ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

LEGAL MEMORANDUM

DATE: August 22, 2016
RE: Legal Analysis of SB 1306

Introduction

Alliance Defending Freedom is a nonprofit legal organization that advocates for civil rights. On request, we regularly provide legal analysis of proposed laws, including bills like SB 1306.

SB 1306 would add sexual orientation and gender identity to the State's nondiscrimination laws. But such laws threaten constitutionally protected freedoms, subordinate the privacy and safety interests of citizens, and expose governments and citizens to significant legal and financial liability.

Supporters of this bill claim that it will end, or at least significantly reduce, "ongoing" discrimination in the State. Yet, there is no evidence of a pattern or practice of sexual orientation or gender identity discrimination in Pennsylvania. Rather than ending discrimination, laws like SB 1306 ensure that it will occur. They do so by threatening with fines and other punishments citizens who are trying to peacefully live, work, and operate their businesses consistent with their deeply held convictions about marriage and human sexuality—people who are happy to serve individuals who identify as gay, lesbian, or transgender, but cannot promote messages, participate in events, or support lifestyles that contradict their beliefs or their organization's code of conduct. These laws also discriminate against the rights of religious organizations to hire employees that share the same religious beliefs and practices, and ensure that they will be driven from the public square. Additionally, these laws threaten employers and schools that seek to protect the privacy rights and dignity interests of their employees and students. SB 1306 thus retreats from our nation's longstanding commitment to upholding privacy and pluralism, and respecting the diverse viewpoints of all Americans.[1]

The analysis below explains some of SB 1306's infirmities, which include the following:

I. SB 1306 threatens the freedom to live, work, and operate one's business according to one's convictions.

II. SB 1306's addition of gender identity jeopardizes citizens' privacy rights and dignity interests, particularly those of women and young girls.

III. SB 1306's inclusion of gender identity fosters costly and unfair litigation for employers and business owners.

[1] Some may suggest that it is possible to craft a "compromise" bill, which protects religious freedom. However, such a "compromise" proposal has yet to be achieved anywhere, and efforts to do so have wreaked discord and strife upon those states that introduced such a measure. The one touted success at such a "compromise" unfortunately primarily consisted of narrow exemptions to Utah's new sexual orientation and gender identity laws that provided protections for religious liberty that were duplicative of existing constitutional rights, and failed entirely to safeguard citizens' right to privacy. Such proposals do not solve the reasonable concerns created by adding sexual orientation and gender identity to the State's nondiscrimination laws, but instead ensure that the constitutionally-protected freedoms of many will be lost.

IV. SB 1306 is unnecessary because the people of Pennsylvania already respect each other and value the diverse views of their neighbors.

I. SB 1306 threatens the freedom to live, work, and operate one's business according to one's convictions.

Adding sexual orientation and gender identity to nondiscrimination laws imperils freedom by requiring citizens to act contrary to their sincerely held beliefs about marriage and human sexuality.[2] The people whose freedom is forfeited by laws like SB 1306 are happy to serve all individuals, including those who identify as gay, lesbian, or transgender, but they cannot promote messages or viewpoints, or participate in events that contradict their convictions. Yet laws like SB 1306 do not simply require businesses or other entities to serve and hire individuals who identify as gay, lesbian, or transgender. Those laws actually force business owners, schools, and ministries to violate their missions, or commitment to a specific code of conduct pivotal to their purpose of existence. They also force citizens to advance messages and participate in events that conflict with their core beliefs (and subject them to severe government punishment if they cannot do so). This is why SB 1306 poses such a major threat to constitutionally-protected freedoms, including free speech and the free exercise of religion.

A key distinction exists between serving and employing Pennsylvanians, regardless of whether they identify as a member of the LGBT community, and celebrating every event or promoting every message or lifestyle. A unanimous decision of the U.S. Supreme Court recognized this distinction in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[3] In that case, individuals organizing a parade did not want to admit a group with a pro-LGBT message, but they otherwise gladly welcomed people who identified as gay, lesbian, or transgender to participate. The Court recognized that this message-based decision did not discriminate against "homosexual as such,"[4] and upheld the constitutional rights of the parade organizers to decline to promote a message that they did not want to support. It is understandable that some people, like the parade organizers in the *Hurley* case, are unable in good conscience to facilitate, celebrate, or promote certain messages or expressive events. Similarly, for some employers who seek to uphold certain codes of conduct pivotal to their mission, *e.g.*, a school, camp, or ministry, the freedom to hire those who will best advance their mission is paramount. Those individuals should be free to determine which events or messages they will support, and to hire those whose values and lifestyles are consistent with the organization's mission or faith tenets. But SB 1306 would prevent them from doing that.

