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A City Club Report on IP52: Religious Liberties

City Club of Portland (Portland, Or.)

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A City Club Report on IP52: Religious Liberties

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In the Spring of 2014, petitioners began collecting signatures to place Initiative Petition 52 (IP 52) on the November 2014 Ballot. If passed, it would protect a personⁱ acting in a nongovernmental capacity, who refuses to "celebrate, participate in, facilitate, or support" a same-sex marriage, civil union, or domestic partnership ceremony or arrangements, if doing so violates the person's "deeply held religious beliefs."

As of July 2014 petitioners had failed to qualify for the ballot. In the interim your committee completed its review of IP 52, and submits the following report, with the hope that our work can inform City Club of Portland, as well as local, state and national communities, on future questions related to this issue.

After review, your committee found that passage of IP 52, or any similar law, would benefit a narrow band of Oregon residents. However, it would have disproportionately negative impacts on same-sex couples who, although legally allowed to marry in the state of Oregon, would not be provided the same protection against discrimination in the marketplace that opposite-sex couples are provided. Your committee recognizes that it may truly offend the conscience and beliefs of deeply religious people to have to serve same-sex couples. However, protection against discrimination for same-sex couples does not constitute reverse discrimination against those with deeply held religious beliefs. The Initiative's harm to same-sex couples' dignity is clearly its most troubling aspect.

Your committee made repeated and rigorous efforts to interview witnesses who were proponents of the Initiative. All of the Initiative's Petitioners invited to give testimony declined. Your committee was troubled by the willingness of proponents to bring forth the Initiative yet unwilling to give testimony in its support. Nonetheless, your committee believes it has reviewed the issue thoroughly and fairly.

Your committee concludes that City Club of Portland should oppose passage of IP 52 and any similar law.

Recommendation: The committee unanimously recommends a no vote.

City Club members will vote on this report between Wednesday, August 20, 2014 and Monday, August 25, 2014. Until the membership votes, City Club of Portland does not have an official position on this report. The outcome of the vote will be reported in the City Club of Portland Bulletin Vol. 97, No. 6 dated August 26, 2014, and online at pdxcityclub.org.

ⁱ defined as including individuals, corporations, other business entities

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Introduction

The ballot title of IP 52 reads:¹

Religious belief exceptions to anti-discrimination laws for refusing services, other, for same-sex ceremonies, ‘arrangements.’

Result of “Yes” Vote: "Yes" vote creates "religious belief" exceptions to anti-discrimination laws for refusals to provide services/ facilities/ goods for same-sex marriage partnership ceremonies, and their "arrangements."

Result of “No” Vote: "No" vote rejects "religious belief" exceptions to anti-discrimination laws for refusals regarding same-sex ceremonies, "arrangements"; retains exemptions for churches/religious institutions, constitutional protections.

Summary: Current laws prohibit discrimination based on sexual orientation in public accommodations (businesses offering services/ facilities/ goods), employment, housing; contain exemptions for churches/ religious institutions. State/ federal constitutions protect free exercise of religion. Measure creates "religious belief" exceptions to anti-discrimination laws for refusing services/ facilities/ goods/ other, for same-sex ceremonies, arrangements. Prohibits administrative enforcement, penalties, civil actions against "person" (defined as including individuals, corporations, other business entities) acting in nongovernmental capacity, for refusing to "celebrate, participate in, facilitate, m support" any same-sex marriage, civil union, domestic partnership ceremony or its arrangements, if doing so violates the person's "deeply held religious beliefs." "Deeply held religious beliefs"; "participate"; "facilitate"; "support"; "ceremony or its arrangements"; "nongovernmental" undefined. Measure to be construed broadly for protection of religious exercise.

Background

Your Committee has been charged by City Club of Portland (“City Club”) to make a recommendation to the membership of City Club on how to vote on Initiative Petition (IP) 52 (the “Initiative”). On May 9, 2014, the Initiative’s sponsors (the “Petitioners”) announced that they would end their campaign to introduce the Initiative. As the Initiative had not yet qualified for the November 2014 general election ballot, it will not appear on the ballot in 2014. The term “Initiative” is therefore used in this report to describe both the Initiative itself and any similar future law.

