



## LEGAL MEMORANDUM

DATE: March 19, 2013  
RE: Legal Repercussions of House Bill 2856 and Senate Bill 486

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### Introduction

West Virginia House Bill 2856 and Senate Bill 486<sup>1</sup> (HB 2856/SB 486)—the proposed legislation to expand nondiscrimination laws in West Virginia to include the categories of “sexual orientation” and “gender identity”—would create multiple legal issues for the state of West Virginia and threaten West Virginians’ First Amendment freedoms, if it is enacted. Herein we examine some of the legal concerns in HB 2856/SB 486.

#### **I. HB 2856/SB 486 threatens West Virginia citizens’ First Amendment freedoms.**

##### **A. HB 2856/SB 486’s religious freedom exemptions are inadequate.**

Although HB 2856/SB 486 includes a narrow religious freedom exemption for certain employers and certain religious organizations involved in housing, it is inadequate to uphold even the bare minimum protections required by the First Amendment. Notably, HB 2856/SB 486 offers no protections for those who have sincere religious beliefs and own or work in places of public accommodations.

HB 2856/SB 486 incorporates specific provisions of Title VII of the Civil Rights Act of 1964 in its treatment of religious exemptions in the employment context. However, the proposed religious exemption would protect *only* the employment decisions of a “religious” “corporation, association, educational institution or institution of learning, or society.”<sup>2</sup> But hiring those individuals that subscribe to the employer’s religious beliefs is already a protected right of religious organizations, thereby making the bill’s proposed protection superfluous.<sup>3</sup> In addition, HB 2856/SB 486’s narrow protections leave vulnerable to attack the many organizations and individuals that may not be “religious,” but who hold sincere beliefs on marriage and human sexuality. Examples of such entities left vulnerable to attack include social service organizations, daycare centers, family-owned businesses, and any employer who holds such beliefs.

HB 2856/SB 486 also purports to protect the ability of schools and universities to make hiring decisions consistent with their religious teachings, so long as the institution is “controlled or managed”

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<sup>1</sup> This legal memo cites to HB 2856 in its analysis. However, the language of both HB 2856 and SB 486 is identical.

<sup>2</sup> See HB 2856, § 5-11-3(d), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>3</sup> See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, ---U.S.---, 132 S. Ct. 694 (2012), and *Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2011).



by a particular religion, or if the curriculum of the institution is “directed toward the propagation of a particular religion.”<sup>4</sup> However, these tests subject a school to a judicial determination of its religious bona fides, and leave to judicial interpretation whether a particular school’s religious freedom is protected. But as the U.S. Supreme Court has ruled, “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.”<sup>5</sup>

Moreover, any protections seemingly afforded by HB 2856/SB 486 are gutted by its denial of freedom to those institutions that operate “a program funded by the state.” This language can only serve to terminate the historically productive relationships between the state and the faith-based agencies with which it contracts, including child-welfare agencies (as discussed in greater detail *infra*), homeless shelters, school programs, and counseling programs. Worse yet, it presents these organizations with the choice to either renounce their faith or abandon their mission—a choice the state should force no one to make.

HB 2856/SB 486 also fails to provide constitutionally-required religious freedom protections to those organizations and individuals engaged in the sale or rental of property for a commercial purpose (as discussed, *infra*).<sup>6</sup>

### **B. Section 5-11-9 threatens religious freedom in employment.**

If enacted, HB 2856/SB 486, in particular §5-11-9(2),<sup>7</sup> (3),<sup>8</sup> and (5),<sup>9</sup> will infringe on the religious liberty of those who work for 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’ and/or their own religious beliefs. Yet certain employers have legitimate reasons to consider an employee or applicant’s sexual behavior when

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<sup>4</sup> 42 U.S.C. 2000e-2(e)(2) (1964).

<sup>5</sup> See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>6</sup> See HB 2856, §5-11A-5, 81st Leg., 1st Sess. (W.Va. 2013). See also W. VA. CODE § 5-11A-8 (2012).

<sup>7</sup> “For any employer, employment agency or labor organization, prior to the employment or admission to membership, to: (A) Elicit any information or make or keep a record of or use any form of application or application blank containing questions or entries concerning the race, religion, color, national origin, ancestry, sex, sexual orientation or age of any applicant for employment or membership; (B) print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specifications or discrimination based upon race, religion, color, national origin, ancestry, sex, sexual orientation, disability or age; or (C) deny or limit, through a quota system, employment or membership because of race, religion, color, national origin, ancestry, sex, age, sexual orientation, blindness or disability.” HB 2856, § 5-11-9(2), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>8</sup> “For any labor organization because of race, religion, color, national origin, ancestry, sex, age, sexual orientation, blindness or disability of any individual to deny full and equal membership rights to any individual or otherwise to discriminate against such individual with respect to hire, tenure, terms, conditions or privileges of employment or any other matter, directly or indirectly, related to employment.” HB 2856, § 5-11-9(3), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>9</sup> “For any employment agency to fail or refuse to classify properly, refer for employment or otherwise to discriminate against any individual because of his or her race, religion, color, national origin, ancestry, sex, age, sexual orientation, blindness or disability.” HB 2856, § 5-11-9(5), 81st Leg., 1st Sess. (W.Va. 2013).



