LGBTQ+ INITIATIVE THREATENS RELIGIOUS FREEDOM

EXECUTIVE SUMMARY

A politically leftist petition initiative aims to add sexual lifestyle protections to Michigan's anti-discrimination law. Sadly, the proposal also intentionally seeks to relegate the free exercise of religious conscience into irrelevance. Purportedly in the name of civil rights, proponents seek special preference for classifications concerning sexual orientation, gender identity and gender expression. Revealing their actual political agenda though, the proposal carefully defines freedom of religion to include only *belief.* Defining religion so narrowly eliminates existing protection for the *free exercise of religion,* thus providing virtually no protection at all.

Grounded in misrepresentation, this leftist-leaning political agenda is armed with the full enforcement power of the state. Those who believe that biology and anatomy are more than a social construct should not have to risk litigation and financial ruin to protect their daughters from men invading their bathrooms or showers. Moreover, the law ought not cloak men with the full enforcement power of the state to enter these most private of places.

Governments frequently wield so-called anti-discrimination initiatives as a weapon to oppress religious people. The exponential expansion of government actions interfering with an individual's exercise of religious conscience is especially prevalent in cases involving small and family-owned businesses. Recent cases against bakers, printers, and bed and breakfast proprietors illustrate the point. Even more troubling, in a deliberate abuse of power, Michigan authorities now investigate Christian business owners for violating the provisions of this petition initiative, even before its proponents obtained a single signature. Lawyers at the Great Lakes Justice Center represent these citizens at no charge.

Elsewhere, government authorities in Houston, Texas, issued subpoenas to Christian pastors. The subpoenas ordered the pastors to give copies of their speeches and sermons related to "homosexuality, or gender identity" to the government for its review. The subpoenas further demanded the pastors produce their e-mails, instant messages, text messages, and diaries, as well as communications to members of their congregation and legal counsel. Soon after Houston subpoenaed the pastors, a city in Idaho threatened criminal prosecution of other Christian pastors for not performing same sex weddings in violation of their sincerely held religious conscience. Ironically trying to justify their hostile attacks in the name of civil rights, activists focus their ire on a mostly Christian minority. Merely defending viewpoints grounded in religious conscience is enough to validate their outrage — especially when those viewpoints threaten "personal autonomy" mantras or remonstrate against forced civil acceptance of all of sexual behavior. For example, a biological male demanded access to an overnight women's shelter in Alaska, occupied by women seeking shelter from domestic violence and sex trafficking abuse. He claimed a right to stay in the same room where the women slept and changed.

The fierceness of the opposition to religious conscience makes clear that such

attacks are not about civil rights as the activists falsely suggest. It is, rather, about their desire for political power to censure, by force of law and punishment, any idea informed by sacred tenets that might interfere with their anti-faith political agenda.

Christian people know that every person has inherent value, made in the very image of God. Christians would, therefore, never discriminate against a person based upon who they are. Christian people will, though, never concede their First Amendment freedom of conscience. An in-depth policy analysis of the proposed petition initiative follows.

A petition initiative seeks to amend Michigan's civil rights law. The proposal radically diminishes protection for religious exercise, while giving special increased coverage for sexual orientation, gender identity, and gender expression.

ANALYSIS

Preliminarily, Christian people know God created all human life in His image. Thus, for Christian people, every person holds positive value and deserves respect. No follower of Jesus would, therefore, ever discriminate against another person based upon who they are. We condemn invidious discrimination and hold animus toward no one. We seek respectful consideration of all viewpoints. We reject the fallacy that honest disagreement equates with hate-speech or bigotry.

NO DEMONSTRATED REASON EXISTS FOR DIMINISHING RELIGIOUS FREEDOM OR FOR ADDING THE NEW CATEGORIES.

The activists' petition initiative proposes a solution to a non-existent problem. No evidence of widespread systematic discrimination exists based on the proposed new categories. For example, people are not routinely firing employees based upon their sexual orientation or gender identity. Likewise, people are not systemically denying access to educational or employment opportunities based upon the proposed categories. Finally, nobody, based upon the proposed categories, ever faced rules requiring them to sit in the back of a bus or use separate but equal public accommodations like bathrooms. Occasional, anecdotal stories do not justify sweeping statutory changes infringing on fundamental constitutional freedoms of religious people. Proponents falsely promote their petition initiative as a cure for a demonstrated problem. In reality, they seek to coerce adherence to a leftist political agenda intentionally irreconcilable with the free exercise of religious conscience.

