perennially the best-selling book, with over five billion copies distributed during the past millennium.

The Bible has been translated, in whole or in part, into 3,223 different languages.

Surveys report that nine out of ten Americans have Bibles in their homes.

Many of the greatest works of literature, art, and music in the past millennium, such as those of Bunyan, Milton, Dickens, Dostoevsky, Tolstoy, Eliot, Lewis, Tolkien, Solzhenitsyn, Michelangelo, Raphael, da Vinci, Bach, Handel, and Vivaldi, were inspired by the Bible.

The earliest public education law in America (1642) was based on the importance of each student knowing the Bible in order to avoid the civil atrocities that had beset Europe. That law declared, “It being the chief project of that Old Deluder, Satan, to keep men from the knowledge of the Scriptures, as in former times . . . . It is therefore ordered . . . [that] after the Lord hath increased [the settlement] to the number of fifty householders, [they] shall then forthwith appoint one within their town to teach all children . . . to write and read.”

The first literacy laws in America were enacted to protect citizens from tyrannical government through a knowledge of the Bible, laws such as that of Connecticut in 1690, which declared, “Observing that . . . there are many persons unable to read the English tongue and thereby incapable to read the Holy Word of God or the good laws of this Colony . . . it is ordered that all parents and masters shall cause their respective children and servants, as they are capable, to be taught to read distinctly the English tongue.”

Our earliest constitutions, compacts, charters, and laws, such as the Mayflower Compact, the Colony of Virginia’s Lawes Divine, Morall and Martiall, etc., the Pilgrim’s Book of General Laws, the Charter of Rhode Island, the Frame of Government of Pennsylvania, and the Fundamental Orders of Connecticut, and various of the original state constitutions reflect the central role of the Bible in shaping America’s civil institutions.

John Locke’s First and Second Treatises on Civil Government (which cited the Scriptures over 1,700 times in explaining the proper foundations for civil government) was a primary source for the drafting of the Declaration of Independence and was quoted throughout the Declaration.

During the Founding Era (1760-1805), the Bible was heavily relied upon in the formation of our founding documents, with 34 percent of the quotes in the political writings of our Founding Fathers being taken from the Bible.

President and Founding Father, John Adams, declared, "Suppose a nation in some distant region should take the Bible for their only law book and every member should regulate his conduct by the precepts there exhibited . . . . What a Utopia, what a Paradise would this region be!"

Signer of the Constitution James McHenry declared that "the Holy Scriptures . . . can alone secure to society, order and peace, and to our courts of justice and constitutions of government, purity, stability, and usefulness . . . . Bibles are strong entrenchments. Where they abound, man cannot pursue wicked courses."

John Jay, coauthor of *The Federalist Papers* and the first Chief Justice of the United States, declared, "The Bible is the best of all books, for it . . . teaches us the way to be happy in this world and in the next."

Founding Father Patrick Henry declared, "[The Bible] is a book worth more than all the other books that were ever printed."

Founding Father and leading American educator Noah Webster declared, "All the miseries and evils which men suffer from vice, crime, ambition, injustice, oppression, slavery, and war, proceed from their despising or neglecting the precepts contained in the Bible"; and he further declared, "The Bible is the chief moral cause of all that is good and the best corrector of all that is evil in human society."

Founding Father and signer of the Declaration of Independence Benjamin Rush, a leading humanitarian and reformer of his day, declared that it is in studying the Bible that man becomes both "humanized and civilized."

President John Quincy Adams declared, "[T]he Bible . . . is, of all books in the world, that which contributes most to make man good, wise, and happy . . . . I have myself, for many years, made it a practice to read through the Bible once every year."

Speaker of the House Robert Winthrop declared, "Men, in a word, must necessarily be controlled either by a power within them or by a power without them; either by the Word of God or by the strong arm of man; either by the Bible or by the bayonet."

President Andrew Jackson declared that the Bible "is the rock on which our Republic rests."

Daniel Webster, the great "Defender of the Constitution," declared, "[T]o the free and universal reading of the Bible . . . men were much indebted for right views of civil liberty. The Bible is . . . a book which teaches man his own individual responsibility, his own dignity, and his equality with his fellow man."

President Abraham Lincoln declared that the Bible "is the best gift God has given to men . . . . But for it, we could not know right from wrong."

At the first presidential inauguration, George Washington laid his hand on the Bible and took the oath of office as prescribed by the Constitution, adding the words "so help me God," after which he leaned over and reverently kissed the Bible.

Every United States president thereafter has taken the oath of office on the Bible, as have thousands of federal, state, and local officials entrusted to manage our governmental affairs.

The Bible has formed the basis of civil justice, being the book on which witnesses are sworn in courts of law.

The teachings in the Bible were the impetus behind the abolition of slavery and the birth of the Civil Rights movement, as evidenced by the lives of leaders such as Benjamin Rush, John Jay, John Quincy Adams, Daniel Webster, William Jay, William Wilberforce, Abraham Lincoln, Martin Luther King, Jr., and others.

The teachings in the Bible inspired humanitarian movements such as worker protection; abolition; women's suffrage; child labor reform; the establishment of hospitals, orphanages, and programs for the care of the poor and the needy; prison reform; universal education and literacy; disaster relief; and so many other movements that have touched and elevated the lives of every American.

NOW, THEREFORE, BE IT RESOLVED BY [LEGISLATIVE BODY] that the members of this body recognize the Bible's influential role in our country's history and humanitarian progress throughout the world.

## NOTES

This model proclamation is largely based on one from the Georgia House of Representatives.

### **Proclamation Recognizing Christmas Day**

Christmas is the Christian feast that celebrates the birth of Jesus Christ as the savior of all throughout the world.

Traditionally, families throughout our great state gather together during Christmas holidays, enjoying many customs including choosing a Christmas tree, participating in Christmas pageants, singing and playing Christmas carols, and exchanging gifts.

Advent and Christmas traditions and symbols prevail throughout the holiday season, and by their presence they bring to mind dearly held Christian values and beliefs, including that in Jesus Christ all people are saved from sin and promised everlasting life.

The celebration of Christmas reminds men, women, and children across our state of the lessons Christ taught and exemplified, such as the importance of caring for others, giving sacrificially, and sharing with those in need in our neighborhoods, churches, schools, and communities.

While families and friends in this state gather this December to share meals, words of encouragement, and gifts, it is important to remember the deeper meaning of Christmas and Christ's life-changing message of God's love and his promise of salvation for all people who will trust in Him.

NOW, THEREFORE, I, [governor's name], do hereby recognize December 25, [year], as CHRISTMAS DAY in this state, and I call this observance to the attention of all our citizens.

#### **NOTES**

This model is largely based on Virginia's "Proclamation Recognizing Christmas Day" dated December 25, 1999.

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## **Category #3 (a) - Religious Liberty Protection Legislation—Public Policy Resolutions**

These model acts are divided into three major categories. The first is model public policy resolutions. The second deals generally with religious liberty protections for professionals and other individuals. The third category deals with religious liberty in the elementary and secondary school context. Note that each model resolution in this category has a fact sheet with entries that are cross-referenced to the “findings” in section 2 of the resolution.

### **Public Policy Resolutions**

The following public policy resolutions are organized somewhat differently than the other model acts. They rely on publicly available surveys and studies based on social science and medical care. To include all the supporting citations would unduly burden the model resolutions, but the citations are critical evidence on which the resolutions rely. Thus, the citations have been provided in a separate “Fact Sheet.”

We emphasize that the purpose of these resolutions is to avoid support for these public policies because they happen to coincide with “traditional” or “biblical” norms. Rather than find that justification compelling, courts have frequently found such justifications “unreasonable” or “irrational,” as they are not based on “reason” or “science.” These resolutions and the accompanying talking points and fact sheets show that traditional, biblical norms are also reasonable and rational in light of the available empirical evidence. Similarly, the compelling state interests identified are not tied to “traditional” or “biblical” morality or standards of conduct, but, rather, to measurable interests such as avoiding medical costs and the like.

Although these resolutions may engender lively opposition, we believe it important to begin a public discourse on these important topics grounded in the language that the opponents themselves use. Moreover, it is important to recognize that, just because the Supreme Court has dictated that states must allow civil marriages between same-sex couples, states may still discourage that practice and encourage intimate sexual relations to take place only among a married man and woman. Indeed, as we set out, there are persuasive health and welfare reasons for states to do so. A helpful analogy in this respect is abortion, in which the Supreme Court has dictated that women have the right to abort their child in certain circumstances, but the states are not required to fund or otherwise support it.

The resolutions have been divided into three. They could be put together in any combination.

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## **Resolution Establishing Public Policy Favoring Intimate Sexual Relations Only Between Married, Heterosexual Couples**

### **Section 1. Purpose**

The issue of homosexual rights has been brought to the fore in recent years, particularly in the context of same-sex marriage. While recognizing the requirements of rulings of the United States Supreme Court, it is beneficial for the health and welfare of the inhabitants of this state to set out its public policy in regard to intimate sexual relations.

### **Section 2. Findings [Details Provided in Fact Sheet]**

(a) The United States Supreme Court has held that, under the federal Constitution, states cannot deny civil marriage licenses to same-sex couples. [A]

(b) While respecting and implementing the ruling of the U. S. Supreme Court, the citizens of this state have determined, as stated in [law or state constitutional amendment], that marriage is between one man and one woman.

(c) The United States Supreme Court has upheld public policy of the United States as established by the United States Congress and of the various states that disfavors, without denying the right to, certain constitutionally guaranteed rights, such as abortion. [B]

(d) The United States Centers for Disease Control and Prevention (“CDC”) have published comprehensive surveys on health issues related to same-sex intimate relationships, which document a higher incidence of serious disease among the population that is involved in such relationships, including:

- 1) Human immunodeficiency virus (HIV) and the auto-immunodeficiency syndrome (AIDS) [C];
- 2) Syphilis [D];
- 3) Human papilloma virus [E];
- 4) Hepatitis [F];
- 5) Cancer [G]; and
- 6) Amebiasis [H].

(e) The health care costs for HIV/AIDS and other illnesses that have been statistically proven to be related to intimate sexual relations other than by a man and a woman in a monogamous relationship are highly significant, estimated to be in the billions of dollars annually in our nation. These costs are borne by this state directly, by state residents indirectly through health insurance premiums and taxes, by private financial assistance organizations of this state, and by the patients residing in this state through out-of-pocket expenses. [I]

(f) The science concerning same-sex attraction and behavior is not settled, while the consequences associated with such behavior are well understood. [J]

(g) The data from social science research increasingly point to a conclusion that children conceived in nonmarital relationships experience greater difficulties than children born to married parents. [K]

(h) Research indicates that family structure is the most important risk factor in child sexual abuse. [L]

### **Section 3. Compelling State Interests**

This state has these compelling interests:

- (a) Maximizing the physical and mental health of its inhabitants;
- (b) Minimizing the costs of health care to its inhabitants and to the State itself for preventable health issues;
- (c) Preventing and minimizing diseases that are related to intimate sexual relations;
- (d) Informing its inhabitants of the health and other dangers relating to intimate sexual relations outside of a marriage between one man and one woman; and
- (e) Confirming the personhood of all individuals in this state and that such personhood is not dependent on their sexual preferences and conduct.
- (f) Ensuring that the well-being of children is a social priority and should be preferred over a policy of sexual expressionism that prioritizes adults' interests over children's welfare.

### **Section 4. State Goals**

In furtherance of these compelling interests, the state has these goals:

- (a) Encouraging behavior that maximizes the probability that its citizens will enjoy good physical and mental health;
- (b) Promoting public health and minimizing preventable public health problems; and
- (c) Through behavior that promotes the good health of its citizenry, ensuring that the expenditure of its limited public funds for public health purposes targets those health issues that are not easily preventable.

### **Section 5. Resolution**

NOW, THEREFORE, it is RESOLVED that the public policy of this state supports and encourages marriage between one man and one woman and the desirability that intimate sexual relations only take place between such couples.

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## FACT SHEET

**A:** The United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), decided that, under the federal constitution, states cannot deny civil marriage licenses to same-sex couples.

**B:** The United States Supreme Court has upheld public policy of the United States Congress and various states that disfavors (without denying the right to) abortion, even though the Court has found there to be a constitutional right to abortion. For example:

- In *Beal v. Doe*, 432 U.S. 438 (1977), the Court held that the federal Medicaid Act did not require that states fund elective first trimester abortions in this joint federal-state program.
- In *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld a state law that denied the use of Medicaid funds for elective first trimester abortions.
- In *Poelker v. Doe*, 432 U.S. 519 (1977), the Court upheld a city's refusal to pay for an elective first trimester abortion in its public hospital.
- In *Harris v. McRae*, 448 U.S. 297 (1980), the Court upheld the federal Hyde Amendment that denied public funding for medically necessary abortions unless required to save the life of the mother.
- In *Williams v. Zbarez*, 448 U.S. 358 (1980), the Court found constitutional a state law that prohibited the use of state funds for performing abortions except to save the life of the mother.
- In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Court upheld a Missouri law that prohibited the use of public employees and facilities to perform or assist in the performance of abortions except when necessary to save the life of the mother.

**C:** HIV infection and the rate of infection are most prevalent among *men who have intimate sexual relations with men (MSM)*.

- "Sexual risk behaviors account for most HIV infections in gay and bisexual men. "Most gay and bisexual men get HIV through having anal sex without condoms or medicines to prevent or treat HIV. Anal sex is the riskiest type of sex for getting or transmitting HIV." CDC, "HIV Among Gay and Bisexual Men," [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html).
- CDC estimates that only 2 percent of the population in the United States are MSM, but accounted for 70% of new HIV infections in 2014; in 2015, they accounted for 82% of new HIV diagnoses among all males aged 13 and older and 67% of the total new diagnoses in the U.S. CDC, "CDC Fact Sheet: HIV Among Gay and Bisexual Men," [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html).
- "From 2010 to 2014, estimated annual HIV infections remained at about 26,000 per year among all [MSM] . . ." Among MSM aged 25-34, though, HIV annual infection increased 23%. CDC, "CDC Fact Sheet: HIV Among Gay and Bisexual Men," [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html).

- At the end of 2014, an estimated 615,400 MSM were living with HIV diagnosis. CDC, “HIV Among Gay and Bisexual Men,” [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html).
- In 2015 “[g]ay and bisexual men accounted for 55% of people who received an AIDS diagnosis.” CDC, “HIV Among Gay and Bisexual Men,” [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html).
- “In 2014, there were 6,110 deaths among [MSM]} . . . living with diagnosed HIV infection.” CDC, “HIV Among Gay and Bisexual Men,” [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html).

**D: Syphilis is increasing, especially among the gay and bisexual community.**

- “In 2014, gay, bisexual, and other men who have sex with men accounted for 83% of primary and secondary syphilis cases where sex of sex partners was known in the United States.” CDC, “Sexually Transmitted Diseases,” [www.cdc.gov/msmhealth/std.htm](http://www.cdc.gov/msmhealth/std.htm).
- “Once nearly eliminated in the U.S., syphilis is increasing, especially among gay, bisexual, and other men who have sex with men (MSM).” CDC, “CDC Fact Sheet: Syphilis & MSM . . .” [www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm](http://www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm).
- “Between 2015 and 2016, the number of reported primary and secondary (P&S) cases increased by 18% . . . . Most (58%) of these cases were among MSM. CDC, “CDC Fact Sheet: Syphilis & MSM . . . .,” [www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm](http://www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm).
- “Most cases of syphilis in the United States are among gay, bisexual, and other men who have sex with men. (MSM), and syphilis has been increasing among MSM for more than a decade. If syphilis is not treated, it can cause serious health problems, including neuralgic (brain and nerve) problems, eye problems, and even blindness. In addition, syphilis is linked to an increased risk of transmission of HIV infection.” CDC, “CDC Fact Sheet: Syphilis & MSM . . . .,” [www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm](http://www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm).
- “Reported cases of P&S syphilis continue to be characterized by a high rate of HIV co-infection, particularly among MSM (Figure 41). Among 2016 P&S syphilis cases with known HIV-status, 47.0% of cases among MSM were HIV-positive . . . .” CDC, “2016 Sexually Transmitted Diseases Surveillance” <https://www.cdc.gov/std/stats16/Syphilis.htm>.
- “Between December 2014 and March 2015, 12 cases of ocular syphilis were reported from two major cities, San Francisco and Seattle. Subsequent case finding indicated more than 200 cases reported over the past 2 years from 20 states. The majority of cases have been among HIV-infected MSM. . . .” <https://www.cdc.gov/std/syphilis/clinicaladvisoryos2015.htm>.
- “In the United States, approximately half of MSM with primary and secondary (P&S) syphilis were also living with HIV. In addition, MSM who are HIV-negative and diagnosed with P&S syphilis are more likely to be infected with HIV in the future. Having a sore or break in the skin from an STD such as syphilis may allow HIV to more easily enter [a person’s] . . . body. . . . [A person] may also be more likely to get HIV because the same behaviors and circumstances that

put [him or her] . . . at greater risk for getting other STDs can also put . . . [him or her] at greater risk for getting HIV.” CDC, “CDC Fact Sheet: Syphilis & MSM . . . ,” [www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm](http://www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm).

**E:** Human papilloma virus (HPV) is the most common sexually transmitted disease (STD) in the United States and is of particular concern in the MSM population.

- “HPV (Human papillomavirus), the most common STD [sexually transmitted disease] in the United States, is also a concern for gay, bisexual, and other men who have sex with men. Some types of HPV can cause genital and anal warts and some can lead to the development of anal and oral cancers . . . . While condoms are effective, HPV and HSV [herpes simplex virus] can be spread by contact with the area around the genitals not protected by the condom . . . . Genital herpes, syphilis, and HPV are most often spread through genital skin-to-skin contact.” CDC, “Sexually Transmitted Diseases,” [www.cdc.gov/msmhealth/std.htm](http://www.cdc.gov/msmhealth/std.htm).
- “Men who receive anal sex are more likely to get anal HPV and develop anal cancer.” CDC, “CDC Fact Sheet: HPV and Men,” [www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm](http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm).
- “Men with weak immune systems (including those with HIV) who get infected with HPV are more likely to develop HPV-related health problems.” CDC, “CDC Fact Sheet: HPV and Men,” [www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm](http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm).

**F:** MSM populations are at higher risk of contracting various types of hepatitis.

- “Gay, bisexual, and other men who have sex with men have a higher chance of getting viral hepatitis including Hepatitis A, B, and C, which are diseases that affect the liver. About 10% of new Hepatitis A and 20% of all new Hepatitis B infections in the United States are among gay and bisexual men.” CDC, “Viral Hepatitis,” [www.cdc.gov/msmhealth/viral-hepatitis.htm](http://www.cdc.gov/msmhealth/viral-hepatitis.htm). This is to be compared to the prevalence of homosexuality reported as follows: “Based on the 2013 NHIS [National Health Interview Survey] data, 96.6% of adults identified as straight, 1.6% identified as gay or lesbian, and 0.7% identified as bisexual. The remaining 1.1% of adults identified as ‘something else,’ Stated ‘I don’t know the answer,’ or refused to provide an answer.” Ward, BW, et al., “Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013,” reported in CDC, *National Health Statistics Reports*, no. 77 (July 15, 2014).
- “HCV [hepatitis C virus] is the most common chronic blood-borne infection in the United States, with an estimated 2.7 million persons living with chronic infection. HCV is not efficiently transmitted through sex . . . . However, data indicate that sexual transmission of HCV can occur, especially among persons with HIV infection. Increasing incidence of acute HCV infection among MSM with HIV infection has been reported in New York City and Boston, along with multiple European cities . . . . No vaccine for hepatitis C is available . . . .” Centers for Disease Control and Prevention, “Emerging Issues,” [www.cdc.gov/std/tg2015/emerging.htm](http://www.cdc.gov/std/tg2015/emerging.htm).

**G:** Certain types of cancer pose a higher risk for LGB [lesbian/gay/bisexual] populations.

- “LGB [lesbian/gay/bisexual] adults are more likely to have cancer,” with 6% of heterosexuals having cancer and 9% LGB. Cal. Health Interview Study, cited in Center for American Progress, “How to Close the LGBT Health Disparities Gap,” <https://www.americanprogress.org/issues/lgbt/reports/2009/12/21/7048/how-to-close-the-lgbt-health-disparities-gap/>.
- “Gay, bisexual and other men who have sex with men are 17 times more likely to get anal cancer than heterosexual men. Men who are HIV-positive are even more likely than those who do not have HIV to get anal cancer.” CDC, “Sexually Transmitted Diseases,” [www.cdc.gov/msmhealth/std.htm](http://www.cdc.gov/msmhealth/std.htm).
- “Infection with the human papilloma virus (HPV) increases the risk of anal cancer. HPV risk is increased by having anal sex and having many sex partners. Smoking also increases your risk for this cancer. Another risk factor is a weak immune system because of HIV infection or other factors.” American Cancer Society, “Cancer Facts for Gay and Bisexual Men,” [www.cancer.org/healthy/findcancerearly/menshealth/cancer-facts-for-gay-and-bisexual-men.htm](http://www.cancer.org/healthy/findcancerearly/menshealth/cancer-facts-for-gay-and-bisexual-men.htm).
- “HPV infection isn’t cancer but can cause changes in the body that lead to cancer. HPV infections usually go away by themselves but having an HPV infection can cause certain kinds of cancer to develop. These include cervical cancer in women, penile cancer in men, and anal cancer in both women and men. HPV can also cause cancer in the back of the throat, including the base of the tongue and tonsils (called oropharyngeal cancer). All of these cancers are caused by HPV infections that did not go away.” CDC, [www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm](http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm).

**H:** Amebiasis is not common in industrialized countries, but poses an emerging risk among MSM populations. “*Entamoeba histolytica* is a pathogenic amoeba that can cause invasive intestinal and extra-intestinal disease. The most frequent manifestations of invasive amebiasis are colitis and liver abscesses. Although *E. histolytica* is one of the most common parasitic infections worldwide, invasive disease remains uncommon in industrialized countries. Recent studies from Japan, Taiwan, and Republic of Korea, areas where *E. histolytica* endemicity is generally low, suggest that amebiasis is an emerging parasitic infection that occurs exclusively in men who have sex with men (MSM) . . . . In Japan, amebiasis has become endemic in MSM; symptomatic *E. histolytica* infection occurs almost exclusively in middle-aged MSM in the large cities of Japan. Similar findings are reported for MSM in Taiwan. More recently, a study from the Republic of Korea documented invasive amebiasis (amebic liver abscess) in HIV-infected MSM. To date, the emergence of *E. histolytica* infections in MSM seems to be limited to the Asia-Pacific region.” Stark, D, et al., “Invasive Amebiasis in Men Who Have Sex with Men, Australia,” *14 Emerging Infectious Diseases* 1141-1142 (July 2008). [https://wwwnc.cdc.gov/eid/article/14/7/08-0017\\_article](https://wwwnc.cdc.gov/eid/article/14/7/08-0017_article)

**I:** The costs of treating HIV/AIDS infection, much of which is preventable, is significant.

- “In all, the total lifetime treatment cost for HIV based on new diagnoses in 2009 was estimated to be \$16.6 billion . . . . Note that the number of new diagnoses listed in this table [1] do not adjust for reporting delay, and thus are likely underestimated . . . . Life treatment cost per

person = \$367,134 (in 2009 dollars; [\$379,668 in 2010 dollars]).” CDC, “HIV Cost-effectiveness,” [www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/index.html](http://www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/index.html) (citing Schackman BR, Gebo, KA, Walensky RP, et al., “The lifetime cost of current human immune-deficiency virus care in the United States.” *Medical Care* 2006; 44: 990-997). More recent studies suggest a range of cost between \$250,000-\$600,000, depending on when treatment is begun and what treatment regimen is used. <https://www.verywell.com/what-is-the-lifetime-cost-if-hiv-49641>

- These significant health care costs for HIV/AIDS are borne by a combination of government and private insurance, financial assistance organizations, and out-of-pocket payments. Irrespective of the payment source, these costs for treating a largely preventable disease are significant.

**J:** The reasons for same-sex attraction are not well understood, although the deleterious consequences associated with acting on such attraction have been extensively documented (see details above under items C-H).

- Professors Lawrence C. Mayer and Paul R. McHugh surveyed the social science studies published through 2015 concerning sexual orientation and summarized the results of those studies as follows:
  - The understanding of sexual orientation as an innate, biologically fixed property of human beings—the idea that people are “born that way”—is not supported by scientific evidence.
  - Although there is evidence that biological factors such as genes and hormones are associated with sexual behaviors and attractions, there are no compelling causal biological explanations for human sexual orientation. Although minor differences in the brain structures and brain activity between homosexual and heterosexual individuals have been identified by researchers, such neurobiological findings do not demonstrate whether these differences are innate or are the result of environmental and psychological factors.
  - Longitudinal studies of adolescents suggest that sexual orientation may be quite fluid over the life course for some people, with one study estimating that as many as 80% of male adolescents who report same-sex attractions no longer do so as adults (although the extent to which this figure reflects actual changes in same-sex attractions and not just artifacts of the survey process has been contested by some researchers).
  - Compared to heterosexuals, non-heterosexuals are about two to three times as likely to have experienced childhood sexual abuse.

Mayer & McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 7 (Fall 2016).

- Professors Mayer and McHugh surveyed the social science studies published through 2015 concerning sexuality, mental health outcomes, and social stress and summarized the results of those studies as follows:
  - Compared to the general population, non-heterosexual subpopulations are at an elevated risk for a variety of adverse health and mental health outcomes.

- Members of the non-heterosexual population are estimated to have about 1.5 times higher risk of experiencing anxiety disorders than members of the heterosexual population, as well as roughly double the risk of depression, 1.5 times the risk of substance abuse, and nearly 2.5 times the risk of suicide.
- Members of the transgender population are also at higher risk of a variety of mental health problems compared to members of the non-transgender population. Especially alarming, the rate of lifetime suicide attempts across all ages of transgender individuals is estimated at 41%, compared to under 5% in the overall U.S. population.
- There is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for non-heterosexual and transgender populations. More high-quality longitudinal studies are necessary for the “social stress model” to be a useful tool for understanding public health concerns.

Mayer & McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 8 (Fall 2016).

- The CDC reported on the largest study of high-school students in the United States undertaken to date as follows: “This pattern [of a higher incidence among minority sex students—self-identified LGB students having only same-sex sexual encounters] also was evident across the six sexual risk behaviors. [These behaviors are ‘related to unintended pregnancy and sexually transmitted infections (STIs), including HIV infection.’] The prevalence of five of these behaviors was higher among gay, lesbian, and bisexual students than heterosexual students and the prevalence of four was higher among students who had sexual contact with only the same sex or with both sexes than students who had sexual contact with only the opposite sex.”  
<https://www.cdc.gov/mmwr/volumes/65/ss/ss6509a1.htm>.

**K:** In her book, *Putting Children’s Interest First in U.S. Family Law and Policy: With Power Comes Responsibility* (Cambridge: Cambridge University Press, 2017), Professor Helen Alvare (Scalia Law School, George Mason University) distills seven conclusions from her review of the sociological, psychological, and economic literature relevant to nonmarital childbearing, a circumstance that is facilitated by the now prevailing federal government policy favoring “sexual expressionism.” (See below for more detail about what “sexual expressionism” means.)

1. “[T]here is a consensus that nonmarital birth itself often (though not always) yields in its wake a variety of outcomes for children in various domains including the cognitive, educational, emotional and economic.” (p59)
2. “[T]he pathways or mediators of these negative influences are many. These include many things that are more apt to happen when a mother and father are not married and may include: . . . absence of the second parent’s income, and time for supervision, guidance and interaction; lower investments in the child because the father is an absent or cohabiting parent; loss of the second parent’s personal and social capital, discipline and protection; loss of the parents’ mutual support for one another and for one another’s parenting; less extended family support; and household instability, due to the greater likelihood that an unmarried parent will re-partner after the child’s birth, or even have additional children by a different partner. Multi-partner fertility complicates parents’ and children’s emotional and residential stability even further, and commonly reduces the biological fathers’ investments into their children . . . . [N]onmarital childbearing may yield worse outcomes for children

than living in post-divorce households; research regularly indicates that fathers who never married have more modest involvement in the lives of their children.”

- “Empirical literature . . . shows . . . [that] attending to children’s brain development, beginning even prenatally and continuing especially during the first several years of the child’s life, is crucial . . . . Nobel prize-winning economist James Heckman summarized ‘decades’ of research in economics, neuroscience and developmental psychology to conclude that: ‘[l]ater attainments [of skills] build on foundations that are laid down early;’ ‘[e]arly family environments are major predictors of cognitive and noncognitive abilities;’ ‘[d]isadvantage is associated with poor parenting practices and lack of positive cognitive and non-cognitive stimulation;’ and ‘[a] child who falls behind may never catch up.’”
  - “Instability appears to be one of the most important mediators [or pathways] of nonmarital children’s disadvantage . . . . An emerging literature documents the unstable trajectories of most nonmarital households, especially as compared to marital households. In the words of one sociologist[,] ‘[f]amily structure at birth sets the stage for subsequent instability.’ Mothers are unlikely to later marry the child’s father and even if they do, their divorce rates are high. Cohabiting nonmarital partnerships are even less stable. Low percentages of children are likely to be with their biological mother and father, even by age three. The later introduction of an unrelated male into a household is, on average, disruptive or worse for children.”
3. “[C]ausation runs in both directions. Poverty, fewer years of education, unstable neighborhoods, family structure deficits, reduced employment prospects, and a history involving crime or drugs, predict for higher rates of nonmarital parenting.”
  4. “[S]cholarly and political leaders across the ideological continuum increasingly share the opinion that causation runs in both directions . . . . [I]n recent years, they are joining together to propose that public and private efforts aim both to promote marital childbearing directly and to address the many factors that lead to it. . . . [T]here are, as yet, insufficient concrete initiatives directly promoting marital childbearing.”
  5. “[L]ower income is an important factor respecting both the causes and the consequences of nonmarital parenting . . . . [L]oss of a second parent’s financial contribution importantly [and negatively] affects a child’s life chances . . . .”
  6. The difficulties faced by nonmarital children are not fully explained by what researchers call “selection effects.” These effects “refer to the notion that there are characteristics that lead some parents to have marital children, and therefore provide them with certain advantages, as distinguished from the characteristics that lead others to have nonmarital children, thereby disadvantaging those children.” In other words, some observers might argue that it is not the marital status of the parents that affects the children; rather, the innate characteristics of the parents that lead them to decide not to marry (among other decisions) is what is really adversely affecting the children—i.e., marital status is irrelevant (or of little consequence). However, Alvare points out “that researchers today appear to believe that children’s outcomes could not be tied strictly to parental traits or genes . . . .”, citing one researcher’s explanation that “the ‘architecture of the brain and the process of skill formation are influenced by an interaction between genetics and individual experience.’”
  7. There are mounting data that there is a “close relationship between nonmarital births and a variety of disturbing social gaps. There are both widening and hardening gaps—in levels of wealth and

income, and in marriage, education, and employment prospects—between high and low socioeconomic classes, white and black Americans, and even between females and males who were both reared by a single-mother.”