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. The possible examples are vast. If HB 2856/SB 486 is enacted, however, those who work for employment agencies or labor organizations will be prevented from serving others according to their sincerely held religious beliefs—something they have a constitutionally-protected right to do.

But the impact of HB 2856/SB 486 will extend beyond employment agencies and labor organizations; it will threaten the religious liberty of employers and employees across the state. HB 2856/SB 486 prohibits “sexual orientation” discrimination by employers “with respect to compensation, hire, tenure, terms, condition or privileges of employment,” declaring “equal opportunity” in the “area of employment” a “human right.”<sup>10</sup> For any organization to be successful in its purpose and mission, however, it must be allowed to employ individuals 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 West Virginia legislature routinely employ this principle, for example, hiring to work in their offices those who share or embody their political beliefs and aspirations. To require otherwise would run counter to the purposes of the legislature.<sup>11</sup>

The proposed legislation thus fails to protect the constitutionally-guaranteed right to free exercise of religion of those individuals and businesses who desire to hire individuals consistent with their religious beliefs or their business’ mission. HB 2856/SB 486 would force these individuals and businesses to choose between violating their conscience and facing jail and/or fines.<sup>12</sup> 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 who is actively engaged in a lifestyle or conduct inconsistent with its religious principles. HB 2856/SB 486 could also force a company that specializes in same-sex counseling to hire someone who has never been in a same-sex relationship.

In addition, this bill could expose businesses to liability for making rational decisions based on matters such as spousal benefits. For instance, a same-sex couple sued Blue Cross Blue Shield of Western New York for, among other claims, allegedly violating the state’s “sexual orientation”

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<sup>10</sup> See HB 2856, §§ 5-11-2 and 5-11-9, 81st Leg., 1st Sess. (W.Va. 2013).

<sup>11</sup> Furthermore, if this law is enacted, all employers will likely have an obligation to prevent employees or customers from engaging in conduct that other employees might view as discriminating on the basis of “sexual orientation.” Moreover, this law will prompt most employers to adopt policies prohibiting “sexual orientation” discrimination, which, regardless of the employers’ intent, will significantly affect their employees’ religious liberty in the workplace.

<sup>12</sup> See W. VA. CODE § 5-11-14 (2012). “Any person who shall willfully resist, prevent, impede or interfere with the commission, its members, agents or agencies in the performance of duties pursuant to this article, or shall willfully violate a final order of the commission, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment, in the discretion of the court, but seeking judicial review of an order shall not be deemed to be such willful conduct.”



nondiscrimination law.<sup>13</sup> In their complaint, the couple alleged that “[b]y failing to provide [them] with spousal health care coverage, BCBSWNY is unlawfully discriminating against them based on their sexual orientation, in violation of the Executive Law.”<sup>14</sup> The enactment of HB 2856/SB 486 could lead to litigation to force individuals or organizations—in violation of their sincerely held religious beliefs—to extend spousal employment benefits to same-sex couples.<sup>15</sup> Federal courts, however, have recently concluded that even for-profit business entities may not be coerced into providing benefits contrary to their values or conscience.<sup>16</sup>

Passage of this bill threatens far-reaching discrimination against West Virginian businesses and individuals who hold sincere religious or moral beliefs. And most troublesome of all, by enacting the proposed law, the government will be complicit in—and, indeed, a direct cause of—the opposite of religious freedom: religious coercion.<sup>17</sup>

**C. Sections 5-11-9(2)(B),<sup>18</sup> 5-11-9(3)(D),<sup>19</sup> 5-11-9(6)(B),<sup>20</sup> and 5-11A-5(c)<sup>21</sup> would violate West Virginians’ constitutionally-protected freedoms of speech and association.**

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<sup>13</sup> This lawsuit was filed *before* the New York State Assembly redefined marriage in 2011, and was premised exclusively on the state’s law like HB 2856.

<sup>14</sup> See [http://www.nyclu.org/files/BlueCross\\_Summons\\_Complaint\\_7.9.08.pdf](http://www.nyclu.org/files/BlueCross_Summons_Complaint_7.9.08.pdf) (last visited Mar. 5, 2013).

<sup>15</sup> See, e.g., *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) (finding that an employer “violated Executive Law § 296(1)(a), which forbids an employer from discriminating against an employee . . . because of [her] sexual orientation,” by refusing to recognize the employee’s same-sex relationship or provide benefit to her same-sex partner).