Laws like SB 1306 stigmatize and punish people who do not harbor any animus but simply want to peacefully live and work consistent with their deeply held religious beliefs or moral convictions. Here are a few examples:

- In Washington, the state is using a law similar to SB 1306 to sue florist Barronelle Stuztman because she could not in good conscience create floral arrangements to celebrate a same-sex

[2] *See, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 43-44 (2000) (noting that legal issues involving sexual orientation "feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality.").
[3] 515 U.S. 557 (1995).
[4] *Hurley*, 515 U.S. at 572.

wedding. Notably, Barronelle serves and employs gays and lesbians, and has happily served this particular couple for ten years, including providing flowers for them for Valentine's Day. But the government seeks to punish Barronelle because she declined to violate her religious beliefs about marriage. Now she might lose her businesses, her life-savings, and everything she owns simply because she believes that marriage is the union of a man and a woman and that her faith forbids her from celebrating any other view of marriage. Indeed, if she does not prevail in the lawsuit brought against her, Barronelle will be forced to pay hundreds of thousands of dollars to the attorneys who have been prosecuting her.[5]

- In Oregon, the state used a law like SB 1306 to punish Melissa and Aaron Klein, owners of Sweet Cakes by Melissa. Although the Kleins are more than willing to provide services to all customers, they cannot design a wedding cake that celebrates a same-sex marriage because of their belief that marriage is the union of a man and a woman. Yet because of that conviction on marriage, the Kleins have been sued, and the government has ordered them to pay $135,000 to the couple who sued them.[6]

- In Kentucky, the City of Lexington declared Blaine Adamson, managing owner of a promotional print shop named Hands On Originals, in violation of a law like SB 1306 because he declined to print shirts with a message promoting a local gay pride festival. Blaine regularly works with and employs members of the LGBT community, but because he was unable to print a message that conflicts with his beliefs, the government punished him and ordered him to attend "diversity training."[7]

- In California, the state's highest court found that physicians whose religious beliefs forbid them from providing an elective fertility procedure for an unmarried woman in a same-sex relationship violated a law like SB 1306.[8]

- In Michigan, government officials who have adopted policies like SB 1306 have declared that counseling students may not decline to provide counseling that affirms same-sex relationships, even if providing counseling under those circumstances would violate their religious beliefs.[9]

As these real-life stories and cases illustrate, laws like SB 1306 result in government discrimination against people who have sincere convictions on important issues like marriage and human sexuality. These laws also impact the First Amendment freedoms of those who work for

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[5] See http://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman (last visited Aug. 21, 2016) for more information about Barronelle Stutzman and Arlene's Flowers, including links to relevant legal documents. The case is currently on direct appeal to the Washington State Supreme Court.

[6] *See* Valerie Richardson, "Sweet Cakes by Melissa owners owe $135,000 in damages for gay wedding refusal," Washington Times, July 2, 2015, *available at* http://www.washingtontimes.com/news/2015/jul/2/sweet-cakes-melissa-owners-owe-135000-damages-gay-/ (last visited Aug. 21, 2016). The Kleins' case is currently on appeal to the Oregon Court of Appeals.

[7] See http://www.adflegal.org/detailspages/case-details/hands-on-originals-v.-lexington-fayette-urban-county-human-rights-commission (last visited Aug. 21, 2016) for more information about Blaine and his case, including links to relevant legal documents.

[8] *See North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959 (Cal. 2008).

[9] *See Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012) (ruling against a public university that dismissed a counseling student because, according to the university, her religious need to refer prospective clients who sought counseling affirming their same-sex relationships amounted to discrimination based on sexual orientation).

employment agencies and labor organizations. The proposed law forbids employment agencies and labor organizations from assisting both employers and employees in a way consistent with their clients' religious beliefs. Yet certain employers have legitimate reasons to consider an employee or applicant's values and lifestyle when making particular employment decisions or recommendations. These situations include, for example, an employment agency that assists an all-girls school to find a basketball coach, a nursing home to hire care-takers, or a counseling center to employ therapists with specific relationship expertise. Businesses have always had the freedom to seek out and find employees whose beliefs and values align with those of the owners. SB 1306 is another example of excessive and unnecessary government regulation that further strips away liberty for small business owners in Pennsylvania.