(pages 59-65; footnotes omitted)

### What is “sexual expressionism?”

The sociologist Mark Regnerus defines the term thusly:

“[O]ur cultural—and now legal—penchant for valorizing the sexual decisions of adults, putting their wishes squarely and unapologetically in front of children’s needs.”  
<http://thefederalist.com/2018/04/06/the-law-should-protect-children-not-sexual-expressionism/>

The notion of “valorizing” means to enhance price, value, and status by organized and usually government action (e.g., as when crop subsidies are provided) (*Merriam-Webster’s Collegiate Dictionary*, 10<sup>th</sup> ed., Springfield: Merriam-Webster, Inc., 1997)

The federal government’s promotion of a sexual expressionist policy has destabilized families and is exacting a high, and unconscionable, social and personal price.

**L:** Citing several research studies, a recent article (“Safer Houses,” *Salvo*, #44, Spring 2018, page 30) noted: “[1] It turns out . . . that the safest place for a female when she is a child is with her two married, biological parents. [2] And the safest place for her when she is grown is with a man to whom she is married, i.e., her husband.” With respect to the first point, the article cites a fact sheet ([https://www.d2l.org/wp-content/uploads/2017/01/Statistics\\_4\\_Risk\\_Factors.pdf](https://www.d2l.org/wp-content/uploads/2017/01/Statistics_4_Risk_Factors.pdf)) that summarizes findings from the *Fourth National Incidence Study of Child Abuse and Neglect* (Sedlak, A.J., Mettenburg, J., Basena, M., Petta, I., McPherson, K., Greene, A., and Li, S. (2010). *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress, Executive Summary*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families. [https://www.acf.hhs.gov/sites/default/files/opre/nis4\\_report\\_congress\\_full\\_pdf\\_jan2010.pdf](https://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf).)

- One finding of this study is that “[f]amily structure is the most important risk factor in child sexual abuse. Children who live with two married biological parents are at a low risk for abuse. The risk increases where children live with step-parents or a single parent.”
- The study also found that “[c]hildren living without either parent (foster children) are 10 times more likely to be sexually abused than children [who] . . . live with both biological parents. Children who live with a single parent [who] . . . has a live-in partner are at the highest risk; they are 20 times more likely to be victims of child sexual abuse than children living with both biological parents.”

The article also refers to a *Washington Post* article ([https://www.washingtonpost.com/posteverything/wp/2014/06/10/the-best-way-to-end-violence-against-women-stop-taking-lovers-and-get-married/?utm\\_term=.f5a31c5a5050](https://www.washingtonpost.com/posteverything/wp/2014/06/10/the-best-way-to-end-violence-against-women-stop-taking-lovers-and-get-married/?utm_term=.f5a31c5a5050)) where the authors, family scholars Brad Wilcox and Robin Wilson, “highlight that, for the safety of girls, nothing is more important than living with their married dads. Summarizing the relevant research, the scholars conclude that ‘girls who are victimized are . . . more likely to have lived without their natural fathers.’”

With respect to the second point, the *Salvo* article cites a Danish study (<https://pdfs.semanticscholar.org/8dae/8580f0f14bbda3015b912ec2110b7ef9d094.pdf>), which “found

that ‘compared to those who were married with children at home, being single with children at home significantly increased the likelihood of [a woman’s] having visited’ a local center for rape victims.”

## NOTES

Many states currently have constitutional or legislative Statements that marriage is between one man and one woman. For example, Louisiana’s Constitution, Article XII (“General Provisions”), Section 15 (“Defense of Marriage”), provides, in part, “Marriage in the state of Louisiana shall consist only of the union of one man and one woman.” In addition, Louisiana’s Civil Code, Article 3520(b) (“Marriage”) provides, in part, “A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana . . . .” As stated above, *Obergefell* does not override these statements of public policy. However, in no state is the public policy expressly supported by social science research and health care statistics as provided in this draft resolution.

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## Resolution Establishing Public Policy Favoring Reliance on and Maintenance of Birth Gender

### Section 1. Purpose

The issue of transgender rights has been brought to the fore in recent years, particularly in the context of access to birth gender-specific facilities and in the context of funding for sex realignment medical procedures. This state recognizes the personhood of all its citizens and acknowledges the importance of promoting the health and social welfare of its citizenry. For these reasons, it is beneficial for the long-term well-being of the inhabitants of this state to set out its public policy in regard to birth gender.

### Section 2. Findings [Details Provided in Fact Sheet]

- (a) Available scientific evidence does not support the assertion that gender identity is an innate, fixed property of human beings that is independent of biological sex. [A]
- (b) Most children who experience cross-gender identification do not continue to do so into adolescence or adulthood. [B]
- (c) Members of the transgender population are at significantly higher risk of a variety of mental health problems compared to members of the non-transgender population. [C]
- (d) There is only limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for transgender populations. [D]
- (e) Evidence from early studies indicates that transgendered female (biological males living as females) youth are at greater risk of being engaged in sex work and of exposure to sexually transmitted diseases. [E]
- (f) The term “gender identity” has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Because of its subjectivity, the term can be used by an individual in a temporally inconsistent manner. [F]
- (g) A policy to facilitate medical intervention to accommodate and promote gender transformation is scientifically baseless and abusive. [G]
- (h) The rate of suicide attempts is dramatically higher in transgender teens. A new study from the American Academy of Pediatrics shows an alarmingly high rate of suicide attempts among transgender teens, particularly transgender boys. [H]

### Section 3. Compelling State Interests

This state has these compelling interests:

- (a) Maximizing the physical and mental health of its inhabitants;
- (b) Minimizing the costs of health care to its inhabitants and to the state itself for avoidable health issues;
- (c) Informing its inhabitants of the health and other dangers relating to gender transformation actions; and
- (d) Confirming the personhood of all individuals in this state and that such personhood is not dependent on self-defined gender identity.

#### Section 4. State Goals

In furtherance of these compelling interests, the state has these goals:

- (a) Encouraging behavior that maximizes the probability that its citizens will enjoy good physical and mental health;
- (b) Promoting public health and minimizing avoidable public health problems;
- (c) Ensuring that the expenditure of its limited public funds for public health purposes targets those health issues that are not easily preventable; and
- (d) Ensuring that appropriate resources are available to assist individuals who are dealing with issues related to gender identity.

#### Section 5. Resolution

NOW, THEREFORE, it is RESOLVED that the public policy of this state supports and encourages maintenance of the birth gender of its citizens.

#### FACT SHEET

**A:** Professors Lawrence S. Mayer and Paul R. McHugh surveyed the social science studies published through 2015 concerning sexuality, mental health outcomes, and social stress. In their report, they noted the following:

- The hypothesis that gender identity is an innate, fixed property of human beings that is independent of biological sex—that a person might be “a man trapped in a woman’s body” or “a woman trapped in a man’s body”—is not supported by scientific evidence.
- Studies comparing the brain structures of transgender and non-transgender individuals have demonstrated weak correlations between brain structure and cross-gender identification. These correlations do not provide any evidence for a neurobiological basis for cross-gender identification.

Mayer & McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 8 (Fall 2016),  
[http://www.thenewatlantis.com/docLib/20160819\\_TNA50SexualityandGender.pdf](http://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf).

**B:** In their survey of studies, cited above, Professors Mayer and McHugh noted the following:

- Children are a special case when addressing transgender issues. Only a minority of children who experience cross-gender identification will continue to do so into adolescence or adulthood; and
- There is little scientific evidence for the therapeutic value of interventions that delay puberty or modify the secondary sex characteristics of adolescents, although some children may have improved psychological well-being if they are encouraged and supported in their cross-gender identification. There is no evidence that all children who express gender-atypical thoughts or behavior should be encouraged to become transgender.
- In a *Wall Street Journal* opinion column by Dr. Paul R. McHugh, he noted further, “When children who reported transgender feelings were tracked without medical or surgical treatment at both

Vanderbilt University and London's Portman Clinic, 70%-80% of them spontaneously lost those feelings. Some 25% did have persisting feelings; what differentiates those individuals remains to be discerned.” (Originally published June 12, 2014, and updated on May 13, 2016, <https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>.)

**C:** In their survey of studies, cited in A above, Professors Mayer and McHugh noted the results of those studies included a finding that members of the transgender population are at higher risk of a variety of mental health problems compared to members of the non-transgender population. Especially alarming, the rate of lifetime suicide attempts across all ages of transgender individuals is estimated at 41%, compared to under 5% in the overall U.S. population.

In the same survey, Professors Mayer and McHugh reported that one study found that, compared to controls, sex-reassigned individuals were about five times more likely to attempt suicide and about 19 times more likely to die by suicide:

A 2011 study at the Karolinska Institute in Sweden [was the result of a] . . . long-term study—up to 30 years—[which] followed 324 people who had sex-reassignment surgery. The study revealed that beginning about 10 years after having the surgery, the transgendered began to experience increasing mental difficulties. Most shockingly, their suicide mortality rose almost 20-fold above the comparable nontransgender population. This disturbing result has as yet no explanation but probably reflects the growing sense of isolation reported by the aging transgendered after surgery. The high suicide rate certainly challenges the surgery prescription. (From the *Wall Street Journal* opinion column by Dr. McHugh, column cited above.)

In the article, “How to Close the LGBT Health Disparities Gap,” it was reported that “[t]ransgender adults are much more likely to have suicide ideation” (2% heterosexual; 5% gay; 50% transgender). [www.americanprogress.org/issues/lgbt/report/2009/12/21/7048](http://www.americanprogress.org/issues/lgbt/report/2009/12/21/7048).

In the *Wall Street Journal* opinion column, cited above, Professor McHugh wrote, “[P]olicy makers and the media are doing no favors either to the public or the transgendered by treating their confusions as a right in need of defending rather than as a mental disorder that deserves understanding, treatment and prevention. This intensely felt sense of being transgendered constitutes a mental disorder in two respects. The first is that the idea of sex misalignment is simply mistaken—it does not correspond with physical reality. The second is that it can lead to grim psychological outcomes.”

**D:** There is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for transgender populations. More high-quality longitudinal studies are necessary for the “social stress model” to be a useful tool for understanding public health concerns.

Mayer & McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 8 (Fall 2016).

[http://www.thenewatlantis.com/docLib/20160819\\_TNA50SexualityandGender.pdf](http://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf).

If social stressors were the sole factor, one would expect that the suicide ideation rates for homosexuals and transgenders would be closely related. However, as noted above, suicide ideation for those reporting as transgender was found to be 10 times that of those reporting as homosexual. [www.americanprogress.org/issues/lgbt/report/2009/12/21/7048](http://www.americanprogress.org/issues/lgbt/report/2009/12/21/7048).

E: What little is known about transgendered youth suggests that biologically male persons living as females are often homeless and likely to be engaged in sex work. One report, using data from two studies, notes that 59-67% “of female transgendered young persons have engaged in sex work, and approximately 20% are HIV positive.” Approximately 33% of the study participants did not use sex protection during intercourse, “[r]ates of alcohol and substance use during sex were also high (40-50%) in this population.” (Note that the two studies relied on “convenience samples” from urban areas, so the results and conclusions are not robust.)

L. Kris Gowen, “The Sexual Health of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth,” at 24 (Oregon Health Authority, Public Health Division), <https://www.pathwaysrtc.pdx.edu/pdf/pbSexualHealthDisparities.pdf>.

F: “The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. ‘Gender identity’ refers to one’s inner sense of being female, male, or some other gender. . . . Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient . . . , [and] individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.” *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 103-04 (2006). See also *DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*.) An “identity” subject to changeable, subjective “individuality” untethered to time or objective biology is, by definition, subject to abuse.

G: "The American College of Pediatricians urges educators and legislators to reject all policies that condition children to accept as normal a life of chemical and surgical impersonation of the opposite sex. Facts – not ideology – determine reality." "Gender Ideology Harms Children," American College of Pediatricians, March 2016, updated September 2017, <https://www.acped.org/the-college-speaks/position-statements/gender-ideology-harms-children> .

The ACP makes these points:

- **Human sexuality is an objective biological binary trait: “XY” and “XX” are genetic markers of male and female, respectively – not genetic markers of a disorder.**
- **No one is born with a gender. Everyone is born with a biological sex. Gender (an awareness and sense of oneself as male or female) is a sociological and psychological concept; not an objective biological one.** No one is born with an awareness of themselves as male or female; this awareness develops over time and, like all developmental processes, may be derailed by a child’s subjective perceptions, relationships, and adverse experiences from infancy forward. People who identify as “feeling like the opposite sex” or “somewhere in between” do not comprise a third sex. They remain biological men or biological women.
- **A person’s belief that he or she is something they are not is, at best, a sign of confused thinking.** When an otherwise healthy biological boy believes he is a girl, or an otherwise healthy biological girl believes she is a boy, an objective psychological problem exists that lies in the mind not the body, and it should be treated as such. These children suffer from gender dysphoria. Gender dysphoria (GD), formerly listed as Gender Identity Disorder (GID), is a recognized mental disorder in

the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-5). The psychodynamic and social learning theories of GD/GID have never been disproved. [See additional detail below.]

- **Puberty is not a disease and puberty-blocking hormones can be dangerous.** Reversible or not, puberty- blocking hormones induce a state of disease – the absence of puberty – and inhibit growth and fertility in a previously biologically healthy child.
- **According to the DSM-5, as many as 98% of gender confused boys and 88% of gender confused girls eventually accept their biological sex after naturally passing through puberty.**
- **Pre-pubertal children diagnosed with gender dysphoria may be given puberty blockers as young as eleven, and will require cross-sex hormones in later adolescence to continue impersonating the opposite sex. These children will never be able to conceive any genetically related children even via artificial reproductive technology. In addition, cross-sex hormones (testosterone and estrogen) are associated with dangerous health risks including but not limited to cardiac disease, high blood pressure, blood clots, stroke, diabetes, and cancer.**
- **Rates of suicide are nearly twenty times greater among adults who use cross-sex hormones and undergo sex reassignment surgery, even in Sweden which is among the most LGBTQ-affirming countries.** What compassionate and reasonable person would condemn young children to this fate knowing that after puberty as many as 88% of girls and 98% of boys will eventually accept reality and achieve a state of mental and physical health?
- **Conditioning children into believing a lifetime of chemical and surgical impersonation of the opposite sex is normal and healthful is child abuse.** Endorsing gender discordance as normal via public education and legal policies will confuse children and parents, leading more children to present to “gender clinics” where they will be given puberty-blocking drugs. This, in turn, virtually ensures they will “choose” a lifetime of carcinogenic and otherwise toxic cross-sex hormones, and likely consider unnecessary surgical mutilation of their healthy body parts as young adults.

**Regarding Point 3, which indicates that gender dysphoria is a product of confused thinking:**

- The American Psychiatric Association (APA) is the author of the Diagnostic and Statistical Manual of Mental Disorders, 5th edition(DSM-5). The APA states that those distressed and impaired by their GD meet the definition of a disorder. The College is unaware of any medical literature that documents a gender dysphoric child seeking puberty blocking hormones who is not significantly distressed by the thought of passing through the normal and healthful process of puberty.
- On page 455 of the DSM-5 under “Gender Dysphoria without a disorder of sex development” it states: “Rates of persistence of gender dysphoria from childhood into adolescence or adulthood vary. In natal males, persistence has ranged from 2.2% to 30%. In natal females, persistence has ranged from 12% to 50%.” Simple math allows one to calculate that for natal boys: resolution occurs in **as many as**  $100\% - 2.2\% = 97.8\%$  (approx. 98% of gender-confused boys). Similarly, for natal girls: resolution occurs in **as many as**  $100\% - 12\% = 88\%$  gender-confused girls.

**The ACP concludes with this “bottom line”:**

Our opponents advocate a new scientifically baseless standard of care for children with a psychological condition (GD) that would otherwise resolve after puberty for the vast majority of patients concerned. Specifically, they advise: affirmation of children’s thoughts which are contrary

to physical reality; the chemical castration of these children prior to puberty with GnRH agonists (puberty blockers which cause infertility, stunted growth, low bone density, and an unknown impact upon their brain development), and, finally, the permanent sterilization of these children prior to age 18 via cross-sex hormones. There is an obvious self-fulfilling nature to encouraging young GD children to impersonate the opposite sex and then institute pubertal suppression. If a boy who questions whether or not he is a boy (who is meant to grow into a man) is treated as a girl, then has his natural pubertal progression to manhood suppressed, have we not set in motion an inevitable outcome? All of his same sex peers develop into young men, his opposite sex friends develop into young women, but he remains a pre-pubertal boy. He will be left psychosocially isolated and alone. He will be left with the psychological impression that something is wrong. He will be less able to identify with his same sex peers and being male, and thus be more likely to self-identify as “non-male” or female. Moreover, neuroscience reveals that the pre-frontal cortex of the brain which is responsible for judgment and risk assessment is not mature until the mid-twenties. Never has it been more scientifically clear that children and adolescents are incapable of making informed decisions regarding permanent, irreversible and life-altering medical interventions. For this reason, the College maintains it is abusive to promote this ideology, first and foremost for the well-being of the gender dysphoric children themselves, and secondly, for all of their non-gender-discordant peers, many of whom will subsequently question their own gender identity, and face violations of their right to bodily privacy and safety.  
(emphasis added)

H: In a study (“Transgender Adolescent Suicide Behavior”) published in the September 2018 issue of the journal *Pediatrics*, the authors reported these results:

Nearly 14% of adolescents reported a previous suicide attempt; disparities by gender identity in suicide attempts were found. Female to male adolescents reported the highest rate of attempted suicide (50.8%), followed by adolescents who identified as not exclusively male or female (41.8%), male to female adolescents (29.9%), questioning adolescents (27.9%), female adolescents (17.6%), and male adolescents (9.8%). Identifying as nonheterosexual exacerbated the risk for all adolescents except for those who did not exclusively identify as male or female (ie, nonbinary). For transgender adolescents, no other sociodemographic characteristic was associated with suicide attempts.  
[http://pediatrics.aappublications.org/content/early/2018/09/07/peds.2017-4218?sso=1&sso\\_redirect\\_count=2&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3A%20No%20local%20token&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+token](http://pediatrics.aappublications.org/content/early/2018/09/07/peds.2017-4218?sso=1&sso_redirect_count=2&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3A%20No%20local%20token&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+token)

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## **Resolution Establishing Public Policy Favoring Adoption by Intact Heterosexual, Marriage-based Families**

### **Section 1. Purpose**

The issue of what family structures are best suited to foster the most desirable childhood outcomes has been debated widely and is the subject of ongoing research. Although causal relationships cannot be drawn conclusively based on the current state of research, there are sufficient preliminary results to indicate a strong association between certain family structures and beneficial, publicly desirable childhood outcomes.

Recognizing the ongoing need for child placement, it is beneficial for the health and welfare of children in this state to set out the state's public policy in regard to family structures that promote favorable childhood outcomes.

### **Section 2. Findings {[Details Provided in Fact Sheet]}**

- (a) It is in the best interest of children to be in a stable family environment. [A]
- (b) On a number of socially important outcomes, it has been observed that children raised in heterosexual, marriage-based, intact families tend to do better than children raised in other family structures. [B]
- (c) The most reliable current data suggest that the biologically intact, two-parent household remains an optimal setting for the long-term flourishing of children. [C]
- (d) Conclusions that there are little or no differences in childhood outcomes for children raised in various types of family structures are to date based on studies that have significant methodological flaws. [D]
- (e) There are data indicating that secondary education outcomes are less desirable for children from some types of non-traditional family structures in comparison with children of married, opposite sex couples. [E]
- (f) Certain family structures appear from the data to be significantly shorter-lived and less stable than other family structures. [F]
- (g) There is little known about childhood outcomes for some family structures, which suggests caution should be exercised in presuming there are generally no significant differences in the placement of children in non-traditional family structures. [G]
- (h) Faith-based placement agencies provide an important source of placement opportunities. [H]

### **Section 3. Compelling State Interests**

This state has these compelling interests:

- (a) Maximizing the physical and mental health of its children;

(b) Promoting stable families in which children are safe and can be raised to realize their potential to become strong physically, mentally, and socially and able to contribute to society to the fullest extent of their abilities;

(c) Ensuring that children who need to be placed in homes other than with their biological parents are placed in an environment that ensures their safety and promotes their flourishing;

(d) Informing its citizens of the most recent and reliable data concerning the relative benefits and drawbacks to different types of family structures, insofar as family structure affects childhood outcomes; and

(e) Ensuring that as many qualified child placement agencies as possible are able to operate within the state, including faith-based agencies that may have more stringent requirements for adoptive and foster parents than other non-faith based agencies.

#### **Section 4. State Goals**

In furtherance of these compelling interests, the state has these goals:

(a) Encouraging adoption and foster care placement practices that have the greatest potential for favorable childhood outcomes;

(b) Promoting public health and minimizing preventable public health problems;

(c) Ensuring, through behavior that promotes the most favorable childhood outcomes, that the children growing to adulthood in this state are physically, emotionally, and socially well-adjusted, thereby reducing the need for the state to use its limited public funds for remediating the physical, emotional, or social ills that may result from a difficult childhood; and

(d) Recognizing that the need for child placement exceeds the opportunities for placement, providing stable and safe placements for as many children as possible in need of such placements.

#### **Section 5. Resolution**

NOW, THEREFORE, it is RESOLVED that the public policy of this state supports and encourages the establishment and strengthening of intact biological families, the placement of children within family structures where there is marriage between one man and one woman, and the placement of children in safe and supportive non-institutional settings where they will receive the love and nurturing, in a stable environment, that enables them to flourish and realize their potential to the maximum practical extent.

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## FACT SHEET

**A:** “[E]very child has a mother and a father, and such kinship matters for kids. To be stably rooted in your married mother and father’s household is to foster the greatest chance at lifelong flourishing. It’s not necessary, of course. It just has the best odds.

“[S]uch kinship ties are often broken, sometimes with intention (by mutual divorce, sperm donation, and some instances of surrogacy), sometimes by accident (as through the death of a parent), and sometimes by necessity (in the case of seeking protection from domestic violence), all through no fault of the child. A good society seeks to discourage broken kinship ties, and to struggle over how to manage those that are unavoidable. It does *not* respond by simply declaring biological bonds to be irrelevant or such brokenness only imagined.

“Nor should a good society support any political project that purports to *inject* new instability into children’s lives by categorically stripping mothers and fathers of their rights as biological parents.”

Mark Regnerus, “A Russian Lawmaker Is Misusing My Gay Parenting Study,” *The Atlantic*, September 16, 2013, <https://www.theatlantic.com/international/archive/2013/09/russian-lawmaker-misusing-my-gay-parenting-study/311054/>.

**B:** Differences have been observed in the outcomes for children raised in “marriage-based intact families and children in cohabiting, divorced, step, and single-parent families . . . .” The former tend to do better in a number of socially important outcomes that include “(a) health, mortality, and suicide risks, (b) drug and alcohol abuse, (c) criminality and incarceration, (d) intergenerational poverty, (e) education and/or labor force contribution, (f) early sexual activity and early childbearing, and (g) divorce rates as adults.” (footnotes omitted) (Loren Marks, “Same-sex parenting and children’s outcomes: A closer examination of the American psychological association’s brief on lesbian and gay parenting,” *Social Science Research* 41 (2012) 735.) <http://www.sciencedirect.com/science/article/pii/S0049089X12000580>.

Summarizing the results of a study (“Emotional Problems among Children with Same-Sex Parents: Difference by Definition” [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2500537](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500537)) published in the February 2015 issue of the *British Journal of Education, Society, and Behavioural Science*, these results were reported:

[O]n eight out of twelve psychometric measures, the risk of clinical emotional problems, developmental problems, or use of mental health treatment services is nearly double among those with same-sex parents when contrasted with children of opposite-sex parents.

The estimate of serious child emotional problems in children with same-sex parents is 17 percent, compared with 7 percent among opposite-sex parents, after adjusting for age, race, gender, and parent’s education and income. Rates of ADHD were higher as well—15.5 compared to 7.1 percent. The same is true for learning disabilities: 14.1 vs. 8 percent. “The study’s author, sociologist Paul Sullins, assessed a variety of different hypotheses about the differences, including comparative residential stability, experience of stigma or bullying, parental emotional problems (6.1 percent among same-sex parents vs. 3.4 percent among opposite-sex ones), and biological attachment. Each of these factors predictably aggravated children’s emotional health, but only the last of these—biological parentage—accounted for nearly all of the variation in emotional problems. While adopted children are at higher risk of

emotional problems overall, being adopted did not account for the differences between children in same-sex and opposite-sex households. It's also worth noting that while being bullied clearly aggravates emotional health, there was *no difference* in self-reported experience of having been bullied between the children of same-sex and opposite-sex parents.

"[T]he study reveals . . . there is *no equivalent replacement* for the enduring gift to a child that a married biological mother and father offer. It's no guarantee of success. It's not always possible. But the odds of emotional struggle at least double without it."

"New Research on Same-Sex Households Reveals Kids Do Best With Mom and Dad," Mark Regnerus, <http://www.thepublicdiscourse.com/2015/02/14417/>.

Over 50 years ago, the sociologist James Coleman conducted a legendary longitudinal study (<https://files.eric.ed.gov/fulltext/ED012275.pdf>) on whether inequities in funding led to inequities in educational outcomes. Contrary to expectations and the prevailing conventional wisdom, the study "actually found that the only variable with a substantially measurable effect on outcomes was family structure." (<http://www.libertylawsite.org/2018/07/11/literacy-is-a-good-not-a-right/>) The study noted this in its summary section:

This analysis concentrates on one cluster of those factors. It attempts to describe what relationship the school's characteristics themselves (libraries, for example, and teachers and laboratories, and so on) seem to have to the achievement of majority and minority groups . . . . The first finding is that the schools are remarkably similar in the way they relate to the achievement of their pupils when the socioeconomic background of the students is taken into account. It is known that socioeconomic factors bear a strong relation to academic achievement. When these factors are statistically controlled, however, it appears that differences between schools account for only a small fraction of differences in pupil achievement.

(James S. Coleman, *et al.*, Equality of Educational Opportunity 21-22 (1966))

More colloquially, this is what the study found:

To everyone's surprise, Coleman . . . found that within regions and types of communities (urban, suburban, and rural), expenditures per pupil were about the same in black and white schools. Even more remarkable, students did not learn more just because more was spent on their education. Nor did any other material resource of a school have much of an effect on how well Johnny and Suzy read—not the number of students in the class, nor the teacher's credentials, nor the newness of the textbooks, nor the number of books in the library, nor anything physical or material that schools had for years considered important. What did count were a host of family-background characteristics: mother's education, father's education, family income, having fewer siblings, the number of books in the home, and other factors—all of which together explained more of the variation among students in their reading achievement than any school-related factor. (emphasis added)

(Paul E. Peterson, *A Courageous Look at the American High School: The legacy of James Coleman*, EDUCATION NEXT, Spring 2010, Vol. 10, No. 2, <https://www.educationnext.org/a-courageous-look-at-the-american-high-school/>)

C: "[T]he science [of analyzing differences in outcomes for children raised in same-sex households] . . . remains young. Until much larger random samples can be drawn and evaluated, the probability-based

evidence that exists . . . suggests that the biologically-intact two-parent household remains an optimal setting for the long-term flourishing of children.”

“Parental same-sex relationships, family instability, and subsequent life outcomes for adult children: Answering critics of the new family structures study with additional analyses,” Mark Regnerus, *Social Science Research* 41 (2012), 1377)

[https://docs.wixstatic.com/ugd/0595d1\\_4a70add65b7c4598a7a9bde1a041978.pdf](https://docs.wixstatic.com/ugd/0595d1_4a70add65b7c4598a7a9bde1a041978.pdf).

The ill effects of growing up fatherless are well established. In a June 2017 NPR interview (<https://www.npr.org/sections/ed/2017/06/18/533062607/poverty-dropouts-pregnancy-suicide-what-the-numbers-say-about-fatherless-kids>) with best-selling author, John Blankstein, these statistics were highlighted:

- The summary of the NPR interview began with this observation: “The growing number of fatherless children in this country poses one of the most serious problems in education today.”
- 24.7 million children in the United States do not live with their biological father (see Census Bureau statistics at <https://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>).
- A U.S. Department of Education study (<https://nces.ed.gov/pubs2001/2001032.pdf>) found that 39% of students, first grade through high school, are fatherless.
- Blankstein noted that “Fatherlessness is having a great impact on education. First of all, it's growing, and the correlations with any number of risk issues are considerable. Children are four-times more likely to be poor if the father is not around. And we know that poverty is heavily associated with academic success.”
- A 2012 study, “The Vital Importance of Paternal Presence in Children's Lives,” shows that seven out of 10 high school dropouts are fatherless. (<https://www.psychologytoday.com/us/blog/co-parenting-after-divorce/201205/father-absence-father-deficit-father-hunger>)
- Blankstein commented that the research he had reviewed found that girls are twice as likely to suffer from obesity and four-times more likely to get pregnant as teenagers without the father present. (<http://journals.sagepub.com/doi/abs/10.1177/0192513X03255346?journalCode=jfia&>)
- Children growing up without a father are twice as likely to commit suicide.

The author of the Psychology Today article mentioned in the fifth bullet of the NPR interview summary (<https://www.psychologytoday.com/us/blog/co-parenting-after-divorce/201205/father-absence-father-deficit-father-hunger>) notes that “the two major structural threats to fathers’ presence in children’s lives are divorce and non-marital childbearing.” The author then summarized these characteristics of children who are fatherless:

- “[D]iminished self-concept, and compromised physical and emotional security (children consistently report feeling abandoned when their fathers are not involved in their lives, struggling with their emotions and episodic bouts of self-loathing).”
- “[B]ehavioral problems (fatherless children have more difficulties with social adjustment, and are more likely to report problems with friendships, and manifest behavior problems; many develop a swaggering, intimidating persona in an attempt to disguise their underlying fears, resentments, anxieties and unhappiness).”
- “[T]ruancy and poor academic performance (71 percent of high school dropouts are fatherless; fatherless children have more trouble academically, scoring poorly on tests of reading, mathematics, and thinking skills; children from father absent homes are more likely to play truant from school, more likely to be excluded from school, more likely to leave school at age 16, and less likely to attain academic and professional qualifications in adulthood).”