<sup>16</sup> See, e.g., *O’Brien v. U.S. Dep’t of Health & Human Servs.*, No. 12-3357 (8th Cir. 2012); *Grote Indus. LLC v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. 2013); and *Legatus v. Sebelius*, 2012 WL 5359630 (E.D. Mich. 2012).

<sup>17</sup> HB 2856, § 5-11-8, 81st Leg., 1st Sess. (W.Va. 2013).

<sup>18</sup> “It shall be an unlawful discriminatory practice... for any employer, employment agency or labor organization...to print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specifications or discrimination based upon race, religion, color, national origin, ancestry, sex, sexual orientation, disability or age...” HB 2856, § 5-11-9(2)(B), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>19</sup> “It shall be an unlawful discriminatory practice...for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs to...[p]rint or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for these programs or to make any inquiry in connection with a program which expresses, directly or indirectly, discrimination or any intent to discriminate unless based upon a bona fide occupational qualification.” HB 2856, § 5-11-9(3)(D), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>20</sup> “It shall be an unlawful discriminatory practice [f]or any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to...[p]ublish, circulate, issue, display, post or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities, privileges or services of any such place shall be refused, withheld from or denied to any individual on account of race, religion, color, national origin, ancestry, sex, age, sexual orientation, blindness or disability, or that the patronage or custom thereof of any individual, belonging to or purporting to be of any particular race, religion, color, national origin, ancestry, sex, sexual orientation or age, or who is blind or disabled, is unwelcome, objectionable, not acceptable, undesired or not solicited.” HB 2856, § 5-11-9(6)(B), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>21</sup> “[I]t is unlawful...[t]o make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, sex, age, sexual orientation, blindness, disability, familial status, ancestry or national origin,



The United States Supreme Court has repeatedly recognized that certain applications of nondiscrimination laws, similar to HB 2856/SB 486, can infringe on cherished First Amendment freedoms, such as freedom of speech and association. In one case, for example, the Massachusetts Supreme Judicial Court ruled that private individuals—the organizers of the St. Patrick’s Day Parade in Boston—violated a prohibition against “sexual orientation” discrimination when they refused to allow a group advocating homosexual behavior to participate in the parade.<sup>22</sup> On appeal, the United States Supreme Court declared that the application of the “sexual orientation” nondiscrimination law violated the constitutional free-speech rights of the parade organizers by compelling them to communicate an unwanted message.<sup>23</sup> This was so, even though the parade itself was a public accommodation under Massachusetts law.

In another case, the New Jersey Supreme Court ruled that a private organization, the Boy Scouts of America, violated the State’s “sexual orientation” nondiscrimination law when it denied a scout-leader position to a man openly engaged in homosexual behavior.<sup>24</sup> Yet the United States Supreme Court ruled that New Jersey’s application of the law infringed the constitutional free-association rights of the Boy Scouts to join together with those individuals who believe in, and seek to promote, the organization’s core values.<sup>25</sup> The Supreme Court noted that protecting expressive association from antidiscrimination laws “is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”<sup>26</sup> These cases tangibly demonstrate the constitutional concerns that are needlessly created by HB 2856/SB 486.<sup>27</sup>

If HB 2856/SB 486 is enacted, West Virginians could face fines and penalties for simply seeking to run their businesses in accordance with their conscience and their values.<sup>28</sup> For example, a family-owned bookstore that advertises its employment opportunities only to those professing its Christian values could face substantial penalties.<sup>29</sup> Similarly, if a religious photographer advertises

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or an intention to make any such preference, limitation or discrimination.” HB 2856, § 5-11A-5(c), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>22</sup> *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293 (Mass. 1994).

<sup>23</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

<sup>24</sup> *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

<sup>25</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

<sup>26</sup> *Id.* at 647-48.

<sup>27</sup> The United States Supreme Court is not alone in acknowledging the constitutional violations that often result from the existence of exceedingly broad nondiscrimination laws. Legal scholars have also remarked that the excessive and unnecessary expansion of nondiscrimination laws has emerged as a “serious threat” to constitutional rights and our nation’s timeless civil liberties. See David E. Bernstein, *YOU CAN’T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* 8 (Cato Inst. 2003); see also Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155, 1200 (2005) (“[T]he broadening of antidiscrimination law . . . creates substantial . . . costs to private actors’ freedom from government restraint”).

<sup>28</sup> See W. VA. CODE § 5-11-14 (2012). “Any person who shall willfully resist, prevent, impede or interfere with the commission, its members, agents or agencies in the performance of duties pursuant to this article, or shall willfully violate a final order of the commission, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment, in the discretion of the court, but seeking judicial review of an order shall not be deemed to be such willful conduct.”

<sup>29</sup> *Id.*



that she is seeking to hire an assistant that shares her beliefs, or if a Jewish counselor advertises to hire another individual to provide “counseling consistent with the Judeo-Christian faith,” both would be penalized under this proposed law. And if a small family-owned company only advertised its residential properties to opposite-sex couples due to its religious beliefs regarding sexuality, they could face legal persecution, if this bill is enacted.