Furthermore, for any organization to be successful in its purpose and mission, it must be free to employ individuals most qualified for the job and committed to its values. Indeed, employers of all kinds look for employees that possess certain skills, attributes, or beliefs which further the mission of the employer and/or the business. Members of the Pennsylvania legislature employ this principle, for example, hiring to work in their offices those who share or embody their political beliefs and aspirations. Coercing organizations or people of faith to hire employees who do not share their beliefs or mission would be grossly disruptive and destabilizing to those organizations. For example, under this proposed bill, a Catholic university or school could be forced to violate its conscience and hire a person whose values and lifestyle are inconsistent with its religious principles. A faith-based camp could be compelled to employ those who do not support or abide by their code of conduct. Also, SB 1306 could force a company that specializes in same-sex counseling to hire someone who has never been in a same-sex relationship.

Laws like SB 1306 not only jeopardize the freedoms of business owners and other organizations, they also harm social-service organizations, like child-welfare and adoption agencies, that hold particular views about marriage and family-related issues. Specifically, those laws have forced adoption and foster-care agencies with significant expertise helping marginalized and needy children to close simply because their policy is to place children only with a married mother and father.[10] Pushing experienced social-service organizations out of the adoption and foster-care fields inflicts significant societal costs—indeed, it harms orphans in desperate need of homes by reducing the pool of qualified adoption service providers.[11]

Laws like SB 1306 target small-business owners and other organizations for these crises of conscience. But there is no need to do this. Most large corporations already have policies that mirror

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[10] *See, e.g.*, Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 299 (Aug. 2008) ("Massachusetts law prohibits discrimination based on sexual orientation . . . . Pursuant to this, Massachusetts Department of Social Services regulations forbid discrimination based on sexual orientation as a condition of licensing. Catholic Charities faced a Hobson's choice: either comply with [the] law and place children with gay couples or lose their license and end their ministry to needy children."); Sarah Torre and Ryan T. Anderson, "Adoption, Foster Care, and Conscience Protection," The Heritage Foundation Backgrounder, Jan. 15, 2014, at 6-7 *available at* http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection#_ftn29 (last visited Aug. 21, 2016) (recounting, among other examples, that the Evangelical Child and Family Agency in Illinois was forced to stop its adoption and foster services because of the State's sexual-orientation nondiscrimination law).

[11] There is no need to force all child-welfare agencies to place children with same-sex couples because many such organizations in Pennsylvania are already committed to doing so.

SB 1306,[12] and many small businesses (driven primarily by a profit motive) are more than happy to hire anyone, promote any message, and participate in any event. So there are more than enough businesses willing and able to provide services to everyone, and the government need not override the consciences of small-business owners, ministries, and schools. SB 1306 is thus an effort by its proponents to stigmatize others and impose their values rather than respecting the freedom of all Pennsylvanians to peacefully live and work according to their convictions. But no legislative body should support a law that makes the cost of operating a small business, nonprofit, or educational institution the conscience of its owners.

Perhaps most troubling of all, SB 1306 will violate the federal constitution whenever it is used to force people to promote viewpoints or messages, or participate in events, that they do not want to support. Indeed, a long line of cases from the U.S. Supreme Court establishes that the government may not require people or organizations to promote, host, or facilitate expression that they deem objectionable.[13] Notably, the Supreme Court has already declared unconstitutional particular applications of sexual-orientation nondiscrimination laws like SB 1306. For instance, in *Hurley* (a case discussed above), the Court concluded that the Constitution forbids the government from requiring parade organizers to facilitate the message of a gay advocacy group.[14] And in *Boy Scouts of America v. Dale*, the Court held that the government may not apply a law like SB 1306 to force an organization to accept a leader who does not adhere to its moral code.[15]

In addition, a Kentucky court recently concluded that the government may not apply a law like SB 1306 to force a promotional printer[16] to produce shirts displaying a message that conflicts with his beliefs.[17] That case affirmed the constitutional rights of Blaine Adamson, managing owner of Hands On Originals, whose story is recounted above. SB 1306 suffers from the same constitutional infirmities as the law declared unconstitutional in Blaine's case. This bill thus places the State at risk of lawsuits for which it may be liable to pay the attorneys' fees of the parties that sue it.[18]

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[12] *See* Human Rights Campaign, "LGBT Equality at the Fortune 500," http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500 (last visited Aug. 21, 2016) (reporting that 89% of Fortune 500 companies include sexual orientation in its nondiscrimination policies and that 66% of those complies include gender identity).