- “[D]elinquency and youth crime, including violent crime (85 percent of youth in prison have an absent father; fatherless children are more likely to offend and go to jail as adults).”
- “[P]romiscuity and teen pregnancy (fatherless children are more likely to experience problems with sexual health, including a greater likelihood of having intercourse before the age of 16, foregoing contraception during first intercourse, becoming teenage parents, and contracting sexually transmitted infection; girls manifest an object hunger for males, and in experiencing the emotional loss of their fathers egocentrically as a rejection of them, become susceptible to exploitation by adult men).”
- “[D]rug and alcohol abuse (fatherless children are more likely to smoke, drink alcohol, and abuse drugs in childhood and adulthood).”
- “[H]omelessness (90 percent of runaway children have an absent father).”
- “[E]xploitation and abuse (fatherless children are at greater risk of suffering physical, emotional, and sexual abuse, being five times more likely to have experienced physical abuse and emotional maltreatment, with a one hundred times higher risk of fatal abuse; a recent study reported that preschoolers not living with both of their biological parents are 40 times more likely to be sexually abused).”
- “[P]hysical health problems (fatherless children report significantly more psychosomatic health symptoms and illness such as acute and chronic pain, asthma, headaches, and stomach aches).”
- “[M]ental health disorders (father absent children are consistently overrepresented on a wide range of mental health problems, particularly anxiety, depression and suicide).”
- “[L]ife chances (as adults, fatherless children are more likely to experience unemployment, have low incomes, remain on social assistance, and experience homelessness).”
- “[F]uture relationships (father absent children tend to enter partnerships earlier, are more likely to divorce or dissolve their cohabiting unions, and are more likely to have children outside marriage or outside any partnership).”
- “[M]ortality (fatherless children are more likely to die as children, and live an average of four years less over the life span).”

The author concludes his summary with this observation: “Given the fact that these and other social problems correlate more strongly with fatherlessness than with any other factor, surpassing race, social class and poverty, father absence may well be the most critical social issue of our time. In Fatherless America, David Blankenhorn calls the crisis of fatherless children ‘the most destructive trend of our generation.’ A recent British report from the University of Birmingham, *Dad and Me*, confirms Blankenhorn’s claims, concluding that the need for a father is on an epidemic scale, and ‘father deficit’ should be treated as a public health issue.”

**D:** Conclusions that there are no significant differences in outcomes between children from same-sex households and opposite-sex households have relied to date on studies whose methodologies do not yield data that meet the statistical rigor expected to make “strong, generalizable assertions . . . .”

Loren Marks, “Same-sex parenting and children’s outcomes: A closer examination of the American psychological association’s brief on lesbian and gay parenting,” *Social Science Research* 41 (2012) 748, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1937762](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937762).

E: A study using data from a large population-based sample from Canada “reveals that the children of gay and lesbian couples are only about 65 percent as likely to have graduated from high school as the children of married, opposite-sex couples.”

“A Married Mom and Dad Really do Matter: New Evidence from Canada,” Mark Regnerus (citing “High school graduation rates among children of same-sex households,” Allen, D.W. *Rev Econ Household* (2013) 11: 635. doi:10.1007/s11150-013-9220-y), <http://www.thepublicdiscourse.com/2013/10/10996/>.

F: Reflecting on an article published in the *Atlantic* (“The Gay Guide to Wedded Bliss,” <https://www.theatlantic.com/magazine/archive/2013/06/the-gay-guide-to-wedded-bliss/309317/>), one reviewer found the conclusions drawn by the article’s author at odds with data from a range of reputable studies:

“[S]tudies have found ‘higher dissolution rates among [legally registered] same-sex couples’ in Scandinavia than among married heterosexual couples. This study, published in *Demography*, found that even though same-sex couples enter their legal unions at older ages—a marker related to greater relational stability—male same-sex marriages break up at twice the rate of heterosexual marriages.”

The break-up rate for lesbians “is a stunning 77 percent higher than that of same-sex male unions. When controlling for possible confounding factors, the ‘risk of divorce for female partnerships actually is more than twice that for male unions.’”

“Other research says the same thing about relationship dissolution rates. A study of two generations of British couples (one born in 1958, the other 1970) in same-sex cohabiting, opposite-sex cohabiting, and heterosexual marriage relationships found the same-sex relationships are dramatically more likely to break up than the opposite-sex cohabiting and married relationships . . . . There were no significant differences between the two generational cohorts, indicating that issues of social stigma and growing social acceptance had no meaningful effect.”

“Other studies . . . ‘find notable instability in lesbian homes, even those with children. The current National Longitudinal Lesbian Family Study (NLLFS) found ‘a significant difference’ in family dissolution rates when comparing lesbian with mother-father headed families, 56 percent and 36 percent respectively.”

“Additional research by other scholars highlights a major comparative study between hetero and lesbian homes where, in the five-year period of the study, six of the fourteen lesbian mother-headed homes had broken up compared to only five of the thirty-eight mother-father headed homes . . . . Whatever the reason, lesbian relationships are dramatically more volatile, fragile, and short-lived than heterosexual couples, whether cohabiting or married.”

Glenn T. Stanton, “What We Can Learn from Same Sex Couples,” *First Things*, 5/31/13, <https://www.firstthings.com/web-exclusives/2013/05/what-we-can-learn-from-same-sex-couples>.

Lesbian couples are more likely to separate and not remain in the same relationship. “A careful review of the literature suggests that more is known about the stability of lesbian parent relationships than previously suspected and that, on average, such relationships tend to be less stable than those of married heterosexual parents. Less is understood about the factors that may influence relationship

stability for gay or lesbian parents, creating a critical need for additional research, especially with different demographic subgroups of lesbian and gay parents.”

Abstract, Walter R. Schumm, “Comparative Relationship Stability of Lesbian Mother and Heterosexual Mother Families: A Review of Evidence,” *Marriage & Family Review*, vol. 41, issue 8, 2010 <http://www.tandfonline.com/doi/abs/10.1080/01494929.2010.543030>.

**G:** In an article reviewing the quality of studies relied upon in a 2005 brief on lesbian and gay parenting prepared for and published by the American Psychological Association, the author reported that 59 published studies were cited in the APA’s list of “Empirical Studies Specifically Related to Lesbian and Gay Parents and Their Children” (pp. 23–45). Of those 59, only eight specifically addressed the outcomes of children from gay fathers. Of those eight, four did not include a heterosexual comparison group. In three of the four remaining studies (with heterosexual comparison groups), the outcomes studied were:

- (1) “the value of children to . . . fathers” (Bigner and Jacobsen, 1989a, p. 163);
- (2) “parenting behaviors of . . . fathers” (Bigner and Jacobsen, 1989b, p. 173); and
- (3) “problems” and “relationship with child” (Harris and Turner, 1986, pp. 107–8).

The first two studies “focused on fathers’ reports of *fathers’* values and behaviors, not on children’s outcomes—illustrating a recurring tendency in the same-sex parenting literature to focus on the parent rather than the child.” The third study “addressed parent-child relationships, but . . . [that] study’s male heterosexual comparison group was composed of two single fathers. Although several studies have examined aspects of gay fathers’ lives, none of the studies comparing gay fathers and heterosexual comparison groups referenced in the APA Brief (pp. 23–45) appear to have specifically focused on children’s developmental outcomes,” with one exception that “found several significant differences between married families and homosexual families.”

Loren Marks, “Same-sex parenting and children’s outcomes: A closer examination of the American psychological association’s brief on lesbian and gay parenting,” *Social Science Research* 41 (2012), 739, 742, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1937762](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937762).

A study “of 6-to-17-year-old children of female same-sex households . . . claims: ‘No differences were observed between household types on family relationships or any child outcomes.’ Here’s what the study actually signals (and it didn’t take a PhD to see it): female same-sex parents report more anger, irritation, and comparative frustration with their (apparently misbehaving) children than do opposite-sex parents.”

Mark Regnerus, “Media Gush over New Study, Only to Find Same-Sex Parents More Irritated with Their Children” (citing “Same-Sex and Different-Sex Parent Households and Child Health Outcomes: Findings from the National Survey of Children’s Health,”

[http://journals.lww.com/jrnldb/Abstract/2016/04000/Same\\_Sex\\_and\\_Different\\_Sex\\_Parent\\_Households\\_and.1.aspx](http://journals.lww.com/jrnldb/Abstract/2016/04000/Same_Sex_and_Different_Sex_Parent_Households_and.1.aspx)), <http://www.thepublicdiscourse.com/2016/04/16760/>.

Mark Regnerus also reported (“The Data on Children in Same-Sex Households Get More Depressing,” <http://www.thepublicdiscourse.com/2016/06/17255/>) on a study (“Invisible Victims: Delayed Onset Depression among Adults with Same-Sex Parents,”

<https://www.hindawi.com/journals/drt/2016/2410392/>). His commentary included the following:

“[I]n the journal *Depression Research and Treatment* contributes to mounting evidence against the ‘no differences’ thesis about the children of same-sex households, mere months after media sources prematurely—and mistakenly—proclaimed the science settled.

“One of the most compelling aspects of this new study is that it is longitudinal, evaluating the same people over a long period of time. . . . [I]ts data source—the National Longitudinal Study of Adolescent Health—is one of the most impressive, thorough, and expensive survey research efforts still ongoing. This study is . . . the first to come to different conclusions [than previous studies to make use of the “Add Health” data to test the “no differences” thesis], for several reasons. One of those is its longitudinal aspect. Some problems only emerge over time.

“[T]he study’s author found that during adolescence the children of same-sex parents reported marginally *less* depression than the children of opposite-sex parents. But by the time the survey was in its fourth wave—when the kids had become young adults between the ages of 24 and 32—their experiences had reversed. Indeed, dramatically so: over half of the young-adult children of same-sex parents report ongoing depression, a surge of 33 percentage points (from 18 to 51 percent of the total). Meanwhile, depression among the young-adult children of opposite-sex parents had declined from 22 percent of them down to just under 20 percent.”

The study notes other differences between children of same-sex parents and of opposite-sex children:

Over time, young-adult children of same-sex parents were more likely to be obese than their counterparts with opposite-sex parents.

Although “fewer young-adult children of same-sex parents felt ‘distant from one or both parents’ as young adults than they did as teens, the levels are still sky-high at 73 percent (down from 93 percent during adolescence). Feelings of distance among the young-adult children of opposite-sex parents actually increased, but they started at a lower level (from 36 percent in adolescence to 44 percent in young adulthood).”

“[M]ore kids of same-sex parents said a parent or caregiver had ‘slapped, hit or kicked you,’ said ‘things that hurt your feelings or made you feel you were not wanted or loved . . . .’”

The author of the summary noted further that “it is not just stability that matters (though it most certainly does). It’s also about biology, love, sexual difference, and modeling.” The author also noted this conclusion from the study’s author: “Well-intentioned concern for revealing negative information about a stigmatized minority does not justify leaving children without support in an environment that may be problematic or dangerous for their dignity and security.”

**H:** In “Adoption, Foster Care, and Conscience Protection” ([http://www.heritage.org/marriage-and-family/report/adoption-foster-care-and-conscience-protection#\\_ftn11](http://www.heritage.org/marriage-and-family/report/adoption-foster-care-and-conscience-protection#_ftn11), 1/15/2014), the authors note:

In the United States, “there are more than 1,000 private, licensed foster care and adoption providers . . . . Many are faith-based organizations whose religious and moral beliefs motivate their care for some of the most vulnerable children in society.”

“The impact of these groups is significant. In 2007, of the roughly 76,000 unrelated domestic adoptions that occurred in the United States, more than 20,000 were handled by private

providers. While public agencies continue to provide the largest number of domestic adoptions every year, the work and success of private, often faith-based organizations help to increase the number of children who find permanent homes every year.”

“The value of faith-based communities and providers extends well beyond their ability to connect vulnerable children with loving homes or guide prospective families through the labyrinth of the foster care and adoption systems. In addition to offering legal, administrative, and material support to adoptive families and birth mothers, private and faith-based organizations often provide intangible—yet invaluable—spiritual, emotional, and relational support that large, bureaucratic state-run agencies are ill-equipped to offer.”

**I:** Under well-settled principles of constitutional law, governmental entities cannot be hostile to religion. The Supreme Court recently underscored this in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), when it overturned denial of an otherwise available public benefit on account of the potential recipient’s religious status. As stated in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), “[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.” In *Walz v. Tax Commission*, 397 U.S. 664, 689 (1970), the Court stated that religious organizations “uniquely contribute to the pluralism of American society by their religious activities.” This resolution makes explicit that this state honors the beneficial relationship between religious activity and the community at large, especially as it relates to serving some of the most vulnerable among us, our children.

**Note:**

Publication of the last study noted above under “**G**” provoked an outcry from academics offended by the study’s findings and demonstrating how politicized this topic is. Note that in following the link to the original article, the article itself is preceded by a strongly worded disclaimer/disavowal by the publisher, along with expressions of concern from other academics who believe the article led to conclusions that were suspect. (Nonetheless, the publisher indicated that it “does not overrule the editorial decisions of our academic editors . . . .”)

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### **Resolution Condemning Religious Persecution Worldwide**

Whereas the International Religious Freedom Act of 1998 (22 U.S.C. 6401 et seq.) found that religious persecution is not confined to a particular region or regime and reaffirmed the commitment of the United States that religious freedom is the right of every individual and should never be arbitrarily abridged by any government;

Whereas the persecution of Christians and members of other religions is a global problem, occurring in countries across Europe, Asia, Africa, the Middle East, and the Americas;

Whereas 2018 reports from international non-governmental organizations state that 215 million Christians experience high levels of persecution—amounting to 1 in 12 Christians worldwide; and that in the most recent 12-month reporting period 3,066 Christians were killed, 1,252 were abducted, 1,020 were raped or sexually harassed, and 793 churches were attacked;

Whereas Christians and members of other religions face persecution not only from Islamic extremist groups, like the Islamic State and Boko Haram, but also from other religious extremist groups, atheistic regimes, and from officials at all levels of government in numerous countries worldwide;

Whereas such persecution ranges from social harassment and discrimination to physical violence, imprisonment, torture, enslavement, rape, death, and genocide;

Whereas the Middle East has been a home to Christians since the first century A.D., but the Christian population in the Middle East has significantly decreased over the past few decades as a result of persecution, displacement, and genocide;

Whereas Christians and members of other religions in Syria, Iraq, and elsewhere have faced assault, torture, imprisonment, enslavement, and execution in a genocidal campaign by the Islamic State and other religious extremists;

Whereas according to 2017 reports from international non-governmental organizations, the Christian population in Iraq decreased from 1,400,000 people in 2003 to just 275,000 people in 2016, as a result of displacement and genocide caused by religious extremism;

Whereas Christian and other religious holy sites in Syria, Iraq, and elsewhere have been destroyed by the Islamic State and other religious extremists;

Whereas in 2016, approximately 200 Christians in Iran were arrested, while others have been beaten, tortured, subjected to feigned public executions, and even sentenced to death for their faith, and at least 90 remain in illegal detention;

Whereas in Saudi Arabia, Christians as well as other religious minorities face imprisonment, torture, and deportation and must practice their faith in secrecy because their houses of worship are not allowed;

Whereas on April 9, 2017, Palm Sunday, 44 people were killed in bomb attacks by the Islamic State on Coptic churches in Egypt;

Whereas the Islamic State has also claimed responsibility for the attack on a bus on May 26, 2017, in which 29 Coptic Christians were killed while traveling to a monastery in Minya, Egypt;

Whereas since the fall of the Gaddafi regime, Libya has served as a haven for militant Islamist extremist groups, like the Islamic State, which has resulted in more violent forms of Christian persecution;

Whereas the Islamic State claimed responsibility for the killing of 51 Coptic Christians in Libya in February and March of 2015;

Whereas Christian migrants from northern Africa traveling through Libya on their way to Europe have been abducted, trafficked, and forced to convert to Islam at the hands of the Islamic State;

Whereas in Afghanistan there are reports that converts to Christianity have been murdered or sent to mental hospitals;

Whereas Christians in Pakistan face accusations of blasphemy, punishable by death, and convictions and sentences for blasphemy are given despite little or no evidence;

Whereas in Pakistan, the government and police turn a blind eye as female Christians are being beaten, attacked, kidnapped, and murdered for refusing to give up their faith and being forced to marry Muslim men;

Whereas according to Open Doors USA, approximately 600 Christian churches were attacked in Pakistan in 2016;

Whereas Christians in Nigeria have been massacred by Islamic extremist groups like Boko Haram and Fulani militias while government security forces either cannot or will not protect its citizens, and Christian leaders are calling the violence, which has caused at least 6,000 Christian deaths in 2018, “pure genocide”;

Whereas in September 2018 more than 20 Nigerian Christians, including Reverend Gerison Ezekiel Killa, were drowned in the Benue River trying to escape persecution from Fulani militia attacks;

Whereas Christian converts in Somalia often face public execution;

Whereas Rwanda has closed more than 8,000 churches in 2018 and passed laws heavily regulating churches and believers;

Whereas in 2017, a mob of 100 men attacked a Christian church in Uganda, beating and raping members of the congregation;

Whereas in September 2018 in the Democratic Republic of Congo, Islamic jihadists stormed the town of Beni and murdered more than 27 at a church;

Whereas in Kenya, Christians are being stoned as a way of persecution for practicing their faith;

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Whereas in Sudan, the Islamist government is trying to eradicate Christians by destroying their churches, villages, hospitals, and schools;

Whereas in May 2017, a Christian governor in Indonesia was found guilty of blasphemy and sentenced to 2 years in prison, in what was widely seen as a challenge to religious pluralism in Indonesia;

Whereas Communist regimes have a strong history of oppressing and persecuting Christians as well as members of other religions;

Whereas since 2013, in the Zhejiang Province of China, crosses have been removed from over 1,500 churches as part of that province's anti-cross campaign;

Whereas in China, members of Christian churches, as well as members of other religions, that are not registered with the government face increased persecution from the Chinese state, including the risk of imprisonment and torture;

Whereas in China, Communist officials are confiscating church belongings and burning them along with murdering priests who continue to preach the Gospel;

Whereas in North Korea, the practice of Christianity is prohibited and if caught, Christians are sent to forced labor camps;

Whereas in November 2016, Vietnam adopted a new "Law on Belief and Religion" that falls dramatically short of internationally accepted standards for human rights and curtails the right to religious freedom for over 8 million Christians in that country;

Whereas in Mexico, Nicaragua, and Colombia, Christian church leaders have been assaulted, threatened, and in some cases killed by transnational criminal organizations and paramilitary armed groups attempting to intimidate and silence them;

Whereas Mexico is reportedly the most dangerous place in the world to be a priest, with at least 6 priests killed in 2018, and 22 priests killed in the past three years due to increased secularism, organized crime, and lawlessness;

Whereas thousands of Christians and members of other religions are held as prisoners around the world, merely for believing in and worshiping according to their faith;

Whereas in Turkey, U.S. Pastor Andrew Brunson is indicted for "Christianization" as a terrorism and espionage charge, since 2016;

Whereas in Pakistan, Asia Bibi has, for almost a decade, been separated from her family, imprisoned, and sentenced to death for blasphemy after arguing with a Muslim co-worker about sharing water with a Christian;

Whereas Pastor John Cao, a Chinese pastor and legal permanent resident of the U.S., was arrested in China in March, 2017 and is facing 7 years of imprisonment for his prominent work in the Chinese “house church” movement;

Whereas, in Sri Lanka, India, the Central African Republic, and elsewhere, Muslims are subject to severe religious persecution;

Whereas, India’s 170 million Muslims live in an environment of constant local violence without meaningful government deterrence;

Whereas, in China’s Xinjiang province, the Uighur population is subject to official harassment, arbitrary detention, and draconian laws on religious dress;

Whereas, there is widespread Muslim-on-Muslim violence in the Middle East, most commonly along the Shia-Sunni divide;

Whereas, there are reports of Muslim genocide in Myanmar;

Whereas religious discrimination is a global human rights problem; and

Whereas the right to religious freedom is a universal right recognized by the Universal Declaration of Human Rights: Now, therefore, be it

Resolved, That the Legislature of [State]—

(1) condemns all violations of religious freedom and affirms that religious freedom is a fundamental right of every individual that should never be arbitrarily abridged by any government;

(2) condemns religious persecution around the world;

(3) urges and calls on the President of the United States and Congress to urge, discriminatory countries to cease their religious persecution and combat religious persecution carried out by extremist non-state actors; and

(4) urges and calls on the President of the United States and Congress to urge, the heads of the governments of all countries around the world to uphold the right to religious freedom and condemn the global persecution of any religious group.

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## **Category #3 (b) - Religious Liberty Protection Legislation—Protection for Professionals and Individuals**

### **Model Acts Dealing with Protection for the Free Exercise of Religion by Various Individuals and Organizations**

The model acts in this portion of this report deal with protection of the free exercise of religion. The free exercise of religion is demonstrated both in speech and actions (e.g., prayer, wearing religious symbols) and refusal to participate in certain actions (e.g., refusal to cover abortions in health insurance, refusal to officiate or host a same-sex wedding). It is recognized that individuals and organizations can draw different lines as to what actions are and are not permitted by their sincerely held religious beliefs, but that it is the right of those individuals and organizations to come to a good faith belief about where that line is to be drawn, and then to be respected in that choice, and is a fundamental freedom on which this country is founded.

Some of the model acts are broad in their application and some narrow in their focus. For that reason, they overlap to some extent. The full range of model acts is given here in recognition that, in some states, broader acts may be less likely to pass compared to narrower acts.

In the next subcategory (c), we have collected model acts related to schools, students, and teachers. While they also fit under the rubric of “protection of free exercise,” they are unique and plentiful enough to have their own subcategory. However, some provisions of the model acts listed in this subcategory would have application to students and teachers as well.

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## Marriage Tolerance Act (a/k/a/ First Amendment Defense Act)

An act to prohibit discriminatory action against a person who believes, speaks, or acts in accordance with a sincerely held religious belief that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such marriage.

### Section 1. Title

This act shall be known as the “Marriage Tolerance Act.”

### Section 2. Purpose

This act is intended to ensure that the First Amendment’s protections for the free exercise of religion are statutorily enforced in (State) so that no legal ambiguity exists regarding the fact that all persons are free to believe, speak, or act upon their sincerely held religious beliefs that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such marriage, without fear of discrimination or adverse or discriminatory action initiated or enforced by any governmental entity.

### Section 3. Findings

The United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), ruled that a state government could not, consistently with the Federal Constitution, deny marriage to couples of the same sex who believed that their marriage would be legitimate and who requested it. At the same time, the Court recognized that individuals hold different religious views on this subject: “Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.” *Id.* at 2607.

The United States Supreme Court recognizes that the peaceful free exercise of religion is a fundamental human right. In *Everson v. Board of Education of Ewing*, 330 U. S. 1 (1947), the Supreme Court opinion declared that a state “cannot hamper its citizens in the free exercise of their own religion,” which was recently reaffirmed in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The Court in *Trinity* further stated, “A law may not discriminate against ‘some or all religious beliefs.’ . . . Nor may a law regulate or outlaw conduct because it is religiously motivated,” *id.* at 2021, quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 532 (1993). The *Trinity* Court further restated from *Lukumi* that the “Free Exercise Clause protects against laws that ‘impose[] special disabilities on the basis of . . . religious status.’ 508 U. S., at 533,” 137 S. Ct. at 2021; *see also Emplmt. Div., Dept. of Human Res. of Ore. v. Smith*, 494 U. S. 872, 877 (1990). Furthermore, the Court in *Trinity* noted that “the Free Exercise Clause protects against ‘indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,’” 137 S. Ct. at 2022, quoting *Lyng v. Nw. Indian Cemetery*, 485 U. S. 439, 450 (1988).

Protecting religious freedom from government intrusion is a government interest of the highest order. Federal law requires that federal courts use strict scrutiny, the highest level of judicial review, in order to ensure suitable protection for free exercise claims. State legislation advances this interest by remedying, deterring, and preventing government interference with religious exercise in a way that complements the protections mandated by federal laws and the First Amendment to the Constitution of the United States.

Freedom of speech, as part of the First Amendment, is intrinsic to the free exercise of religion. The United States Supreme Court has noted that the two freedoms are interrelated: “Indeed, in Anglo-American history at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, at 760 (1995).

Government cannot infringe on the “fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say.” *Hurley v. Irish Am. Gay Grp. of Boston*, 515 U.S. 557, 558 (1995). “Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.” *Id.* at 574. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 634 (1943), the Supreme Court determined that it was not within the valid power of the government “to force an American citizen publicly to profess any statement of belief, or to engage in any ceremony of assent to one.” As the Court so ably stated, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” *Id.* at 642. “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993), quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). And the Supreme Court reiterated in *Matal v. Tam*, 137 S. Ct. 1744 (2017), “We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’” *Id.* at 1763, quoting *Street v. N.Y.*, 394 U. S. 576, 592 (1969).

In a pluralistic society, in which people hold more than one view of marriage, the wisdom expressed in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 634 (1943), is the best arbitrator of public differences. The purposes of the state and its citizens are best served by protecting individuals from government action and penalty solely because of their beliefs, speech, or actions with regard to the contentious issue of the appropriateness of same-sex marriage, without affecting the authority of the state to express its own views as to this issue, to encourage the actions that it believes best suit the best interests of the state and its inhabitants, and to discourage actions that it believes do not as long as those actions are not coercive.

#### **Section 4. Definitions**

As used in this act, the term:

- (a) “Discriminatory action” means any action that directly or indirectly adversely affects the person against whom the discriminatory action is taken, places the person in a worse position than the person was in before the discriminatory action was taken, or is likely to deter a reasonable person from acting or refusing to act. It includes, but is not limited to, any action to:

- (i) Alter in any way state tax treatment of an exemption from taxation under state law; or
  - (ii) Cause any tax, penalty, or payment to be assessed against a person or deny, delay, or revoke an exemption from taxation under state law; or
  - (iii) Deny, withhold, reduce, exclude, terminate, or otherwise make unavailable any public benefit from or to a person, including for purposes of this act admission to, equal treatment in, or eligibility for a degree from any educational program at any educational facility administered by a government; or
  - (iv) Deny, withhold, reduce, exclude, terminate, or otherwise make unavailable any public benefit from or to a person, including for purposes of this act admission to, equal treatment in, or eligibility for a degree from any educational program at any educational facility administered by a government; or
  - (v) Deny, withhold, reduce, exclude, terminate, condition, or otherwise make unavailable access to any speech forum (whether a traditional, limited, or nonpublic forum) administered by a government, including access to education facilities available for use by student or community organizations; or
  - (vi) Enter into a contract that is inconsistent with, would in any way interfere with, or would in any way require a person to surrender voluntarily the rights protected by this section.
- (b) “Government” means the state or any local subdivision of the state or public instrumentality or public corporate body created by or under authority of state law, including but not limited to the executive, legislative, and judicial branches and every department, agency, board, bureau, office, commission, authority, or similar body thereof; municipalities; counties; school districts; special taxing districts; conservation districts; authorities; and any other state or local public instrumentality or corporation.
- (c) “Person” means any individual, corporation, partnership, proprietorship, firm, enterprise, association, public or private organization of any character, or other legal entity.
- (d) “Public benefit” means any grant, accreditation, certification, license, advantage, employment, access to public facility, or other benefit conferred in whole or in part by government.

### **Section 5. Prohibition and Enforcement**

- (a) Government shall not take any discriminatory action against a person wholly or partially on the basis that such person believes, speaks, or acts in accordance with a sincerely held religious belief that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such a marriage.
- (b) A person may assert a violation of this act as a claim or defense in a judicial, agency, or other proceeding and obtain special damages, a declaratory judgment, or injunctive or other appropriate relief against a government.
- (c) Notwithstanding any other provision of law, an action under this act may be commenced, and relief may be granted, in a court of competent jurisdiction without regard to whether the person commencing the action has sought or exhausted available administrative remedies.
- (d) The Attorney General may bring an action for a declaratory judgment or injunctive relief for any violation of this act.

- (e) When an aggrieved person prevails in an action under this act, the court may award reasonable attorney's fees and expenses of litigation.

#### **Section 6. Accreditation**

For purposes of this act, government shall consider accredited, licensed, or certified any person who would have been accredited, licensed, or certified by a nongovernmental agency but for a determination by the agency against such person wholly or partially on the basis that the person believes, speaks, or acts in accordance with a sincerely held religious belief that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such a marriage.

#### **Section 7. Interpretation**

- (a) This act shall be construed in favor of a broad protection of free exercise of religious beliefs to the maximum extent permitted by the terms of this act, the United States Constitution, and the Constitution of this state. Notwithstanding any other provision of law, sexual orientation discrimination shall not be considered discrimination on the basis of sex, and the refusal to participate in or foster or service a same-sex marriage or intercourse shall not be considered to be sexual orientation discrimination in this state.
- (b) Nothing in this act shall be construed to narrow the meaning or application of any other law of this state protecting free exercise of religion.
- (c) If any part of this law is found unlawful, it shall be segregated from the whole and the remainder shall remain valid to the maximum lawful extent.

#### **Section 8. Waiver of Sovereign Immunity**

The defense of sovereign immunity is waived as to any claim, counterclaim, cross-claim, or third-party claim brought in the courts of this state by an aggrieved person seeking special damages, a declaratory judgment, injunctive relief, or reasonable attorney's fees and expenses of litigation against the state or any political subdivision thereof.

#### **Section 9. Effective date**

This act shall become effective upon its becoming law.

#### **Section 10. Repeal of conflicting laws**

All laws and parts of laws in conflict with this act are repealed. To the extent of any conflict with another law of this state, this act shall have precedence unless the contrary is expressly stated in the conflicting law.

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## NOTES

The model act does not include the following provisions that sometimes are points of contention:

1. Mississippi passed the “First Amendment Defense Act” on which this act is modeled. The constitutionality of the act was immediately challenged, and a federal district court in Mississippi enjoined enforcement of the act on the grounds that it did not also protect those who believe, speak, and act on their belief in favor of same-sex marriage, finding this to be a violation of equal protection. This ruling was defective because government is free to support and protect the exercise of religion without at the same time addressing opposing views (e.g., exemptions from taxes and the draft), and the district court’s ruling was reversed by the U. S. Court of Appeals for the Fifth Circuit on the ground that the parties who brought the suit did not have standing to do so (not reaching the merits of the equal protection argument).

Some have suggested that the act be adapted to avoid an equal protection challenge. Such an alternative may also gain broader political acceptance of the legislation. However, we advise against that approach. The proponents of same-sex marriage may advance their views under the full protection of the First Amendment and the *Obergefell* ruling. This legislation is intended to specifically address, and only address, a person’s speech and actions arising from a sincerely held religious belief that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such marriage.

However, if the political and legislative situation is such that legislators do not have enough support to pass the recommended language, the following approach is a fall-back position. Primarily, anywhere the legislation currently states “**that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such a marriage,**” substitute the words “regarding lawful marriage in this state.”

Example:

(a) Government shall not take any discriminatory action against a person wholly or partially on the basis that such person believes, speaks, or acts in accordance with a sincerely held religious belief **that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such a marriage.**

changes to the following:

(a) Government shall not take any discriminatory action against a person wholly or partially on the basis that such person believes, speaks, or acts in accordance with a sincerely held religious belief regarding lawful marriage in this state.

We repeat, however, that we advise against this alternative. This language still carries a risk, even if slim, of being abused by an individual or group alleging that their same-sex marriage views are a “sincerely held religious belief.”

2. For similar reasons, we advise against adding protection for those who act only on the basis of “conscience.” The First Amendment to the United States Constitution protects only the free exercise of *religion*, and “conscience” provisions were advanced but rejected at the time of enactment partly

because of the fear that the latter term was too open-ended and subject to abuse. However, we recognize that some states use the “conscience” formulation in their constitutions, and its inclusion may be appropriate in the act in some circumstances, depending on the individual state’s interpretation of that provision.