And because of the definition of “sexual orientation,” this new law will unreasonably discriminate against establishments or business owners that cater to gay and lesbian clientele. Under this law, the owner of an LGBT bookstore could be punished for insisting on advertising to and/or hiring gays or lesbians to serve her clientele. It would be understandable and reasonable for this business owner to hire gays and lesbians for her bookstore, but this law would forbid such actions.

HB 2856/SB 486 thus fails to extend constitutionally-required protections to West Virginia citizens to be able to communicate and promote their businesses in accordance with their beliefs or mission.

**D. Section 5-11-9(6)(A)<sup>30</sup> threatens religious freedom of individuals and businesses that provide “public accommodations.”**

HB 2856/SB 486 would inflict widespread and pervasive harm on religious liberty, impacting—among others—business owners, professionals, religious organizations, and anyone working for the state, or any political or civil subdivision thereof, who offers their “services, goods, facilities or accommodations to the general public.”<sup>31</sup> The adoption of HB 2856/SB 486 would present these individuals and businesses with a diabolic choice: violate their conscience or face legal action, including fees and even jail time, as well as possible termination from their employment.<sup>32</sup>

Persecution of those who simply seek to live their daily lives and operate their businesses consistent with their deeply held religious beliefs is not mere speculation. On the contrary, in other jurisdictions that have passed laws like HB 2856/SB 486, they have been used as swords to attempt to force Americans to violate their conscience, remove themselves from the marketplace, or suffer legal harms for merely abiding by their convictions. Examples include:

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<sup>30</sup> “It shall be an unlawful discriminatory practice... [f]or any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to [r]efuse, withhold from or deny to any individual because of his or her...sexual orientation...either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations.” HB 2856, § 5-11-9(6)(A), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>31</sup> HB 2856, § 5-11-3(j), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>32</sup> See N.D. CENT. CODE § 14-02.4-20 (1960). “If the department, as the result of an administrative hearing, or the court determines that the respondent has engaged in or is engaging in a discriminatory practice, the department or the court may enjoin the respondent from engaging in the unlawful practice and order temporary or permanent injunctions, equitable relief, and backpay limited to no more than two years from the date a minimally sufficient complaint was filed with the department or the court.”



- Because of a law like HB 2856/SB 486, a same-sex couple sued a Christian association when it chose to act according to its sincerely held religious beliefs and decline the use of its pavilion on its private property for a same-sex couple's civil union.<sup>33</sup> The couple found a place for their ceremony, but still chose to persecute the ministry.
- Because of a law like HB 2856/SB 486, a same-sex couple filed a discrimination complaint against a Colorado bakery because the baker declined a request to prepare a cake for the couple's same-sex celebration.<sup>34</sup> Plenty of bakeries will assist them, but this bakery is still being persecuted.
- Because of a law like HB 2856/SB 486, a same-sex couple filed discrimination complaints with the Illinois Attorney General and the Illinois Department of Human Rights against two small, family-owned bed-and-breakfasts when the owners of those establishments, for religious reasons, declined to host the couple's civil-union ceremony.<sup>35</sup> Plenty of bed-and-breakfasts were available to the couple, but the legal action was still pursued.
- Because of a law like HB 2856/SB 486, a Virginia municipality's human-rights commission ordered a video-duplication business to copy two documentaries promoting homosexual behavior, even though the business owner said that producing the material would violate his religious and ethical values.<sup>36</sup> Several video duplication businesses were available to perform this service, but this business was still legally forced to perform a service against its beliefs.
- Because of a law like HB 2856/SB 486, a young photographer in New Mexico respectfully declined to photograph a same-sex commitment ceremony because of her religious beliefs on marriage. Although the same-sex couple went on to find another photographer and had a successful commitment ceremony together, they subsequently took legal action against this young woman, and the New Mexico Human Rights Commission fined her \$6600 for the alleged discrimination.<sup>37</sup>
- Because of a law like HB 2856/SB 486, a California court found that physicians whose religious beliefs forbid them to provide an elective fertility procedure for an unmarried woman

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<sup>33</sup> See, e.g., *Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo*, 339 Fed.Appx. 232 C.A.3 (N.J.), 2009

<sup>34</sup> See, e.g., *Masterpiece Cakeshop, Colorado Bakery, Allegedly Denies Wedding Cake To Local Gay Couple*, huffingtonpost.com, Jul. 23, 2012, available at [http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake\\_n\\_1695386.html](http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake_n_1695386.html) (last visited Mar. 18, 2013) (Colorado-based bakery whose owner believes that marriage is the union of one man and one woman legally targeted by same-sex couple).

