January 27, 2014

Kansas House of Representatives
Kansas State Capitol
Room 346-S
300 SW 10th St.
Topeka, Kansas 66612

Re: Opposition to HB 2453 – Protection Religious Freedom Regarding Marriage

Dear Member:

On behalf of its Kansas members and supporters, the Great Plains Chapter of Americans United for Separation of Church and State urges you to oppose HB 2453, a bill that would allow individuals, religious entities and privately-held businesses to freely discriminate against Kansas citizens. This bill does nothing except open the door to abuses of Kansas citizens’ health, safety, and civil rights.

This Exemption is Unconstitutionally Broad

While HB 2453 claims to concern “religious freedoms with respect to marriage,” the language of the bill is so broad that it invites discriminatory treatment of all Kansas citizens. As long as an individual, “religious entity,” or even a privately held business claims a “sincerely held religious belief,” regarding “sex or gender,” any man or woman of Kansas can be refused “services, accommodations, advantages, facilities, goods, or privileges” as well as state “social services.” The expansive nature of this bill cannot be underestimated as it states that it “shall be construed in favor of a broad protection of religious exercise.”

Although the government may offer religious accommodations even where it is not required to do so by the Constitution, the state’s ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion.” In Texas Monthly, Inc. v. Bullock, the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose “substantial burdens on nonbeneficiaries” or they are designed to prevent “potentially serious encroachments on protected religious freedoms.” To meet the confines of the

1 Section 1(a).
2 Section 4(d).
3 Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
5 480 U.S. 1, 18 n. 8 (1989).
Establishment Clause, “an accommodation must be measured so that it does not override other significant interests.”

Further, in Estate of Thornton v. Caldor, Inc., the Supreme Court struck down a blanket exemption for Sabbatarians because it “unyielding[ly] weight[ed]” the religious interest “over all other interests,” including the interests of co-workers. It is clear that the more expansive the exemption and the greater the burden it places on others, the more likely the exemption will violate the Establishment Clause. The bill does call for certain entities to require a willing employee to provide the services in place of one who objects, but that requirement only applies to governmental entities and non-religious employers and exempts them from even this requirement if it would cause an “undue burden.” This language would not cure the policy or constitutional concerns.

**HB 2453 is Unnecessary**

In 2013, Kansas passed an extremely expansive religious freedom act known as the Kansas Preservation of Religious Freedom Act (KPRFA). The KPRFA, which is broader than the federal Religious Freedom and Restoration Act (RFRA) and other similar state religious freedom statutes, allows Kansas citizens to challenge a regulation if it creates a burden on their religion—as opposed to requiring a substantial burden, which is the language used in most similar statutes. As problematic as this language in the KPRFA is, HB 2453 goes even further, allowing an exemption from the law even when the law serves a compelling government interest in the least restrictive way possible. HB 2453 will be yet another mechanism permitting widespread discrimination against the citizens of Kansas.

**This Bill Creates Public Safety Concerns**

This bill would also increase the opportunities for the religion of individuals and religious entity’s religious belief to trump citizens’ access to critical healthcare and safety services. Examples from federal case law explicate this potential problem: Based on their religious beliefs, a maternity ward nurse has refused to scrub for an emergency caesarian section and left a woman “standing in a pool of blood,” a nurse has insisted on telling an AIDS patient and his partner about her views on salvation and that God

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8 “If an individual employed by a governmental entity or other non-religious entity invokes any of the protections provided by section 1, and amendments thereto, as a basis for declining to provide a lawful service that is otherwise consistent with the entity’s duties or policies, the individual’s employer shall either promptly provide another employee to provide such service, or shall otherwise ensure that the requested service is provided, if it can be done without undue hardship to the employer.” Section 2(d).
“doesn’t like the homosexual lifestyle,”\textsuperscript{11} and a police officer has refused to guard an abortion clinic.\textsuperscript{12}

The language of HB 2453 is too broad in that it could apply to both public and private health care institutions and medical providers. Such a broad exemption poses real barriers to patients who cannot seek medical services at another institution, especially if the patient lives in a rural area.

**HB 2453 Clearly Targets Kansas’ LGBT Community**

The act is purported to concern “religious freedoms with respect to marriage.” While the language of the bill, as mentioned above, is much broader than that, many of the provisions of the bill have a direct discriminatory effect on Kansas’ LGBT citizens. HB2453 explicitly allows individuals and religious entities to deny “employment or employment benefits, related to . . . the celebration of, any marriage, domestic partnership, civil union or similar arrangement.” Further, the bill allows for individuals or religious entities to not recognize the validity of any “marriage, domestic partnership, civil union or similar arrangement.” Each of these provisions has the direct effect of denying same sex couples any spousal benefits provided by the state of Kansas under the guise of religious freedom.

**The Bill Extends Protections to For-Profit Corporations**

The bill expands the definition of a “religious entity” to include a “privately-held business operating consistently with its sincerely held religious beliefs.”\textsuperscript{13} This definition applies even to for-profit and secular corporations and organizations. With this language, the owners of a private hotel could refuse to provide a hotel room to a same sex couple or to an unmarried man and woman, if the owners believe that doing so would violate their religious beliefs.

These businesses entered the stream of commerce for monetary gain. If they want to reap the benefits of the marketplace they should have to play by the same rules as everyone else. Furthermore, if the state were to allow for-profit entities to abide by any law—whether employment laws, nondiscrimination laws, health and safety laws—that they argued burdened their religion, employees and their customers and clients would have no real protections at all. General corporations should not be permitted to escape the mandates of the law, or the protections afforded their employees or the general public.


\textsuperscript{12} Rodriguez v. City of Chicago, 156 F.3d 771, 772 (7th Cir. 1998).

\textsuperscript{13} Section 3(a)(3).
This Exemption Permits Government-Funded Discrimination

HB 2453 would allow government funding for religious entities that discriminate against Kansas citizens in providing social services. For example, a Christian based adoption agency receiving state funds could refuse to place a child in an otherwise stable home because the prospective parents were unmarried, were a same sex couple, or were adherents to a religion adverse with the agency’s beliefs. Allowing government money to flow to these institutions without holding them to non-discrimination laws is a clear violation of one of the central principles of our country’s constitutional order: “the Constitution does not permit the State to aid discrimination.”

Moreover, this bill fails to safeguard taxpayer funds from flowing to organizations that contract with the government to provide services, but then refuse to fulfill their obligations under the contract. This bill prohibits a state government entity from withholding benefits to an individual or religious entity that would deny counseling, adoption, foster care and other social services if it would be contrary to its sincerely held religious beliefs regarding sex or gender.

Although Americans United supports accommodations to protect religious freedom, HB 2453 is broad and unnecessary only providing yet another mechanism for discrimination against Kansas citizens. Accordingly, we urge you to oppose HB 2453.

Sincerely,

Vickie Sandell Stangl
President, Great Plains Chapter
Americans United for Separation of Church and State

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15 In a similar example, the Obama Administration recently decided not to renew a grant with the United States Conference of Catholic Bishops (USCCB) for human trafficking services. The Administration did so because the USCCB refused to serve or even refer victims of human trafficking for reproductive health services, such as contraception, sterilization, or abortion. These services, however, are critical to these victims. Sara Israel-Hartley, Religious Discrimination Alleged by Catholic Group That Lost Federal Funding to Stop Human Trafficking, DESERT NEWS (Nov. 4, 2011) available at http://www.deseretnews.com/article/700194644/Religious-discrimination-alleged-by-Catholic-group-that-lost-federal-funding-to-stop-human.html?pg=all.