3. A provision regarding civil rights is not included, such as the following, “provided, however, no provision of this act may be construed to allow an organization to decline to provide a service or rent a facility on the basis of a person's race, ethnicity, or national origin.” Since the Civil Rights Act of 1964 and/or the state’s civil rights act cover these types of situations, it is redundant to include such language. Thus, any arguments that a hotel could turn away an interracial couple or refuse to rent a ballroom for a Jewish wedding are bogus arguments. In addition, including such language invites the addition of “sexual orientation,” which would potentially make the act circular if wrongly construed by the judiciary and defeat its purpose.

4. No provision is included that excludes public officers or employees from protection or relief. For example, a probate judge who fails or refuses to perform his or her official duties, such as refusing to sign a marriage certificate for a same-sex couple on religious grounds, could still find relief under this legislation. However, some states may want to deal with the issue of government employees in a totally separate bill and exclude them in this one.

5. A provision that deals with hospitals and nursing homes is not included because the U. S. Department of Health and Human Services adopted regulations in 2011 that require these types of facilities participating in Medicaid and Medicare to allow patients to determine their own visitors. The regulation also prohibits discrimination with regard to visitors, including such factors as sexual orientation and gender identity. See 42 C.F.R. 482.13(h)(4).

6. A provision requiring a person to give 30 days written advance notice to a governmental entity prior to filing a free exercise claim has not been included, but has appeared in some similar legislative initiatives.

The following is a partial list of helpful resources:

Dawn Stefanowicz, “A Warning from Canada: Same-Sex Marriage Erodes Fundamental Rights,” The Witherspoon Institute, *The Public Discourse*, April 24, 2015, <http://www.thepublicdiscourse.com/2015/04/14899/>.

Ryan T. Anderson, “How Rich Corporate Elites Are Lobbying Lawmakers to Crush Marriage Advocates,” The Heritage Foundation, *Daily Signal*, July 29, 2015, <http://dailysignal.com/2015/07/29/how-rich-corporate-elites-are-lobbying-lawmakers-to-crush-marriage-advocates/>.

Emma Green, “How Will the U.S. Supreme Court's Decision Affect Religious Liberty,” *The Atlantic*, June 26, 2015, <http://www.theatlantic.com/politics/archive/2015/06/how-will-the-us-supreme-courts-same-sex-marriage-decision-affect-religious-liberty/396986/>.

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Opinion, "The New Intolerance," *The Wall Street Journal*, March 30, 2015, <https://www.wsj.com/articles/the-new-intolerance-1427760183>.

Jonathan V. Last, "You Will Be Assimilated," *The Weekly Standard*, June 22, 2015, Vol. 20, No. 39.

## TALKING POINTS

America's diverse culture requires public toleration of peaceful dissent and differences of opinion. Although the United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), created a legal duty for the states to allow and recognize same-sex couples to marry, the Supreme Court in that same decision recognized that many of its citizens will legitimately continue to refuse to accept same-sex marriage as valid, appropriate, or beneficial. Citizens should not fear losing their natural and constitutional freedoms simply because others have gained new rights. When the Supreme Court gave women the right to elective abortions, it did not simultaneously require that all doctors had to perform them, businesses had to celebrate them, governments had to fund them, and government schools had to teach children about them. Similarly, by creating minimal rights or restrictions on the states with respect to the legal recognition of same-sex marriage, the Supreme Court does not intend to dictate determinations of society's best practices for children and families or to limit differences of opinion on such matters. In fact, the legislative and executive branches of government can make findings and express their own viewpoints on such topics as abortion and same-sex marriage and, through their policies, enhance the chances that children will live productive, healthy lives and mature to be good citizens.

### THE ISSUE:

- The Supreme Court in *Obergefell* took pains to point out that its decision requiring states to recognize same-sex marriage did not mean that all had to agree that such marriages are valid or beneficial to society or the participants: "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons." *Id.* at 2607.
- Nonetheless, in some recent instances, often relying on the decision in *Obergefell*, executive and judicial entities have elevated anti-discrimination statutes, including sexual orientation, to override the greater constitutional rights of citizens guaranteed in the First Amendment, including the freedoms of speech, religion, and assembly.
- Clear legislative boundaries are needed in this important area to assure civil discourse and an appropriate balancing of individual rights.

### THE PROBLEM:

- The new legal status of same-sex marriage has been used to create a hostile environment for many Americans who hold to the ancient tradition of marriage as between one man and one woman. Many individuals have been fined, fired, put out of business, taken to court, or endured death threats simply for advocating that marriage is between a man and a woman and sexual relations are reserved for such a marriage or for simply refusing to offer services or facilities for same-sex

marriage ceremonies, despite freely servicing homosexuals and those in same-sex marriages. This refusal to participate in the same-sex marriage event is a refusal to be associated with that event, rather than the persons, and so is not sexual orientation discrimination. It is no different than a Jewish restaurateur refusing to service a Hamas gala fundraising for the destruction of the State of Israel.

- By the same token, those who hold opposite views should not be discriminated against for holding those views. For instance, a homosexual baker has a right not to bake a cake for a gathering organized to voice opposition to same-sex marriage.
- The First Amendment rights of Americans are being violated. Governmental entities are failing to respect that the free exercise of religion “implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.” *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring).
- Some governmental entities demonstrate a hostility toward religion by using the coercive arm of government to force religious citizens and their organizations to do what their faith forbids or to prevent them from doing what their faith requires. Other states leave faith-based organizations vulnerable to legal action by failing to provide clarity regarding the rights of their citizens to freely exercise their sincerely held religious beliefs.

#### **THE SOLUTION: LEGISLATION THAT PROVIDES LEGAL STABILITY, VALUES FREEDOM IN A DIVERSE CULTURE, AND RESPECTS THE FREE EXERCISE OF RELIGION AND SPEECH BY ALL INDIVIDUALS AND THEIR ORGANIZATIONS**

- The act would prevent state and local governments from taking sides against individuals and organizations that believe, speak, or peacefully act upon their sincerely held religious beliefs that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such marriage.
- The act provides broad protections against discriminatory or adverse government actions directed toward such individuals and organizations, not only protecting them against frivolous lawsuits but against unfavorable treatment in tax policies, charitable fundraising, accreditation, licensing, contracts, cooperative agreements, scholarships, certifications, employment, government benefits, access to government facilities, educational programs, and the like.

#### **EXAMPLES OF WHY THIS IS IMPORTANT**

- In Idaho, the city of Coeur d'Alene passed a city ordinance that prevented discrimination based on sexual preference. The city told local Christian ministers who objected to same-sex marriage that they would be required to perform same-sex weddings or face fines or jail time.
- In Georgia, Dr. Eric Walsh was offered a job by the Department of Public Health, only to have the department rescind the offer once they learned he was a lay preacher. After a two-year legal battle, the State of Georgia settled the claim rather than go to court. <http://www.ajc.com/news/news/state-regional-govt-politics/man-files-complaint-over-rescinded-job-offer/nhSpw/>. In a similar case, the City of Atlanta fired its Fire Chief for publicly expressing his religious beliefs. <http://www.redstate.com/2014/11/25/atlantas-fire-chief-suspended-for-publicly-professing-christian-beliefs/>.

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- A student, majoring in counseling at Augusta State College in Georgia, challenged the program's requirements that she complete "diversity sensitivity training" and other remediation assignments after instructors learned of her religious beliefs. She lost her case in the Eleventh Circuit and could not complete her program of study. <http://www.thefire.org/eleventh-circuit-rejects-court-order-for-keeton-graduate-student-seeking-to-prevent-expulsion/>.
  - The owners of Memories Pizza in Walkerton, a small town in Indiana, received death threats after remarking that they would decline to serve pizza at a same-sex wedding event. The situation escalated to the point that they considered closing their business for good. <http://www.nationalreview.com/article/416311/rfra-now-more-ever-ian-tuttle/>
  - In Oregon, business owners Aaron and Melissa Kline could no longer keep their doors open after charges of discrimination at their bakery when they declined to make a wedding cake for a same-sex couple. Their litigation continues. <http://dailysignal.com/2017/03/02/bakers-accused-of-hate-get-emotional-day-in-court/>.
  - Barronelle Stutzman, the owner of Arlene's Flowers, is facing a similar situation of ongoing litigation. After losing her appeal in the Washington State Supreme Court, she is now appealing to the United States Supreme Court, all due to exercising her religious conviction that she should not provide an arrangement of flowers for a same-sex wedding. <http://www.catholicnewsagency.com/news/florist-takes-religious-liberty-case-to-us-supreme-court-44817/>.

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## Preserving Religious Freedom Act - (a/k/a Religious Freedom Restoration Act) (“State RFRA”)

An act to provide for the preservation of religious freedom; to provide for a short title; to provide for findings; to provide for definitions; to provide for penalties; to provide for the granting of relief; to repeal conflicting laws; and for other purposes.

### Section 1. Title

This act shall be known and may be cited as the “Preserving Religious Freedom Act.”

### Section 2. Purpose

This act is intended to ensure that this state applies at least the same level of religious liberty protections applied at the federal level in order to ensure that state and local governmental entities will not restrict a person’s free exercise rights more than the federal government. This act will:

(a) require application of the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and guarantee its application in all cases in which free exercise of religion is substantially burdened; and

(b) provide a claim or defense to persons whose religious exercise is substantially burdened by government.

### Section 3. Findings

(a) The Framers of the United States Constitution, recognizing free exercise of religion as an unalienable human right, secured its protection in the First Amendment to the United States Constitution.

(b) The Framers of the Constitution of this state similarly believed it fundamental to the rights and liberties of its citizens to protect their free exercise of religion, stating . . . [insert language and citation here].

(c) The United States Supreme Court recognizes that the peaceful free exercise of religion is a fundamental constitutional right. In *Everson v. Board of Education of Ewing*, 330 U. S. 1 (1947), the Supreme Court opinion declared that a state “cannot hamper its citizens in the free exercise of their own religion,” which was recently reaffirmed in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The Court in *Trinity* further stated, “A law may not discriminate against ‘some or all religious beliefs.’ . . . Nor may a law regulate or outlaw conduct because it is religiously motivated,” *id.* at 2021, quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 532 (1993). The *Trinity* Court further restated from *Lukumi* that the “Free Exercise Clause protects against laws that ‘impose[] special disabilities on the basis of . . . religious status.’ 508 U. S., at 533,” 137 S. Ct. at 2021; *see also Smith*, 494 U. S. at 877. Furthermore, the Court in *Trinity* noted that “the Free Exercise Clause protects against ‘indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,’” 137 S. Ct. at 2022, quoting *Lyng v. Nw. Indian Cemetery*, 485 U. S. 439, 450 (1988).

(d) Freedom of speech, as part of the First Amendment, is intrinsic to the free exercise of religion. The United States Supreme Court has noted that the two freedoms are interrelated: “Indeed, in Anglo-American history at least, government suppression of speech has so commonly been directed precisely

at religious speech that a free-speech clause without religion would be Hamlet without the prince.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 760 (1995). The free exercise of religion is often done communally, and so the freedom of assembly, another part of the First Amendment, also often complements the free exercise of religion and guarantees it.

(e) Laws, policies, and regulations that may be “neutral” toward religion on their face have the potential to burden religious exercise as surely as laws purposely intended to regulate or control the free exercise of religion.

(f) The burdening of the free exercise of religion by government is, in some instances, legitimate. However, to protect the free exercise of religion in this state, the appropriate standard of review for any government action that burdens the free exercise of religion is that government must not substantially burden the free exercise of religion without compelling justification and must use the least restrictive means to achieve its purpose.

(g) In *Employment Division v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court held that a federal law that was neutral on its face only had to be rational to be upheld, even though it burdened the free exercise of religion.

(h) Congress understood the *Smith* decision to be a threat to religious liberty and passed the Religious Freedom Restoration Act of 1993 (RFRA), unanimously in the U.S. House of Representatives and almost unanimously in the U.S. Senate. RFRA restored the compelling interest test set forth in prior federal court rulings for striking a proper balance between religious liberty and competing governmental interests.

(i) In *City of Boerne v. Flores*, 521 U.S. 507(1997), the United States Supreme Court held that, to the extent that RFRA covered actions by the states, it infringed on the legislative powers reserved to the states under the Constitution of the United States, with the result that RFRA is now only applicable to federal government actions.

(j) Protecting religious freedom from government intrusion is a federal interest of the highest order. Federal law requires that federal courts use strict scrutiny, the highest level of judicial review, to ensure the greatest possible protection for free exercise claims. This interest is of no less importance in this state.

(k) Since the decision in *Boerne*, twenty-two states have enacted statutes to restore the protections of RFRA to the free exercise of religion with regard to the actions of state and local governments of those states.

#### **Section 4. Definitions**

The following definitions apply to this act:

(a) “Demonstrates” means meets the burdens of going forward with the evidence and of persuasion.

(b) “Free exercise of religion” means that all persons are free to believe, speak, or peacefully act upon their sincerely held religious beliefs, including, but not limited to, the right to speak or to act or to refuse to speak or to refuse to act in a manner that is substantially motivated by a sincerely held religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. The use, building, or conversion of real property for the purpose of the free exercise of religion

shall be considered to be free exercise of religion of the person or entity that uses or intends to use the property for that purpose.

(c) "Government" means the State or any local subdivision of the State or public instrumentality or public corporate body created by or under authority of state law, including but not limited to the executive, legislative, and judicial branches and every department, agency, board, bureau, office, commission, authority, or similar body, thereof; municipalities; counties; school districts; special taxing districts; conservation districts; authorities; and any other state or local public instrumentality or corporation. Government action includes the enforcement of laws, rules, and regulations by government at the initiation of private individuals.

(d) "Compelling governmental interest" means a governmental interest of the highest order that cannot otherwise be achieved without burdening the free exercise of religion of the person seeking relief under this act.

### **Section 5: Free Exercise of Religion Protected**

(a) Government shall not substantially burden a person's free exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person

- (i) is essential to achieve a compelling governmental interest of the highest order, and
- (ii) is the least restrictive means of achieving that compelling governmental interest.

(b) If a person's free exercise of religion has been burdened in violation of this act, that person may assert that violation as a claim or defense in a judicial, agency, or other governmental proceeding and may obtain appropriate relief against a government.

(c) Notwithstanding any other provision of law, an action under this act may be commenced, and relief may be granted, in a court of competent jurisdiction without regard to whether the person commencing the action has sought or exhausted available administrative remedies.

(d) The Attorney General may, on behalf of the state, bring an action for a declaratory judgment or injunctive relief for any violation of this act.

### **Section 6: Applicability**

This act applies to all government actions and implementations thereof, whether statutory or otherwise, and whether adopted before or after the effective date of this law.

### **Section 7: Interpretation**

(a) This act shall be construed in favor of a broad protection of the free exercise of religion to the maximum extent permitted by the terms of this act, the United States Constitution, and the Constitution of this state.

(b) When determining whether the free exercise of religion is substantially burdened under this act, that issue shall not be considered a question of law, but, instead, is to be considered a factual determination based on the subjective belief of the individual involved, and that the individual's belief should be considered determinative unless it is found to be in bad faith or insincere.

(c) Nothing in this act shall be construed to narrow the meaning or application of any other law of this state protecting the free exercise of religion.

#### **Section 8: Civil action**

The defense of sovereign immunity is waived as to any claim, defense, counterclaim, cross-claim, or third-party claim brought in the courts of this state by an aggrieved person under this act seeking special damages, a declaratory judgment, injunctive relief, or reasonable attorney's fees and expenses of litigation against the state or any political subdivision thereof, all of which relief is authorized under this act. In any such case, the applicable provisions of this act shall control to the extent of any conflict with other provisions.

#### **Section 9: Effective date**

This act shall become effective upon its becoming law.

#### **Section 10: Repeal of conflicting laws**

All laws and parts of laws in conflict with this act are repealed.

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## NOTES

This act is modeled on what are generally called “State RFRA” acts. Examples of similar state laws passed since 1997 include the following:

Alabama

<http://alisondb.legislature.state.al.us/alison/codeofalabama/constitution/1901/CA-170364.htm>.

Florida

<http://laws.flrules.org/node/1022>.

Idaho

<https://legislature.idaho.gov/statutesrules/idstat/title73/t73ch4/sect73-402/>.

Illinois

<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2272&ChapterID=64>.

Kentucky

<http://www.lrc.ky.gov/statutes/statute.aspx?id=42395>.

Pennsylvania

<http://www.legis.state.pa.us/WU01/LI/LI/US/PDF/2002/0/0214..PDF>.

Texas

<http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.110.htm>.

Virginia

<http://law.lis.virginia.gov/vacode/title57/chapter1/section57-2.02/>.

All of these laws rely on the original federal statute, but some are more comprehensive in their legislative language than others. The original federal law can be found at <http://uscode.house.gov/view.xhtml?path=/prelim@title42/chapter21B&edition=prelim>.

Some materials of relevance are the following:

The Ad Hoc Committee for Religious Liberty of the United States Conference of Catholic Bishops explains in its brief, “Our First, Most Cherished Liberty: A Statement on Religious Liberty,” what is at stake.

[www.usccb.org/issuesandaction/religiousliberty/upload/Our\\_First\\_Most\\_Cherished\\_Liberty.pdf](http://www.usccb.org/issuesandaction/religiousliberty/upload/Our_First_Most_Cherished_Liberty.pdf).

Kim Colby, “A Perpetual Haven: Why the Religious Freedom Restoration Act Matters,” *Public Discourse*, June 30, 2014, <http://www.thepublicdiscourse.com/2014/06/13391/>.

Sean Davis, “How RFRA Works, Explained in One Chart,” *The Federalist*, April 1, 2015, <http://thefederalist.com/2015/04/01/how-rfra-works-explained-in-one-chart/>.

David Masci, Pew Research, "The Hobby Lobby Decision and the Future of Religious Liberty Rights," June 30, 2014, <http://www.pewresearch.org/fact-tank/2014/06/30/the-hobby-lobby-decision-and-the-future-of-religious-liberty-rights/>.

Wesley J. Smith, "Will Doctors Be Forced to Kill?" *First Things*, July 25, 2014, [http://www.firstthings.com/web-exclusives/2014/07/will-doctors-be-forced-to-kill?utm\\_source=First+Things+Subscribers&utm\\_campaign=babef21d74-7\\_25\\_147\\_25\\_2014&utm\\_medium=email&utm\\_term=0\\_28bf775c26-babef21d74-172564633](http://www.firstthings.com/web-exclusives/2014/07/will-doctors-be-forced-to-kill?utm_source=First+Things+Subscribers&utm_campaign=babef21d74-7_25_147_25_2014&utm_medium=email&utm_term=0_28bf775c26-babef21d74-172564633).

Baptist Joint Committee, "The Religious Freedom Restoration Act: 20 Years of protecting Our First Freedom," 2013, <http://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf>.

Jane Robbins, "Religious Liberty Bill Deserves Support," *Atlanta Journal Constitution*, January 15, 2015, [http://www.myajc.com/news/news/opinion/religious-liberty-bill-deserves-support/njpXf/?ecmp=ajc\\_social\\_twitter\\_2014\\_sfp#fb02b06d.3601613.73561](http://www.myajc.com/news/news/opinion/religious-liberty-bill-deserves-support/njpXf/?ecmp=ajc_social_twitter_2014_sfp#fb02b06d.3601613.73561).

Some other relevant resources are as follows:

U.S. House of Representatives, Judiciary Committee Hearing on Religious Liberty, June 10, 2014, Testimony of Kim Colby, Director, Christian Legal Society's Center for Law and Religious Freedom. To read her testimony instead of watching the hearing, use the following link. <http://clsnet.org/document.doc?id=773>.

Video Links:

Part I - <http://www.ustream.tv/recorded/48633118> After clicking the "play" arrow, move the slider on the bar to 1:30:45 because the hearing was delayed for an hour and a half.

Part II - <http://www.ustream.tv/recorded/48637459>

A Briefing Before The U.S. Commission on Civil Rights, "Peaceful CoExistence: Reconciling Nondiscrimination Principles with Civil Liberties," September 2016, [www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF](http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF). (The majority report in this document graphically shows that many in government advocate the elevation of discrimination laws above the constitutional freedom of the free exercise of religion. The dissenting opinions offer powerful rebuttals.)

Some states, despite not having a "State RFRA," have applied the compelling interest/strict scrutiny level of review to burdens on the free exercise of religion via their own constitutions. In such instances, the need for this statute is not as great, although its passage would protect against the possibility that the courts of the state would adopt a less stringent standard of review, as the U.S. Supreme Court did in *Smith*.

## TALKING POINTS

The Federal Government provides the highest level of protection to the free exercise of religion as a fundamental human right of the first order. This same level of protection is not available for persons living in many states of this nation because some federal protections extend only to claims arising under the laws of the Federal Government. This legislation is intended to correct the inequalities of religious

liberty protections in this state so that all its citizens have the same protections for the peaceful free exercise of religion as they enjoy under federal law. This state and its political subdivisions will not be guilty of restricting a person's free exercise rights more than the Federal Government is allowed to do. The freedoms of the First Amendment of the United States Constitution will be strongly protected and preserved in this state.

**THE ISSUE:**

- When constitutional conflicts are brought before the courts in this state, there is currently no state legislation that requires the courts to provide the same deference to free exercise claims that is currently provided under federal law.
- Laws, policies, and regulations "neutral" toward religion have the potential to burden religious exercise as surely as laws purposely intended to regulate or control religious exercise.
- Protecting the free exercise of religion from government intrusion is a federal interest of the first order. Federal law requires that federal courts use strict scrutiny, the highest level of judicial review, in order to ensure the adequate protection of free exercise claims. State courts should do no less.

**THE PROBLEM:**

- Prior to 1990, the courts used the compelling interest/strict scrutiny test to resolve free exercise claims. However, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court held that a federal law that was neutral on its face only had to be rational to be upheld, even though it burdened the free exercise of religion.
- Congress understood this threat to religious liberty created by the *Smith* case and passed the Religious Freedom Restoration Act of 1993 (RFRA) to restore strict scrutiny, striking sensible balances between religious liberty and competing prior governmental interests.
- In *City of Boerne v. Flores*, 521 U.S. 507(1997), the Court held that RFRA only applied to actions of the Federal Government and could not be constitutionally applied to state and local governmental actions.
- Since that time, approximately 22 states have passed legislation requiring their courts to use the same standard as set out for federal government action in RFRA, and at least 11 other states have had RFRA-type protections applied through state court decisions. This state's legislative body needs to pass legislation to ensure that strict scrutiny is faithfully applied by our state courts in free exercise cases.
- This need has taken on increased urgency recently. Often relying on the decision in *Obergefell*, some executive and judicial entities have elevated anti-discrimination statutes, including sexual orientation, to override the greater constitutional rights of citizens guaranteed in the First Amendment, including the freedoms of speech, religion, and assembly. The U.S. Commission on Civil Rights, in its 2016 majority report, "Peaceful CoExistence: Reconciling Nondiscrimination Principles with Civil Liberties," recommends exactly that.

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**THE SOLUTION: LEGISLATION THAT MAKES THE STATE AND FEDERAL LAW STANDARD TO PROTECT THE FREE EXERCISE OF RELIGION CONSISTENT**

- This legislation ensures that courts in this state would use the federal law standard of compelling interest/strict scrutiny for religious free exercise claims. This means that the test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), would be applied consistently with respect to state and local governmental actions, ensuring its application in all cases in which free exercise of religion is substantially burdened. This means that, whether state or local governmental actions substantially burden the free exercise of religion, the government must justify it with a compelling interest and must use the least restrictive practical means to accomplish its legitimate constitutional objective.
- The act does not protect against bad faith or insincere representations of a burden on free exercise. However, some courts have misapplied the federal RFRA with respect to the “substantial burden” analysis, making independent decisions as to whether or not a burden is “substantial” as a matter of law. This act makes clear that substantiality is a factual determination based on the subjective belief of the individual involved, rather than the judge’s own belief, and that the individual’s belief should be determinative unless it is found to be in bad faith or insincere.
- Legal clarity avoids unnecessary litigation. Litigation involving the free exercise of religion is often among the hardest fought, as fundamental principles are at stake. The state has a compelling interest to avoid such litigation and to protect religious liberty.
- The law clarifies that a person whose religious exercise is substantially burdened by government can make a claim or mount a defense against the government’s action and receive a declaration as to the legality of the government’s action in a timely way, whether or not damages are requested. Moreover, the Attorney General on behalf of the state can request such a declaration when an appropriate situation presents itself.
- This act enhances government’s transparency and accountability because it requires government officials to justify their unwillingness to accommodate citizens’ religious exercise.
- This act reinforces America’s commitments to limited government and pluralism. This state’s government is supposed to be a limited government that defers to its citizens’ religious liberty. In this act, the State re-commits itself to the foundational principle that American citizens have the God-given right to live peaceably and undisturbed in accord with their religious beliefs.
- This act helps ensure healthy religious diversity in the state and reduces conflict along religious lines. Conflict becomes unnecessary when everyone’s religious liberty is protected.
- A growing body of international research shows a positive relationship between religious freedom and economic freedom. One recent study shows the connection between religious freedom and ten of the twelve pillars of global competitiveness measured by the World Economic Forum’s Global Competitiveness Index. Countries that protect religious freedom, in general, experience higher income, higher levels of education for women, better health outcomes, less armed conflict, less corruption, less harmful regulation, and (perhaps most important of all) other personal liberties

(such as freedom of the press, freedom of speech, economic liberty, and freedom of travel) are more secure. (See Brian J. Grim, Greg Clark, and Robert Edward Snyder, "Is Religious Freedom Good for Business?: A Conceptual and Empirical Analysis," 10 *Interdisciplinary J. of Research on Religion*, article 4, 2014, ISSN 1556-3723.)

#### EXAMPLES OF WHY THIS IS IMPORTANT

- Home-based churches and Bible study groups that face eviction on unequal terms with large gatherings (like parties) could mount a free exercise claim under this legislation.
- Church ministries that help ex-prisoners or that feed the homeless have been confronted with local government bans on their activities. Under this legislation, these ministries would have a better defense for their religious liberty.
- Medical professionals with religious objections would have a defense against providing drugs or services that would facilitate abortions. For example, in Vermont, after the passage of an assisted suicide law, the Vermont Board of Medical Practice and Office of Professional Regulation interpreted the law to require doctors to counsel their patients about the assisted suicide option. Doctors who lodged objections due to their convictions of conscience or their Hippocratic oaths were still expected to follow the board's interpretation of the law. *Vermont All. for Ethical Healthcare, Inc. v. Hoser*, No. 5:16-CV-205, 2017 WL 1284815 (D. Vt. Apr. 5, 2017), *appeal dismissed sub nom. Vermont All. for Ethical Healthcare, Inc. v. van de Ven*, No. 17-1481, 2017 WL 3429397 (2d Cir. May 22, 2017). See, <http://www.adflegal.org/detailspages/case-details/vermont-alliance-for-ethical-healthcare-v.-hosser>.
- The federal RFRA allowed Hobby Lobby, a privately held company whose owners are opposed to abortion on the basis of sincere religious belief, to prevail in its free exercise claim against the Affordable Care Act's mandate that the company fund abortifacients for its employees. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
- Without a similar act, Washington State has basically compelled a family-owned drug store to shut down because it refuses to sell abortifacients. This pharmacy was targeted by Planned Parenthood for its refusal to carry Plan B abortifacients or to refer customers to pharmacies that did. Under political pressure, the Pharmacy Commission of Washington State issued regulations that essentially prohibited pharmacies from refusing to follow their religious beliefs in these ways. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). See, <https://www.adflegal.org/detailspages/case-details/stormans-v.-wiesman>.

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## Child Protection Act

An act relating to children and youth services, so as to ensure that licensed child-placing agencies with sincerely held religious beliefs may continue to provide services for children in connection with adoption and foster care according to their religious beliefs and to prohibit departmental discrimination or adverse actions due to the sincerely held religious beliefs of such licensed child-placing agencies.

### Section 1. Title

This act is entitled the “Child Protection Act.”

### Section 2. Purpose

This act is intended to ensure that all qualified child-placing agencies in this state are free to provide their services without impediment related to an agency’s free exercise of religion protected by the United States Constitution and this state’s Constitution. This act is not intended to limit or deny any person’s right to adopt a child or participate in foster care.

### Section 3. Findings

The legislature finds and declares all of the following:

- (a) When it is necessary for a child in this state to be placed with an adoptive or foster family, placing the child in a safe, loving, and supportive home is a paramount goal of this state.
- (b) As of the effective date of this act, there are approximately [xxx] licensed adoption and foster care agencies in this state that are authorized to participate in and assist families with adoption and foster parent placements of children.
- (c) Having as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to the children of this state who are in need of these placement services and to all of the citizens of this state because the more qualified agencies taking part in this process, the greater the likelihood that permanent child placement can be achieved.
- (d) As of the effective date of this act, the adoption and foster care licensees of this state represent a broad spectrum of organizations and groups, some of which are faith-based and some of which are not faith-based.
- (e) Faith-based and non-faith-based child-placing agencies have a long and distinguished history of providing adoption and foster care services in this state.
- (f) Private child-placing agencies, including faith-based child-placing agencies, have the right to free exercise of religion under both the state and federal constitutions. Under well-settled principles of constitutional law, this right includes the freedom to abstain from conduct that conflicts with an agency’s sincerely held religious beliefs.
- (g) Under well-settled principles of constitutional law, governmental entities cannot be hostile to religion. As the United States Supreme Court stated in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), “we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.” In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Supreme Court

recently underscored this principle by overturning denial of an otherwise available public benefit on account of the potential recipient's religious status. Federal and state governments have long recognized the beneficial relationship between religious activity and the community at large, leading to its moral, mental, and social improvement. The Supreme Court has recognized that government grants tax exemptions to religious organizations "because they uniquely contribute to the pluralism of American society by their religious activities." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 689 (1970).

- (h) Children and families benefit greatly from the adoption and foster care services provided by faith-based and non-faith-based child-placing agencies. Ensuring that faith-based child placing agencies can continue to provide adoption and foster care services will benefit the children and families who receive publicly funded services.
- (i) There is no compelling reason to require a child-placing agency to violate its sincerely held religious beliefs in providing any service, since alternative access to the services is equally available.
- (j) Under well-established department contracting practices, a private child-placing agency does not receive public funding with respect to a particular child or particular individuals referred by the department unless that agency affirmatively accepts the referral.
- (k) Under well-settled principles of constitutional law distinguishing "private action" from "state action," a private child-placing agency does not engage in state action when the agency performs private adoption or direct placement services. Similarly, a private child-placing agency does not engage in state action relative to a referral for services under a contract with the department before the agency accepts the referral.
- (l) The identities of child-placing agencies in this state are well publicized and readily available to the public.