<sup>35</sup> See, e.g., Terry Hillig, *Men say Alton inn won't host their civil union ceremony*, Stltoday.com, Feb. 23, 2011, available at [http://www.stltoday.com/news/local/metro/article\\_14f7eef0-3f7a-11e0-bb53-0017a4a78c22.html](http://www.stltoday.com/news/local/metro/article_14f7eef0-3f7a-11e0-bb53-0017a4a78c22.html) (last visited Mar. 18, 2013); *Gay Couple Sues Illinois Bed And Breakfast For Refusing To Host Civil Union Ceremony*, huffingtonpost.com, May 25, 2011, available at [http://www.huffingtonpost.com/2011/02/23/gay-couple-sues-illinois\\_n\\_827115.html](http://www.huffingtonpost.com/2011/02/23/gay-couple-sues-illinois_n_827115.html) (last visited Mar. 18, 2013)

<sup>36</sup> *Vincenz v. Bono Film and Video*, Case No. 05-066 PA, Arlington County Human Rights Commission Decision (Apr. 13, 2006) (on file with author and the Arlington County Human Rights Commission) (determining that the video-duplication business, by refusing to "duplicate two documentaries . . . entitled: 'Gay and Proud' and 'Second Largest Minority,'" "discriminated against the complainant on the basis of her sexual orientation").

<sup>37</sup> *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428. Notably, the photographer declined the request based on her sincere religious beliefs about marriage; she did not decline the request based on sexual orientation, and, in fact, has gladly photographed those individuals with same-sex attraction.



in a same-sex relationship violated the State’s sexual-orientation nondiscrimination law.<sup>38</sup> The same-sex couple successfully found doctors to assist them, but still persecuted the religious physicians with a lawsuit.

- A Georgia woman filed a discrimination complaint against a licensed counselor, who, because of her deeply held religious beliefs about same-sex relationships, respectfully declined to provide counseling about her same-sex relationship. The counselor referred the prospective client to a colleague, who within minutes provided the client with the help she sought. The counselor was nonetheless terminated from her employment.<sup>39</sup>

These individual and businesses, and others like them—who refuse to discard their religious beliefs at the door when they operate their businesses or carry out their professions—should not be forced to choose between their conscience and their livelihood. Nobody is required to forfeit their religious freedom when they enter the marketplace, but HB 2856/SB 486’s failure to exhibit tolerance imperils the constitutionally-protected religious liberty of West Virginians and could needlessly drain West Virginia of business, revenue, tax dollars, and employment opportunities.<sup>40</sup>

#### **E. HB 2856/SB 486 threatens faith-based child-welfare providers.**

Evidence from other jurisdictions that have passed similar measures to HB 2856/SB 486 reveals that “sexual orientation” nondiscrimination laws lead to government discrimination against certain individuals and organizations engaged in the provision of child-welfare services. There are frequent examples of government entities refusing to contract with individuals and organizations that conduct themselves in accordance with their religious beliefs because of the government entities’ adherence to nondiscrimination laws.

Unfortunate victims of this discrimination—in addition to the children and families they serve—include the faith-based child-welfare agencies that, for religious reasons, strive to place children in homes with both a mother and a father. Indeed, statutes like the proposed law have forced charitable adoption organizations to close because they could not continue to adhere to their religious convictions.<sup>41</sup> Regrettably, this type of unnecessary discrimination has already occurred in Illinois, Massachusetts, and the District of Columbia.<sup>42</sup>

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<sup>38</sup> *North Coast Women’s Care Med. Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959 (Cal. 2008).

<sup>39</sup> *Walden v. Centers for Disease Control and Prevention*, Case No. 1:08-CV-2278-JEC-WEJ, Magistrate Judge’s Final Report and Recommendation, Doc. No. 111, at 16; 19-22; and 40-41 (N.D. Ga. 2009).

<sup>40</sup> 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”).

<sup>41</sup> See, e.g., Father Robert J. Carr, *Boston’s Catholic Charities to stop adoption service over same-sex law*, Catholic Online, available at [http://www.catholic.org/national/national\\_story.php?id=19017](http://www.catholic.org/national/national_story.php?id=19017) (last visited Mar. 18, 2013) (“Catholic Charities in Boston announced March 10 that it is getting out of the adoption business.”).

<sup>42</sup> See, e.g., Laurie Goodstein, *Illinois Catholic Charities close over adoption rule*, The Boston Globe, available at <http://www.bostonglobe.com/news/nation/2011/12/29/illinois-catholic-charities-close-rather-than-allow-same-sex-couples-adopt-children/Km9RBLkpKzABNLJbUGhvJM/story.html> (last visited Mar. 18, 2013) (“[M]ost of the Catholic Charities



HB 2856/SB 486, if enacted, could lead the government to discriminate against faith-based child-welfare agencies in the name of “nondiscrimination.” Reducing the pool of qualified adoption service providers with whom the state can contract cannot be in the best interests of the children that need loving families, but who are presently in state care. This law would also work to deny birth mothers—who desire to place their children in homes with a mom and a dad, or in homes with parents who hold specific religious beliefs on sexuality—the choices and opportunities necessary for her to ensure the best interests of her child are met.

