



To: Members of the Judiciary Committee

Cc: Senator Adam Morfeld

From: ACLU of Nebraska

Date: February 21, 2017

Re: LB 173

Dear Honorable Senators,

The ACLU of Nebraska is a non-profit, non-partisan organization that works to defend and strengthen the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through policy advocacy, litigation and education. We serve thousands of supporters throughout our great state and represent more than 1million members nationwide. Last biennium our organization took a position on over a hundred unique pieces of legislation and our position prevailed an impressive 76% of the time.

The ACLU has a long history defending the LGBT community. The National ACLU brought our first LGBT rights case in 1936 and founded the LGBT Project in 1986. The mission of the ACLU LGBT Project is the creation of a society in which lesbian, gay, bisexual and transgender (LGBT) people enjoy the constitutional rights of equality, privacy and personal autonomy, and freedom of expression and association. Today the ACLU brings more LGBT cases and advocacy initiatives than any other national organization. The ACLU of Nebraska has led the way for LGBT rights in the courts with our historic successful litigation challenging Nebraska's discriminatory DOMA and we are presently defending our historic win on behalf of LGBT foster parents before the Nebraska Supreme Court.

As such, we respectfully submit our unqualified support for LB 173 and ask that this testimony be included in the public hearing record on the same.

Policy Issues:

Employment discrimination against lesbian, gay, bisexual and transgender workers is pervasive and harmful. It violates core American values of fairness and equality by discriminating against qualified individuals based on characteristics unrelated to the job. This legislation modernizes and updates already familiar provisions and concepts found in civil rights laws that have served our society well. The Nebraska Legislature needs to act to ensure that LGBT individuals have the same workplace protections that apply based on race, color, religion, sex, national origin, age, and disability.

The reality is that we know LGBT Nebraskans currently experience discrimination in the workplace both anecdotally and through research.¹ Anecdotally, let me share this recent example: in November 2014 the ACLU of Nebraska filed historic litigation to challenge the states discriminatory Defense of Marriage Act. Prior to filing, our organization interviewed many hard working Nebraskans who faced economic, emotional, and other forms of discrimination because of this provision. While we are grateful to have seven brave families as named plaintiffs in our case the fact is many Nebraskans we interviewed specifically indicated they were not willing to step forward because our state lacks employment protections. They explicitly noted that a lack of employment protections prevented them from stepping forward and vindicating their rights in our courts because of a real risk in losing their job and their ability to provide for their family.

The reality remains that it is legal to fire or refuse to hire someone based on his or her sexual orientation or gender identity in most of Nebraska and specifically outside of the jurisdiction of the Omaha city ordinance² and the Grand Island ordinance that applies only to public employees, and various strong nondiscrimination polices in the military, University of Nebraska, and among private employers. The Nebraska Legislature should enact this bill to ensure our great State as a whole has clarity and uniformity to ease certainty in application for our citizens and our businesses instead of a patchwork of protections that result in uncertainty and confusion.

¹ UNIVERSITY OF NEBRASKA MEDICAL CENTER, MIDLANDS SEXUAL HEALTH RESEARCH COLLABORATIVE, *The Midlands LGBT Needs Assessment Community Report* (June 25, 2011), <http://unmc.edu/publichealth/departments/healthpromotion/mshrc/research/midlands-lgbtq-communityreport.pdf>; *See also*, Riley Johnson, *Gay Rights Group Announces Expanded Operation in Nebraska*, LINCOLN JOURNAL STAR, Sept. 15, 2014, http://journalstar.com/news/local/gay-rights-group-announces-expanded-operation-in-nebraska/article_fea919e9-40ad-5deb-bf2f-62def6fabb12.html

² OMAHA, NE., MUN. CODE ch. 13.88 (1980), *available at* https://www.municode.com/library/ne/omaha/codes/code_of_ordinances?nodeId=PTIIMUCO_CH13H_URI_ARTIHCIRIAN_DIV2DIEM.

While we wish to reinforce and draw the committee's attention to strong public support for this measure, which includes an impressive 74 percent of Nebraskans that support laws protecting lesbians, gays or bisexuals from job discrimination³ and strong support from the business and faith communities support⁴ for this legislation as illustrated at yesterday's media event, we understand other testifiers will focus on those aspects of the debate today. As such, we will use our limited time to focus on issues in the ever-changing legal landscape.

Legal Issues:

In the past, some Nebraska policymakers have contended that this legislation is unnecessary, as employment, discrimination against LGBT persons is already prohibited based on "sex" or "gender" as defined in current law. It is true that the federal Equal Employment Opportunity Commission⁵ has held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is sex discrimination and therefore covered under Title VII of the Civil Rights Act of 1964.⁶ The Commission has also found that claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping state a sex discrimination claim under Title VII.⁷ Additionally, a very recent memo from the US Department of Justice confirms the federal governments position on this issue for future litigation but recent changes in leadership at the Department of Justice make this position less clear today.⁸

³ *Employment Non-Discrimination Act*, ACLU, https://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act; *See also, Americans Agree on ENDA*, CENTER FOR AMERICAN PROGRESS, http://cdn.americanprogress.org/wp-content/uploads/2013/10/ENDA_final.png. and <http://news.unl.edu/newsrooms/today/article/study-on-gay-issues-nebraska-far-less-red-than-label-suggests/>

⁴ *Business Coalition for Workplace Fairness, Members*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/business-coalition-for-workplace-fairness-members>.