#### **Section 4. Definitions**

(a) "Adverse action" means any action that directly or indirectly adversely affects the person or child-placing agency against whom the adverse action is taken, places the person or child-placing agency in a worse position than the person or child-placing agency was in before the adverse action was taken, or is likely to deter a reasonable person or child-placing agency from acting or refusing to act. It includes, but is not limited to:

- (i) denying a child-placing agency's application for funding;
- (ii) refusing to renew the child-placing agency's funding;
- (iii) canceling the child-placing agency's funding;
- (iv) declining to enter into a contract with the child-placing agency;
- (v) refusing to renew a contract with the child-placing agency;
- (vi) canceling a contract with the child-placing agency;
- (vii) declining to issue a license to the child-placing agency;
- (viii) refusing to renew the child-placing agency's license;
- (ix) canceling the child-placing agency's license;
- (x) taking an enforcement action against a child-placing agency;
- (xi) imposing, levying, or assessing a monetary fine, fee, penalty, damages, award, or injunction;

- (xii) discriminating against the child-placing agency in regard to participation in a government program;
- (xiii) taking any action that materially alters the terms or conditions of the child-placing agency's funding, contract, or license;
- (xiv) altering in any way the tax treatment of, or causing any tax, penalty, or payment to be assessed against, or denying, delaying, revoking, or otherwise making unavailable an exemption from taxation;
- (xv) disallowing, denying, or otherwise making unavailable a deduction for state tax purposes of any charitable contribution made to an organization; or
- (xvi) withholding any government benefit that is available to other child-placing agencies.

(b) "Child-placing agency" means an adoption or foster care agency that is licensed by the [state department responsible for such licensure and regulating child-placing agencies] to provide services.

(c) "Department" means [state department responsible for licensing and regulating child-placing agencies].

(d) "Person" includes natural and legal persons.

(e) "Private Services" includes any service that a child-placing agency provides, except foster care case management and adoption services provided under a contract with the department.

(f) "Public Services" includes foster care case management and adoption services provided under a contract with the department.

(g) "Services" includes but is not limited to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement in a foster home or for adoption.

## **Section 5. Private Placements**

### **(a) Sincerely Held Religious Beliefs**

To the fullest extent permitted by state and federal law, a child-placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child-placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child-placing agency.

### **(b) Non-prejudicial Effect on Provision of Services**

If a child-placing agency declines to provide any services under subsection (a), the child-placing agency's decision does not limit the ability of another child-placing agency to provide those services.

### **(c) Prohibition of Adverse Action for Sincerely Held Religious Beliefs**

To the fullest extent permitted by state and federal law, the state or a local unit of government shall not take an adverse action against a child-placing agency on the basis that the child-placing agency has declined or will decline to provide any services that conflict with, or provide any services under circumstances that conflict with, the child-placing agency's sincerely held religious beliefs, including

those contained in a written policy, statement of faith, or other document adhered to by the child-placing agency.

(d) **Compelling Interest and Non-retaliatory Intent for Adverse Action**

In any adverse action taken by the state or local unit of government against a child-placing agency asserting a violation of its sincerely held religious belief adhered to by the child-placing agency, the state or local unit of government must prove, by clear and convincing evidence, that its action is warranted by a compelling interest, and that the adverse action is the least restrictive means to achieve the compelling interest.

**Section 6. Placements Under Contract with the State**

(a) **Acceptance of Referral**

If the department makes a referral to a child-placing agency for foster care case management or adoption services under a contract with the child-placing agency, the child-placing agency may decide not to accept the referral if the services would conflict with the child-placing agency's sincerely held religious beliefs. Before accepting a referral for services under a contract with the department, the child-placing agency has the sole discretion to decide whether to engage in activities and perform services related to that referral. The department shall not control the child-placing agency's decision whether to engage in those activities or perform those services. A governmental entity shall not enter into a contract that is inconsistent with, would in any way interfere with, or would in any way require a child-placing agency or organization to voluntarily surrender the rights recognized by this section. For purposes of this subsection, a child-placing agency accepts a referral by doing either of the following:

- (i) Submitting to the department a written agreement to perform the services related to the particular child or particular individuals whom the department referred to the child-placing agency.
- (ii) Engaging in any other activity that results in the department being obligated to pay the child-placing agency for the services related to the particular child or particular individuals whom the department referred to the child-placing agency.

(b) **Prohibition of Adverse Action for Sincerely Held Religious Beliefs**

The state or a local unit of government shall not take an adverse action against a child-placing agency on the basis that the child-placing agency has decided to accept or not accept a referral under subsection (a).

(c) **Compelling Interest and Non-retaliatory Intent for Adverse Action**

In any adverse action taken by the state or local unit of government against a child-placing agency asserting a violation of its sincerely held religious belief adhered to by the child-placing agency, the state or local unit of government must prove, by clear and convincing evidence, that its action is warranted by a compelling interest, and that the adverse action is the least restrictive means to achieve the compelling interest.

**Section 7. Defense and Remedies for Violations**

A child-placing agency may assert a violation of this act as a claim or defense against a governmental entity in any judicial or administrative proceeding. Any person or child-placing agency who successfully asserts a claim or defense pursuant to this act may recover the following:

- (i) declaratory relief;
- (ii) injunctive relief to prevent or remedy a violation of the provisions of this Act or the effects of that violation;
- (iii) compensatory damages for pecuniary and non-pecuniary losses;
- (iv) reasonable attorneys' fees and costs; or
- (v) any other appropriate relief.

The sovereign, governmental, and qualified immunities of any governmental entity are not otherwise waived by this subsection.

**Section 8. Effect on Rights**

- (a) This act may not be construed to allow a child-placing agency to deprive a minor of the rights, including the right to medical care, provided by [insert appropriate reference to Family Code, etc.].
- (b) This act may not be construed to prevent law enforcement officers from exercising duties imposed on the officers under the [insert appropriate reference to Family Code, Penal Code, etc.].

**Section 9. Repeal of Conflicting Law**

All laws and parts of laws in conflict with this act are repealed.

**Section 10. Effective Date**

This act shall become effective upon it becoming law.

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## NOTES

The model act borrows from several acts designed to strengthen and protect child placement options. Acts already on the books include these:

Alabama bill (HB 24), signed into law 5/3/17.  
<https://legiscan.com/AL/text/HB24/2017>.

Kansas bill (SB 284), signed into law 5/18/18  
[http://www.kslegislature.org/li/b2017\\_18/measures/documents/sb284\\_enrolled.pdf](http://www.kslegislature.org/li/b2017_18/measures/documents/sb284_enrolled.pdf)

Michigan bill (HB 4188), signed into law 6/11/15.  
<http://legislature.mi.gov/documents/2015-2016/publicact/htm/2015-PA-0053.htm>.

North Dakota statute, see page 3, section 50-12-07.1.  
<http://www.legis.nd.gov/cencode/t50c12.pdf>.

Oklahoma bill (SB 1140), signed into law 5/11/18  
[http://webserver1.lsb.state.ok.us/cf\\_pdf/2017-18%20ENR/SB/SB1140%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20ENR/SB/SB1140%20ENR.PDF)

South Dakota bill (SB 149), signed into law 3/10/17.  
<http://www.sdlegislature.gov/docs/legsession/2017/Bills/SB149P.htm>.

Texas bill (HB 3859), signed into law 6/15/17.  
<http://www.legis.state.tx.us/search/DocViewer.aspx?ID=85RHB038595B&QueryText=foster%2bOR%2bplacement&DocType=B>.

Virginia bill (HB 189), signed into law 4/9/12.  
<http://lis.virginia.gov/cgi-bin/legp604.exe?121+ful+CHAP0690>.

The following articles on the topic are also helpful resources:

John Stonestreet and Roberto Rivera; "BreakPoint: Ideology First, Helping Foster Kids Second (If at All)," July 23, 2018; <http://www.breakpoint.org/2018/07/breakpoint-ideology-first-helping-foster-kids-second-if-at-all/> (The article focuses on a lawsuit seeking to keep the State of Michigan from working with a religious foster care service provider because of the provider's religious beliefs about marriage.)

Diana Chandler, "Faith-Based Adoption Placement Protected in 5 States," *Baptist Press*, May 10, 2017,  
<http://www.bpnews.net/48841/faithbased-adoption-placement-protected-in-5-states>.

Catholic News Agency, "U.S. Bishops Back Religious Freedom for Adoption, Foster Care Providers," April 12, 2017,  
<http://www.catholicnewsagency.com/news/us-bishops-back-religious-freedom-for-adoption-foster-care-providers-14632/>.

Ryan Anderson and Sarah Torre, "Adoption, Foster Care, and Conscience Protection," Heritage Foundation, January 15, 2014,  
<http://www.heritage.org/marriage-and-family/report/adoption-foster-care-and-conscience-protection>.

Paul A. Long, "Preserving the Religious Liberty of Faith-Based Child Placement Agencies," Michigan Catholic Conference, October 18, 2013,  
<https://www.micatholic.org/advocacy/news-room/the-word-from-lansing/2013/faith-based-adoption-agencies/>.

The model act does not include the following provisions that are found in some of the state statutes linked to above.

- A requirement (found, for example, in section 14e.(4) of the Michigan act) that faith-based agencies give referrals, as some such agencies may have conscientious objections to doing so. This exclusion is especially important in states that do not have State RFRAs that would arguably provide protection in such circumstances. (See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).)
- A provision (found, for example, in section 45.008.(f) of the Texas act) that an agency may not decline services for certain narrow purposes. ("Provided, however, no provision of this Act may be construed to allow a child placement agency to decline to provide a service on the basis of a person's race, ethnicity, or national origin.")

## TALKING POINTS

This act is designed to strengthen child placement options in a pluralistic culture. States have longstanding partnerships with a diverse range of private agencies that work to find loving homes for children. Like-minded individuals, exercising their freedom of assembly, have historically formed voluntary organizations to care for vulnerable children long before government was involved. The principles of compassion, service, and mercy compel people from all socio-economic strata, diverse backgrounds, and religious persuasions throughout our pluralistic culture to care of children in their time of need.

## THE ISSUE: VULNERABLE CHILDREN IN NEED OF SAFE, LOVING HOMES

- This state had over (xxx) children in the foster care system at the end 2016; but only (xxx) foster homes available. Of the children in foster care, at least (xxx) needed adoption, but only (xxx) were placed in permanent homes.
- In addition to the numbers provided above, many adoptions occur every year outside of the state's foster care system.
- Private agencies, according to their beliefs and mission statements, have long played a critical role in recruiting, training, and retaining adoptive and foster families.

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**THE PROBLEM: POTENTIAL LOSS OF CHILD-PLACING SERVICES BY FAITH-BASED AGENCIES**

- In at least three states (Illinois, Massachusetts, and California) and Washington, D.C., faith-based child-placing agencies have shut down rather than compromise their sincerely held religious beliefs. Holding to the biblical view of the family, these agencies could not stay true to their missions and also comply with laws that required them to place children in homes that did not meet their religious qualifications.
- States are failing to respect the free exercise of religion in two ways. Some states demonstrate a hostility toward religion by using the coercive arm of government to force religious citizens and their organizations to do what their faith forbids or prevent them from doing what their faith requires. Other states leave faith-based organizations vulnerable to law suits by failing to provide legal clarity regarding the free exercise rights of their sincerely held religious beliefs.

**THE SOLUTION: LEGISLATION THAT PROVIDES LEGAL STABILITY, STRENGTHENS LONGSTANDING PARTNERSHIPS, VALUES AUTHENTIC CHOICE IN A PLURALISTIC CULTURE, AND RESPECTS RELIGION**

- Vulnerable children have the best chance of being placed in loving homes when many child-placing agencies are available to partner with the State. This legislation is designed, in part, to ensure the maximum number of qualified agencies are providing services within the state.
- Ensuring a diversity of private providers and their ability to operate according to their values—and with families who share those values—makes it more likely that the greatest possible number of children will become part of permanent, loving families.
- Protecting the conscience rights and religious liberty of private adoption and foster-placement providers takes nothing away from others. Indeed, not every private provider needs to perform every service—and state-run agencies can provide a complete array of services. A diverse range of provider options exists for anyone who is legally able and willing to adopt or provide foster care.
- Under well-settled principles of constitutional law, governmental entities cannot be hostile to religion. The Supreme Court recently underscored this in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), when it overturned denial of an otherwise available public benefit on account of the potential recipient’s religious status. As the United States Supreme Court stated in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), “we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.” In *Walz v. Tax Commission*, 397 U.S. 664, 689 (1970), the Court stated that religious organizations “uniquely contribute to the pluralism of American society by their religious activities.” This legislation ensures that this state honors the beneficial relationship between religious activity and the community at large, especially as it relates to serving the most vulnerable among us.

**EXAMPLES OF WHY THIS IS IMPORTANT**

- Launched in 2008 by Focus on the Family, Wait No More hosts events that gather government leaders, churches, private adoption providers, and prospective adoptive parents to provide information and opportunities to begin the adoption process on site. The one-day events introduce

prospective families to the hundreds of children waiting for adoption in their own communities and provide the tools, information, and network to encourage families to consider opening their homes and lives to vulnerable children. By 2014, Wait No More events had taken place in 14 States and with remarkable results -- 2,600 families had begun the adoption process from foster care. In Colorado alone, the number of children in foster care waiting for adoption was cut in half within just a couple of years due to ongoing efforts such as Wait No More and other faith-based collaborations.

- Pastor DeForest “Buster” Soaries and his congregation of the First Baptist Church at Lincoln Gardens in New Jersey began their foster care work (called “Harvest of Hope”) in response to the alarming number of newborns being left in local hospitals. Harvest of Hope partners with other churches to connect foster children to loving families, leading a statewide network of churches educating prospective adoptive families. As of 2014, the organization outperformed government agencies in finding permanent homes for children and teens. Since it began, the program has recruited 385 foster families, placing a total of over 900 children in temporary foster care. Some 149 families have adopted 235 children.
- In Massachusetts, Boston Catholic Charities, as a state-licensed adoption provider, had to choose between being willing to place children with same-sex couples or remaining faithful to Catholic teaching that marriage is between one man and one woman and its conviction that children deserve to be raised by a married mother and father. The result? Catholic Charities of Boston chose to close, despite a successful record of placing more children in adoptive homes than any other state-licensed agency.
- What happened in Massachusetts also occurred in the District of Columbia, where D.C. Catholic Charities was forced to transfer its foster care and adoption program to other providers, and in Illinois, where the Evangelical Child and Family Agency was forced to transfer the cases of the foster children it had served for decades to different agencies.
- Some state officials have claimed that they have been able to absorb the number of needy children that otherwise would have been handled by private, faith-based organizations. While this absorption has been forced on those officials by the state policy, it certainly has not been a beneficial outcome, and it does not address any diminution of care of the children and increased delays in placement. Moreover, it does not afford parents and guardians a choice of a placement informed by their faith and sincerely held religious beliefs, to the great detriment of the children, their parents and guardians, and the desired pluralism of this state and our country.
- The statistics of foster care in this country make clear that states should endeavor to maximize the resources available for placing children with families. Hundreds of thousands of children spend time in the foster care system each year. The 20,000 who age out without having a “forever family” face daunting odds when it comes to thriving in their life-after-foster-care. According to one article (<http://www.sharedjustice.org/most-recent/2017/3/30/aging-out-of-foster-care-18-and-on-your-own>):
  - By age 26, only three to four percent of youth who aged out of foster care earn a college degree. One in five of these youth will become homeless after turning 18. Only half will obtain employment by 24. Over 70 percent of female foster youth will become pregnant by 21, and one in four former foster youth will experience PTSD.

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- The problems associated with aging out of foster care also affect the communities these youth live in. A 2013 study by the Jim Casey Youth Opportunities Initiative showed that, “on average, for every young person who ages out of foster care, taxpayers and communities pay \$300,000 in social costs like public assistance, incarceration, and lost wages to a community over that person’s lifetime. Do the math and you can conservatively estimate that this problem incurs almost \$8 billion in social costs to the United States every year.”
  - Other statistics of outcomes for children who age out of the system are equally sobering. The National Foster Youth Institute has published these statistics:
    - After reaching the age of 18, 20% of the children who were in foster care will become instantly homeless.
    - Only 1 out of every 2 foster kids who age out of the system will have some form of gainful employment by the age of 24.
    - There is less than a 3% chance for children who have aged out of foster care to earn a college degree at any point in their life.
    - 7 out of 10 girls who age out of the foster care system will become pregnant before the age of 21.
    - The percentage of children who age out of the foster care system and still suffer from the direct effects of PTSD: 25%.  
[https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/?utm\\_source=Colson+Center+Master+List&utm\\_campaign=39954e9020-EMAIL\\_CAMPAIGN\\_2018\\_07\\_17\\_08\\_49\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_84bd2dc76d-39954e9020-6669161](https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/?utm_source=Colson+Center+Master+List&utm_campaign=39954e9020-EMAIL_CAMPAIGN_2018_07_17_08_49_COPY_01&utm_medium=email&utm_term=0_84bd2dc76d-39954e9020-6669161)
  - Additional statistics on children in foster care are summarized by the Administration for Children and Families in the U.S. Department of Health and Human Services at this link: <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.
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## Clergy Protection Act

An act relating to the protection of clergy and religious organizations for honoring a sincerely held religious belief relating to participation in a lawful marriage.

### Section 1. Title

This act shall be entitled the Clergy Protection Act.

### Section 2. Findings

(1) The United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), ruled that a state could not, consistently with the Federal Constitution, deny marriage to couples of the same sex who believed that their marriage would be legitimate and who requested it. At the same time, the Court recognized that individuals hold different religious views on this subject: "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons." *Id.* at 2607.

(2) The United States Supreme Court recognizes that the peaceful free exercise of religion is a fundamental human right. In *Everson v. Board of Education of Ewing*, 330 U. S. 1 (1947), the Supreme Court opinion declared that a state "cannot hamper its citizens in the free exercise of their own religion," which was recently reaffirmed in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The Court in *Trinity* further stated, "A law may not discriminate against 'some or all religious beliefs.' . . . Nor may a law regulate or outlaw conduct because it is religiously motivated," *Id.* at 2021, quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 532 (1993). The *Trinity* Court further restated from *Lukumi* that the "Free Exercise Clause protects against laws that 'impose[] special disabilities on the basis of . . . religious status.'" 137 S. Ct. at 2021; *see also Emplmt. Div., Dept. of Human Res. of Ore. v. Smith*, 494 U. S. 872, 877 (1990). Furthermore, the Court in *Trinity* noted that "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,'" 137 S. Ct. at 2022, quoting *Lyng v. Nw. Indian Cemetery*, 485 U. S. 439, 450 (1988).

(3) Protecting religious freedom from government intrusion is a government interest of the highest order. Federal law requires that federal courts use strict scrutiny, the highest level of judicial review, in order to ensure the greatest possible protection for free exercise claims. State legislation advances this interest by remedying, deterring, and preventing government interference with religious exercise in a way that complements the protections mandated by federal laws and the First Amendment to the Constitution of the United States.

(4) Freedom of speech, as part of the First Amendment, is intrinsic to the free exercise of religion. The United States Supreme Court has noted that the two freedoms are interrelated: "Indeed, in Anglo-American history at least, government suppression of speech has so commonly been directed precisely

at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, at 760 (1995).

(5) Government cannot infringe on the "fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say." *Hurley v. Irish Am. Gay Grp. of Boston*, 515 U.S. 557, 558 (1995). "Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id.* at 574. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 634 (1943), the Supreme Court determined that it was not within the valid power of the government "to force an American citizen publicly to profess any statement of belief, or to engage in any ceremony of assent to one." As the Court so ably stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *Id.* at 642. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U. S. 384, 394 (1993), quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). And the Supreme Court reiterated in *Matal v. Tam*, 137 S. Ct. 1744 (2017), "We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Id.* at 1763, quoting *Street v. N.Y.*, 394 U. S. 576, 592 (1969).

(6) In a pluralistic society, in which people hold more than one view of marriage, the wisdom expressed in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 is the best arbitrator of public differences. The purposes of the state and its citizens are best served by protecting individuals from government action and penalty solely because of their beliefs, speech, or actions with regard to the contentious issue of the appropriateness of same-sex marriage, without affecting the authority of the State to express its own views as to this issue and to encourage the actions that it believes best suit the best interests of the state and its inhabitants and to discourage actions that it believes do not.

### Section 3. Definitions

The following definitions apply for purposes of this act:

- (a) "Clergy" or "member of the clergy" means an individual who has been ordained or accredited as a spiritual advisor, counselor, or leader by any religious organization established on the basis of a community of faith and belief, doctrines, and practices of a religious character, or an individual reasonably believed so to be by the person consulting that individual.
- (b) "Religious organization" means a nonprofit organization that is any of the following:
  - (1) A house of worship, including but not limited to, a church, convention, denomination, congregation, association, diocese, conference, council, synagogue, mosque, or temple;
  - (2) A religious group, society, corporation, association, entity, partnership, order, preschool, school, institution of higher education, ministry, charity, social service provider, children's home, camp, retreat center, clinic, hospital or other health care facility, hospice, elder care facility, or crisis pregnancy center, whether or not connected to or affiliated with a church, convention, denomination or other organization of churches, and associated counseling, courses, and teaching, where said organization holds itself out to the public in whole or in part as religious and its purposes and activities are in whole or in part religious; or

(3) Any clergy, religious leader, minister, officer, manager, employee, member, or volunteer of any entity described in paragraph (a) or (b) of this subdivision.

(c) “Sincerely held religious belief” means a religious belief, speech, or action motivated by that belief, whether or not the belief or action is compulsory or a central part or central requirement of the person’s religious belief.

(d) “Penalize or withhold benefits” as used in subsection 3(b) of this section means any adverse administrative, civil, or criminal action that directly or indirectly affects the religious organization, clergy, or person against whom the adverse action is taken, places the religious organization, clergy, or person in a worse position than before the adverse action was taken, or is likely to deter a reasonable action or inaction. It includes, but is not limited to: the following adverse actions taken by the state, local governmental entity, or any person acting under color of state or local law to:

(1) Alter the tax treatment of, or cause any tax, fine, or payment to be assessed against, to delay, revoke, or otherwise deny an exemption from taxation;

(2) Disallow or hinder a deduction for tax purposes of any charitable contribution;

(3) Withhold, reduce, exclude, terminate, or otherwise deny any accreditation, license, certificate, contract, grant, loan, guarantee, or insurance;

(4) Withhold, reduce, exclude, terminate, or otherwise deny any entitlement, social service benefit, health care benefit, or to alter or deny a custody award, foster home placement, or adoption;

(5) Deny access to meeting space, channels of communication, or other resources at an educational institution that is otherwise available to other student organizations, participation in charitable fundraising campaigns that are otherwise available to other charitable organizations, or access to minister at correctional institutions or other public facilities and property as is otherwise available to other nongovernmental organizations;

(6) Recognize or allow an administrative charge or civil claim;

(7) Require any mediation, sensitivity training, paperwork requirements, or otherwise create demands; or

(8) Restrict the right of persons and religious organizations covered by this act to limit employment, spousal benefits, the sale or rental of housing accommodations, admission, membership, leadership, or to otherwise give preference to persons who share the same sincerely held religious beliefs, including standards of conduct, or from taking such action as is calculated to promote the religious principles for which a congregation or organization is established or maintained.

(e) “Person” means an individual or a corporation, company, sole proprietorship, partnership, society, club, organization, agency, association, or any employee, agent, or volunteer of any of these entities.

#### **Section 4. Protections of Clergy and Religious Organizations**

(a) A member of the clergy, a religious organization, an organization supervised or controlled by or in connection with a religious organization, or an individual employed by a religious organization may not be required to promote, perform, solemnize, or validate any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization,

formation, or celebration of any marriage if the action would cause the person or religious organization to violate a sincerely held religious belief.

- (b) Any other statutes and regulations notwithstanding, a refusal to promote or to provide solemnization, validation, services, accommodations, facilities, goods, or privileges under subsection (a) of this section shall not serve as the basis for a civil or criminal cause of action or any other action by this state, an agency of this state, or a political subdivision of this state to penalize or withhold benefits or privileges, including tax exemptions or governmental contracts, grants, licenses, or anything else encompassed by the definition of “penalize or withhold benefits” in section 2(d) of this act from any protected religious organization or person.
- (c) Any other statutes and regulations notwithstanding, a refusal to provide services, accommodations, facilities, goods, or privileges under subsection (a) of this section shall not serve as the basis for a civil or agency action by or on behalf of a private person claiming discrimination.

#### **Section 5. Similar Protections Afforded to Others**

No person engaged in business in this state, whether located in-state or out-of-state, shall be required to provide any services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, maintenance, dissolution, or celebration of any marriage if the action would cause the person to violate a sincerely held religious belief. The protections provided under section 3 of this act shall also be afforded to persons covered under this section.

#### **Section 6. Severability**

The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part or parts that remain.

#### **Section 7. Effective date**

This act shall go into effect immediately upon its lawful enactment.

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## NOTES

This model act provides similar protections that are also found in the Marriage Tolerance Act. However, this bill is not as broad in its application. The primary focus of this legislation is to protect those in the religious community. As a secondary goal, it aims to protect business owners who have sincerely held beliefs regarding marriage. However, this provision for business owners is not required if the state has an adequate “State-RFRA” law, as such a law should provide the same protections (and more), and it also overlaps with the model Marriage Tolerance Act (a version of which has only been enacted in Mississippi).

Sources: This language is modeled in part on Utah Code 1953 § 63G-20-101, et seq., and laws adopted by Connecticut, Delaware, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington State, as well as the District of Columbia. Conn. Gen. Stat. §§46b-22, 46b-35a; Del. Code Ann. tit. 13, §106; D.C. Code §46-406(c); Md. Code Ann., Note: Fam. Law §§ 2-201, 2-202, 2-406, 2012 Mary. Laws Ch. 2 (H.B. 438); Minn. Stat. Ann. §517.09; N.H. Rev. Stat. Ann. § 457:37; N.Y. Dom. Rel. Law § 11(1); R.I. Gen. Laws Ann. §15.3-6.1; Vt. Stat. Ann. tit. 18, § 5144(b); Wash. Rev. Code § 26.04.010.

The following are some helpful resources:

- Kirsten Andersen, “Catholic Couple Fined \$13,000 for Refusing to Host Same-sex ‘Wedding’ at Their Farm,” *LifeSite News*, August 20, 2014, <https://www.lifesitenews.com/news/catholic-couple-fined-13000-for-refusing-to-host-same-sex-wedding-at-their>.
- Kelly Harkness, “Fearing Another Lawsuit, Christian Business Owners Stopped Hosting All Weddings. Now their Business is Dead.” *The Daily Signal*, June 19, 2015, <http://dailysignal.com/2015/06/19/fearing-another-lawsuit-christian-business-owners-stopped-hosting-all-weddings-now-their-business-is-dead/>.
- Associated Press, “Same-sex Couple, Wedding Venue in Central Minnesota Settle Discrimination Case,” *Star Tribune*, August 22, 2014, <http://www.startribune.com/same-sex-couple-settle-dispute-with-minnesota-wedding-venue/272282461/http://www.kare11.com/news/business-sues-state-over-same-sex-laws/364295316>.
- David Unze, “Business Sues State Over Same-sex Laws,” *St. Cloud Times*, KARE, December 6, 2016, <http://www.kare11.com/news/business-sues-state-over-same-sex-laws/364295316>.
- Heather Hahn, “Gay Couple Files Complaint for Refusal of Wedding,” United Methodist Church, November 12, 2014, <http://www.umc.org/news-and-media/gay-couple-files-complaint-for-refusal-of-wedding>.
- Although not focused on any single policy issue, Tennessee recently enacted a bill (HB 2683) that provides protection to clergy with respect to having sermons and related notes and audio-video material subpoenaed by any government entity (other than a court), or being subpoenaed personally to testify about a sermon, in any administrative or civil action. <https://publications.tnsosfiles.com/acts/110/pub/pc0663.pdf>

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## TALKING POINTS

America's diverse culture requires public toleration of peaceful dissent and differences of opinion. Although the United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), created a legal duty for the states to allow and recognize same-sex marriages, the Supreme Court in that same decision recognized that many citizens will legitimately continue to refuse to accept same-sex marriage as valid, appropriate, or beneficial. Citizens should not fear losing their natural and constitutional freedoms simply because others have gained new rights. When the Supreme Court gave women the right to elective abortions, it did not simultaneously require that all doctors had to perform them, businesses had to celebrate them, governments had to fund them, and government schools had to teach children about them. Similarly, by creating minimal rights or restrictions on the states with respect to the legal recognition of same-sex marriage, the Supreme Court does not intend to dictate determinations of society's best practices for children and families or to limit differences of opinion on such matters. Furthermore, the Court has no intention of dictating to religious organizations and persons that they jettison sincerely held religious beliefs in favor of a secular definition of marriage.

### THE ISSUE:

- Because the Supreme Court redefined marriage in *Obergefell v. Hodges*, explicit protections are needed to protect clergy, congregations, religious organizations, and small businesses that provide goods and services for weddings from forced participation in marriage ceremonies that violate their sincerely held religious beliefs.
- The First Amendment's Free Exercise rights are being subjugated in various states to the Court decreed right to same-sex marriage.

The free exercise of religion "implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). Free exercise also includes the right to abstain from speech and participation in that which offends one's faith as upheld in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In his concurring opinion, Justice Murphy stated that "official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship." *Id.* at 638.

### THE PROBLEM:

- Only eleven states and the District of Columbia adopted same-sex marriage through legislation prior to the *Obergefell* ruling. These states, due to their legislative process, provided some protection for clergy and congregations as those states instituted same-sex marriage. The other 39 states had no such protections once *Obergefell's* ruling applied to the entire nation. Therefore, states which have not provided statutory clarity to protect clergy and religious organizations need to do so in order to prevent constant litigation in the courts.
- Such situations create expensive disruption for ministers, religious organizations, and business owners who must defend their free exercise rights in court. Government has a constitutional duty to protect its citizens' First Amendment freedoms and prevent such legal harassment that interferes

with their productivity in the community. Government also has a duty to ensure that its coercive power is not used in ways that infringe upon the peaceful religious speech and actions of its citizens and their organizations.

**THE SOLUTION: LEGISLATION THAT VALUES FREEDOM FOR ALL IN A DIVERSE CULTURE, CLEAR STATUTORY LANGUAGE THAT DOES NOT ALLOW WIDE DISCRETION TO THE COURTS THUS REDUCING FRIVOLOUS LAWSUITS AND THE DISRUPTION OF PEOPLE'S LIVES AND LIVELIHOODS**

- This legislation specifically protects religious officials, congregations, and religious organizations, such as schools, colleges, hospitals, homeless shelters, and other religious charities, from state or local laws, including administrative regulations that would force them to violate their sincerely held religious beliefs regarding marriage. It protects individual congregants, who may be small business owners, from being forced to provide services or goods for wedding ceremonies or from being penalized in any way for their non-participation.
- This also protects religious programs, courses, retreats, workshops, and counseling which may offer pre-marital counseling, marriage workshops, family retreats, or educational courses on human sexuality. It protects religious organizations' rights to have policies that are consistent with their religious beliefs in the area of employment, spousal benefits, housing accommodations, admissions, membership, and leadership positions.
- Although there is overlap between this legislation and the Marriage Tolerance Act, this legislation proactively protects against any laws imposing direct requirements on clergy, congregations, and religious organizations. This legislation provides absolute assurance that they are protected against all government actions in the marriage context. Unfortunately, in the current climate, such explicit assurances are necessary.