**F. Sections 5-11A-5-7 threaten the religious freedom of those engaged in the provision of housing, both charitable and for-profit.**

The proposed law’s disregard for religious liberty and constitutional associational rights also extends to those in the housing industry that maintain certain principles about sexual conduct. For example, under the proposed law, individuals with sincere religious beliefs that run homeless shelters or other charitable housing facilities could no longer operate according to their religious tenets by, for example, prohibiting unmarried couples from sharing a room or bed. Others negatively impacted include landlords who, for example, do not rent to unmarried cohabitating couples.

Indeed, because of a law like HB 2856/SB 486, a same-sex couple filed a discrimination complaint against a small, family-owned-and-operated inn in Vermont when the owner expressed reluctance to host the couple’s ceremony because of his religious beliefs about marriage.<sup>43</sup> Legal action was taken against this family business, despite the fact that the couple found a place to have their reception. Similarly, because of a law like HB 2856/SB 486, a same-sex couple sued a bed and breakfast in Hawaii for allegedly discriminating when the owner declined to rent a room in her home contrary to her religious beliefs about marriage and sexuality.<sup>44</sup>

**II. Codification of “gender identity” would endorse conduct caused by an established mental disorder and create harm for organizations and individuals.**

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affiliates in Illinois are closing down rather than comply with a new requirement that says they can no longer receive state money if they turn away same-sex couples as potential foster care and adoptive parents.”); Father Robert J. Carr, *Boston’s Catholic Charities to stop adoption service over same-sex law*, Catholic Online, available at [http://www.catholic.org/national/national\\_story.php?id=19017](http://www.catholic.org/national/national_story.php?id=19017) (last visited Mar. 18, 2013) (“Catholic Charities in Boston announced March 10 that it is getting out of the adoption business, over Massachusetts state law requiring that that the agency place children with same-sex couples.”); Julia Duin, *Catholics end D.C. foster-care program*, Washington Times, available at <http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/> (last visited Mar. 18, 2013) (“The Archdiocese of Washington’s decision to drop its foster care program is the first casualty of the District of Columbia’s . . . same-sex marriage law.”).

<sup>43</sup> See, e.g., *Lesbians target innkeeper over same-sex “wedding,”* WorldNetDaily, June 30, 2005, available at [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=45073](http://www.wnd.com/news/article.asp?ARTICLE_ID=45073) (last visited Mar. 18, 2013); See, e.g., Anne-Marie Dorning, *ACLU: Wildflower Inn Sued Over Refusal to Host Gay Wedding*, ABCNews.com, Jul. 20, 2011, available at <http://abcnews.go.com/US/vermont-inn-sued-refusal-host-gay-couples-wedding/story?id=14110076> (last visited Mar. 18, 2013).

<sup>44</sup> See, e.g., <http://lubbockonline.com/filed-online/2011-12-19/gay-couple-sues-hawaii-bed-and-breakfast-denied-room-because-sexual> (last visited Mar. 19, 2013).



Traditional legal classifications of sex, as well as race and nationality, are innate, immutable characteristics that cannot be naturally changed. HB 2856/SB 486, however, would place into West Virginia law the novel *legal* concept of “gender identity.”<sup>45</sup>

“Gender identity,” unlike sex, is determined by a person’s *perceived* identity, appearance, or mannerisms regardless of the individual’s designated sex at birth; it is thus an internally conceived and objectively unverifiable characteristic.<sup>46</sup> Placing “gender identity” in the law creates an unworkable legal construct based on an individual’s *subjective* perception, not objective characteristics.<sup>47</sup> Simply put, it will radically change West Virginia law’s—and, in turn, society’s—view of maleness and femaleness. It transforms everyone’s legal status as male or female from biology to one rooted in self-determination.

Codifying “gender identity” creates and endorses legal protection for mentally impaired conduct caused by an established psychiatric disorder. The proposed legislation’s “gender identity” appears to regard persons commonly known as “transgender,” a category that includes biological males who subjectively identify as women and biological females who subjectively identify as men.<sup>48</sup> These individuals, however, generally suffer from a psychiatric disorder known as Gender Identity Disorder (“GID”), as even supporters of these laws admit.<sup>49</sup> GID is an established mental illness recognized by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders;<sup>50</sup> it causes persons to experience “conflict between [their] physical gender and the gender he or she identifies” and to be “very uncomfortable with the gender they were born.”<sup>51</sup>

However, the definition of “gender identity” in HB 2856/SB 486 applies to everyone and allows any West Virginian, on any given day, to “perceive” themselves as a member of the opposite

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<sup>45</sup> HB 2856 defines “sexual orientation” to include “gender identity”: “The term ‘sexual orientation’ means heterosexuality, bisexuality, homosexuality or gender identity or expression, whether actual or perceived.” HB 2856, § 5-11-3(n), 81st Leg., 1st Sess. (W.Va. 2013).