THE ACTIVISTS' INITIATIVE INFRINGES ON THE RIGHT TO FREEDOM OF SPEECH AND RELIGIOUS CONSCIENCE.

Initiatives, like the one here, lead to government censorship and punishment of citizens holding valid religious and political views. Banning dissent to state-mandated acceptance of sexual fluidity occurs when a religious person's views conflict with an authority's agenda promoting *gender identity*.

Unconstitutional interference with a citizen's freedoms of religion or expression must not stand. Government must not use its power in ways hostile to religion or religious

viewpoints.[1] Indeed, government ought to protect and not impede the free exercise of religious conscience.[2] The First Amendment to the United States Constitution protects individuals against government actions substantially interfering with the free exercise of religion or abridging freedom of speech or assembly.[3] Michigan's Constitution likewise protects these unalienable liberties.[4] Under these constitutional provisions, government authorities hold no power to dictate acceptable verses unacceptable exercises of religious conscience. Nor do these provisions permit government authorities to silence and punish discourse it finds offensive. The activists' initiative invites authorities to limit the viewpoint of allowable speech and the exercise of religious conscience -- compelling employers to politically normalize LGBTQ behavior.

Here the activists' proposal unabashedly seeks to forever chill religious people from exercising religious conscience or even participating in the marketplace of ideas. It ultimately requires those subject to Michigan's Civil Rights Law to adopt, implement, and enforce policies that promote the LGBTQ lifestyle. Statutorily mandated support and affirmation of LGBTQ behaviors unavoidably conflicts with the conscience of many people whose sincerely held religious tenets irreconcilably collide with this lifestyle. It is wrong to force a citizen to violate their religious conscience or face punishment. Inherent intolerance exists in the way the initiative defines religion, given that it expressly eliminates all protection for the free exercise of religious conscience.[5] "Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination."[6]

According to the U.S. Supreme Court, government officials ought not act as thought police. "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."[7] The activists' proposal patently violates this critical principle. The activists claim to promote non-discrimination – by discriminating against, silencing, and punishing, people whose conscience cannot support the LGBTQ lifestyle.

Michigan ought not create an environment that chills First Amendment freedoms of citizens who disagree with the

[1] *See e.g., Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1731 (2018).

[2] *See e.g., Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2022 (2017) (holding government violates Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *Burwell* v. *Hobby Lobby Stores, Inc.,*134 S. Ct. 2751, 2775 (2014) (holding Religious Freedom Restoration Act applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171, 196 (2012) (barring employment discrimination suit brought against religious school). *See also,* E.O. 13831; E.O. 13798, 82 FR 21675 (May 9, 2017).

[3] U.S. Const. amend. I

[4] See, e.g., (Article I, Section 4, stating, "The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.")

[5] The definition limits protection for "religion" to an individual's "beliefs," thus excluding the free exercise of religious conscience.

[6] *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

[7] *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

LGBTQ political agenda.

To be sure, government infringement of content-based regulation of expression faces strict scrutiny. This means the government must show 1) a "compelling government interest justifying the infringement on speech, and 2) that it is using the least restrictive means possible to accomplish this compelling interest. The reason the Supreme Court employs strict scrutiny here is because it considers speech a fundamental liberty.[8]

In *R.A.V. v. City of St. Paul*,[9] the U.S. Supreme Court struck down a city law that levied special restrictions on individuals who expressed views on the subjects of race, color, creed, or gender. The Supreme Court held that such a law facially violates the First Amendment right to freedom of speech because "the First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects."[10] The Court further pointed out that the law displayed the government's special hostility towards particular biases. That is precisely what the First Amendment forbids.[11] The St. Paul law struck down by the Supreme Court and the activists' proposed new categories share the same unconstitutional features.