**EXAMPLES OF WHY THIS IS IMPORTANT**

- In Idaho, the city of Coeur d'Alene passed a city ordinance that prevented discrimination based on sexual preference. The city told local Christian ministers who objected to same-sex marriage that they would be required to perform same-sex weddings or face fines or jail time. [www.washingtontimes.com/news/2014/oct/20/idaho-citys-ordinance-tells-pastors-to-marry-gays/](http://www.washingtontimes.com/news/2014/oct/20/idaho-citys-ordinance-tells-pastors-to-marry-gays/).
- In Oregon, business owners Aaron and Melissa Kline could no longer keep their doors open after charges of discrimination at their bakery when they declined to make a wedding cake for a same-sex couple. Their litigation continues. <http://dailysignal.com/2017/03/02/bakers-accused-of-hate-get-emotional-day-in-court/>.
- In Washington State, Barronelle Stutzman, the owner of Arlene's Flowers, is facing a similar situation of ongoing litigation. After losing her appeal in the State Supreme Court, she is now appealing to the United States Supreme Court, all due to exercising her religious conviction that she should not provide an arrangement of flowers for a same-sex wedding. <http://www.catholicnewsagency.com/news/florist-takes-religious-liberty-case-to-us-supreme-court-44817/>.

- In New Jersey, the Ocean Grove Camp Meeting Association, affiliated with the United Methodist Church, declined to provide its facilities for a civil-union ceremony. However, due to the state's non-discrimination law, the association became the target of a lawsuit, *Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo*, 339 Fed. Appx. 232, 237–38 (3d Cir. 2009). Sadly, the association's religious liberty rights, as well as its property rights, were not protected by the court. <http://www.adflegal.org/detailspages/case-details/bernstein-v.-ocean-grove-camp-meeting-association>.
- In Colorado, revised statute § 24-34-601(2)(a) is creating problems for business owners that object to using their services to promote same-sex marriage. The decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018) has slowed, but not halted, the ill effects of the Colorado statute.

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## Licensed Professional Civil Rights Act

An act prohibiting discrimination by any individual or organization against an applicant for, or a holder of, an occupational license, due to the professional's or potential professional's sincerely held religious beliefs.

### Section 1. Title

This act shall be entitled the "Licensed Professionals Civil Rights Act."

### Section 2. Findings

- (a) As of January 1, 2018, there are approximately XXX professions for which this state requires a person to obtain an occupational license, a process that regulates a significant portion of professions in this state;
- (b) The licensed professions in this state comprise a vibrant, diverse, and vitally important part of our state's economy;
- (c) This state maintains stringent standards for obtaining occupational licenses, and these standards, intended to protect the health and safety of the public, should not overly restrict economic or religious freedoms;
- (d) This state has a compelling interest in fostering a diverse group of licensed professionals to serve the needs of its residents, including by honoring the sincerely held religious beliefs of professionals and those who wish to become professionals and who would otherwise be prohibited or deterred from entering a chosen profession;
- (e) Licensing laws and regulations can become so burdensome or punitive as to deprive people of their property without due process and violate their First Amendment protections, *see Thomas v. Collins*, 323 U.S. 516, 530-531 (1945);
- (f) The United States Supreme Court "has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly, and thereby invade the area of protected freedoms. . . . [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. *Cantwell v. Connecticut*, 310 U. S. 296, 310 U. S. 304." *NAACP v. Ala.*, 377 U.S. 288, 307 (1964);
- (g) Incidents over the last several years involving those in the licensed professions and studying to become a member of a licensed profession have penalized those individuals for holding true to their sincerely held religious beliefs; and
- (h) Such incidents show a hostility to religious belief and practice that is unnecessary, lacking in tolerance, and counterproductive to this state's economy and culture.

### Section 3. Definitions

- (a) "Penalty" means any administrative, disciplinary, civil, or criminal fine, rebuke, suspension or revocation of a license, prohibition on obtaining a license, hindrance to educational or training opportunities toward obtaining or maintaining a license, or any other adverse action whatsoever.

- (b) “Person” means any governmental or private individual, organization, or other entity resident in this state.
- (c) “Sincerely held religious belief” means a religious belief, speech, or action motivated by that belief, whether or not the belief, speech, or action is compulsory or a central part or central requirement of the person’s religious belief, provided that such sincerely held religious belief does not incite violence or have the reasonable expectation of resulting in serious physical harm to oneself or another person.

#### **Section 4. Certain Actions Prohibited**

A person may not take any action, including but not limited to adopting or implementing any rule, regulation, code of conduct, or policy, or impose any penalty that

- (a) limits an applicant’s ability to obtain a license or professional education based in whole or in part on a sincerely held religious belief of the applicant; or
- (b) burdens a license holder’s:
  - (i) free exercise of religion, regardless of whether the burden is the result of a rule generally applicable to all license holders;
  - (ii) freedom of speech regarding a sincerely held religious belief; or
  - (iii) freedom of assembly, such as membership in any religious professional organization or organization that holds certain religious beliefs, for example and illustration only, by requiring a person to provide a list of his associational memberships or contributions to any association or by censuring an individual for association with an organization that does not permit leadership to be held by practicing homosexuals.

Notwithstanding any provision to the contrary, an educational institution or other organization may act consistently with its own sincerely held religious beliefs, including in the admission of applicants and regulation of its students or members.

#### **Section 5. Administrative or Judicial Relief**

- (a) A person may assert that a violation of section 3 of this act as a defense in an administrative hearing or as a claim or defense in a judicial proceeding.
- (b) A person may bring an action for injunctive relief against a violation of section 3 of this act.

#### **Section 6. Severability**

The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part or parts that remain.

#### **Section 7. Effective date**

This act shall go into effect immediately upon its lawful enactment.

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## NOTES

In Tennessee, a very limited bill that began as an effort to protect the sincerely held religious beliefs of counselors was changed in its final language to “sincerely held principles.” Although such language is helpful to gain bipartisan support, there is not a dependable line of Supreme Court rulings that provide the same case law stability as those dealing with “sincerely held religious beliefs.” Nonetheless, such language may be more immune to court challenges. For further information see the 2016 history of HB 1840 and SB 1556 on the following Tennessee General Assembly page:

<http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1556&ga=109>.

See also: <https://factn.org/portfolio-item/tn-senate-bill-1556-tn-house-bill-1840/>

To review legislation in other states dealing with the issue of professional licenses, visit the following Arizona and Texas legislative sites: <http://www.azleg.gov/ars/41/01493-04.htm> and <http://www.legis.state.tx.us/tlodocs/85R/billtext/pdf/SB00651I.pdf#navpanes=0>.

Helpful resources in this area include the following:

- Mary Alice Robbins, “Protecting Religious Beliefs Becomes Tense Issue in State Bar Sunset Bill Debate,” *Texas Lawyer*, May 16, 2017, <http://www.texaslawyer.com/id=1202786370973/Protecting-Religious-Beliefs-Becomes-Tense-Issue-in-state-Bar-Sunset-Bill-Debate?slreturn=20170812213728>
- Scott Shackford, Reason.com, “Lawsuit Aims to Force Catholic Hospitals Perform Transgender-Related Surgeries,” April 26, 2017, <https://www.google.com/amp/reason.com/blog/2017/04/26/lawsuit-aims-to-force-catholic-hospitals/amp>

## TALKING POINTS

### THE ISSUE

Schools, boards, and associations are empowered to act as the gatekeepers of many professions. They write regulations and policies which control professional practices, licensing, and individual professional conduct. They decide who may study to become a professional. At issue is whether the licensed professions will remain open to a full cross-section of this state’s citizens, including those who have sincere religious beliefs that oppose abortion, intimate relations between those of the same sex, and transgender operations.

### THE PROBLEM

Incidents over the last several years have resulted in various professionals being censured or deprived of their chosen livelihoods, not because of poor service to their clients, but because of disagreements with or disapproval of their sincerely held religious beliefs, such as not believing it ethical to participate in or facilitate abortion or same-sex sexual intercourse or transgender operations. Aspiring professionals are also being turned away from schools and not being granted degrees because of their sincerely held religious beliefs. This lack of tolerance not only runs counter to our state’s commitment to tolerance

and religious freedom, but it also is wholly unnecessary, harms the economy, and discourages qualified individuals from joining the professions. Some examples include the following:

- In Washington State, a pharmacy was targeted by Planned Parenthood for its refusal to carry Plan B abortifacients or to refer customers to pharmacies that did. Under political pressure, the Pharmacy Commission of Washington State issued regulations that essentially prohibited pharmacies from refusing to follow their religious beliefs in these ways. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), cert. denied, 136 S. Ct. 2433 (2016). See, <https://www.adflegal.org/detailspages/case-details/stormans-v.-wiesman>.
- In Vermont, after the passage of an assisted suicide law, the Vermont Board of Medical Practice and Office of Professional Regulation interpreted the law to require doctors to counsel their patients about the assisted suicide option. Doctors who lodged objections due to their convictions of conscience or their Hippocratic oaths were still expected to follow the board's interpretation of the law. *Vermont All. for Ethical Healthcare, Inc. v. Hoser*, No. 5:16-CV-205, 2017 WL 1284815 (D. Vt. Apr. 5, 2017), appeal dismissed sub nom. *Vermont All. for Ethical Healthcare, Inc. v. van de Ven*, No. 17-1481, 2017 WL 3429397 (2d Cir. May 22, 2017). See, <http://www.adflegal.org/detailspages/case-details/vermont-alliance-for-ethical-healthcare-v.-hoser>.
- In Wyoming, the Wyoming Supreme Court upheld the determination of the Commission on Judicial Conduct and Ethics that a judge's refusal to officiate at same-sex marriages was judicial misconduct, despite the fact that officiating weddings is discretionary and judges can refuse to perform wedding ceremonies for a host of other reasons. *In re Neely*, 390 P.3d 728 (Wyo. 2017). See, <http://www.adflegal.org/detailspages/case-details/neely-v.-wyoming-commission-on-judicial-conduct-and-ethics>.
- In Tennessee, the American Counseling Association amended its ethics code to prohibit counselors from referring clients to other counselors based on their "personally held values." This language was a direct response to a religious liberty case, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (see below) that held that a Christian counselor could refer a gay/lesbian client if the therapy sought required the counselor to affirm a same-sex relationship in violation of a counselor's sincerely held religious beliefs. <https://factn.org/portfolio-item/tn-senate-bill-1556-tn-house-bill-1840/>.
- The Christian Medical Association has documented systematic discrimination, often religious in nature, for medical professionals who seek to honor their pro-life convictions. <https://cmda.org/library/doclib/Real-life-conscience-stories-RevisedMay09.pdf>.
- A master's degree student finishing up her final requirements in a counseling program at Eastern Michigan University referred a potential client, upon religious grounds, to another fellow counselor. Although the guidelines allowed referrals, the school review board in charge of the program expelled her for what they viewed as discrimination against a same-sex relationship. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). See <https://www.adflegal.org/detailspages/case-details/ward-v.-polite>.
- A student, majoring in counseling at Augusta State College in Georgia challenged the program's requirements that she complete "diversity sensitivity training" and other remediation assignments after instructors learned of her religious beliefs. She lost her case in the Eleventh Circuit and could not complete her program of study. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011). See

<http://www.thefire.org/eleventh-circuit-rejects-court-order-for-keeton-graduate-student-seeking-to-prevent-expulsion/>.

- The American Bar Association in 2016, in an express attempt to “change the culture,” has recommended to all the states, which largely follow the model rules crafted by the ABA, that they amend their rules of professional responsibility to define as unprofessional conduct any discrimination, broadly defined, against sexual orientation, marital status, and gender identity. To date, the Attorneys General of Texas, South Carolina, and Louisiana have all found the revised rule likely to violate the United States Constitution’s freedoms of speech, free exercise of religion, and assembly/association and due process.

Another critical part of the problem is that many have lost sight of the central importance of religious liberty to a free, self-governing society and to its economic vitality. Historically, religious liberty has been a preeminent fundamental human right guaranteed to American citizens by the First Amendment to the United States Constitution. The protection for the “free *exercise* of religion” also recognizes that a religious person cannot separate her “religious” life from her “secular” life, as all of life must be religiously informed and one’s profession is viewed as an exercise of religion by service to others.

- “The theory upon which our political institutions rest is, that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that, in the pursuit of happiness, all avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law.” *Cummings v. Mo.*, 71 U.S. 277, 321-322 (1867).
- “It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.” *Truax v. Raich*, 239 U.S. 33, 41 (1915).

Social science studies also demonstrate that, by protecting religious liberty, a society increases its chances of achieving a healthy economy. A growing body in international research shows a positive relationship between religious freedom and economic freedom. One recent study shows the connection between religious freedom and ten of the twelve pillars of global competitiveness measured by the World Economic Forum’s Global Competitiveness Index. Countries that protect religious freedom, in general, experience higher income, higher levels of education for women, better health outcomes, less armed conflict, less corruption, less harmful regulation, and (perhaps most important of all) other personal liberties (such as freedom of the press, freedom of speech, economic liberty, and freedom of travel) are more secure. See Brian J. Grim, Greg Clark, and Robert Edward Snyder, “Is Religious Freedom Good for Business?: A Conceptual and Empirical Analysis,” 10 *Interdisciplinary J. of Research on Religion*, article 4, 2014, ISSN 1556-3723.

#### **THE SOLUTION: LEGISLATION THAT VALUES FREEDOM IN A DIVERSE CULTURE OF COMPETING VALUES AND REDUCES THE DISRUPTION OF PEOPLE’S LIVES AND LIVELIHOODS**

- This legislation helps ensure that licensing boards, schools, professional organizations, and others focus on their missions and do not improperly use their authority to coerce individuals to violate their sincerely held religious beliefs in exchange for the right to receive licenses or to continue in their chosen professions.

- This legislation helps prevent religious discrimination and increase tolerance and diversity in the professions, from the time a person seeks out the educational training, certificates, and education needed to become licensed in an occupation and throughout that professional's career.
- If a professional still experiences religious discrimination related to the demands of those who license or regulate his profession, this legislation provides a judicial remedy.

## **Category #3 (c) - Religious Liberty Protection Legislation – Protection for Teachers and Students**

### **Model Acts Protecting Students and Teachers in Their Free Exercise of Religion**

In this final subsection of the Category #3 acts, we collect acts relating to the practice of religion in the schools and school boards of this country. This is a frequent battleground over the free exercise of religion by students, teachers, and administrators. It commonly involves prayer, but also many other expressions, such as wearing apparel with religious messaging and discussing topics from a religious perspective. Some federal protections are already in place, such as the Equal Access Act, 20 U.S.C. § 4071, but no comprehensive ones. Also, as indicated in the initial act in this series, federal law requires school districts to certify that they are in compliance with guidelines issued by the U.S. Department of Education outlining religious freedom for students and teachers in the school setting.

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## Student Prayer Certification Act

An act providing for certain reporting and certifications by the State Board of Education and local school districts to comply with federal law.

### Section 1. Short title

This act shall be known and may be cited as the “Student Prayer Certification Act.”

### Section 2. Legislative Findings

- (a) The United States Congress enacted legislation (codified at 20 U.S.C. 7904) that requires public elementary and secondary schools to certify that they have no policy that prevents, or otherwise denies participation in, constitutionally protected prayer.
- (b) A local education agency (LEA) must provide this certification annually (by October 1) in writing to its state education agency (SEA). The U.S. Department of Education (the Department) has issued guidance that SEAs and LEAs are to use in meeting this requirement.
- (c) The Department can withhold federal funding for the public schools in the state if the requirements of 20 U.S.C. 7904 are not met.
- (d) This state has an interest in ensuring that the certification requirement is met so that federal funding for public schools is not put at risk.

### Section 3. Compliance with Annual Certification Requirements

To ensure that this state remains in compliance with this federal requirement and to ensure that the constitutionally protected right to prayer is unimpeded in the public schools, the [SEA] shall do the following:

- (a) Annually, by [date], remind [LEAs] of the requirement for such certification.
- (b) Biennially, by [date], report the following information to the [appropriate state legislative committee(s)]:
  - (i) The process the [SEA] established for receiving the annually required [LEA] certification, including any certification form and state guidance for compliance.
  - (ii) In what form and where annual [LEA] certifications are maintained.
  - (iii) How the [SEA] responded to [LEAs] that did not provide the annual certification.
  - (iv) Whether the [SEA] has received complaints in the past two years that any [LEA(s)] are not in compliance with the U.S. Department of Education’s guidance on this topic and how such complaints have been handled.
  - (v) Whether the [SEA] has provided its annual certifications to the U.S. Department of Education.

### Section 4. Effective Date

This act shall become effective on the first July 1 following its enactment so as to be implemented during the immediately following school year.

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## NOTES

- Congress enacted legislation (codified at 20 U.S.C. 7904) that requires public elementary and secondary schools to certify that they have no policy that prevents, or otherwise denies participation in, constitutionally protected prayer.
- A local education agency (LEA) must provide this certification annually (by October 1) in writing to its state education agency (SEA). The U.S. Department of Education (the Department) has issued guidance that SEAs and LEAs are to use in meeting this requirement.
  - Original letter from then-Secretary Paige is posted on the Department's website: [https://www2.ed.gov/policy/gen/guid/religionandschools/letter\\_20030207.html](https://www2.ed.gov/policy/gen/guid/religionandschools/letter_20030207.html)
  - Department's Guidance is here: [https://www2.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (originally published in 68 Fed. Reg. 9646 (Feb. 28, 2003))
- The Department does not specify a particular form to be used by the LEA for this certification. Instead, the SEA is to determine the form it will require for such certification, as long as the certification is in writing and clearly states that the LEA has no such policy.
- Individual LEA certifications are not submitted to the Department, but are maintained by the SEA per its usual records retention policy.
- The SEA is required to send the Department annually (by November 1) a list of LEAs that have not filed the certification or against which complaints of noncompliance have been made to the SEA.
- The Department can bring enforcement actions (e.g., withholding funds) against LEAs that do not comply with this statutory mandate. The General Education Provisions Act (see 20 U.S.C. 1234c & d) authorizes the Department Secretary to bring enforcement actions against recipients of federal education funds that are not in compliance with the law.
- Hopefully, your state is already acting in compliance with this federal requirement, but some states have not been and have not set up any mechanism to ensure compliance. A sample letter to determine whether your state's school administrations are complying is provided here:

[date]

[Legislator's contact information]

Dear [SEA leader title]:

I write to inquire about [SEA's] procedures for complying with the requirements of 20 U.S.C. 7904 (section 8524 of the Every Student Succeeds Act ("ESSA") of 2015) and related guidance from the U.S. Department of Education concerning annual certification by this state's local educational agencies (LEAs) that they have no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools. In particular, please provide information in response to the following questions:

- What process has [SEA] established for receiving the annually required LEA certification, including any certification form and state guidance for compliance?
- In what form and where are annual LEA certifications maintained?
- How does [SEA] respond to LEAs that do not provide the annual certification?
- Has [SEA] received complaints that any LEA(s) are not in compliance with the U.S. Department of Education's guidance on this topic?
  - If so, how are such complaints handled and tracked?
- Has the [SEA] provided its annual certifications to the U.S. Department of Education?
  - If so, please provide a copy of the past two years' certification that has been submitted.
  - If not, please explain why.

Please provide your response by [date]. If you have questions about this inquiry, please contact [name of appropriate staff member].

Thank you for your cooperation with my request for this information.

Sincerely,

[Legislator's name]

### Talking Points

- This act is to assure compliance with requirements of federal law.
- If the State is not compliant, it risks federal funding for education.
- Federal funding is a critical resource for the state's public school systems.
- This federal requirement is designed to ensure that public schools are respecting the constitutionally protected rights of its students. That is also a critical interest of this state. If the State is not compliant, it risks federal funding for education.
- The reporting requirements on the SEA are basically to provide a copy of what is required by federal law to supply to the U.S. Department of Education. This will not pose a significant additional burden on the SEA.

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## Teacher Protection Act

An act relating to the indemnification of, and other assistance to, those who are subjected to potentially ruinous lawsuits involving approved religious practices, including teachers, other school district employees, school districts, and members of boards that govern school districts.

### Section 1. Title

This act shall be entitled the Teacher Protection Act.

### Section 2. Definitions

The following definitions apply for purposes of this act:

- (a) "Covered person" means any teacher, other school district employee, or member of a board that governs a school district.
- (b) "Good faith" means a reasonable belief of a covered person or school district that a policy or practice does not expressly violate an opinion or order of a court of competent jurisdiction's interpretation of a federal, state, or local constitutional provision, law, or regulation. However, should a policy or practice violate such an opinion or order, a belief shall still be considered to be held in "good faith" if it comports with the U.S. Department of Education's "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," dated February 7, 2003, or its then-current version.
- (c) "State assistance" means:
  - (i) Defense of the lawsuit by the Attorney General;
  - (ii) Indemnification by the state for damages and costs of any type, including, but not limited to, court costs and attorney's fees and costs;
  - (iii) Resource materials, formal or informal advice from the Attorney General, or any other assistance whatsoever that the Attorney General may choose to render; or
  - (iv) Any or all of the above in combination.

### Section 3. Protections

A covered person or school district that is sued as a result of a good faith policy adopted by the school district's governing board or a good faith practice of an individual school or school district that authorizes religious exercise, including, but not limited to, student and teacher expression of religious views in class or class work, student and teacher wearing of religious apparel in school, religious clubs or meetings on school grounds, voluntary prayer, a moment of silence, or a religious activity or expression at a school-sponsored event may request from the Attorney General any form of assistance as defined in section 2(c) of this act. This assistance is available regardless of whether the lawsuit alleges violation

of the federal or state constitutions; federal or state statutes; local ordinances; or federal, state, or local regulations that specifically reference the state or federal establishment clauses; or whether the lawsuit invokes any other grounds not specifically enumerated above.

#### **Section 4. Determination by the Attorney General**

The Attorney General shall determine whether a request for assistance made under this section arises from a good faith school district policy, a good faith school district practice, or an individual school's good faith policy. If the Attorney General determines that the request does not arise from such a good faith policy or practice, the Attorney General shall decline to provide assistance. If the Attorney General determines that the request arises from such a good faith policy or practice, the Attorney General shall, if requested or if the lawsuit otherwise comes to the Attorney General's attention, render assistance to the covered person or school district.

#### **Section 5. Remedy for Non-assistance**

A covered person or a school district that was denied assistance, but that prevails in the lawsuit for which assistance was requested, is entitled to recover litigation costs and attorney's fees from the Attorney General by submitting a form to the Attorney General. The required form shall be created and available within thirty days of the enactment of this bill. The required form shall require reasonable documentation to be submitted therewith. But the required form and its required documentation shall be designed so as to facilitate ease of compensation of persons and school districts described by this section.

In the event the Attorney General disputes or fails to pay the litigation costs and attorney's fees submitted under this section, the covered person or school district may file suit in the court of appropriate jurisdiction seeking a recovery of the submitted litigation costs and attorneys' fees. If the covered person or school district prevails in this action, the litigation costs and attorneys' fees incurred in this action shall be awarded by the court in addition to the litigation costs and attorneys' fees the Attorney General disputed or failed to pay.

#### **Section 6. Severability**

The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part or parts that remain.

#### **Section 7. Effective date**

This act shall go into effect immediately upon its lawful enactment.

## NOTES

This model act uses generic titles for “school board,” “school district,” “Attorney General,” and the like. Appropriate alterations may be needed to conform to the terminology used in your jurisdiction or appropriate officer to be designated for the specified duties (e.g., “Solicitor General” instead of “Attorney General”).

Links to the referenced U.S. Department of Education guidelines and accompanying letter are as follows:

[https://www2.ed.gov/policy/gen/guid/religionandschools/letter\\_20030207.html](https://www2.ed.gov/policy/gen/guid/religionandschools/letter_20030207.html).

[https://www2.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

*Teachers & Religion in Public Schools*, a comprehensive guiding document on religious liberty issues for school personnel, was written in 2006 and is available at the following link:

<https://www.clsnet.org/document.doc?id=130>.

Louisiana recently enacted legislation (SB512) that permits a school employee who is supervising a student-led, student-initiated prayer to bow his or her head as a sign of respect or deference to the students’ religious beliefs and practices.

<http://www.legis.la.gov/legis/ViewDocument.aspx?d=1103664>

Helpful resources include the following:

Ann Bradley, “Rural Texas District Cancels Plan for Pupils to Dress as Opposite Sex,” *Education Week*, November 23, 2004,

<http://www.edweek.org/ew/articles/2004/11/24/13briefs-3.h24.html>.

Teacher Bans Cross and Forces LGBT Agenda on Students, Liberty Counsel, April 20, 2017, <https://www.lc.org/newsroom/details/042017-teacher-bans-cross-and-forces-lgbt-agenda-on-students>.

Jessica Meyers, “Plano’s ISD’s Candy Cane Lawsuit has Turned from Case to Cause,” *Dallas News*, December 2011, <https://www.dallasnews.com/news/plano/2011/12/19/plano-isds-candy-cane-lawsuit-has-turned-from-case-to-cause>.

Valerie Wigglesworth, “Texas AG’s Concerns over Legality of Frisco High School’s Prayer Room called ‘Publicity Stunt’ by School District,” *Dallas News*, March 2017, <https://www.dallasnews.com/news/frisco/2017/03/17/texas-ags-office-raises-concerns-prayer-room-friscos-liberty-high-school>.

Mark Walsh, “Supreme Court Declines to Hear Superintendent’s Appeal in Parental-Rights Case,” *Education Week*, May 19, 2008, [http://blogs.edweek.org/edweek/school\\_law/2008/05/supreme\\_court\\_declines\\_to\\_hear\\_4.html](http://blogs.edweek.org/edweek/school_law/2008/05/supreme_court_declines_to_hear_4.html).

“Indoctrination in Public Schools?” Clarion Project, August 28, 2017, <https://clarionproject.org/pro-islam-indoctrination-public-schools/>.

Janet Levy, "San Diego: Ground Zero for Islamic Indoctrination in American Public Schools," *American Thinker*, May 5, 2017, <http://www.americanthinker.com/articles/2017/05/san-diego-ground-zero-for-islamic-indoctrination-in-american-public-schools.html>.

Todd Starnes, "Students Opposed to LGBT Agenda Shamed in Classroom," FoxNews.com, February, 9, 2015, <http://www.foxnews.com/opinion/2015/02/09/students-opposed-to-lgbt-agenda-shamed-in-classroom/>.

Todd Starnes, "Lawsuit: Girls Exposed to Transgender Twerking & Grinding in Locker Room," FoxNews.com, September 7, 2016, <http://www.foxnews.com/opinion/2016/09/07/lawsuit-girls-exposed-to-transgender-twerking-grinding-in-locker-room.html>.

Todd Starnes, "Lawsuit: Public School Forced My Child to Convert to Islam," FoxNews.com, January 8, 2016, <http://www.foxnews.com/opinion/2016/01/29/lawsuit-public-school-forced-my-child-to-convert-to-islam.html>.

## TALKING POINTS

Teachers, school administrators, school board members, and other government personnel in PreK-12 public education are confronting growing legal complexities regarding the free exercise of religion. The vast number of legal threats, lawsuits, and the lack of consistency in free exercise decisions in federal courts has created a confusing atmosphere for educators. In some instances, school personnel are so fearful of lawsuits that they fail to accommodate, and thus sacrifice, the free exercise rights of their students and teachers. By trying to create a religion-free zone, they chill religious expression and portray a hostility toward religion, something that is forbidden by the United States Supreme Court. On the other hand, those that do accommodate their teachers' and students' rights to express religious views in classroom assignments or at holiday assemblies, for example, may still receive an organization's threat of a lawsuit. Often lost in the equation are the free exercise rights that educators themselves have. Although educators have limited free exercise rights in the classroom, they still retain those rights in certain peer-to-peer and other workplace settings, and nothing impedes those rights once an educator is off campus and not acting as a representative of the school.

## THE ISSUE:

- In practical terms, educators need to know that the State has their back when they have diligently implemented and followed best constitutional practices with regard to religious exercise. Currently, educators cannot count on the State to come to their aid when facing potentially ruinous lawsuits. Even when they win, it can be difficult to recover from the turmoil created by such conflicts.
- Clear legislative direction is needed in PreK-12 education to ensure that educators know the best constitutional practices for protecting free exercise rights without running afoul of establishment clause violations.

**THE PROBLEM:**

- School systems and educators that do their best to honor the religious free exercise rights of students and the religious heritage of our nation often receive threatening letters from organizations that accuse them of unconstitutional Establishment Clause violations. These threats often misrepresent the state of the law, but these tactics can cause school systems to restrict the constitutional freedoms of both their teachers and students.
- On the other hand, some school systems or individual teachers demonstrate a hostility toward religion by using the coercive arm of government to require students to participate in what offends their religious beliefs or to prevent students from expressing religious views or participating in religious activities. By doing so, educators fail to respect that the free exercise of religion "implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). Free exercise also includes the right to abstain from speech and participation in that which offends one's faith as upheld in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In his concurring opinion, Justice Murphy stated that "official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship." *Id.* at 638.
- In any of these situations, there can be a potential minefield of threatened lawsuits. Such situations create expensive disruption in the public education system, and most of these situations, if not all, are totally avoidable. However, local school personnel are often unaware of best constitutional practices due to the intricate case law of the United States Supreme Court and other courts.

**THE SOLUTION: LEGISLATION THAT PROVIDES LEGAL GUIDANCE AND STABILITY, VALUES FREEDOM IN A DIVERSE CULTURE, AND RESPECTS THE PEACEFUL FREE EXERCISE OF RELIGION WITHIN THE CONSTITUTIONAL FRAMEWORK APPROPRIATE TO THE PREK-12 SETTING**

- The act would help relieve the burden on classroom teachers or other school personnel when they receive letters from organizations threatening lawsuits due to alleged violations of Free Exercise or Establishment Clause concerns.
- The act provides considerable incentive for local education personnel to follow best constitutional practices. By doing so, they will greatly increase their prospects for legal support from the state's Attorney General's Office.
- The act provides specific parameters of how religious liberty must be respected in the PreK-12 setting, including by reference to U.S. Department of Education guidelines that school districts are required to follow (and certify compliance with) by federal law. Such legal clarity, distilled from at least 50 years of federal court rulings, will provide the best defense for local school personnel and should help prevent legal harassment from third parties.

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## EXAMPLES OF WHY THIS IS IMPORTANT

The Spurger Independent School District in Texas had planned a cross-dressing day for its students. Because of an alert parent who contacted legal counsel, the school system realized its error and the school system abandoned its plans and avoided potential lawsuits.

