

TESTIMONY IN SUPPORT OF OHIO H.B. 369, THE OHIO FAIRNESS ACT

Presented by Chad Eggspuehler to the Ohio House Civil Justice Committee

February 4, 2020

Chair Hambley, Vice Chair Patton, Ranking Minority Member Brown, and the members of the House Civil Justice Committee, my name is Chad Eggspuehler. I'm an alumnus of The Ohio State University – Moritz College of Law, a former law clerk to Circuit Judge Deborah Cook here in the Sixth Circuit, and I'm currently in an appellate litigation practice with Tucker Ellis in Cleveland, Ohio.

I write today in my individual capacity to speak in favor of the renewed version of the Ohio Fairness Act, House Bill 369. The extension of basic, non-discrimination protections to the LGBT community makes Ohio more competitive. It signals Ohio's open doors. It's not about "special rights," but equal access in the marketplace and the community. As the Bill's sponsors demonstrate, it need not be a Democrat or Republican issue. It's simply the right thing to do.

THE NEED FOR LEGAL PROTECTION

It's high time for Ohio to join the 20 or so other states offering nondiscrimination protections. Courtesy of data provided by the OCRC, no fewer than 106 complaints of LGBT discrimination were filed between 2004 and the end of 2017, with more than 40 of those complaints occurring since 2015. If those numbers seem trivial, please keep in mind that OCRC fielded that many complaints *despite* the lack of legal protection. And I can assure you that, for the victims, the complaints were anything but trivial: workplace harassment, withheld pay, and termination; assault and battery; ignored housing applications; nonresponsive landlords; even mistreatment by an EMS after a car accident.

If that data were not alarming enough, in the spring of 2019, an Iowa State University study found that same-sex couples are 73 percent more likely to be denied a mortgage loan, despite being rated "less risky overall" than other potential borrowers. And when they are approved, their interest rates are up to 0.2 percent higher on average than other borrowers.

Or take the concrete example of discrimination out of our neighbor to the north, Michigan, where Aimee Stephens was fired from her funeral director position for no other reason than that she is transgender and intended to transition. The U.S. Supreme Court should decide that case—and the scope of federal Title VII protection—this term. While we hope that the high court will recognize the common sense and textual reasons that LGBT discrimination is a form of sex discrimination, that is no reason for Ohio to wait on the sidelines. It has taken more than 50 years for the federal courts to resolve whether or not Title VII protects LGBT employees. The State should declare once and for all that such discrimination is unacceptable in Ohio, regardless of federal law.

Discrimination against LGBT individuals is not a new phenomenon. If the trials of Oscar Wilde and Alan Turing, the Holocaust, the murder of Harvey Milk, and the government's failure to address the HIV/AIDS crisis seem like distant memories, the brutal murders of Matthew Shepard and Brandon Teena happened in the cable news era. In 2013, the body of 20-year-old Ce Ce Dove was found, stabbed and drowned, in an Olmstead Township retention pond. And just two years ago, Cleveland State University's campus endured a shocking poster campaign advising LGBT students to commit suicide. Sadly, that happens all too often, too, as the 2014 suicide of Cincinnati trans teenager Leelah Alcorn following forced conversion therapy reminded us.

Throughout these dark chapters, the law often stood silent in the face of discrimination. Indeed, for much of my life, the law expressly permitted it. In 1992, Colorado adopted a constitutional amendment *forbidding* the state and its cities from adopting *any* legal protections. As recent as 2003, when I was in college, Texas and a handful of other states still criminalized same-sex intimacy. Hard to believe that, barely a generation ago, something as simple as date night could land you in jail. As a classmate asked during a debate about *Lawrence v. Texas*, "*what are they supposed to do, play Monopoly?*"

AN OPPORTUNITY FOR LEGISLATIVE LEADERSHIP

The law can and should do better. And in many ways, it has. The U.S. Supreme Court's decisions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*; the passage and repeal of Don't Ask, Don't Tell; and myriad developments around the country have advanced the equality and dignity of LGBT citizens and their families. Ohio's citizens helped lead the way in the push for marriage equality—thanks to the bravery and leadership of four Ohio couples and a fifth couple who adopted a child born in Ohio.