<sup>46</sup> See Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine, available at <http://emedicine.medscape.com/article/917990-overview> (last visited Mar. 18, 2013).

<sup>47</sup> See HB 2856, §5-11-2(n), 81st Leg., 1st Sess. (W.Va. 2013); see also Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392, 395-96 (2001) (noting that one goal of this recent push for the law to embrace the concept of gender identity is to “encourag[e] courts and society to conclude that the determination of one’s sex should rest with the individual and not the state”).

<sup>48</sup> Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/medical/transgendered> (last visited Mar. 18, 2013) (“[A] person . . . who identifies with or expresses a gender identity that differs from the one which corresponds to the person’s sex at birth.”).

<sup>49</sup> Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues*, National Center for Lesbian Rights (2003), available at <http://www.transgenderlaw.org/resources/translaw.htm> (last visited Mar. 18, 2013) (“Transsexualism is technically classified as a specific form of a broader psychiatric disorder termed ‘gender identity disorder,’ also known as ‘gender dysphoria.’”).

<sup>50</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV* (2000).

<sup>51</sup> *Gender Identity Disorder*, MedlinePlus, available at <http://www.nlm.nih.gov/medlineplus/ency/article/001527.htm> (last visited Mar. 18, 2013).



sex. The definition does not even require the “perception” be sincere or actual. Of course, the disturbing manners in which this law can be abused know no boundaries.

In addition to statewide sexual confusion, these “gender identity” provisions could simultaneously force employers, businesses, and other entities to conform their businesses and business practices to the “perceptions” of the mentally impaired, or worse yet, those that would intentionally abuse the proposed open-ended definition of “gender identity.” The law does not require society to conform its standards to the unfortunate delusions of those who are, for example, schizophrenic. Similarly, we should not legislate conformance to those who are gender confused. But the proposed law, if enacted, would place the government’s stamp of approval on these individuals’ mentally impaired behavior, communicating to society that these actions are socially acceptable even though the medical community has determined that they are psychiatrically disordered.

Secondly, the reach of the “gender identity” provisions are sweeping and would detrimentally impact West Virginia citizens, as well as businesses, organizations, and government agencies handling any matter that takes into account a person’s sex. This includes not only schools, universities, and government offices that deal with public records, but every organization that hires employees. Indeed, this broad scope will impact most organizations in West Virginia. Consider the following examples of the potential impact of such a law:

- Organizations must allow persons to access sex-segregated programs, activities, and facilities in accordance with the sex they choose.<sup>52</sup> This means, for example, that a school must allow a biological male who professes a female identity to attend an all-girls school or participate in an all-girls class or athletic program.
- Organizations and businesses must disregard a potential employee’s biological sex and make hiring decisions based on their subjectively perceived state as a male or a female. This could prove difficult when one is seeking to hire, for example, a football coach, and a biological female who identifies as a man applies for the job. Or when seeking to hire a physical education teacher for an all-girls school and a biological male who identifies as a female is recommended for the position.
- Organizations must allow their employees to access bathrooms, showers, and locker-room facilities in accordance with the sex they choose.<sup>53</sup> Notably, it has been insufficient in some jurisdictions for organizations to create a private “family” or “unisex” bathroom for use by such individuals.<sup>54</sup>

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<sup>52</sup> Maine Human Rights Commission, *Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities*, available at [http://www.foxnews.com/projects/pdf/2-08-2010\\_Draft\\_MHRC\\_Sexual\\_Orientation\\_Guidance.pdf](http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf) (last visited Mar. 18, 2013) (“In general, students . . . must be allowed access to gender-segregated programs, activities, and facilities in accordance with their gender identity . . . , and they must be addressed by their chosen names and pronouns.”).

<sup>53</sup> Maine Human Rights Commission, *Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities*, available at [http://www.foxnews.com/projects/pdf/2-08-2010\\_Draft\\_MHRC\\_Sexual\\_Orientation\\_Guidance.pdf](http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf) (last visited Mar. 18, 2013) (“[S]tudents must be allowed access to the bathrooms that correspond with their gender identity”).

<sup>54</sup> Heather Steeves, *Panel rules against Orono school in transgender bathroom access*, Bangor Daily News, Sept. 20, 2010, available at <http://www.bangordailynews.com/external/mobile/?id=154263> (last visited Mar. 18, 2013); *Human Rights Panel Rules Against Orono School in Transgender Bathroom Issue*, Maine Public Broadcasting Network, Sept. 21, 2010,



- Publicly accessible organizations and entities that maintain separate lodging facilities for men and women—such as homeless shelters or drug-and-alcohol-rehabilitation centers—must allow persons to lodge with the residents who share the sex that they choose.<sup>55</sup> This means that a women’s homeless shelter, for example, must allow a biological male who professes a female identity to sleep in the women’s facilities.
- Employers, schools, and other organizations must allow employees to dress in accordance with the sex they choose. This means that employers will no longer be allowed to maintain a reasonable dress code.<sup>56</sup> For example, a school or university must allow biological male employees who profess a female identity to wear dresses, skirts, and earrings to their classes and other school functions.<sup>57</sup> Or if a company requires its employees to wear uniforms, HB 2856/SB 486 would force the company to allow an anatomically female employee to come to work dressed in a male’s uniform because of her perceived “gender identity” as a male.