<http://www.edweek.org/ew/articles/2004/11/24/13briefs-3.h24.html>

A superintendent at Greenville Independent School District in Texas violated a teacher's parental rights to raise her children according to the dictates of her conscience by making her promotion dependent upon her taking her children out of a religious private school which they attended. In the resulting lawsuit, the superintendent was held personally liable and was required to pay punitive damages.

In the Wellington Independent School District of Texas, teachers sent fliers home with students asking them to bring Valentines for their upcoming Valentine's party, but specifically stated that their Valentines were to be "free of religious content." It was discovered that one teacher had made this constitutional error when drafting the flyer. The administration corrected the flyer to ensure that the school was not expressing religious hostility and reassured students that the school did not ban items with religious content.

Charles County Public Schools in Maryland is facing a lawsuit due to inappropriate instruction in the Muslim faith which took place at La Plata High School. The parents had requested that their child opt-out of the instruction which demeaned her Christian faith, but the principal did not allow the request and told the parents the student "would receive 'zeros' on any incomplete assignments even if the assignments violated the family's religious beliefs and heritage." Furthermore, the school banned the father from being on school property. Due to such hostility toward the family's religious objections to the Islamic lessons, the principal, the vice-principal, and the entire school system must endure the time and costs of defending its actions in court. <http://www.foxnews.com/opinion/2016/01/29/lawsuit-public-school-forced-my-child-to-convert-to-islam.html>.

In another Texas case, the issue of whether the principal and teacher should be personally liable for prohibiting elementary school students from, for example, confiscating pencils with "Jesus Is the Reason for the Season" from "goodie bags" voluntarily provided by a student to fellow students during a non-curricular, "winter break" party was litigated not only in the federal district court but also before a three-member panel of the Fifth Circuit and then before the full Fifth Circuit, which ultimately held (on a closely split vote) that the law was too confused (prior to the ruling by that court) to hold the teachers personally liable, even though they had acted improperly. *Morgan v. Swanson*, 659 F.3d 359 (5<sup>th</sup> Cir. 2011) (*en banc*).

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## Preserving Religious Freedom in School Act

An act to preserve and protect the religious freedom guaranteed by the United States and state Constitutions for students and teachers in the primary and secondary public schools.

### Section 1. Title

This act is entitled the “Preserving Religious Freedom in School Act.”

### Section 2. Findings

- (a) Recently, the United States Supreme Court recognized again that the peaceful free exercise of religion is a fundamental constitutional right. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), Chief Justice Roberts wrote, “A law may not discriminate against ‘some or all religious beliefs.’ . . . Nor may a law regulate or outlaw conduct because it is religiously motivated,” *id.* at 2021, citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 532 (1993).
- (b) Protecting religious freedom from government intrusion is a government interest of the highest order. Federal law requires that federal courts use strict scrutiny, the highest level of judicial review, to ensure the greatest possible protection for free exercise claims. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). State legislation advances this interest by remedying, deterring, and preventing government interference with religious exercise in a way that complements the protections mandated by federal laws and the First Amendment to the Constitution of the United States.
- (c) The freedoms of speech and assembly, as parts of the First Amendment, are intrinsic to the free exercise of religion. The United States Supreme Court has noted with regard to the linkage between freedom of speech and the free exercise of religion, “Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 760 (1995). And with regard to the linkage to freedom of assembly, the Supreme Court has noted that “this Court has more than once recognized . . . the close nexus between the freedoms of speech and assembly.” *NAACP v. Ala.*, 357 U.S. 449, 460 (1958).
- (d) The U.S. Department of Education, pursuant to 20 U.S.C. § 7904, requires state and local educational agencies annually to certify, as a condition to receiving funds, that there is no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools.

### Section 3. Definitions

As used in this act:

- (a) “Discrimination” means the act of denying rights, benefits, equitable treatment, or access to facilities available to others.

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- (b) “Parent” is either or both parents of a student, any guardian of a student, any person in a parental relationship to a student, or any person exercising supervisory authority over a student in place of the parent.
  - (c) “Public K-12 Schools” include charter schools and consist of kindergarten classes; elementary, middle, and high school grades and special classes; virtual instruction programs; workforce education; career centers; adult, part-time, and evening schools, courses, or classes, as authorized by law to be operated under the control of district school boards; and lab schools operated under the control of state universities.
  - (d) “School personnel” means all personnel employed by the public K-12 school whether employed on a regular full-time basis, an hourly basis or otherwise.
  - (e) “Student” means any person enrolled in a public K-12 school in this state.

#### **Section 4. Prohibited discrimination**

- (a) A school district may not discriminate against a student or parent on the basis of a religious viewpoint or religious expression. A school district shall treat a student’s voluntary expression of a religious viewpoint on an otherwise permissible subject in the same manner that the school district treats a student’s voluntary expression of a secular viewpoint.
- (b) A student may express his or her religious beliefs in coursework, artwork, and other written and oral assignments free from discrimination. A student’s homework and classroom assignments shall be evaluated, regardless of their religious content, based on expected academic standards relating to the course curriculum and requirements. A student may not be penalized or rewarded based on the religious content of his or her work if the coursework, artwork, or other written or oral assignments permit a student’s viewpoint to be expressed.
- (c) A student may pray or engage in religious activities or religious expression before, during, and after the school day in the same manner, and to the same extent, that a student may engage in secular activities or expression. A student may organize prayer groups, religious clubs, and other religious gatherings before, during, and after the school day in the same manner and to the same extent that a student is permitted to organize secular activities and groups.
- (d) A school district shall give a religious group access to the same school facilities for assembling as given to secular groups without discrimination based on the religious content of the group’s expression. A group that meets for prayer or other religious speech may advertise or announce meetings in the same manner, and to the same extent, that a secular group may advertise or announce meetings, including school media, the school’s public-address system, the school newspaper, and school bulletin boards.
- (e) A school district may not prevent school personnel from participating in religious activities on school grounds that are initiated by students at reasonable times before or after the school day, if such activities are voluntary and do not conflict with responsibilities or assignments of such personnel.

- (f) Students and school personnel may wear clothing, accessories, and jewelry that display a religious message or symbol in the same manner and to the same extent that secular types of clothing, accessories, and jewelry that display messages or symbols are permitted to be worn.
- (g) A school district shall not prohibit members of athletic teams at any public elementary and secondary school from engaging in voluntary, student-initiated, student-led prayer.
- (h) A school district shall allow a religious group and/or student to distribute religious literature in a public school to the same extent, and under the same circumstances, as a student is permitted to possess or distribute literature on non-religious topics or subjects in such school.
- (i) A school district shall not censor the religious content of any speech of a student invited to speak at a school's commencement ceremony, *provided that* the school district shall, either in writing or orally, state that the school district does not endorse or sponsor any of the commencement speeches.
- (j) A school district shall comply with the federal requirements in Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against an employee on the basis of religion.

#### **Section 5. Severability**

The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part or parts that remain.

#### **Section 6. Effective date**

This act shall go into effect immediately upon its lawful enactment.

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## NOTES

- This model act is similar to legislation passed in 2017 by the Florida Senate (SB 436), the Indiana House of Representatives (HB 1024), and the Kentucky Senate (SB 17).
- Since the religious expression of a high school coach has been in the news recently (the well-publicized case of Coach Joe Kennedy, who prayed on the 50-yard line after each game and recently lost in the U.S. Court of Appeals for the Ninth Circuit his claim for his job back at Bremerton High School in Washington State), further information on the particular responsibilities of teachers and coaches may be beneficial. The following information is provided by the Virginia Board of Education and the Virginia Office of the Attorney General, which were directed by the Commonwealth (Va. Code § 22.1-280.3, subsequently renumbered § 22.1-203.2) to hold public hearings and draft guidelines for public school districts to consider and adopt as policies:

As public employees, and agents of the public schools, the speech rights of teachers are not absolute and must be balanced against the school's legitimate right and duty to maintain order, perform its obligations to the population served, and avoid government sponsorship of religion. Teachers must be cognizant of their great influence in shaping student values and their overarching duty not to use their position to indoctrinate students into their religious beliefs or lack thereof.

As a general matter, neither the Free Exercise nor Free Speech clauses provide teachers an unqualified right to engage in religious expression with students at school. Because teachers play a central role in setting values for our children, they must also bear responsibility for their actions which impermissibly create a danger of establishing religion in the public schools, including misapprehension by pupils that the public schools sponsor the teacher's viewpoint. Teachers should not lead students in devotional activities during class or school-sponsored activity, or encourage students to participate with the teacher in religious activity before or after school. A teacher who wishes to participate in voluntary student, religious activity during free time should be careful that his or her participation is not misinterpreted by students as official sponsorship of religious belief. The circumstances of each case, including the maturity of the students and the context and duration of the event must be professionally considered.

A teacher may respond honestly, in a noncoercive, and nonindoctrinating manner, to student-initiated inquiries about religion, just as a teacher may respond in an appropriate manner to student inquiries about political, philosophical or other secular interests. Balance, degree and fairness are important considerations, and the specific question may best be answered by referring the student to his or her parents.

Teachers should be able to meet with other teachers for private religious speech, including prayer, meditation and reading of religious materials, during their free time, such as immediately before or after class or during breaks or lunch. As professionals, teachers need to be careful however that their actions are not misinterpreted by students.

Virginia State Board of Education, *Guidelines Concerning Religious Activity in the Public Schools 6-7* (1995), available at [http://www.doe.virginia.gov/boe/guidance/support/religious\\_activity.pdf](http://www.doe.virginia.gov/boe/guidance/support/religious_activity.pdf); see also

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First Amendment Center, *A Teacher's Guide to Religion in the Public Schools* (2008), available at <http://www.religiousfreedomcenter.org/wpcontent/uploads/2014/08/teachersguide.pdf>.

## TALKING POINTS

- As the Supreme Court has repeatedly said, students and teachers do not shed their constitutional rights at the schoolhouse gate. *E.g., Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
- The United States Supreme Court has made clear on many occasions that the government cannot advance or inhibit religion. *E.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971). That is, the government must be neutral between religious and secular expression, activities, and organizations. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).
- One of the greatest forums for contact between government and its citizens is public schools. More than half of the formative years for about 90% of our nation's students is spent under the instruction and control of public school personnel, who may inadvertently promote or hinder religious expression, thereby violating the constitutional rights of students.
- The act is modeled after legislation passed by the Florida, Kentucky, and Indiana legislatures in 2017. It is designed to protect the constitutional rights of students who express a religious viewpoint in class or homework, want to pray, or want to start a Bible club or other religious group.
- This act, however, is not designed to give the religious students an *advantage*; rather, it permits religious expression, prayer, or religious clubs *only* to the extent secular viewpoints or secular, non-curricular clubs are allowed consistent with appropriate time, place, and manner restrictions. If the public high school chess club, debate team, or student activities council use a classroom after school and can announce their meetings, the same courtesy must be given to religious student groups. The same equal treatment is afforded religious accessories and jewelry.
- This act also considers the rights of school personnel who may also be religious and who may want to participate with the students in religious activities. This participation must be voluntary, and it must not interfere with other assigned duties. With these conditions, the school personnel (teachers or staff) may participate (and sponsor if such sponsorship is a necessary condition of the club), but may not lead.
- The act deals with many situations common in schools (homework that includes a religious viewpoint, a student wearing a cross on a necklace, and prayer) that have led to litigation in the past. The act does not permit persons in authority (such as teachers and administrators) to proselytize, and it permits religious conduct and expression only to the extent that secular conduct and expression is permitted.
- This act has the salutary purpose of avoidance of the expense and disruption of litigation by clarifying rights and obligations in this sometimes contentious area.

- Federal law requires certification of compliance with Department of Education guidance assuring the religious freedom of students and staff in the public schools. The act provides assurance that the federal funding conditioned upon that compliance continues.

## Category #4 – Talking Points to Counter Anti-Religious Freedom Legislation

### Countering Adding “Sexual Orientation” as a Civil Rights Category

The category of “sexual orientation” should not be included in the legislation. It is not a category uniformly recognized throughout the country, and it is subject to misinterpretation and abuse. See Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008) (“The meaning of the phrase ‘sexual orientation’ is complex and not universally agreed upon.”)

Including “sexual orientation” as a protected civil rights category has these consequences:

- It suggests an inability to distinguish between the personhood of an individual and that individual’s lifestyle or sexual behavior (which is something quite apart from personhood). It is appropriate to protect individuals against discrimination based on their “personhood” (as is done, for example, with safeguards against discrimination based on race and national origin). It is not appropriate to elevate to protected status a requirement that someone’s feelings not be hurt through disapproval of and refusal to support that person’s particular behavior that is morally repugnant to another individual.
- It may lead to efforts that violate an individual’s First Amendment speech rights by forcing that individual to communicate a message contrary to his or her religious beliefs. There are many examples where, under the guise of non-discrimination, individuals and organizations have been harassed and sanctioned for refusing to participate in speech or behavior that they found morally objectionable.
- It may lead to efforts to violate the First Amendment right to assemble. Or, stated in the reverse, it may lead to efforts to force individuals to assemble as part of an activity to which they object on moral or religious grounds.
- The Supreme Court, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), stated this well-known and long-honored principle of constitutional law:

One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . . [F]reedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

. . . .

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

*Id.* at 638-39, 641-42.

### Countering Adding “Gender Identity” as a Civil Rights Category

The term “gender identity” has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Because of its subjectivity, the term can be used by an individual in a temporally inconsistent manner, and legislation based on its use is vague and violates due process.

“The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. ‘Gender identity’ refers to one’s inner sense of being female, male, or some other gender. . . . Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient . . . , [and] individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.” *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 103-04 (2006). See also *DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*.) An “identity” subject to changeable, subjective “individuality” untethered to time or objective biology is, by definition, subject to abuse.

The movement for official acknowledgement that taking transgender actions is “normal,” and that such inclinations should even be encouraged, contrasts with social science studies documenting the dramatic, long-term deleterious effects on those who have elected to have transgender medical procedures performed. For example, Dr. Paul McHugh, former Chief of Psychiatry at Johns Hopkins Hospital, noted that gender identity confusion is a mental disorder that deserves understanding, treatment, and prevention and that the suicide rate among those who had “reassignment” surgery is 20 times higher than that among non-transgender people. Dr. McHugh also noted studies show that 70% - 80% of children who express transgender feelings spontaneously lose such feelings over time. P. McHugh, “Transgender Surgery Isn’t the Solution,” 6/12/14 *Wall St. J.*, available at <http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>; see also Cal. Health Interview Study, reported in Center for American Progress, “How to Close the LGBT Health Disparities Gap,” [www.americanprogress.org/issues/lgbt/report/2009/12/21/7048](http://www.americanprogress.org/issues/lgbt/report/2009/12/21/7048) (“[t]ransgender adults are much more likely to have suicide ideation” (2% heterosexual; 5% gay; 50% transgender).

By including this term, the proposed legislation helps perpetuate a pretense that ignores physical reality and social science results, unfairly and improperly accusing those who do not support transvestitism and gender transfers of “harassment” and “discrimination.”

### Countering Conversion Therapy Prohibitions

A number of states (see links below) have recently passed bills that prohibit conversion therapy practices. This legislation is premised, at least in part, on the policy assumption that conversion therapy is invariably harmful and that the only help that can be offered to individuals suffering from gender dysphoria is that which concedes the condition and seeks to accommodate efforts by the individual to transform socially and physically. This policy assumption ignores data demonstrating the short- and long-term harmfulness of gender conversion to the transgendered individual and to society.

At least the following states have recently enacted prohibitions on conversion therapy:

- Delaware— <http://legis.delaware.gov/BillDetail?legislationId=25678> (click on relevant pdf file)
- Hawaii— <https://www.capitol.hawaii.gov/session2018/bills/GM1113.PDF>
- Maryland— <http://mgaleg.maryland.gov/2018RS/bills/sb/sb1028T.pdf>
- Nevada— [https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB201\\_EN.pdf](https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB201_EN.pdf)
- New Hampshire— [http://gencourt.state.nh.us/bill\\_status/billText.aspx?sy=2018&id=160&txtFormat=pdf&v=current](http://gencourt.state.nh.us/bill_status/billText.aspx?sy=2018&id=160&txtFormat=pdf&v=current)
- Washington— <http://lawfilesexternal.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/5722.PL.pdf>

A similar effort in Maine was vetoed by the Governor, and the legislature was unable to override the veto. The link to the vetoed bill is:

<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0640&item=2&snum=128> , and the governor's veto message may be downloaded from here:

<https://www.maine.gov/governor/lepage/official-documents/128th-legislature-bills-vetoed.html>

Among the points the governor made in his veto message were concerns about the threat the legislation posed to personal religious freedom.

In California, AB 2943 would have amended “the California Consumer Legal Remedies Act—a consumer law that outlaws unfair and deceptive practices—by adding so-called ‘sexual orientation change efforts’ to a list of banned practices. It would [have] in effect ban[ned] all practices that the State deems attempting to change one’s sexual orientation—including practices as indirect as the publishing of certain material.” (<https://www.heritage.org/civil-society/commentary/anti-first-amendment-bill-poses-imminent-threat-california> ) The sponsor of the bill, however, recently withdrew it so that more work could be done to examine its consequences and whether it was appropriately crafted to accomplish the purposes intended. (<https://californiafamily.org/2018/thank-you-assemblyman-low-for-pulling-ab-2943-and-listening-to-our-concerns/>)

Proposed and enacted legislation, relying on an alleged consensus of “scientific” opinion about homosexual and transgender status and “conversion” therapies, seeks to label as illegal any attempt to suggest or persuade that homosexual and transgender inclinations are undesirable or capable of change. It is based on the assumption that such inclinations and behaviors, when compared to heterosexual ones, are equally advantageous and provide equally healthy outcomes to the individuals involved.

None of these assumptions is accurate. As set out below, (a) actions taken based on homosexual and transgender inclinations have serious, documented physical and mental health consequences for the

individuals; (b) such consequences also have serious monetary consequences in health care costs that are borne by all citizens; (c) social science studies using defensible methodologies do not support that either homosexuality or transgender status is “immutable”; and (d) the conclusions of organizations on which the assumptions of the enacted and proposed legislation are based are not founded on “settled science.”

Moreover, such legislation seeks to stifle speech based on its viewpoint, in violation of the free speech guarantees of the federal and state constitutions, and violates other constitutional provisions as well. As one commenter has observed: “The larger issue, however, is not about the value of reparative therapy that should be determined on the basis of its clinical effectiveness but about whether Christian counselors will soon be banned from helping clients overcome unwanted same-sex attraction. While the effectiveness of such treatments is debatable, there is clear evidence that homosexual orientation is sometimes mutable and that those struggling with same-sex desires can have healthy heterosexual relationships.” (<https://www.thegospelcoalition.org/article/the-clash-between-christian-therapy-and-the-normalization-of-homosexuality/>) The same commenter goes on to note: “But such evidence is discounted by groups like the American Psychological Association (APA), an organization that has a record of making embarrassing claims about homosexuality that have no basis in science. Despite putting politics before science (or perhaps because of that reason), the APA has been able to influence both the public and lawmakers that homosexuality is an immutable trait and that “being gay is just as healthy as being straight.”

### **Public Policy and Social Science Findings and Statistics**

Legislative efforts to prohibit conversion therapy and related efforts are not in the best interests of the state or its residents. Nor are efforts to add “sexual orientation” and “gender identity” to the civil rights acts as prohibited categories of discrimination. Instead, public policy should favor sexual intercourse between only a married man and woman. This is supported by ample social science and health care statistics, while many claims unsupported by valid studies are pushed by those advancing such efforts.

1. Studies do not prove that either homosexuality or transgender inclinations are unchangeable, and laws should not “lock in” one “scientific” view on this issue like earlier generations did when they believed that the sun revolves around the earth and not *vice versa*.
  - Available scientific evidence does not support the assertion that gender identity is an innate, fixed property of human beings that is independent of biological sex. [See references below, item A.]
  - Most children who experience cross-gender identification do not continue to do so into adolescence or adulthood. [B]
  - The science concerning same-sex attraction and behavior is not settled. [C, D]
2. The statements of the American Psychiatric Association and other organizations to the effect that “science” has reached a consensus on the immutability of homosexual and transgender inclinations, their equivalence in terms of psychological health to heterosexually oriented individuals, and that “conversion therapy” is harmful are founded on methodologically flawed studies and are contrary to documented facts.

- Studies do not support claims that homosexual and transgender inclinations are immutable. [E]
  - Studies do show that homosexual and transgender inclinations are affected in part by environmental factors. [F]
  - Studies do show that homosexual and transgender inclinations are correlated to personal and familial trauma. [G]
  - Studies do show that homosexual and transgender inclinations are changeable and that a significant number of those who change such inclinations are helped, not harmed. [H]
3. The Centers for Disease Control and other organizations have documented the serious physical and mental health consequences of practicing homosexual and transgender individuals, consequences that have serious monetary consequences in health care costs that are borne by all citizens.
- The United States Centers for Disease Control and Prevention (“CDC”) have published comprehensive surveys on health issues related to same-sex intimate relationships, which document a higher incidence of serious disease among the population that is involved in such relationships, including (see bracketed “Fact Sheet” references for supporting detail):
    - Human immunodeficiency virus (HIV) and the auto-immunodeficiency syndrome (AIDS) [I];
    - Syphilis [J];
    - Human papilloma virus [K];
    - Hepatitis [L];
    - Cancer [M]; and
    - Amebiasis [N].
  - The health care costs for HIV/AIDS and other illnesses that have been statistically proven to be related to intimate sexual relations other than by a man and a woman in a monogamous relationship are highly significant, estimated to be in the billions of dollars annually in our nation. These costs are borne by states directly, by state residents indirectly through health insurance premiums and taxes, by private financial assistance organizations of the states, and by the patients residing in the states through out-of-pocket expenses. [O]
  - Members of the transgender population are at significantly higher risk of a variety of mental health problems compared to members of the non-transgender population. [P]
  - There is only limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for transgender populations. [Q]
  - Evidence from early studies indicates that transgendered female (biological males living as females) youth are at greater risk of being engaged in sex work and of exposure to sexually transmitted diseases. [R]
  - The rate of suicide ideation is dramatically higher in transgender teens. A new study from the American Academy of Pediatrics shows an alarmingly high rate of suicide attempts among transgender teens, particularly transgender boys. [S]
4. Legislation that seeks to prohibit conversion therapy violates freedom of speech and freedom of religion guarantees of the federal and states’ constitutions.

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- The term “gender identity” has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Because of its subjectivity, the term can be used by an individual in a temporally inconsistent manner, and legislation based on its use is vague and violates due process. [T]
  - Such legislation would be an impermissible government regulation of speech based upon its content or viewpoint, as it prohibits and penalizes speech only on one side of these issues. [U]
  - Such legislation would unconstitutionally infringe on the free exercise of religion, as some who wish to be assisted in resisting homosexual and transgender inclinations, and some who wish to counsel such individuals or convince them that they should do so, act based on religious principles. [V]
  - Such legislation would unconstitutionally restrict the access of individuals to information about how to address same-sex attractions and gender identity. [W]
5. Such legislation is both unnecessary and not in the best interests of a state or its residents.
- Although state-specific, there likely are protections under a state’s consumer protection laws that are broad, reaching any transaction that involves a monetary transaction, such as one-on-one counseling and therapy, written materials addressing these issues, and conferences and public events with paid attendance. Such laws likely provide for injunctive, compensatory, and punitive relief, together with attorney’s fees. [X]
  - A state has these compelling interests:
    - Maximizing the physical and mental health of its inhabitants;
    - Minimizing the costs of health care to its inhabitants and to the state itself for preventable health issues;
    - Preventing and minimizing diseases that are related to intimate sexual relations;
    - Informing its inhabitants of the health and other dangers relating to intimate sexual relations outside of a marriage between one man and one woman;
    - Confirming the personhood of all individuals in this state and that such personhood is not dependent on their sexual preferences and conduct;
    - Not stifling legitimate scientific inquiry;
    - Protecting the free speech rights of its residents and not itself engaging in viewpoint discrimination; and
    - Protecting the freedom of religion and due process right of its residents and not legislating in violation of those rights.
  - In furtherance of these compelling interests, a state should have these goals:
    - Encouraging behavior that maximizes the probability that its citizens will enjoy good physical and mental health;
    - Promoting public health and minimizing preventable public health problems;
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- Through behavior that promotes the good health of its citizenry, ensuring that the expenditure of its limited public funds for public health purposes targets those health issues that are not easily preventable;
- Avoiding legislation that violates free speech of its citizens and is viewpoint discriminatory; and
- Avoiding legislation that violates freedom of religion guarantees of its inhabitants.

## **REFERENCES**

**A:** Professors Lawrence S. Mayer and Paul R. McHugh surveyed the social science studies published through 2015 concerning sexuality, mental health outcomes, and social stress. In their report, they noted the following:

- The hypothesis that gender identity is an innate, fixed property of human beings that is independent of biological sex—that a person might be “a man trapped in a woman’s body” or “a woman trapped in a man’s body”—is not supported by scientific evidence.
- Studies comparing the brain structures of transgender and non-transgender individuals have demonstrated weak correlations between brain structure and cross-gender identification. These correlations do not provide any evidence for a neurobiological basis for cross-gender identification.

Mayer & McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 8 (Fall 2016), [http://www.thenewatlantis.com/docLib/20160819\\_TNA50SexualityandGender.pdf](http://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf).

**B:** In their survey of studies, cited above, Professors Mayer and McHugh noted the following:

- Children are a special case when addressing transgender issues. Only a minority of children who experience cross-gender identification will continue to do so into adolescence or adulthood; and
- There is little scientific evidence for the therapeutic value of interventions that delay puberty or modify the secondary sex characteristics of adolescents, although some children may have improved psychological well-being if they are encouraged and supported in their cross-gender identification. There is no evidence that all children who express gender-atypical thoughts or behavior should be encouraged to become transgender.

In a *Wall Street Journal* opinion column by Dr. Paul R. McHugh, he noted further, “When children who reported transgender feelings were tracked without medical or surgical treatment at both Vanderbilt University and London’s Portman Clinic, 70%-80% of them spontaneously lost those feelings. Some 25% did have persisting feelings; what differentiates those individuals remains to be discerned.” (Originally published June 12, 2014, and updated on May 13, 2016, <https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>.)

**C:** The reasons for same-sex attraction are not well understood, although the deleterious consequences associated with acting on such attraction have been extensively documented.

- Professors Lawrence C. Mayer and Paul R. McHugh surveyed the social science studies published through 2015 concerning sexual orientation and summarized the results of those studies as follows:

- The understanding of sexual orientation as an innate, biologically fixed property of human beings—the idea that people are “born that way”—is not supported by scientific evidence.
- Although there is evidence that biological factors such as genes and hormones are associated with sexual behaviors and attractions, there are no compelling causal biological explanations for human sexual orientation. Although minor differences in the brain structures and brain activity between homosexual and heterosexual individuals have been identified by researchers, such neurobiological findings do not demonstrate whether these differences are innate or are the result of environmental and psychological factors.
- Longitudinal studies of adolescents suggest that sexual orientation may be quite fluid over the life course for some people, with one study estimating that as many as 80% of male adolescents who report same-sex attractions no longer do so as adults (although the extent to which this figure reflects actual changes in same-sex attractions and not just artifacts of the survey process has been contested by some researchers).
- Compared to heterosexuals, non-heterosexuals are about two to three times as likely to have experienced childhood sexual abuse. Mayer & McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 7 (Fall 2016).

Professors Meyer and McHugh surveyed the social science studies published through 2015 concerning sexuality, mental health outcomes, and social stress and summarized the results of those studies as follows:

- Compared to the general population, non-heterosexual subpopulations are at an elevated risk for a variety of adverse health and mental health outcomes.
- Members of the non-heterosexual population are estimated to have about 1.5 times higher risk of experiencing anxiety disorders than members of the heterosexual population, as well as roughly double the risk of depression, 1.5 times the risk of substance abuse, and nearly 2.5 times the risk of suicide.
- Members of the transgender population are also at higher risk of a variety of mental health problems compared to members of the non-transgender population. Especially alarming, the rate of lifetime suicide attempts across all ages of transgender individuals is estimated at 41%, compared to under 5% in the overall U.S. population.
- There is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for non-heterosexual and transgender populations. More high-quality longitudinal studies are necessary for the “social stress model” to be a useful tool for understanding public health concerns. Mayer & McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 8 (Fall 2016).

**D:** “The American College of Pediatricians urges educators and legislators to reject all policies that condition children to accept as normal a life of chemical and surgical impersonation of the opposite sex. Facts – not ideology – determine reality.” “Gender Ideology Harms Children,” American College of Pediatricians, March 2016, updated September 2017, <https://www.acped.org/the-college-speaks/position-statements/gender-ideology-harms-children>

The ACP makes these points:

- **Human sexuality is an objective biological binary trait: “XY” and “XX” are genetic markers of male and female, respectively – not genetic markers of a disorder.**
- **No one is born with a gender. Everyone is born with a biological sex. Gender (an awareness and sense of oneself as male or female) is a sociological and psychological concept; not an objective biological one.** No one is born with an awareness of themselves as male or female; this awareness develops over time and, like all developmental processes, may be derailed by a child’s subjective perceptions, relationships, and adverse experiences from infancy forward. People who identify as “feeling like the opposite sex” or “somewhere in between” do not comprise a third sex. They remain biological men or biological women.
- **A person’s belief that he or she is something they are not is, at best, a sign of confused thinking.** When an otherwise healthy biological boy believes he is a girl, or an otherwise healthy biological girl believes she is a boy, an objective psychological problem exists that lies in the mind not the body, and it should be treated as such. These children suffer from gender dysphoria. Gender dysphoria (GD), formerly listed as Gender Identity Disorder (GID), is a recognized mental disorder in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-5). The psychodynamic and social learning theories of GD/GID have never been disproved. [See additional detail below.]
- **Puberty is not a disease and puberty-blocking hormones can be dangerous.** Reversible or not, puberty- blocking hormones induce a state of disease – the absence of puberty – and inhibit growth and fertility in a previously biologically healthy child.
- **According to the DSM-5, as many as 98% of gender confused boys and 88% of gender confused girls eventually accept their biological sex after naturally passing through puberty.**
- **Pre-pubertal children diagnosed with gender dysphoria may be given puberty blockers as young as eleven, and will require cross-sex hormones in later adolescence to continue impersonating the opposite sex. These children will never be able to conceive any genetically related children even via artificial reproductive technology. In addition, cross-sex hormones (testosterone and estrogen) are associated with dangerous health risks including but not limited to cardiac disease, high blood pressure, blood clots, stroke, diabetes, and cancer.**
- **Rates of suicide are nearly twenty times greater among adults who use cross-sex hormones and undergo sex reassignment surgery, even in Sweden which is among the most LGBTQ – affirming countries.** What compassionate and reasonable person would condemn young children to this fate knowing that after puberty as many as 88% of girls and 98% of boys will eventually accept reality and achieve a state of mental and physical health?
- **Conditioning children into believing a lifetime of chemical and surgical impersonation of the opposite sex is normal and healthful is child abuse.** Endorsing gender discordance as normal via public education and legal policies will confuse children and parents, leading more children to present to “gender clinics” where they will be given puberty-blocking drugs. This, in turn, virtually ensures they will “choose” a lifetime of carcinogenic and otherwise toxic cross-sex hormones, and likely consider unnecessary surgical mutilation of their healthy body parts as young adults.