Explanation of Initiative Petition 52

The “Protect Religious Freedom Initiative” would protect from prosecution or civil suit those who decline to “solemnize, celebrate, participate in, facilitate, or support” same-sex marriage, civil union, or domestic partnership ceremonies, or the “arrangements” of any such ceremony. Such people would otherwise be liable for unlawful discrimination on the basis of sexual orientation under Oregon’s Public

Accommodations Law.² The Initiative would not apply to people who are acting in a governmental capacity, meaning that government officials could not claim exemption to the Public Accommodations Law, whatever their beliefs.³

Not all refusals to provide goods or services would have been permitted by the Initiative. Only a “deeply held religious belief” would exempt someone from the Public Accommodations Law.⁴ The Initiative does not define “deeply held religious belief.” Nor does it specify whether a person’s “deeply held religious belief” serves as a defense to prosecution and/or penalization, or whether the State would have to prove that a person was *not* acting on a “deeply held religious belief” in order to enforce anti-discrimination laws.ⁱⁱ The Initiative did, however, include a statement that it must be “construed in favor of the broad protection of religious exercise” to the extent allowed by the Oregon and United States constitutions. This legislative directive would likely require a court to defer to a person’s own representation of their religious beliefs.⁵

The oft-cited catalyst of the Initiative is the case of the Gresham bakery “Sweet Cakes by Melissa,” which in 2013 refused to bake a cake for a lesbian couple.⁶ The couple filed a complaint with the Oregon Bureau of Labor and Industries (“BOLI”), which ultimately found that “the bakery is not a religious institution...and the business’ policy of refusing to make same-sex wedding cakes represents unlawful discrimination based on sexual orientation.”⁷

The Initiative was filed with the Oregon Secretary of State’s office on January 28, 2014. It was sponsored by State Representative Sherrie Sprenger (District 17), who represents rural portions of Linn and Marion counties, and Theresa Harke, spokesperson for the Oregon Family Council.

Early in the Initiative’s development, a dispute arose regarding the official ballot title authored by the Oregon Attorney General’s Office. The Petitioners argued that the Secretary of State’s proposed ballot title, which described the law as creating a “religious belief” exception to the State’s anti-discrimination laws, was politically charged and thus inappropriate for a ballot title.⁸ The Petitioners suggested, instead, that the measure “exempts religious opposition to same sex marriage/civil union/domestic partnership from penalties for discrimination.”⁹

On May 8, 2014, the Oregon Supreme Court approved the Attorney General’s ballot title, including the disputed language.¹⁰ On May 9, the Petitioners suspended their campaign and announced that they would mount a legal challenge against what they called Oregon’s “religious discrimination laws.”¹¹ As the signatures necessary to place the Initiative on the November 2014 ballot would not be gathered, the Initiative was effectively abandoned.¹²

ⁱⁱ It is most likely that this law would provide a defense rather than an additional burden of proof for prosecutors or plaintiffs (M. Olney, personal communication, May 15, 2014).

Oregon’s Public Accommodations Law prohibits discrimination on the basis of sexual orientation.

The Initiative would allow certain kinds of religiously motivated discrimination against same-sex couples, discrimination that would otherwise violate Oregon’s Public Accommodations Law. Under the Public Accommodations Law, it is illegal for most providers of goods and services to refuse services on the basis of most immutable qualities, including sexual orientation.¹³ Public accommodations laws ensure an open commercial marketplace by limiting the circumstances under which merchants can refuse to provide certain goods or services. These laws have existed in Anglo-American common law for hundreds of years.¹⁴ Oregon’s Public Accommodations law was passed in 1953 and initially prohibited discrimination on the basis of “race, religion, color or national origin.”¹⁵ In doing so over ten years before the federal Civil Rights Act of 1964,¹⁶ Oregon established an early policy of non-discrimination in the commercial setting. The law was later expanded to prohibit discrimination on the basis of sex.¹⁷ Discrimination on the basis of sexual orientation was prohibited in 2007.¹⁸

A public accommodation includes “any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise.”¹⁹ The Public Accommodations Law applies to individuals, businesses, and public bodies. Most businesses with a public presence that supply goods or services are considered public accommodations. The law does not affect non-commercial religious expression, as it excludes “any institution, bona fide club or place of accommodation which is in its nature distinctly private.”²⁰ Religious institutions are therefore not public accommodations and not prohibited from discriminating on the basis of sexual orientation. For example, a judge must officiate a wedding ceremony for any couple who has the right to marry under the law, while a minister may refuse to officiate a marriage for any reason, including religious beliefs.