The Supreme Court also struck down laws infringing upon Freedom of Association. Under these holdings, Freedom of Association protects one's right to not associate with others where the exclusion is based upon the expressive message of the group.[12] Freedom of association includes the right not to associate.

The Supreme Court also viewed protecting the free exercise of religious conscience as essential. In a number of cases the Court applied strict scrutiny, treating the free exercise of religion as a fundamental right. But, as we shall see, this high standard of review does not necessarily mean a court will always protect the free exercise of religion.

In *Sherbert v Verner*, the Court struck down government action denying unemployment benefits to a person who lost her job when she did not work on her Sabbath.[13] Similarly, in *Wisconsin v. Yoder*, the Court overturned convictions for violations of state compulsory school attendance laws that conflicted with defendants' sincerely held religious beliefs.[14] Because the Court considered these unalienable rights fundamental, it required government to provide a compelling interest to justify interfering with an individual's free exercise of religion. The Court, while applying this strict scrutiny to government action, further required the government to show it used the least restrictive means available to accomplish its interest.

The Court, however, eventually drifted away from this constitutional absolute in connection with its treatment of the freedom of religion. In *Employment Division v. Smith,* the Supreme Court upheld as constitutional a law substantially infringing upon the free

[8] *Turner Broadcasting Syst. v. FCC* 512 U.S. 622, 641 (1994); *Lambs Chapel v. Center Moriches Sch. Dist.,* 508 U.S. 384 (1993).
[9] 505 U.S. 377 (1992)
[10] Id. at 391.
[11] Id. at 396.
[12] See e.g., *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000).
[13] *Sherbert v Verner* (1963) 374 US 398
[14] *Wisconsin v Yoder* (1972) 406 US 205

exercise of religious conscience.[15] In *Smith* the Court characterized the government action at issue as a neutral law of general applicability. Because the government action was neutral and generally applicable, the Court required no justification by the government for its action—even though the action substantially infringed upon the free exercise of religious liberty. Thus, the Court concluded that in such situations government action is constitutional if rationally related to a legitimate government interest—the lowest level of scrutiny an American court can apply when reviewing a law to determine whether it is constitutional.[16]

In response to the *Smith* decision, Congress, in a bi-partisan way, enacted the Religious Freedom Restoration Act (RFRA).[17] The act expressly provided that:

> *Government shall not substantially burden a person's 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— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.*

In promulgating the RFRA, Congress declared: "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." Congress stated the purpose of the legislation was (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

The Supreme Court reviewed Congress' exercise of its power after the passage of RFRA. The Court upheld the RFRA as applied to federal government actions, but said Congress acted outside the scope of its constitutional authority as applied to the states.[18] Thus, unless a state enacts a **state RFRA**, state government actions interfering with religious conscience do not face the higher standard of review. Michigan has not enacted a state RFRA

Moreover, not even a high standard of review stands in the way of an activist judicial panel determined to enact a preferred political preference.[19] Indeed, given the language of the activists' petition initiative, it is clear the proposal's proponents expect an activist court to construe the existence of a

[15] *Employment Division v Smith* (1990) 494 US 872

[16] Compare, *Church of Lukumi Babalu Aye v Hialeah* (1993) (holding that Court will apply strict scrutiny to a law substantially infringing upon religious liberty when the law is not a neutral law of general applicability).

[17] Title 42 United States Code § 2000bb.

[18] In *Gonzales v O Centro Espirita A Beneficente Uniao Do* (2006), (upholding RFRA requirements as applied to federal government actions; *City of Boerne v Flores* (2007) (striking down RFRA requirements as applied to states)

[19] *See EEOC v. Harris Funeral Homes, Inc.,* No. 16-2424, slip op. at 35-45 (6th Cir. March 7, 2018) (deeming a compelling government interest exists in eradicating discrimination based on the court's new classifications, and that enforcement under the statute is the least restrictive means of accomplishing this interest. This case is now before the U.S. Supreme Court).

government interest sufficient to interfere with religious conscience -- thus justifying exercises of government power against religious people. Without a state RFRA, the proposed special protection for sexuality categories intentionally creates an irresolvable conflict with existing statutory protection for religious liberty. The activists know the language in their proposal forces the courts to choose whose statutory protection should prevail. That is why the activists' proposal definitionally dilutes the currently existing protection for religious liberty.