[13] *See, e.g.*, *Hurley*, 515 U.S. at 572-73 (government may not require a public-accommodation parade organization to facilitate the message of a gay advocacy group); *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality) (government may not require a business to include a third party's expression in its billing envelope); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (government may not require citizens to display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not require a newspaper to include a third party's writings in its editorial page).

[14] *Hurley*, 515 U.S. at 572-73.

[15] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

[16] People of faith who operate for-profit businesses have the right to freely exercise their religion. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014) (finding that a law protecting the free exercise of religion applied to for-profit businesses); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (finding that a family-owned for-profit corporation "has standing to assert the free exercise rights of its owners"); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 Geo. Mason L. Rev. 59, 64 (2013) (explaining that for-profit businesses have the right to exercise religion).

[17] *Hands On Originals v. Lexington-Fayette Urban County Human Rights Comm'n*, No. 14-CI-04474, slip op. (Fayette Cir. Ct. April 27, 2015).

[18] Federal law permits private citizens to sue state and local governments in federal court when they believe that their constitutional rights have been violated, and when those lawsuits are successful, the government is generally required to pay the challengers for their attorneys' fees. *See* 42 U.S.C. §§ 1983, 1988 (providing that persons who successfully demonstrate that a state or local law is unconstitutional may recover costs and attorneys' fees). Those attorneys' fees awards are often

By putting many business owners and nonprofit organizations to the choice between their convictions and continuing their operations and advancing their mission, SB 1306 will force many of these organizations to close their doors or limit their services. That, in turn, will decrease jobs, tax dollars, diversity in the marketplace, and the number of available social-service providers. Yet no one benefits from this, thus further confirming that SB 1306 is bad policy for Pennsylvania.

II. SB 1306's addition of gender identity jeopardizes citizens' privacy rights and dignity interests, particularly those of women and young girls.

SB 1306 also threatens the privacy rights of individuals and presents significant public-safety risks by placing into state law the ambiguous legal concept of "gender identity or expression."[19] According to SB 1306, gender identity is determined by a person's identity, appearance, mannerisms, expressions, or other gender-related characteristics regardless of his or her designated sex at birth; it is thus an internally conceived and objectively unverifiable characteristic.[20] This means that if SB 1306 is enacted, men who profess a female identity will be permitted to access women's bathrooms, locker rooms, and other private facilities (and vice versa). SB 1306 would apply to schools, colleges and universities, businesses, nonprofits, churches, and religious organizations, and would subject all of these entities to lawsuits if they sought to protect the privacy of those entrusted to their care.

But laws that allow biological males into restrooms or locker rooms used by women violate constitutional privacy rights. As the Ninth Circuit Court of Appeals has observed, "[s]hielding one's unclothed figure from the view of strangers, *particularly strangers of the opposite sex*, is impelled by elementary self-respect and personal dignity."[21] Federal appellate courts have thus concluded that individuals in various states of undress have a constitutional right to privacy. The Second Circuit Court of Appeals, for example, has recognized a "privacy interest" in protecting against "the involuntary viewing of private parts of the body by members of the opposite sex."[22]

And many other courts have held that the government violates the privacy rights of its citizens when its policies require someone to be undressed in the presence of members of the opposite biological sex.[23] For instance, the Tenth Circuit Court of Appeals has recognized that the constitutional privacy

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many hundreds of thousands of dollars (and at times even more). *See, e.g.*, Zoe Tillman, "Kentucky Ordered to Pay $1.1M in Fees in Same-Sex Marriage Case," The National Law Journal, Jan. 13, 2016, *available at* http://www.nationallawjournal.com/home/id=1202747048894/Kentucky-Ordered-to-Pay-11M-in-Fees-in-SameSex-Marriage-Case?mcode=1202615432992&curindex=1&slreturn=20160020090416 (last visited Aug. 21, 2016).