Violators of the Public Accommodations Law are subject to civil penalties imposed by the Oregon Bureau of Labor and Industries (BOLI) or private civil actions filed by victims of illegal discrimination.²¹ Violations are considered Class A misdemeanors.²²

Same-sex marriage is now legal in Oregon.

Until recently, same-sex marriage was prohibited by Oregon’s Constitution: “It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.”²³ This section was added with the passage of Measure 36 in 2004. In 2009, the Legislature passed the Oregon Family Fairness Act, which provided for “domestic partnerships” in Oregon.²⁴

The Supreme Court’s decision in *U.S. v. Windsor*, striking down the federal Defense of Marriage Act (DOMA), ignited a series of challenges to various state restrictions on same-sex marriage.²⁵ On May 19, 2014, federal district court judge Michael McShane ruled that Oregon’s restriction on same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and struck it down on that basis.²⁶ This ruling took effect immediately; as of this report, same-sex marriage licenses are being issued in Oregon.²⁷ Same-sex marriage bans have been recently invalidated in six other states,

but several of those decisions are stayed pending appeal.²⁸ The U.S. Supreme Court will likely decide the effects of these rulings.²⁹

“Religious Freedom” laws are part of a national reaction to same-sex marriage.

The last year has seen a growing number of “religious freedom” initiatives and bills across the country, possibly in response to the expanding legalization of same-sex marriage.³⁰ These laws take two general forms.³¹ The first type are expanded state versions of the federal Religious Freedom Restoration Act (RFRA),³² which broadly prevent states from enforcing laws that would substantially burden a person’s exercise of religion.³³ These proposals, such as Arizona’s SB 1062, are interpreted as loosening states’ public accommodations laws by extending protections for discrimination beyond those currently afforded only to religious institutions.³⁴ The second type is narrower exemptions from public accommodations laws for those not wanting to participate in or support same-sex marriage ceremonies.³⁵ The Initiative is a member of this latter group.

The Initiative is a reaction to evolving concepts civil rights and an expansion of religious freedom.

Same-sex marriage rights have been expanding dramatically throughout the states in recent years.³⁶ Scholars have suggested that this is part of a fundamental change in the nation’s approach to same-sex marriage.ⁱⁱⁱ Several witnesses suggested that religious freedom initiatives are probably part of a backlash against this trend.³⁷ Their analysis is supported by the apparent timing of religious freedom proposals as parallel to, but slightly behind, the national expansion of marriage equality. At least one scholar posited that that the expansion of LGBT rights and the desire for protecting religious liberties are inherently linked.

[T]he strongest features of the case for same-sex civil marriage also make a strong case for significant religious-liberty protections for dissenters. One implication is that there are good reasons for recognizing same-sex civil marriage. But the other implication is that if a state makes such recognition, it should enact strong religious accommodations too, as a matter of consistency and even-handedness.³⁸

It is thus likely that the recent spate of religious freedom initiatives, including Oregon’s, are intended to blunt the impact of same-sex marriage on people who oppose same-sex marriage for religious reasons by carving out these exemptions.

ⁱⁱⁱ “According to Pew Research Center data, just 35 percent of Americans favored allowing gay people to marry in 2001, and 57 percent opposed it. This year, support reached 50 percent, and opposition fell to 43 percent. Among younger Americans, support is even stronger: Two-thirds of those born after 1981 say they back gay marriage” (Grofum, J. 2014, January 8. Five Years of State Victories for Gay Marriage Supporters. Retrieved from <http://www.pewstates.org/projects/stateline/headlines/five-years-of-state-victories-for-gay-marriage-supporters-85899531421>).