Yet, for all that courts have done, some of the most meaningful developments have come from the legislative and executive bodies of cities and states around the country. Rather than disputing each issue piecemeal, in the context of centuries-old constitutional doctrines, as adversaries in court, the legislative process can bring people together to forge lasting policy solutions to the problems of today. More than two dozen Ohio municipalities have already taken this step by extending nondiscrimination protections that nearly three-quarters of Ohioans support. The General Assembly has that opportunity here.

Structurally, the Ohio Fairness Act fits comfortably into the landscape of Ohio's nondiscrimination laws. It recognizes new protected classes within the existing statutory provisions, rather than a new legal framework. Again, protected status does not mean "special rights," but only *equal access* in the marketplace and in the community, no better, no worse.

Yet, beyond the meaningful and necessary legal protections, bipartisan passage of the Ohio Fairness Act would send a powerful message that discrimination against LGBT citizens is unacceptable in this state. That's an assurance that many vulnerable young people need to hear.

SQUARING NONDISCRIMINATION PROTECTIONS WITH RELIGIOUS LIBERTY

This progress can be accomplished in harmony with religious liberty. No doubt, the people of Ohio hold a variety of religious and moral beliefs. Our nation and our state have long protected the free exercise of religion while simultaneously avoiding establishments of religion. Importantly, House Bill 369 preserves the civil rights laws' existing protections for religious institutions. People have a right to express their religious, moral, and value opinions in the marketplace of ideas. But the marketplace of ideas is very different from the *actual* marketplace.

That's why Ohio's civil rights laws instruct that members of protected classes be accorded, as a baseline, an equal measure of dignity in the actual marketplace. That no person be excluded from a store or restaurant on account of gender, disability, or religion. That no person be fired from their job because of their age or disability. Adding LGBT citizens to these protections will not force anyone to abandon their conscience, religious practices, or beliefs any more than other civil rights protections do. It has *never* been the policy of our country or our state that people must pass individual merchants' religious tests in order to be a member of the general community. *Open for business* means *open to all*.

Masterpiece Cakeshop, decided by the U.S. Supreme Court in 2018, poses no obstacle to passage of the Ohio Fairness Act. Indeed, parts of the majority opinion encourage it. The Court states:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.

Further, the Court reaffirmed the principle expressed in *Newman v. Piggie Park Enterprises* (1968) that religious and conscience-based objections "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." "It is unexceptional," the *Masterpiece Cakeshop* Court explained, "that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on *the same terms and conditions* as are offered to other members of the public."

The takeaway from *Masterpiece Cakeshop* is not that businesses have a right to discriminate, but that State officials—like the state civil rights commission—cannot disparage people’s religious views or hold them to a double-standard based on the officials’ preferred viewpoint. *None* of the Bill’s sponsors here today ask the State to disparage religious views or impose a double-standard. All we seek is equal access in the marketplace.

I’m happy to answer any of the Committee’s questions about the Title VII cases or *Masterpiece Cakeshop* and related cases, as I have studied them in detail for articles and blog reports. But I urge the Committee and the General Assembly that the mere possibility of a constitutional objection to the Ohio Fairness Act is no reason to do nothing. Each day that passes without nondiscrimination protections is a day that shop doors may close, bosses may fire, landlords may evict, and lenders may deny credit for no other reason than someone’s sexual orientation or gender identity. Ohio *must* do better than that.

With your leadership, Ohio can put an end to the worst of these discriminatory practices that exclude LGBT citizens in all phases of their lives. And Ohio may live up to the promise of my alma mater:

Time and change will surely show

How firm thy friendship, O-HI-O.

I thank you for your time and your service to the State.