When the framers of the First Amendment protected the "free exercise" of religion, they recognized it necessarily includes the right to hold and manifest beliefs without fear of government punishment or coercion. The activists' proposal, however, explicitly limits protection for "religion" to an individual's "beliefs," thus intentionally excluding any protection for the free exercise of religious conscience.

Michigan law ought to affirm and uphold constitutionally-protected freedoms, not grant special protections for some, while coercing others to comply with a leftist cultural agenda.

THE ACTIVISTS' PROPOSAL VIOLATES PROCEDURAL DUE PROCESS REQUIREMENTS OF THE 14TH AMENDMENT BY UNCONSCIONABLY FAILING TO PROVIDE FAIR NOTICE OF THE CONDUCT IT PROPOSES TO PROHIBIT.

The activists' initiative calls for the adoption, implementation, and enforcement of classifications concerning sexual orientation, gender identity and gender expression.

The Fourteenth Amendment to the U.S. Constitution provides that state governments must not "deprive any person of life, liberty, or property, without due process of law." The due process Clause of 14th Amendment to the U.S. Constitution requires, at a minimum, notice of what a government policy prohibits.[20] This constitutional rule of law provides predictability for individuals in the conduct of their affairs. An unambiguously drafted law affords prior notice to the citizenry of conduct proscribed. In this way, the rule of law provides predictability for individuals in their personal and professional behaviour. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly.

[20] U.S. Const. Amend. 14. This rule of law is axiomatic throughout the free world. The European Convention on Human Rights, for example, guarantees individuals the right to prior notice of what constitutes prosecutable criminal conduct. European Convention on Human Rights *opened for signature* Nov. 5, 1950, Arts. 6 and 7, Europe. T.S. No. 5, [hereinafter "ECHR"]. To access the ECHR on the web, click here: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

The ambiguous language of the activists' proposal fails to provide the public with adequate notice of the kind of conduct prohibited by the law. This failure creates an impossibly precarious proposition for citizens attempting to discern what constitutes prohibited conduct, so as to conform their personal and professional behaviour to the policy. Because accusers with political agendas can use ambiguity in the language to decide, after the fact, what the law prohibits, the possibility of facing oppressive government action is always unpredictable.

For example, the vagueness of the undefined phrase *sexual orientation*, fails to provide adequate notice of what the law prohibits. Sexual orientation comes in many forms. Does the initiative cover, for example, a sermon about the conduct of a group of people whose sexual orientation is for extramarital sex (swingers/adulterers)? Does it cover discussion about the conduct of a group of people whose sexual orientation is for multiple partners within a marital relationship (polygamists)? What about a group of people whose sexual orientation is for young children (pedophiles)? Does it cover a group of people whose orientation is toward violence (e.g., serial killer rapists)? What about people whose sexual orientation is for dead humans (necrophiles)? What about people whose sexual orientation is for barnyard animals (bestiality)? Or those whose sexual orientation is toward one's own close relatives (incest)? Given the absence here of any statutory definition, the ambiguous language arguably could include any and all such groups. Will an otherwise law-abiding citizen, therefore, face government enforcement for calling pedophilia or necrophilia bad? An individual's inalienable right to free religious expression forbids such government-imposed guessing games, especially when, as here, the public has no way of predicting what morally-relative choice a government authority will choose when making an enforcement decision. Because no articulated rule of law gives notice to the public of what the phrase proscribes, unpredictable possibilities of persecution pervade all parts of the social order.

The undefined term of *gender identity* is even more problematic. Taken to its logical conclusion, it proscribes infinite possibilities. As used in the activists' initiative, this phrase is so vague and subjective that it is impossible for any reasonable person to reliably discern permissible from prohibited conduct. How is an accused supposed to know how someone else internally perceives their own gender?

When, as here, ambiguous language prevents notice of what constitutes prohibited conduct, accusers (and sympathetic authorities) arbitrarily define the prohibited conduct *after* the commission of the act. Thus, the conduct prohibited by the activists' proposal wholly depends (at best) on the whim of an accuser's personal feelings—rather than on a clearly expressed rule of law articulated in the language of the provision. An accuser gets to define what this language means without limit by simply filing charges alleging some statement or action violates the law. Then the authority of the Civil Rights Commission takes over.