Analysis of Initiative Petition 52

Your Committee undertook a thorough review of available literature on this topic. It conducted interviews of witnesses knowledgeable about the Initiative and who represent a wide variety of perspectives, including journalism, theology, political activism, and law. Despite multiple requests, none of the Petitioners or other proponents was willing to provide testimony.^{iv} One person in favor of the Initiative provided detailed written comments that helped your committee understand some of the religious concerns animating the Initiative. Your committee has attempted to understand and adequately represent the views of both sides of the issue.

Potential Positive and Negative Impacts of the Initiative

Potential Positive Impacts

- Would eliminate conflicts between certain religious beliefs and legal duties for Oregonians who may provide goods and services to wedding ceremonies and whose religious beliefs condemn same-sex marriage.

Potential Negative Impacts

- Initiative would target same-sex couples and label them as unequal, implying the relationship was inferior to opposite-sex couples.
- Targeted discrimination would be a barrier against Oregon's LGBT residents' full participation in society and potentially make goods and services related to wedding ceremonies more difficult to obtain.
- Initiative's terminology is ill-defined, unclear, and likely vulnerable to a successful legal challenge.
- Initiative would undercut the broad protections of Oregon's Public Accommodations Law, and could lead to additional exceptions for other forms of discrimination.
- Initiative would have a generally negative impact on the economy of Portland and Oregon.

Discussion

The Initiative suffers from a lack of clarity.

Several of the Initiative's key terms remain undefined. As written, the Initiative would allow people to defend against any alleged violation of the Public Accommodations Law by asserting that their refusal of goods or services to same-sex couples was based on a "deeply held religious belief." A person would be

^{iv} Petitioners Rep. Sherrie Sprenger and Teresa Harke, and their attorney, Shawn Lindsay, declined all invitations to provide testimony. Other parties thought to be potentially in favor of the Initiative, including the Archdiocese of Portland, Moreland's Family Pantry, and Sweet Cakes by Melissa did not reply to your Committee's invitations.

able to assert this defense if they would otherwise have to “solemnize, celebrate, participate in, facilitate, or support any same-sex marriage or its arrangements.”

There is no limiting factor as to who can claim to have a “deeply held religious belief.” For example, people may be able claim a “deeply held religious belief” as a mere pretext for discrimination based on simple prejudice. As one witness explained, the failure to use the more common legal term “bona fide” when describing a “deeply held religious belief” may require a court to uncritically defer to a person’s own articulation of their religious beliefs.³⁹ The Initiative’s requirement that it “be construed in favor of the broad protection of religious exercise” also suggests that a court would not be able to determine whether someone actually held the religious beliefs he or she purports to hold.

Similarly, none of the verbs “solemnize, celebrate, participate in, facilitate, or support” are defined. The terms “facilitate” and “support” are particularly unclear.⁴⁰ There are many lynchpins to a successful wedding ceremony. Could a cab company refuse to deliver guests because it would “facilitate” or “support” the wedding? Could a gas station owner refuse to fill the tank of a couple’s car on their way to or from the wedding ceremony? Could a hotel refuse to rent a room to a same-sex couple on their honeymoon? These questions lead to troubling legal and social concerns.

A lack of clarity is the hallmark of bad law. The Initiative’s failure to provide for a clear limiting factor means that these terms would have to be defined through litigation, increasing prosecution costs for the State and the costs associated with bringing a private claim for discrimination. Just as importantly, this vague statutory language may make both the State and victims of discrimination timid or unsure about their remedies. It may also give undesired pause to those with a deeply-held religious beliefs who might seek the protection of this law. Although the Initiative has been abandoned, City Club should carefully consider similarly vague language in any legislation proposed in the future.

Even if passed into law, it is not clear that the Initiative would survive a challenge under the U.S. Constitution. According to a legal scholar who has done significant research on this topic, such directly-targeted discrimination is probably not permissible under the Equal Protection Clause of the Fourteenth Amendment.⁴¹

The Initiative would have a somewhat negative economic impact.