⁵ *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/federal/otherprotections.cfm>.

⁶ *See Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

⁷ *See Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011), <http://www.eeoc.gov/decisions/0120110873.txt>; *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011), <http://www.eeoc.gov/decisions/0520110649.txt>.

⁸ *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims*, DEPARTMENT OF JUSTICE (Dec. 18, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>. See also: https://www.nytimes.com/2017/02/11/us/politics/trump-transgender-students-injunction.html?_r=2

Thus, while basic employment protections in any form are welcome it is important to note the very real limitations of these rulings. Most notably a federal agency decision does not have the same force of law or clarity as an affirmative state law as proposed in this legislation. Additionally, these rulings are only applicable to federal employees and some federal contractors. The rulings may have some bearing on cases involving local and state public employees⁹ but that extent is less clear. Assuming those EEOC rulings have a broader application, to include the private sector is speculative at best. An analysis of cases in the Eight Circuit confirms this position¹⁰ and there is no clear case law on point in Nebraska to date. Reliance on federal agency decisions may complicate matters due to theories of preemption. The bottom line is this: while there is an emerging trend in the courts in favor of equality different courts in different jurisdictions have decided these issues in different ways leaving the law of the land unsettled and full of uncertainty for employees and employers.¹¹

This legislation strikes the right balance in terms of respecting religious freedom and ending discrimination in the workplace. Religious freedom is a fundamental American value that we cherish and work hard to defend. However, as LGBT people gain greater equality under the law, we are seeing a troubling push to allow anyone, including religious organizations, businesses, and government officials, to use their religious beliefs to discriminate. These demands for exemptions come both through litigation and legislative proposals. The ACLU is at the forefront of making sure that

⁹ *Gender Identity Discrimination*, WORKPLACE FAIRNESS (Jan. 22, 2015), <http://www.workplacefairness.org/genderid>.

¹⁰ *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *Hunter v. United Parcel Service, Inc.*, 697 F.3d 697 (8th Cir. 2012). See also *Radtke v. Misc. Drivers & Helpers Union Local #638*, 836 F.Supp.2d 1023 (D. Minn. 2012) (overruled *Sommers*).

¹¹ Anton Marino, *Transgressions of Inequality: The Struggle Finding Legal Protections Against Wrongful Employment Termination on the Basis of the Transgender Identity*, 21 AM. U.J. GENDER SOC. POL'Y & L. 865 (2013); See also, *Gender Identity Discrimination*, supra note 9 (“Until recently, federal courts have uniformly held that transgender people are not protected under Title VII (the law which makes sex discrimination illegal) on the ground that Congress did not intend for the term “sex” to include being transgender. Recently, however, some courts have concluded that transgender persons are protected from discrimination under Title VII and other sex discrimination statutes. These decisions are based upon an older U.S. Supreme Court case that considers discrimination based on gender stereotyping to be illegal sex discrimination prohibited by Title VII. This issue has developed similarly in state courts as in federal courts. In the past, employment gender identity discrimination cases brought under state laws prohibiting sex discrimination have been unsuccessful, including cases in Connecticut, Pennsylvania, and the District of Columbia. More recently, however, some state courts and state administrative agencies have indicated a willingness to depart from older Title VII precedents and to interpret state and local sex discrimination laws to include transgender people. These states and cities include Massachusetts, New York City, Connecticut, Hawaii, Vermont and New Jersey.”).

religion is not used to discriminate against LGBT people. Nobody should be turned away from a business, refused service by government officials, or evicted from their home just because of who they are.

Under the approach in LB 173, the long standing and appropriate religious exemptions in Nebraska law remain in place and mirror best practices as understood under current case law.¹² Clergy people, and places of worship, have the freedom to determine which marriages they will and won't perform in their faith traditions. They also retain full ability to choose ministers that conform to their religious beliefs in employment matters. Common sense updates to our states longstanding nondiscrimination laws as presented in LB 173 do not change that as these protections are grounded in the First Amendment to the United States Constitution¹³.

In conclusion, we wholeheartedly believe that legislation rather than litigation is the best remedy to address these issues. This legislation offers a common sense way to provide a clear answer to mitigate risk and legal liability at nominal cost for Nebraska taxpayers. Litigation to test these theories in Nebraska would be lengthy and expensive while offering no definitive result in favor of application and strong precedent in support of nondiscrimination for LGBT persons.

Thank you for your service and your consideration. If we can be of any additional assistance, please contact us at your convenience.

¹² *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012)

¹³ U.S. Const. am. 1.