[19] SB 1306 defines "gender identity or expression" as "the gender-related identity, appearance, mannerisms, expression or other gender-related characteristics of an individual regardless of the individual's designated sex at birth."

[20] *See* Shuvo Ghosh, *Gender Identity*, eMedicine, http://emedicine.medscape.com/article/917990-overview (last visited Aug. 21, 2016).

[21] *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (emphasis added); *see also York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from . . . strangers of the opposite sex[] is impelled by elementary self-respect and personal dignity.").

[22] *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980).

[23] *See, e.g.*, *Hill v. McKinley*, 311 F.3d 899 (8th Cir. 2002) (constitutional right to privacy violated when female prisoner was left unclothed and potentially could be viewed by male guards); *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993) (male prisoner may state a valid privacy claim where he is required to be nude in the presence of female guards); *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992) (male prisoner states claim for a privacy violation when he was subjected to strip search in presence of female guards); *Johnathan Lee X v. Gulmatico*, 932 F.2d 963 (4th Cir. 1991) (male prisoner states

rights of a male prisoner may be violated when prison officials allow female guards to view the prisoner showering and using the toilet.[24] Similarly, at least one federal district court has held that female prisoners' privacy rights were violated when government officials allowed male prisoners and deputies to peer into their cells and view their toilets.[25] Under the logic of these cases, those who object to the presence of the other biological sex in facilities where individuals are in states of partial or total undress will likely be able to assert a claim against the State for violating their privacy rights.[26]

Furthermore, laws like SB 1306 increase the likelihood that victims of sexual abuse will be re-traumatized. Nearly one in four women has been sexually abused, mostly by males.[27] Requiring access to women's bathrooms and locker rooms by men who profess a female identity, even if with innocent intentions, guarantees that victims of sexual abuse will be exposed to partially or fully unclothed male strangers. Thus, even males identifying as women who have no intention of sexually assaulting women and girls will cause enormous emotional harm to victims who deserve protection.[28]

Additionally, one must also consider the threat of male predators masquerading as females. In Dallas, in 2012, Paul Witherspoon, who now goes by "Paula," is a registered sex offender, and has been convicted of sexual assault against a young girl and indecency involving sexual contact with another girl. In 2012, Witherspoon was reported to the police in Dallas because he was in the women's bathroom. He was ticketed by a Dallas policeman. But because Witherspoon now presents as a woman, his attorney at Lambda Legal (a nationwide advocacy group for LGBT issues) asserted that, under the Dallas gender-identity law, Witherspoon had every right to use the bathroom with women and young girls.[29]

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claim for violation of privacy right when female guards are stationed near showers and can observe prisoner showering); *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987) (assuming without deciding that inmates retain a constitutional right to privacy and that male inmates state such a claim when prisons allow females to observe them showering); *Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982) (constitutional privacy rights may be violated where female guards are allowed to view male prisoners showering and using the toilet); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (constitutional privacy rights are violated where a female inmate's undergarments were removed by female nurse but with male guard present); *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (constitutional right to privacy violated where male police officer asked woman complaining of assault to undress, examined her, and photographed her in indecent positions). *But see Petty v. Johnson*, 193 F.3d 518 (5th Cir. 1999) (holding that there was no violation of male prisoners' right to privacy where prison allows female guards to observe them showering); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir.1985) (use of female guards to supervise showering does not violate male inmates' right to privacy).

[24] *Cumbey*, 684 F.2d 712.

[25] *Dawson v. Kendrick*, 527 F. Supp. 1252 (S.D. W. Va. 1981).

[26] The courts that have considered this issue in the prison context have noted that incarcerated individuals do not enjoy full privacy rights. *See Cumbey*, 684 F.2d at 714. Courts will likely be far more sympathetic to non-incarcerated persons who have full privacy rights, such as an elderly woman who objects to encountering biological males in public restrooms or a teenage girl who does not want biological males showering with her at the local swimming pool.

[27] Shanta R. Dube et al., "Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim," 28 American Journal of Preventive Medicine 430 (2005), *available at* http://www.jimhopper.com/pdfs/Dube_(2005)_Childhood_sexual_abuse_by_gender_of_victim.pdf (last visited Aug. 21, 2016).