The proposal places individuals, business people and religious organizations in an impossibly precarious position when attempting to discern what constitutes discrimination under the proposed categories. Because accusers with an agenda can use the

ambiguity of the proposed categories to decide, after the fact, what is prohibited or what offends them, the possibility of people of faith facing oppressive civil charges and litigation is limitless. The accusers are only limited by their own imagination and ability to come up with new ways to charge someone under the new categories.

Indeed, the proposed new, protected categories are incapable of clear definition. A person can be accused under the vague terms of such categories for merely expressing a religious belief that another individual internally defines as being offensive to him or her. The determination of the wrongful act is subjective and in the eyes of the beholder. The determination of whether a person is a member of one of the new protected classes is likewise subjective and in the eye of the beholder. A person cannot know if their conduct is prohibited until after the fact. Thus, even if a person or business possesses no intent to offend or discriminate, the alleged victim can commence legal action pursuant to this law. Doing so subjects the accused to exorbitant legal costs and fines, as well as revocation of state licenses. Here the full power of the state enables those with a cultural agenda to destroy their opponent's business and personal finances.

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

Enforcement of the Proposed Law Undermines Precepts of Good Governance Under the Rule of Law

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

In the case of a vaguely worded law, enforcement can, without prior notice of the conduct prohibited, lead to a citizen's loss of livelihood. Moreover, if the law vaguely regulates free expression, an ominous chill on

the exercise of fundamental freedoms accompanies its promulgation. The great potential for abuse through arbitrary enforcement of these new provisions is reason enough to oppose their enactment. Compelled by the piercing chill of an unpredictable potential legal action, citizens cease exercising their basic liberties. They fear to assemble, pray, worship, or even speak.

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

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

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

Selective enforcement and punishment of citizens under the activists' initiative sends a bitter chill throughout the business and religious communities of our country. Promulgating vague laws that allow for arbitrary and selective enforcement is never an appropriate public policy for any institution that values good governance under the rule of law.

The Negative Impact on the Business Community – Excessive Regulation, Litigation, and Increased Costs

If enacted, the proposed new law empowers the State to revoke or suspend a citizen's business license (i.e., see Michigan Compiled Law 37.2703). It is wrong to give the proponents of these new categories the ability to use the full force of the State to financially destroy people of conscience in the business community.

Moreover, if Michigan adds the categories, expect well-funded activists to sue religious people exercising their sincerely held religious conscience. Also expect these activists to demand religious people to pay their attorney fees if they prevail. Interestingly, no provision exists in the law permitting the small business owner to recover its attorney fees or litigation costs if it successfully defends such a legal attack. The cost of just one such lawsuit could easily put a small business out of business. Incongruously, an activist accuser who frivolously files such a lawsuit, faces no penalty.

The law should not force a citizen to choose between losing their business or violating their religious conscience. Historically, activists use these additional categories as a sword, not a shield. All these cases demonstrate an intent to attack Christian-owned business and religious communities under the guise of

nondiscrimination. Proponents' intent is truly diabolical: silence Christian people and force great financial hardship upon them, simply for exercising conscience.

Conclusion

Make no mistake about it. Activists plan to wield the proposed law as a weapon to destroy their opponents in one of the great cultural debates of our time. At the urging of leftist activists, government authorities increasingly use laws like the one proposed here to silence and financially cripple Christian people of conscience.

The evidence clearly shows that the impetus for the activists' proposal in no way relates to advancing civil rights; The activists seek nothing less than compulsory civil acceptance of sexual conduct by force of law and punishment.

The test of a properly functioning republic is not whether the government protects the speech and religious rights with which it agrees – it is whether it will protect the speech, religious rights and the economic liberty of those citizens with whom it does not agree. Instead of censuring or punishing speech and religious liberty, the answer is always to have more speech and the free exchange of ideas – at least in a republic that values true freedom, pluralism, and diversity.

Great Lakes Justice Center