**Regarding Point 3, which indicates that gender dysphoria is a product of confused thinking:**

- The American Psychiatric Association (APA) is the author of the Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5). The APA states that those distressed and impaired by their GD meet the definition of a disorder. The College is unaware of any medical literature that documents a gender dysphoric child seeking puberty blocking hormones who is not significantly distressed by the thought of passing through the normal and healthful process of puberty.
- On page 455 of the DSM-5 under “Gender Dysphoria without a disorder of sex development” it states: “Rates of persistence of gender dysphoria from childhood into adolescence or adulthood vary. In natal males, persistence has ranged from 2.2% to 30%. In natal females, persistence has ranged from 12% to 50%.” Simple math allows one to calculate that for natal boys: resolution occurs in **as many as**  $100\% - 2.2\% = 97.8\%$  (approx. 98% of gender-confused boys). Similarly, for natal girls: resolution occurs in **as many as**  $100\% - 12\% = 88\%$  gender-confused girls.

### The ACP concludes with this “bottom line”:

Our opponents advocate a new scientifically baseless standard of care for children with a psychological condition (GD) that would otherwise resolve after puberty for the vast majority of patients concerned. Specifically, they advise: affirmation of children’s thoughts which are contrary to physical reality; the chemical castration of these children prior to puberty with GnRH agonists (puberty blockers which cause infertility, stunted growth, low bone density, and an unknown impact upon their brain development), and, finally, the permanent sterilization of these children prior to age 18 via cross-sex hormones. There is an obvious self-fulfilling nature to encouraging young GD children to impersonate the opposite sex and then institute pubertal suppression. If a boy who questions whether or not he is a boy (who is meant to grow into a man) is treated as a girl, then has his natural pubertal progression to manhood suppressed, have we not set in motion an inevitable outcome? All of his same sex peers develop into young men, his opposite sex friends develop into young women, but he remains a pre-pubertal boy. He will be left psychosocially isolated and alone. He will be left with the psychological impression that something is wrong. He will be less able to identify with his same sex peers and being male, and thus be more likely to self identify as “non-male” or female. Moreover, neuroscience reveals that the pre-frontal cortex of the brain which is responsible for judgment and risk assessment is not mature until the mid-twenties. Never has it been more scientifically clear that children and adolescents are incapable of making informed decisions regarding permanent, irreversible and life-altering medical interventions. For this reason, the College maintains it is abusive to promote this ideology, first and foremost for the well-being of the gender dysphoric children themselves, and secondly, for all of their non-gender-discordant peers, many of whom will subsequently question their own gender identity, and face violations of their right to bodily privacy and safety. (emphasis added)

E: Dr. Stanton L. Jones, in reviewing the claims of the American Psychological Association in contrast to applicable studies, found as follows, confirming the later findings of Drs. Mayer and McHugh:

- “Using a more representative sample from the Australian Twin Registry, Bailey in 2000 saw the concordance for identical male twins fall from 52 to a mere 20 percent, and the matching for homosexual orientation between each pair of identical male twins fell to a mere 3 out of 27 pairs (11.1 percent). The findings of Bailey’s new study failed to reach statistical significance. The ballyhooed genetic effect had shrunk considerably, a fact that failed, of course, to capture any media attention and is often left out of the textbook treatments of the subject. In 2010, an

impressive and much larger study utilizing the Swedish Twin Registry produced almost identical results: Among the 71 pairs of identical male twins of whom at least one twin was gay, in only seven cases (9.8 percent) was the second twin also gay, yet another statistically insignificant result.” Stanton L. Jones, *Same-Sex Science: The social sciences cannot settle the moral status of homosexuality*, First Things (Feb. 2012), <https://www.firstthings.com/article/2012/02/same-sex-science>.

Dr. Jones also confirmed, similarly to Drs. Mayer and McHugh, that the state of understanding in this area is far from settled and requires further, careful study:

- “In contrast to the hubris of those prone to making emphatic pronouncements, what we do not yet know about the causation of sexual orientation dwarfs the bit that we are beginning to know. And the fact that causation is indubitably a complex and mysterious by-product of the interaction of biological and psychological variables confounds the assertion that sexual orientation is just like skin color, determined at birth or even conception. And contrary to the suggestions of some, the involvement of some biological influence does not prove that change in sexual orientation is impossible. One of our foremost behavior genetics experts, Thomas Bouchard, has argued forcefully that ‘one of the most unfortunate misinterpretations of the heritability coefficient is that it provides an index of trait malleability (i.e., the higher the heritability the less modifiable the trait is through environmental intervention).’” Stanton L. Jones, *Same-Sex Science: The social sciences cannot settle the moral status of homosexuality*, First Things (Feb. 2012), <https://www.firstthings.com/article/2012/02/same-sex-science>.

**F:** Dr. Jones, again confirming the survey of studies by Drs. Mayer and McHugh, reported as follows:

- “Recent studies show that familial, cultural, and other environmental factors contribute to same-sex attraction. Broken families, absent fathers, older mothers, and being born and living in urban settings all are associated with homosexual experience or attraction. Even that most despised of hypothesized causal contributors, childhood sexual abuse, has recently received significant empirical validation as a partial contributor from a sophisticated thirty-year longitudinal study published in the *Archives of Sexual Behavior*. Of course, these variables at most partially determine later homosexual experience, and most children who experienced any or all of these still grow up heterosexual, but the effects are nonetheless real.” Stanton L. Jones, *Same-Sex Science: The social sciences cannot settle the moral status of homosexuality*, First Things (Feb. 2012), <https://www.firstthings.com/article/2012/02/same-sex-science>.

**G:** Dr. Jones with specific reference to the APA’s SOCE task force report and other claims found as follows:

- “The 2009 APA task force report on Sexual Orientation Change Efforts (SOCE), *Appropriate Therapeutic Responses to Sexual Orientation*, presents over and over as established ‘scientific fact’ that ‘no empirical studies or peer-reviewed research supports theories attributing same-sex sexual orientation to family dysfunction or trauma.’ Neuroscientist Simon LeVay, author of a major book on the science of same-sex attraction, in considering environmental and psychological factors influencing sexual orientation concludes that ‘there is no actual evidence to support any of those ideas.’ There are, in fact, many such studies and a lot of actual evidence.” Stanton L. Jones, *Same-Sex Science: The social sciences cannot settle the moral status of homosexuality*, First Things (Feb. 2012), available at <https://www.firstthings.com/article/2012/02/same-sex-science>.

- “[I]n 1986, in its amicus curiae brief for the Supreme Court case *Bowers v. Hardwick*, the American Psychological Association (APA) stated, erroneously, that ‘extensive psychological research conducted over almost three decades has conclusively established that homosexuality is not related to psychological adjustment or maladjustment.’ Today, twenty-five years later, the association’s website still declares, after decades of research to the contrary, that ‘being gay is just as healthy as being straight.’

“Evelyn Hooker, in her 1957 study [on which the APA relied], was careful to reject only the claim that homosexuality is always pathological. She never made the logically distinct assertion that homosexual persons on average are just as psychologically healthy as heterosexuals. It is well that she did not, because the consistent findings of the best, most representative research suggest the contrary, despite a few scattered compatible findings from smaller studies of less representative samples. One of the most exhaustive studies ever conducted, published in 2001 in the *American Journal of Public Health* and directed by researchers from Harvard Medical School, concludes that ‘homosexual orientation . . . is associated with a general elevation of risk for anxiety, mood, and substance-use disorders and for suicidal thoughts and plans.’ Other and more recent studies have found similar correlations, including studies from the Netherlands, one of the most gay-affirming social contexts in the world. Depression and substance abuse are found to be on average 20 to 30 percent more prevalent among homosexual persons. Teens manifesting same-sex attraction report suicidal thoughts and attempts at double to triple the rate of other teens. Similar indicators of diminished physical health emerge in this literature.” Stanton L. Jones, *Same-Sex Science: The social sciences cannot settle the moral status of homosexuality*, First Things (Feb. 2012), available at <https://www.firstthings.com/article/2012/02/same-sex-science>.

The CDC reported on the largest study of high-school students in the United States undertaken to date as follows: “This pattern [of a higher incidence among minority sex students—self-identified LGB students having only same-sex sexual encounters] also was evident across the six sexual risk behaviors. [These behaviors are ‘related to unintended pregnancy and sexually transmitted infections (STIs), including HIV infection.’] The prevalence of five of these behaviors was higher among gay, lesbian, and bisexual students than heterosexual students and the prevalence of four was higher among students who had sexual contact with only the same sex or with both sexes than students who had sexual contact with only the opposite sex.” <https://www.cdc.gov/mmwr/volumes/65/ss/ss6509a1.htm>.

**H:** With respect to the criticisms of the APA concerning “conversion therapy,” Dr. Jones reported as follows:

- “Such criticism took its most comprehensive form in the report of the 2009 APA task force studying SOCE (sexual-orientation change efforts). These scholars set extraordinary standards of methodological rigor for what they regarded as a reasonable scientific study of the possibility of sexual-orientation change, a move that resulted in the classification of only six studies out of dozens as meriting close examination. These studies were, in turn, dismissed for a variety of reasons, leaving the panel with no credible findings, by their standards, documenting the efficacy of SOCE. After dismissing SOCE for its lack of empirical validation, the panel then recommended gay-affirming therapy while *explicitly* acknowledging that it lacked the very type of empirical validation required of SOCE.

“In the absence of evidence, it would be proper scientific procedure to acknowledge one’s ignorance. The members of the APA task force claim that their review has established that ‘enduring

change to an individual's sexual orientation is uncommon" and "that it is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex sexual attractions through SOCE.' But even more-forceful claims have been made. The Public Affairs website of the APA for many years stated, 'Can therapy change sexual orientation? No,' and insisted that homosexuality 'is not changeable.' But has science proven this? Not at all; rather, skeptical reviewers have dismissed evidence of the possibility of change for some on the basis of such studies being methodologically inadequate by post hoc and artificially stringent standards. . . .

"Is sexual orientation immutable? With Mark Yarhouse of Regent University, I recently studied people seeking to change their sexual orientation. We assessed the sexual orientations and psychological distress levels of 98 individuals (72 men, 26 women) trying to change their sexual orientation through ministries organized under Exodus International, beginning early in the process and following them over six to seven years with five additional, independent assessments. Our original round of findings was published in a book titled *Ex-Gays?*; the latest round, in the *Journal of Sex and Marital Therapy*.

"Of the 61 subjects who completed the study, 23 percent reported success in the form of 'conversion' to heterosexual orientation and functioning, while 30 percent reported they were able to live chastely and had disidentified themselves from homosexual orientation. On the other hand, 20 percent reported giving up and fully embracing homosexual identity, and the remaining 27 percent continued the process of attempted change with limited and unsatisfactory success. On average, statistically significant decreases in homosexual orientation were reported across the entire sample, while a smaller but still significant increase of heterosexual attraction was reported. The attempt to change orientation was not found to lead to increases in psychological distress on average; indeed, the study found several small significant improvements in psychological distress associated with the interventions. And lest we fall prey to the same mistakes we have been criticizing in others, we have said repeatedly that because our sample was not demonstrably representative of those seeking change among all religious homosexuals, these are likely optimistic outcome estimates."

Stanton L. Jones, *Same-Sex Science: The social sciences cannot settle the moral status of homosexuality*, First Things (Feb. 2012), available at <https://www.firstthings.com/article/2012/02/same-sex-science>.

I: HIV infection and the rate of infection are most prevalent among men who have intimate sexual relations with men (MSM).

- "Most gay and bisexual men acquire HIV through having anal sex without condoms or medicines to prevent or treat HIV. Anal sex is the riskiest type of sex for getting or transmitting HIV." CDC, "HIV Among Gay and Bisexual Men," [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html) (last updated 2/27/18)
- "In 2014[,] gay and bisexual men made up an estimated 2% of the U.S. population, but accounted for 70% of new HIV infections." In 2015, "[g]ay and bisexual men accounted for 82% (26,376) of new HIV diagnoses among all males aged 13 and older and 67% of the total new diagnoses in the United States." CDC, "CDC Fact Sheet: HIV Among Gay and Bisexual Men," [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html) (September 2017)
- "Gay, bisexual, and other men who have sex with men (MSM) represent approximately 2% of the United States population, yet are the population most severely affected by HIV. In 2010, young gay

and bisexual men (aged 13-24 years) accounted for 72% of new HIV infections among all persons aged 13 to 24, and 30% of new infections among all gay and bisexual men. At the end of 2011, an estimated 500,022 (57%) persons living with an HIV diagnosis in the United States were gay and bisexual men, or gay and bisexual men who also inject drugs.” CDC, “HIV Among Gay and Bisexual Men,” [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html).

- In 2014, “there were 6,110 deaths among gay and bisexual men living with diagnosed HIV infection.” <https://www.cdc.gov/hiv/group/msm/index.html>
- In 2015, “[g]ay and bisexual men accounted for 55% (10,047) of people who received an AIDS diagnosis.” <https://www.cdc.gov/hiv/group/msm/index.html>

**J:** Syphilis is increasing, especially among the gay and bisexual community.

- “In 2014, gay, bisexual, and other men who have sex with men accounted for 83% of primary and secondary syphilis cases where sex of sex partners was known in the United States.” CDC, “Sexually Transmitted Diseases,” [www.cdc.gov/msmhealth/std.htm](http://www.cdc.gov/msmhealth/std.htm).
- “Once nearly eliminated in the U.S., syphilis is increasing, especially among gay, bisexual, and other men who have sex with men (MSM).” CDC, “CDC Fact Sheet: Syphilis & MSM . . . ,” [www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm](http://www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm).
- “Between 2015 and 2016, the number of reported primary and secondary (P&S) cases increased by 18%. . . . Most (58%) of these cases were among MSM.” CDC, “CDC Fact Sheet: Syphilis & MSM . . . ,” [www.cdc.gov/std/Syphilis/STDFactMSM-Syphilis.htm](http://www.cdc.gov/std/Syphilis/STDFactMSM-Syphilis.htm).
- “In the United States, approximately half of MSM with primary and secondary (P&S) syphilis were also living with HIV. In addition, MSM who are HIV-negative and diagnosed with P&S syphilis are more likely to be infected with HIV in the future. Having a sore or break in the skin from an STD such as syphilis may allow HIV to more easily enter . . . [a person’s] body. . . . [A person] may also be more likely to get HIV because the same behaviors and circumstances that put [him or her] . . . at risk for getting other STDs can also put . . . [him or her] at greater risk for getting HIV. “ CDC, “CDC Fact Sheet: Syphilis & MSM . . . ” [www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm](http://www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm).

**K:** Human papilloma virus (HPV) is the most common sexually transmitted disease (STD) in the United States and is of particular concern in the MSM population.

- “HPV (Human papillomavirus), the most common STD [sexually transmitted disease] in the United States, is also a concern for gay, bisexual, and other men who have sex with men. Some types of HPV can cause genital and anal warts and some can lead to the development of anal and oral cancers. . . . While condoms are effective, HPV and HSV [herpes simplex virus] can be spread by contact with the area around the genitals not protected by the condom. . . . Genital herpes, syphilis, and HPV are most often spread through genital skin-to-skin contact.” CDC, “Sexually Transmitted Diseases,” [www.cdc.gov/msmhealth/std.htm](http://www.cdc.gov/msmhealth/std.htm).
- “Men who receive anal sex are more likely to get anal HPV and develop anal cancer.” CDC, “CDC Fact Sheet: HPV and Men,” [www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm](http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm).

- “Men with weak immune systems (including those with HIV) who get infected with HPV are more likely to develop HPV-related health problems.” CDC, “CDC Fact Sheet: HPV and Men,” [www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm](http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm).

**L:** MSM populations are at higher risk of contracting various types of hepatitis.

- “Gay, bisexual, and other men who have sex with men have a higher chance of getting viral hepatitis including Hepatitis A, B, and C, which are diseases that affect the liver. About 10% of new Hepatitis A and 20% of all new Hepatitis B infections in the United States are among gay and bisexual men.” CDC, “Viral hepatitis,” [www.cdc.gov/msmhealth/viral-hepatitis.htm](http://www.cdc.gov/msmhealth/viral-hepatitis.htm). This is to be compared to the prevalence of homosexuality reported as follows: “Based on the 2013 NHIS [National Health Interview Survey] data, 96.6% of adults identified as straight, 1.6% identified as gay or lesbian, and 0.7% identified as bisexual. The remaining 1.1% of adults identified as ‘something else,’ stated ‘I don’t know the answer,’ or refused to provide an answer.” Ward, BW, et al., “Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013,” reported in CDC, National Health Statistics Reports, no. 77 (July 15, 2014).
- “HCV [hepatitis C virus] is the most common chronic blood-borne infection in the United States, with an estimated 2.7 million persons living with chronic infection. HCV is not efficiently transmitted through sex. . . . However, data indicate that sexual transmission of HCV can occur, especially among persons with HIV infection. Increasing incidence of acute HCV infection among MSM with HIV infection has been reported in New York City and Boston, along with multiple European cities . . . . No vaccine for hepatitis C is available . . . .” Centers for Disease Control and Prevention, “Emerging Issues,” [www.cdc.gov/std/tg2015/emerging.htm](http://www.cdc.gov/std/tg2015/emerging.htm).

**M:** Certain types of cancer pose a higher risk for LGB [lesbian/gay/bisexual] populations.

- “LGB [lesbian/gay/bisexual] adults are more likely to have cancer,” with 6% of heterosexuals having cancer and 9% LGB. Cal. Health Interview Study, cited in Center for American Progress, “How to Close the LGBT Health Disparities Gap,” <https://www.americanprogress.org/issues/lgbt/reports/2009/12/21/7048/how-to-close-the-lgbt-health-disparities-gap/>.
- “Gay, bisexual and other men who have sex with men are 17 times more likely to get anal cancer than heterosexual men. Men who are HIV-positive are even more likely than those who do not have HIV to get anal cancer.” CDC, “Sexually Transmitted Diseases,” [www.cdc.gov/msmhealth/std.htm](http://www.cdc.gov/msmhealth/std.htm).
- “Infection with the human papilloma virus (HPV) increases the risk of anal cancer. HPV risk is increased by having anal sex and having many sex partners. Smoking also increases your risk for this cancer. Another risk factor is a weak immune system because of HIV infection or other factors.” American Cancer Society, “Cancer Facts for Gay and Bisexual Men,” <https://www.cancer.org/healthy/find-cancer-early/mens-health/cancer-facts-for-gay-and-bisexual-men.html>
- HPV infection “isn’t cancer but can cause changes in the body that lead to cancer. HPV infections usually go away by themselves but having an HPV infection can cause certain kinds of cancer to develop. These include cervical cancer in women, penile cancer in men, and anal cancer in both women and men. HPV can also cause cancer in the back of the throat, including the base of the

tongue and tonsils (called oropharyngeal cancer). All of these cancers are caused by HPV infections that did not go away.” CDC, [www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm](http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm).

**N:** Amebiasis is not common in industrialized countries, but poses an emerging risk among MSM populations. “Entamoeba histolytica is a pathogenic amoeba that can cause invasive intestinal and extraintestinal disease. The most frequent manifestations of invasive amebiasis are colitis and liver abscesses. Although E. histolytica is one of the most common parasitic infections worldwide, invasive disease remains uncommon in industrialized countries. Recent studies from Japan, Taiwan, and Republic of Korea, areas where E. histolytica endemicity is generally low, suggest that amebiasis is an emerging parasitic infection that occurs exclusively in men who have sex with men (MSM). . . . In Japan, amebiasis has become endemic in MSM; symptomatic E. histolytica infection occurs almost exclusively in middle-aged MSM in the large cities of Japan. Similar findings are reported for MSM in Taiwan. More recently, a study from the Republic of Korea documented invasive amebiasis (amebic liver abscess) in HIV-infected MSM. To date, the emergence of E. histolytica infections in MSM seems to be limited to the Asia-Pacific region.” Stark, D, et al., “Invasive Amebiasis in Men Who Have Sex with Men, Australia,” *Emerging Infectious Diseases* 14(7):1141-1142 (July 2008), [https://wwwnc.cdc.gov/eid/article/14/7/08-0017\\_article](https://wwwnc.cdc.gov/eid/article/14/7/08-0017_article)

**O:** The costs of treating HIV/AIDS infection, much of which is preventable, is significant.

- “In all, the total lifetime treatment cost for HIV based on new diagnoses in 2009 was estimated to be \$16.6 billion. . . . Note that the number of new diagnoses listed in this table [1] does not adjust for reporting delay, and thus are likely underestimated. . . . Life treatment cost per person = \$367,134 (in 2009 dollars; [\$379,668 in 2010 dollars]).” CDC, “HIV Cost Effectiveness,” [www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/index.html](http://www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/index.html) (citing Schackman BR, Gebo, KA, Walensky RP, et al., “The lifetime cost of current human immunodeficiency virus care in the United States.” *Medical Care* 2006; 44: 990-997). More recent studies suggest a range of cost between \$250,000-\$600,000, depending on when treatment is begun and what treatment regimen is used. <https://www.verywell.com/what-is-the-lifetime-cost-of-hiv-49641>
- These significant health care costs for HIV/AIDS are borne by a combination of government and private insurance, financial assistance organizations, and out-of-pocket payments. Irrespective of the payment source, these costs for treating a largely preventable disease are significant.

**P:** In their survey of studies, cited in A above, Professors Mayer and McHugh noted the results of those studies included a finding that members of the transgender population are at higher risk of a variety of mental health problems compared to members of the non-transgender population. Especially alarming, the rate of lifetime suicide attempts across all ages of transgender individuals is estimated at 41%, compared to under 5% in the overall U.S. population.

In the same survey, Professors Mayer and McHugh reported that one study found that, compared to controls, sex-reassigned individuals were about five times more likely to attempt suicide and about 19 times more likely to die by suicide. “A 2011 study at the Karolinska Institute in Sweden [was the result of a] . . . long-term study—up to 30 years—[which] followed 324 people who had sex-reassignment surgery. The study revealed that beginning about 10 years after having the surgery, the transgendered began to experience increasing mental difficulties. Most shockingly, their suicide mortality rose almost 20-fold above the comparable nontransgender population. This disturbing result has as yet no explanation but probably reflects the growing sense of isolation reported by the aging transgendered

after surgery. The high suicide rate certainly challenges the surgery prescription.” (From the Wall Street Journal opinion column by Dr. McHugh, column cited above.)

In the article, “How to Close the LGBT Health Disparities Gap,” it was reported that “[t]ransgender adults are much more likely to have suicide ideation” (2% heterosexual; 5% gay; 50% transgender). [www.americanprogress.org/issues/lgbt/report/2009/12/21/7048](http://www.americanprogress.org/issues/lgbt/report/2009/12/21/7048).

In the Wall Street Journal opinion column, cited above, Professor McHugh wrote, “[P]olicy makers and the media are doing no favors either to the public or the transgendered by treating their confusions as a right in need of defending rather than as a mental disorder that deserves understanding, treatment and prevention. This intensely felt sense of being transgendered constitutes a mental disorder in two respects. The first is that the idea of sex misalignment is simply mistaken—it does not correspond with physical reality. The second is that it can lead to grim psychological outcomes.” (emphasis added)

**Q:** There is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for transgender populations. More high quality longitudinal studies are necessary for the “social stress model” to be a useful tool for understanding public health concerns. Mayer & McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 8 (Fall 2016). [http://www.thenewatlantis.com/docLib/20160819\\_TNA50SexualityandGender.pdf](http://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf).

If social stressors were the sole factor, one would expect that the suicide ideation rates for homosexuals and transgenders would be closely related. However, as noted above, suicide ideation for those reporting as transgender was found to be 10 times that of those reporting as homosexual. [www.americanprogress.org/issues/lgbt/report/2009/12/21/7048](http://www.americanprogress.org/issues/lgbt/report/2009/12/21/7048).

**R:** What little is known about transgendered youth suggests that biologically male persons living as females are often homeless and likely to be engaged in sex work. One report, using data from two studies, notes that 59-67% “of female transgendered young persons have engaged in sex work, and approximately 20% are HIV positive.” Approximately 33% of the study participants did not use sex protection during intercourse, “[r]ates of alcohol and substance use during sex were also high (40-50%) in this population.” (Note that the two studies relied on “convenience samples” from urban areas, so the results and conclusions are not robust.) L. Kris Gowen, “The Sexual Health of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth,” at 24 (Oregon Health Authority, Public Health Division), <https://www.pathwaysrtc.pdx.edu/pdf/pbSexualHealthDisparities.pdf>.

**S:** In a study (“Transgender Adolescent Suicide Behavior”) published in the September 2018 issues of the journal *Pediatrics*, the authors reported these results:

Nearly 14% of adolescents reported a previous suicide attempt; disparities by gender identity in suicide attempts were found. Female to male adolescents reported the highest rate of attempted suicide (50.8%), followed by adolescents who identified as not exclusively male or female (41.8%), male to female adolescents (29.9%), questioning adolescents (27.9%), female adolescents (17.6%), and male adolescents (9.8%). Identifying as nonheterosexual exacerbated the risk for all adolescents except for those who did not exclusively identify as male or female (ie, nonbinary). For transgender adolescents, no other sociodemographic characteristic was associated with suicide attempts.

[http://pediatrics.aappublications.org/content/early/2018/09/07/peds.2017-4218?sso=1&sso\\_redirect\\_count=2&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3A%20No%20local%20token&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+token](http://pediatrics.aappublications.org/content/early/2018/09/07/peds.2017-4218?sso=1&sso_redirect_count=2&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3A%20No%20local%20token&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+token)

**T:** “The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. ‘Gender identity’ refers to one’s inner sense of being female, male, or some other gender. . . . Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient . . . , [and] individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.” *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 103-04 (2006). See also *DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*.) An “identity” subject to changeable, subjective “individuality” untethered to time or objective biology is, by definition, subject to abuse.

**U:** A Michigan legislator recently called for the attorney general to investigate whether a church violated Michigan’s consumer protection act when it held workshops for those seeking help with same-sex attraction. See <https://housedems.com/article/rep-condemn-conversion-therapy-workshop-planned-downriver>.

**V:** “Government action that stifles speech on account of its message . . . pose[s] the inherent risk that the [g]overnment seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

A ban on counseling speech is facially content based because whether counselors may lawfully speak to clients who seek counseling regarding same-sex attraction or gender identity “depends on what they say.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). By placing unique restrictions on speech related to sexual orientation and gender identity, legislation “disfavors . . . speech with a particular content.” Strict scrutiny is required whenever the government creates “a regulation of speech because of disagreement with the message it conveys,” *id.* at 2664 (quotation omitted).

**W:** As the Supreme Court recognized in the same-sex marriage case of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), many of the world’s major religions—including Judaism, Islam, and Christianity—teach against sexual activity outside of marriage between a man and woman, that individuals have a choice to abstain from immoral sexual behavior, and that they are benefitted when they do. *Id.* at 2594 (“This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”)

Laws that burden the free exercise of religion are subject to strict scrutiny if they are not neutral toward religion or target it. See, e.g., *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

**X:** The First Amendment not only protects the right to speak, it also protects the right to hear and receive it. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (right of free speech also “protects the right to receive it”). This principle has been repeatedly applied in professional settings. See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (applying the “First Amendment right to receive information and ideas” to a ban on pharmacies publishing drug prices (quotation omitted)); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977) (doing the same for a ban on

lawyers advertising the price of routine legal services because it “inhibit[ed] the free flow of commercial information”).

In *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 536-37 (2001), lawyers representing the interests of indigent welfare recipients were prohibited to attempt “to amend or otherwise challenge existing welfare law.” The Supreme Court compared this speech regulation to previous government attempts “to use an existing medium of expression and to control it . . . in ways which distort its usual functioning.” *Id.* at 543. The Supreme Court explained that the First Amendment generally forbids government from regulating private speech forums “in an unconventional way to suppress speech inherent in the nature of the medium.” *Id.*

The mental health professions recognize their purpose in assisting clients achieve their personal goals. See, e.g., Am. Counseling Ass’n Code of Ethics Preamble (2014) (defining “counseling” as empowering “diverse individuals . . . to accomplish [their own] mental health . . . goals” and emphasizing the importance of patient “autonomy”); Code of Ethics of the Nat’l Ass’n of Social Workers § 1.02 (2008) (“Social workers respect and promote the right of clients to self[-]determination and assist clients in their efforts to identify and clarify their goals.”).

### Countering Repeals of State RFRA

When the United States Supreme Court held (*City of Boerne v. Flores*, 521 U.S. 507 (1997)) that the federal Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C. §§ 2000bb (1)-(4)) did not apply to State and local laws, many states<sup>1</sup> proceeded to fill this gap by passing their own RFRA. A state RFRA provides these significant benefits<sup>2</sup>, which would be undermined by a repeal of a State's RFRA.

- Minority faiths are placed on the same footing as more broadly accepted religions.
- RFRA contribute to defusing religious conflict and animosity by creating a level playing field for all faiths.
- RFRA provide a common sensical balancing test that courts can apply when they weigh religious liberty against government interest.
- RFRA promote greater transparency and accountability when the government seeks to take actions that impinge on the religious freedom of its citizens. These acts create an incentive for the government to find innovative and constructive approaches to achieving the government's particular interest while also respecting the religious beliefs and practices of its citizens.
- These acts reinforce this country's and this State's commitment to pluralism by protecting religious diversity. Religious freedom is a foundational principle that underlies this country's and this State's heritage of ensuring the individual's right to worship (or not to worship), unhindered, according to one's conscience and conviction.

Becket Law, a leading nonprofit public interest law firm that defends religious freedom, has identified some of the myths and truths about RFRA (<https://www.becketlaw.org/research-central/rfra-info-central/>):

- The myth is that "RFRA spells disaster for LGBT rights;" the truth is that "21 states have passed a state RFRA. States like Connecticut and Illinois have had RFRA on the books since the 1990s, and LGBT advocates still hail them as some of the best states for LGBT individuals."
- The myth is that "RFRA was created to discriminate based on sexual orientation;" the truth is that it "was created to protect religious minorities--RFRA was originally created after Oregon state denied unemployment benefits to Native American counselors who were fired for using peyote in their religious ceremonies."
- The myth is that "RFRA is just a trump card for religious people to use in court;" the truth is that "[n]o side gets an automatic win. The interests of all sides get weighed. All RFRA does is level the

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<sup>1</sup> The National Conference of State Legislatures has identified at least 21 states that have enacted RFRA legislation as of 2016. See <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

<sup>2</sup> The following material is adapted from the testimony of Kimberlee W. Colby (Director, Center for Law and Religious Freedom, Christian Legal Society) before the Judiciary Committee of the U.S. House of Representatives, Subcommittee on the Constitution and Civil Justice ("The State of Religious Liberty in the United States," June 10, 2014).

playing field in court for people of deeply held religious convictions. Sometimes they win and sometimes they lose.”