[28] Kelsey Harkness, "Sexual Assault Victims Speak Out Against Washington's Transgender Bathroom Policies," The Daily Signal, Jan. 25, 2016, *available at* http://dailysignal.com/2016/01/25/sexual-assault-victims-speak-out-against-washingtons-transgender-bathroom-policies/ (last visited Aug. 21, 2016).

[29] *See* Ray Villeda, "Transgender Woman: Convictions Irrelevant to Citation: Witherspoon convicted in 1990 for sexual assault of child, indecency with child," NBCDFW, May 12, 2012, *available at*

SB 1306 will create similar situations and, in that way, jeopardizes citizens' reasonable privacy interest and safety concerns. This is not the kind of policy that any state should create for the people whose rights and safety it is supposed to protect.

III. SB 1306's inclusion of gender identity fosters costly and unfair litigation for employers and business owners.

SB 1306 is likely to lead to costly and unreasonable litigation because it implements standards that are impossible for employers and business owners to understand—let alone comply with. Organizations like Facebook recognize at least 58 different genders, which include designations like "Cis Man," "Cis Male," "Cisgender Male," "Bigender," "Agender," and "Androgynous."[30] Proponents of gender-identity theory also assert that gender varies for some people depending upon time and context.[31] Indeed, some individuals have even taken extreme steps to change their gender identity only to regret the change and seek to undo it.[32] But SB 1306 will unfairly require employers to discern, understand, and honor all of the many genders with which their employees and customers might identify, and avoid making them feel "discriminated" against because of their identity. Yet few people know what the numerous gender-identity terms mean, and even fewer know how to identify or differentiate between them. Requiring employers and business owners to consider such amorphous, subjective, and fluid concepts, and subjecting them to liability for missteps, is no way to treat the State's job and revenue creators.

In addition, the gender-identity provision of SB 1306 creates a number of other unjust situations for employers and business owners. Employers could be subject to lawsuits under SB 1306 for refusing to force their employees to address with male pronouns female coworkers who identify as men. Business owners who provide health-care coverage for their employees could be sued for declining to pay for "sex-reassignment" surgeries. A doctor or medical facility that generally performs hysterectomies could be sued for refusing to perform that procedure for someone seeking to "transition" from female to male.

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http://www.nbcdfw.com/news/local/Transgender-Woman-Convictions-Irrelevant-to-Citation-149923975.html (last visited Aug. 21, 2016).

[30] *See* Russell Goldman, "Here's a List of 58 Gender Options for Facebook Users," ABC News, Feb. 14, 2014, *available at* http://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users/ (last visited Aug. 21, 2016).

[31] *See* Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. CL. & CR. 101, 104 (2006) (noting that "individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.").

[32] *See* Jay Akbar, "The man who's had TWO sex changes," Daily Mail, Jan. 26, 2015, *available at* http://www.dailymail.co.uk/news/article-2921528/The-man-s-TWO-sex-changes-Incredible-story-Walt-Laura-REVERSED-operation-believes-surgeons-quick-operate.html (last visited Aug. 22, 2016); "MTV True Life: Transgender Teens change their minds as adults," GenderTrender, Apr. 5, 2013, *available at* https://gendertrender.wordpress.com/2013/04/05/mtv-true-life-transgender-teens-change-their-minds-as-adults/ (last visited Aug. 22, 2016); Grace Murana, "8 Amazing Stories of Reverse Sex Change," Oddee, Jan. 29, 2015, *available at* http://www.oddee.com/item_99220.aspx (last visited Aug. 22, 2016); Tara Palmeri, "I'm a guy again! ABC newsman who switched genders wants to switch back," NYPost, Aug. 6, 2013, *available at* http://nypost.com/2013/08/06/im-a-guy-again-abc-newsman-who-switched-genders-wants-to-switch-back/ (last visited Aug. 22, 2016); Helen Weathers, "A British tycoon and father of two has been a man and a woman . . . and a man again . . . and knows which sex he'd rather be," Daily Mail, *available at* http://www.dailymail.co.uk/femail/article-1026392/A-British-tycoon-father-man-woman---man---knows-hed-be.html (last visited Aug. 22, 2016).

Businesses could be sued for simply maintaining reasonable dress codes. And a day-care center or school could face liability for declining to assign teachers who profess a gender different from their biological sex to oversee young children who might be confused by such things. No employer or business owner should face a lawsuit for taking any of these reasonable actions. Yet SB 1306 would open the door to such costly lawsuits and potentially crippling liabilities.