Same-sex marriages are likely to be good for Oregon’s economy, because of the long-term economic stability that marriage often provides, and because of spending related to the ceremony itself.⁴² The Williams Institute predicts that same-sex weddings in Oregon will generate \$47.3 million and lead to the creation of 468 new jobs in the first three years.⁴³ As the Initiative would probably serve to reduce the number of transactions related to a wedding, it could have negative economic consequences. However, because it is unclear how many businesses would refuse goods or services to same-sex couples, the Initiative’s direct economic impact is unclear.

Regardless, same-sex couples could have more difficulty obtaining goods and services in support of their wedding ceremonies if the law were enacted.⁴⁴ Such difficulty would depend on the political makeup of the community in which the couple wishes to purchase such goods or services. In more conservative

regions of Oregon, the impact on same-sex couples might be magnified, especially where there are few commercial alternatives.⁴⁵

On the other hand, some business owners may choose to close their businesses rather than be presented with circumstances that would violate their religious beliefs.⁴⁶ Passage of the Initiative might relieve religious business owners from having to choose between observing their religion and engaging in business, and thus facilitate their business's continued operation.⁴⁷

Even if an exemption from the Public Accommodations law were provided, engaging in legal discrimination could have reputational consequences for that business. Witnesses predicted that business could suffer significant backlash from publicized refusals to serve same-sex couples.⁴⁸ Just such a backlash was visited upon Sweet Cakes by Melissa after it refused to serve a same-sex couple.⁴⁹ This would also adversely impact employees of such businesses, who may not have control over discriminatory policies.

Your Committee concludes that refusals to provide goods or services to same-sex weddings would have negative impacts on those businesses that discriminate. Your Committee also concludes that, on balance, the Initiative would have a negative economic impact by blunting somewhat the economic benefits of same-sex marriage.

The Initiative would have profoundly negative impact on same-sex couples.

Beyond potentially making goods or services more difficult to obtain, several witnesses believe that passage of the Initiative would have serious negative impacts on the self-image and self-respect of same-sex couples.⁵⁰ "It's harmful in a real way to people's psyche even if they can get services elsewhere," explained one witness, an attorney.⁵¹ Another witness made a similar observation: "the hurtfulness against individuals, the hurtfulness against families—who after all are trying to have a wedding, something that is joyful—I think would be deeply offensive."⁵² Your committee agrees.

Current law does not brand religiously-inclined people as less-deserving of public accommodations, but the Initiative would do just that to same-sex couples. Using the aegis of the State to label same-sex couples as less-deserving of equal treatment in the commercial sphere will necessarily perpetuate and officially endorse a notion that same-sex couples are inferior.

The Initiative would also serve to reverse what many would see as progress towards equal rights and tolerance of all people, something that arguably runs counter to Oregon's established ethos of equality.^v Said one witness, "This feels to me very much like picking and choosing, and we are choosing against a particularly disfavored group of people. We haven't done that with other disfavored groups in the past."⁵³

^v M. Cahana., personal communication, May 22, 2014; D. Leslie, personal communication, May 22, 2014. To the extent that it is the policy of the State to prohibit discrimination on the basis of sexual orientation—and the very existence of the Public Accommodation Law suggests that it is—the Initiative would serve to thwart that policy.

Although the Petitioners declined to explain the Initiative to your Committee, several witnesses expressed skepticism that the law is about gay marriage. Instead, the initiative is likely in opposition to LGBT rights in general.⁵⁴ According to one witness, a legal scholar, “if it was just about marriage we would have allowed discrimination against interfaith couples, inter-race couples, and couples in which one of the previous members had been previously divorced and one hasn’t. Only when it comes to same sex couples, are we suddenly going to allow discrimination.”⁵⁵ Regardless of the intent of the Petitioners, there is a sense that the Initiative is a symptom of prejudice against LGBT people in general. The careful targeting of this law towards only same-sex couples, though perhaps intended to quell fears of broader discriminatory effect, makes its discriminatory intent all the more evident.