These bizarre—but real and demonstrated—occurrences highlight two practical problems with HB 2856/SB 486’s proposed prohibition of “discrimination” based on “gender identity.” First, it disregards the rights, interests, and dignity of the unsuspecting citizens who are exposed to the individuals that profess a sex contrary to their biological reality, such as female employees who use the restrooms, showers, and locker rooms at their place of employment when a biological male who professes a female identity accesses those facilities.

Second, the proposed law exposes employers, businesses, organizations, schools, and government agencies to unnecessary liability. By forcing these entities to allow biological males access to women’s restrooms, showers, and residence facilities based solely on their perceived gender on any given day, HB 2856/SB 486 leaves these organizations at the mercy of—with no reasonable means of excluding—opportunists seeking entry to these sensitive areas. This, in turn, will subject those organizations to legal liability for violating their common-law duty of care to co-workers, customers, and patrons.<sup>58</sup>

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*available at* <http://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/3478/ItemId/13583/Default.aspx> (last visited Mar. 18, 2013); *Panel: School Discriminated Against Transgender 6th Grader by Not Letting Student Use Girls’ Room*, Fox News, Sept. 22, 2010, *available at* <http://www.foxnews.com/us/2010/09/22/panel-school-discriminated-transgender-th-grader-letting-student-use-girls-room/> (last visited Mar. 18, 2013).

<sup>55</sup> National Gay and Lesbian Task Force Policy Institute & National Coalition for the Homeless, *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People* 31-33, 37-38 (2003), *available at* <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf> (last visited Mar. 18, 2013) (noting that “[a] men’s shelter is [not] . . . appropriate for a [biological male who professes a female identity]”).

<sup>56</sup> *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 38 (2007) (statement of Lawrence Z. Lorber, partner, Proskauer Rose, LLP, an attorney with more than 30 years of experience with labor and employment law), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_house\\_hearings&docid=f:37637.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf) (last visited Mar. 18, 2013) (opposing a federal “gender identity” nondiscrimination law and noting that “[i]t is simply unclear how a reasonable dress code can coexist with the . . . indefinite classification of self-perceived gender identity”).

<sup>57</sup> Maine Human Rights Commission, *Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities*, *available at* [http://www.foxnews.com/projects/pdf/2-08-2010\\_Draft\\_MHRC\\_Sexual\\_Orientation\\_Guidance.pdf](http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf) (last visited Mar. 18, 2013) (“[S]tudents must be permitted to dress in accordance with their gender identity”).

<sup>58</sup> Restatement (Second) of Torts § 343 (1965) (noting that an organization that invites persons onto its premises owes a duty, and “is subject to liability for physical harm,” to those invitees if certain conditions are satisfied).



Moreover, third parties will be understandably affronted when they are forced to share a government-operated restroom, shower, locker room, or residence facility with a person of the opposite biological sex—whether an opportunist or an individual who is genuinely confused about his or her sex. Those offended third parties can sue the government for violating their constitutional right to privacy.<sup>59</sup> Indeed, courts have held that a person’s right to privacy may be violated when a government’s conduct enables members of the opposite sex to observe that person while he or she is undressing, using restroom facilities, or showering.<sup>60</sup> Similar legal claims might also exist against private businesses and organizations—or the intruding individual of the opposite sex—for violating an employee’s, customer’s, or other third party’s common-law right to privacy.<sup>61</sup>

In conclusion, HB 2856/SB 486 improperly seeks to introduce a radical concept into the law: the notion that people can self-determine whether they will identify as a male or female in many social settings. Codifying that novel idea, as shown above, has many dangerous consequences that undermine the well-being and safety of many West Virginians.

### Conclusion

HB 2856/SB 486 presents serious First Amendment concerns, as outlined herein. The experiences of other jurisdictions demonstrate the potential legal challenges associated with such laws.

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<sup>59</sup> *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (“There is a constitutional right to privacy.”).

<sup>60</sup> *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (noting that a person’s constitutional right to privacy is violated where a government policy or conduct allows a member of the opposite sex to view him or her while “engag[ing] in personal activities, such as undressing, using toilet facilities, or showering”); *see also Lee v. Downs*, 641 F.2d 1117, 1119-20 (4th Cir. 1981) (noting that men are “entitled to judicial protection of their right of privacy denied by the presence of female[s] . . . in positions to observe the men while undressed or using toilets”); *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.”).

<sup>61</sup> Restatement (Second) of Torts § 652(B) (1965) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy.”).