IV. SB 1306 is unnecessary because the people of Pennsylvania already respect each other and value the diverse views of their neighbors.

Laws like SB 1306 are supposed fixes in search of a problem. With very few exceptions, Americans simply do not refuse to hire, serve, or rent to people because they identify as gay, lesbian, or transgender. Indeed, no evidence indicates that there is a systemic pattern and practice of invidious discrimination in this State that might justify this heavy-handed change to the state nondiscrimination laws. It would thus be imprudent to impose a law whose predecessors in other jurisdictions have a demonstrated history of overriding constitutionally-protected freedoms, privacy rights, and safety interests when no real problem needs to be addressed.

Historically, nondiscrimination laws in the United States have sought to address systemic and intractable instances of invidious discrimination. For example, Congress enacted the Civil Rights Act of 1964 because entire parts of the country were closed to African Americans.[33] As one legal scholar has noted, "[c]ivil rights laws were enacted against a background of devastating and widespread discrimination[.]"[34] Segregation, and institutionalized white-supremacy, was the law of the land in a number of states.[35] In large swaths of the nation, black Americans were denied the opportunity to vote, excluded from the skilled trades, and denied access to many hotels, restaurants, and theaters.[36] Their children were forced to attend inferior segregated schools.[37] They were met with attack dogs, cattle prods, and batons if they attempted to protest. The system of racial discrimination known as "Jim Crow" was pervasive, and it was designed to prevent black Americans from taking part in American society. It was against this backdrop, where "[i]nvidious discrimination was ubiquitous throughout the country," that Congress enacted the Civil Rights Act of 1964.[38]

For similar reasons, in 1990, Congress enacted the Americans With Disabilities Act (ADA), a law that prohibits employers and places of public accommodation from discriminating against people

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[33] *See, e.g.*, Steven G. Anderson, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1220 (1992) ("Prior to the passage of the Civil Rights Act of 1964, racial discrimination was widespread and seemingly overt."); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 425 (2010) (noting that at the time of the passage of the Civil Rights Act of 1964 and shortly thereafter, "the presumption was one of widespread discrimination").

[34] Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 406-07 (1994).

[35] *See* John Valery White, *Brown v. Board of Education and the Origins of the Activist Insecurity in Civil Rights Law*, 28 OHIO N.U. L. REV. 303, 361 (2002) ("[S]egregation was the widespread order, not only in the South where most black Americans still lived but everywhere substantial numbers of black Americans lived, some degree of separation of the races was memorialized in practice and law."). *See also Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 228 (1973) ("The history of state-imposed segregation is [] widespread in our country[.]")

[36] Michael J. Fellows, *Civil Rights – Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387, 395 (2004).

[37] Fellows, *Civil Rights – Shades of Race*, 26 W. NEW ENG. L. REV. at 395.

[38] Fellows, *Civil Rights – Shades of Race*, 26 W. NEW ENG. L. REV. at 397.

because of a disability. Congress enacted that law because it determined that there was a pattern of widespread invidious discrimination against people with disabilities.[39] "[W]ell-catalogued"[40] evidence demonstrated that such discrimination was occurring.[41] Congress found that 8.2 million disabled people wanted to work but had been excluded from the job market because of their disability.[42] And even those who were able to find work typically could not obtain employment on equal terms with the non-disabled. In fact, a 1989 U.S. Census Bureau study revealed that disabled men earned 36 percent less, and disabled women earned 38 percent less, than their non-disabled counterparts.[43] This discrimination was both "serious" and "pervasive."[44]

But discrimination of this nature towards those who identify as gay, lesbian, or transgender is simply absent in America, including in Pennsylvania.[45] All people, including members of the LGBT community, are welcome as neighbors, patrons, and friends. Indeed, the business community is voluntarily hiring and serving everyone. The people of this State are already treating one another with dignity and respect. This divisive change to the nondiscrimination law is not needed. Balancing the absence of need against the demonstrable threat that laws like SB 1306 pose to constitutional freedoms, privacy rights, and safety interests confirms that this law is bad policy for the people of Pennsylvania.