Witnesses also voiced concern that passage of a law similar to the Initiative could perhaps open the door to other attempts to legalize discrimination against other historically disfavored groups.⁵⁶ Although it is difficult to speculate whether the Initiative would “open the door” to new forms of legalized discrimination, it is likely to increase such fears, especially among other historically-disfavored racial, religious, and ethnic groups.⁵⁷

Finally, with the recent legalization of same-sex marriage in Oregon, the impact of the Initiative would be magnified: where an argument could have been made that, under prior law, a minimal number of couples would be affected by the initiative because same-sex marriage was illegal, the number of couples that would now be affected by the initiative is much greater.

The Initiative falsely presumes anti-discrimination laws are in themselves discriminatory.

The Initiative would provide an allowance for those whose religious beliefs condemn same-sex marriage to refuse to provide products or services in support of a same-sex marriage ceremony. For those who hold such beliefs, being able to refuse to participate in same-sex marriage ceremonies may be very important.^{vi} One witness, a pastor at a Northeast Portland church, provided the following explanation of concerns animating same-sex marriage opponents:

I am concerned about [my congregation’s] freedom to follow their religious convictions and about their ability to provide financially for themselves if they are forced to choose between disobeying their God or their State. [A requirement to provide goods or services in support of same sex marriage] impacts me and my congregation by affecting our ability to provide an accurate picture for the world of who our God is. If we are forced to participate in things that our God forbids we are forced to publicly present our God as someone other than who we believe him to be. [It also] impacts me and my congregation by affecting our ability to love our neighbor. The biblical definition of love includes truth telling. If we are forbidden from telling

^{vi} Legal scholar Thomas C. Berg has noted that for some, refusal to participate in a same-sex marriage ceremony is conduct that is fundamental to personal identity. Berg, T. C. (2010). What Same-Sex Marriage and Religious-Liberty Claims Have in Common. *Northwestern Journal of Law & Social Policy*, 5, 206.

the truth, "I cannot participate in this because this dishonors God," we are forbidden from loving our gay neighbors.⁵⁸

The Petitioners made the similar point that "religious freedom is not just exercised on Sundays, it's exercised Monday through Saturday as well, and people of faith cannot leave their religion at the door before entering the marketplace or their place of work."⁵⁹ One witness also expressed concern that continued prohibitions on religiously-based discrimination may precipitate other laws that would further constrain religious expression.⁶⁰ Your committee has no reason to doubt the good-faith claims of religious people that involvement in same-sex marriages conflicts with deeply-held beliefs and constrains their freedom of religious expression in commercial contexts.

However, the Petitioners also argue that the Public Accommodations Law goes beyond simply limiting religious expression in some contexts, but in fact constitutes discrimination against certain religious beliefs. "If refusing to celebrate or participate in a same-sex wedding is labeled as 'discrimination' then Christians, Muslims, Jews and many others will themselves be discriminated against, in that freedom of religion will no longer apply to them," said one witness in an attempt to help your Committee understand the proponent's views. According to the Petitioners, "there is a growing trend among political groups and government officials to discriminate against and to silence individuals of faith."⁶¹ This sentiment is reflected in the text of the Initiative, which in its preamble includes the following statement: "[u]nfortunately, there are groups pushing the view that religion is a purely private matter and that religious voices or opinions should be silenced."⁶² Such a narrative implies that Oregon's anti-discrimination laws discriminate against people of faith simply because the laws prohibit certain kinds of discrimination against same-sex couples.

The perception that religious liberties are under attack by expanding civil rights for same-sex couples is not universal among people of faith. Several witnesses, including representatives of faith-based organizations, expressed skepticism about this argument and explained that such sentiments are probably not held by the majority of religious Oregonians.⁶³ In fact, it may be that just as many religious beliefs may be offended by allowances for discriminatory religious expression as would be benefitted by it. For example, at least two witnesses, both of whom lead religious congregations, stated that *not* being able to officiate same-sex weddings had offended their religious principles and welcomed the recent legalization of same-sex marriage in Oregon.⁶⁴

The narrative of persecution put forth by the Petitioners is inconsistent with the very purpose of the Public Accommodations Law. Prohibitions on discriminatory behavior in the marketplace are not themselves discriminatory; rather, they apply broadly to Oregonians regardless of religion. One witness provided a very helpful explanation of how the Public Accommodations Law functions as applicable to all Oregonians, regardless of their religion:

"We have decided that the marketplace is an open marketplace, and that any service that a person provides...is available to everybody. [...] So a kosher meat vendor is only going to provide kosher meat and will not be asked to provide ham hocks. [But] any kosher butcher that says because of my religious beliefs, 'I am not going to sell to non-Jews,' shouldn't be in business."⁶⁵

Your committee found no evidence that the Public Accommodation Law or any other anti-discrimination law targets certain religious practices. The law does not limit or prescribe what goods or services people provide, it simply requires that if provided, they are provided to everyone that can pay for them. This reflects an implied contract between merchants and the public they both serve and benefit from.⁶⁶ The only religious expression prohibited by the Public Accommodations Law is invidious discrimination. Merchants who condemn same-sex marriage for religious reasons are no more limited in their freedom of expression than any others with similar prejudices.

The Public Accommodations Law also does not constitute a “new” restriction on religious expression. It is simply an existing law applied to a relatively new right—same sex marriage.⁶⁷

The prospects for this or other religious freedom proposals in the future are unclear.

The Initiative’s abandonment leaves open the possibility of a similar initiative in the future. As of the date of this report, similar initiatives have not seen widespread adoption in other states, with Mississippi being the only state to adopt an expanded “religious freedom” bill.⁶⁸

It is possible that, as in this case, future ballot title processes will decide the political calculus before such a measure ever gets to a vote. In the case of IP 52 in 2014, the Petitioners lost a legal dispute regarding the Initiative’s ballot title, which as proposed by the Attorney General’s Office would have created “religious belief exceptions to anti-discrimination laws.”⁶⁹ This language was apparently considered a death-knell to Initiative’s political prospects.⁷⁰ This suggests that future proposals of this nature must be able to de-emphasize the effects on anti-discrimination laws in the wording of the ballot title. So long as a future version of the Initiative creates an exception to those laws, it is unclear how it would fare any better if proposed again in the future.

Perhaps this is why the Petitioners have announced that they will challenge the Public Accommodations Law in the courts.⁷¹ Such a challenge has not been filed as of the date of this report, so your Committee cannot comment on its prospects for success. Nevertheless, a witness who is an expert on the topic is doubtful that there is any viable legal challenge to the Public Accommodations Law on these grounds.⁷²

Conclusion and Recommendation

Your Committee concludes that expanded civil rights for LGBT Oregonians does not justify exceptions to the Public Accommodations Law to allow religiously-based discrimination against same-sex couples. People engaged in commercial activity enter into an implicit contract with the public that their businesses will be open to all without regard for immutable characteristics, in return for the opportunity to earn a profit or fulfill a social mission. This contract protects all Oregonians, regardless of their race, color, religion, sex, nationality, marital status, age, or sexual orientation. It enables, for example, people of all religions to purchase goods or services from those not sharing their beliefs, just as it enables same-sex couples to purchase a wedding cake from those who might disagree with same-sex marriage. This is the balance struck by the Public Accommodations Law—a balance that is unchanged simply because same-sex couples now enjoy the right to marry.

Your Committee recognizes that peoples of faith who do not wish to play any part in a same-sex marriage may be harmed by strict application of the Public Accommodations Law. Indeed, it may truly offend the conscience and beliefs of deeply religious people to have to serve same-sex couples. This is a reality that your committee does not discount or dismiss.

On balance, however, the harm to same-sex couples caused by the Initiative would likely be greater and more widespread. It would say to such couples that they were somehow less deserving of anti-discrimination protections than every other heterosexual couple. The societal impact of this could be far more harmful than any discrete inconvenience caused by having to find an alternative baker or wedding photographer. As one witness put it, “the problem for Jackie Robinson wasn’t that he couldn’t find a hotel room, it was that he couldn’t stay in the same hotel as his teammates.”⁷³ The Initiative’s harm to same-sex couples’ dignity is clearly its most troubling aspect.

For these reasons, your committee concludes that City Club should oppose passage of this Initiative and any similar law.

Signatures

Respectfully submitted,

Roberto Jimenez, chair

Brian Landoe, vice chair

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About the City Club

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