Furthermore, while SB 1306 states that its enactment will "foster economic growth and prosperity," and that "the absence of nondiscrimination protections hinder efforts to recruit and retain the diversity of talented individuals and successful enterprises required for a thriving economy," the facts speaks to the contrary. Numerous studies suggest that states without these classifications actually have greater economic growth, while many states that have added these classifications to their laws have weaker economies and lower job growth.[46] While this does not mean that states with these types of laws always experience low economic growth, it does indicate that these classifications are not essential to

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[39] Harvard Law Review, *I. Constitutional Law A. Constitutional Structure*, 114 HARV. L. REV. 179, 187 (2000).
[40] *Alexander v. Choate*, 469 U.S. 287, 295 (1985).
[41] Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 390 (1991) (explaining that a 1986 Harris poll demonstrated widespread discrimination against disabled people).
[42] Molly M. Joyce, *Has the Americans with Disabilities Act Fallen on Deaf Ears? A Post-Sutton Analysis of Mitigating Measures in the Seventh Circuit*, 77 CHI.-KENT L. REV. 1389, 1393 (2002).
[43] Joyce, *Has the Americans with Disabilities Act Fallen on Deaf Ears?*, 77 CHI.-KENT L. REV. at 1393.
[44] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 416 (1991) (quoting U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983)). Note also that a similar history of pervasive age discrimination surrounded Congress's enactment of the Age Discrimination in Employment Act (ADEA). *See* Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 512 (1995) (noting that at the time of the passage of the ADEA, it was documented that there was "widespread age discrimination in the workplace").
[45] This is not to suggest that there might not be rare instances of real or apparent discrimination. But nondiscrimination laws, as discussed above, are intended to address instances of systemic and intractable discrimination.
[46] *See* "Best States for Business," Forbes.com, http://www.forbes.com/best-states-for-business/ (last visited Aug. 21, 2016); "2015 Best and Worst State Rankings," ChiefExecutive.net, available at http://chiefexecutive.net/ best-worst-states-business/ (last visited Aug. 21, 20,16); Laffer, Arthur, et al., "Rich States, Poor States, Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index," American Legislative Exchange Council, available at https://www.alec.org/ publication/rich-states-poor-states/(last visited Aug. 21, 2016); Prah, Pamela, "Which States Will Generate Jobs in 2014?," The Pew Charitable Trusts, Jan. 7, 2014, available at http://www.pewtrusts.org/en/research-and-analysis/blogs/ stateline/2014/01/07/which-states-will-generate-jobs-in-2014 (last visited Aug. 21, 2016); "Site Selection's 2015 Top State Business Climate Rankings," SiteSelection.com, available at http://siteselection.com/issues/2015/nov/cover.cfm (last visited Aug. 21, 2016).

economic growth. Notably, the majority of states and the federal government do not include sexual orientation and gender identity in employment, housing, or public accommodation nondiscrimination laws.[47]

Conclusion

Many cities and states that have recently considered adding sexual orientation and gender identity to their nondiscrimination statutes have declined to do so. Just this year, the legislatures of Alaska, Arizona, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Ohio, Tennessee, Utah[48], and West Virginia declined to add these new categories because how these types of laws jeopardize freedom. In 2015, the legislatures of Idaho, Missouri, Nebraska, North Dakota, Pennsylvania, and Wyoming declined to add these new categories. And when Charlotte, NC enacted a law similar to SB 1306 this year, the General Assembly called a special session to rectify the harm to Charlotte businesses and citizens' privacy the law would pose. In short, people across the nation, after considering many of the concerns raised in this memorandum, are recognizing that these laws do not reflect good public policy and thus are declining to enact them.

In conclusion, the state should not enact SB 1306 unless it is prepared to stigmatize people of good will for simply following their consciences on such profound and personal matters as marriage and human sexuality, and to compromise Pennsylvanians' privacy rights and dignity interests. While some may have laudable intent in supporting SB 1306, it restricts the freedom and violates the privacy of Pennsylvania citizens. We encourage all elected officials who are asked to vote for a law like SB 1306 to consider the demonstrated problems posed by these laws and to make the choice that promotes the common good.

[47] Currently, 28 states and the federal government do not include sexual orientation or gender identity in their employment and housing nondiscrimination laws, while 29 states and the federal government do not include these classifications in their public accommodation nondiscrimination laws.

[48] Utah proposed adding sexual orientation and gender identity to their state public accommodations statute.