

# Memorandum on Nondiscrimination Strategy in Pennsylvania

June 22, 2016

To: PA Competes and Allies

From: American Unity Fund  
Equality Pennsylvania  
Freedom for All Americans  
Gill Action  
Log Cabin Republicans  
National Center for Transgender Equality  
Transgender People of Color Coalition

Re: Response to ACLU of Pennsylvania and the ACLU National LGBT Project on  
Nondiscrimination Strategy in Pennsylvania

We write to respond to a memorandum dated June 10, 2016, from the ACLU of Pennsylvania and the ACLU National LGBT Project (together, “ACLU”). We agree with the ACLU that the ultimate objective in Pennsylvania is comprehensive protection from discrimination based on sexual orientation and gender identity in employment, housing, and public accommodations. We have long supported and worked for legislation that would provide such comprehensive protection.

However, we disagree with the ACLU that LGBT people have “little to gain and much to lose” in Pennsylvania by passing bills that deal with housing and employment, even if a separate public accommodations bill cannot pass at this time. In this memorandum, we explain why it’s critical to make some progress on employment and/or housing now rather than waiting to make more complete progress at an uncertain date in the future. Each of the four points below corresponds to the four main points made in the ACLU memorandum of June 10.

**1. Existing federal protection for LGBT people in employment and housing is inadequate, requiring state legislative action.**

The ACLU’s position rests in part on a lack of urgency about employment and housing protections in Pennsylvania because the group believes that such protections are already provided under the “sex” discrimination provisions of Title VII and the Fair Housing Act. This reliance on federal law is misplaced. State statutory housing and employment protection for LGBT Pennsylvanians is critically necessary and the current state of federal law is not an adequate substitute for it.

On employment, the ACLU points to two rulings by the Equal Employment Opportunity Commission (EEOC) that interpret existing federal protection against “sex

discrimination” to include gender identity and sexual orientation. We support this “sex discrimination” interpretation of Title VII (and of other state and federal statutes) as a step toward real nationwide protection. But EEOC guidance is only a first step.

To begin, interpretations of federal law by the EEOC are not binding on courts. In fact, while four Circuits have indeed held on the merits that sex discrimination includes gender-identity discrimination, the other eight have not. The Third Circuit, which governs Pennsylvania, has not squarely addressed the issue of gender-identity discrimination under Title VII.

None of the twelve circuits have yet held that sex discrimination includes sexual-orientation discrimination under federal employment law. Even more concerning, nine of the twelve, including the Third Circuit, have explicitly held or strongly indicated in dicta that Title VII does not prohibit sexual-orientation discrimination.<sup>1</sup> This creates a difficult barrier in the federal courts.

Thus, while the day may yet come, the federal circuit courts have not reached a consensus supporting the EEOC’s views on sexual orientation or gender identity. Furthermore, even the EEOC’s own view may be reversed by future commissioners chosen by a President who opposes LGBT equality. We are likely years away from any definitive decision in the federal courts, including by the Supreme Court, on whether gay and transgender people are protected under existing federal employment law.

In housing, federal protection from sexual-orientation and gender-identity discrimination is even less secure. The Department of Housing and Urban Development notes on its website that neither sexual orientation nor gender identity are specifically protected but that a gay or transgender person’s experience of housing discrimination “*may still be covered by the Fair Housing Act.*”<sup>2</sup> The same website refers potential LGBT complainants to *state agencies* in states that specifically prohibit discrimination based on sexual orientation and/or gender identity. Pennsylvania is not on that list.

For now the federal case law on housing remains mixed and unsettled, with at least three district courts holding that the FHA does not apply to sexual-orientation discrimination.<sup>3</sup>

We hope, and believe, that courts will eventually agree that gay and transgender people are covered by existing federal law on housing and employment, but we are not there yet.

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<sup>1</sup> The other circuits are: the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth.

<sup>2</sup> See

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination) (emphasis added). HUD has determined that discrimination based on sexual orientation and gender identity in providing homeless shelters is prohibited. <https://www.hudexchange.info/news/final-rule-on-equal-access-to-housing-published/>.

<sup>3</sup> *Neithamer v. Brenneman Property Services, Inc.*, 81 F. Supp. 2d 1, 4 (D.D.C. 1999); accord *Swinton v. Fazekas*, No. 06-CV-6139T (MAT), 2008 WL 723914, at 5 (W.D.N.Y. Mar. 14, 2008) and *Ordelli v. Mark Farrell & Associates*, No. 3:12-cv-1791, 2013 WL 1100811, at 2 (D. Ore. Mar. 15, 2013).

It is because of the uncertainty and insecurity of federal protection that the major national LGBT-rights organizations, including the ACLU, are supporting federal legislation that would specifically include protection for LGBT people in employment and housing. They are *not* counting on the EEOC or the federal courts to achieve the goal of nondiscrimination. They accept the view that protection, to be real and lasting, must be specifically written into the law. For these very reasons, Pennsylvania too must add sexual orientation and gender identity to its statutes to make sure its citizens are protected. Pennsylvanians should not have to wait for what may be years for federal courts or Congress to protect them when their own legislature can do so now.

**2. The passage of employment and housing protection will not likely threaten pro-LGBT judicial or administrative action on public accommodations, and Pennsylvania lawmakers should not await uncertain action from state courts or executive agencies.**

The ACLU argues that states may advance nondiscrimination through state agency interpretations of existing state law. The ACLU also argues that Pennsylvania could follow this path through state court litigation or executive action. “We are currently researching an administrative and legal strategy” for Pennsylvania, the memorandum states. We commend the ACLU for working to develop such a strategy. But Pennsylvanians should not have to wait for what is likely to be several years to prevail in a state court or agency.<sup>4</sup>

But the ACLU suggests that winning on employment and housing in the state legislature may jeopardize its future plans for winning more comprehensively through state courts or agencies. The ACLU argues that “adding LGBT protections only to housing and employment might wrongly lead courts to conclude that the existing sex discrimination protections do not apply to LGBT people.”

This unfavorable interpretation is not likely to prevail. To the extent courts evaluate legislative intent in statutory construction, they properly look to the intent of the enacting legislature—not to the action or inaction of a subsequent legislature that had nothing to do with passing the original statute. In this case, the dominant and traditional method of statutory construction would mean looking to the intent of the legislature that originally banned sex discrimination, not to the current legislature that merely adds the words “gender identity” and “sexual orientation” to some, but not all, provisions of the original law. It is true that a court could eschew the dominant approach, as the ACLU fears, but such a decision would be subject to appellate review.

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<sup>4</sup>The ACLU adds that the Pennsylvania Human Relations Commission is already “accepting” claims of sexual orientation and gender identity discrimination under a sex discrimination theory. AUF directly contacted the Commission, which confirmed only that they were accepting gender-identity claims. But the office would not say whether they would, in fact, determine that gender-identity discrimination was actionable. There are also no state court decisions agreeing that such claims are valid under existing law.

Meanwhile, future litigation in Pennsylvania urging a sex-discrimination theory to protect LGBT people would suffer its own uncertainties. It is already vulnerable to the argument that the Fairness Act has been introduced and failed to pass for many years. State courts and agencies may conclude that the state legislature never intended to protect gay and transgender people from discrimination, which is why they blocked passage of the Fairness Act.<sup>5</sup> While we think that would be the wrong interpretive conclusion from a failure to pass a comprehensive bill, a court could reach it.

The more important point, however, is what type of protections are LGBT people getting when they come in the form of state administrative rulings, rules, and court decisions? We believe that clear statutory language is far superior when it comes to whether LGBT people will continue to experience discrimination. Clear statutory language is more likely to be followed by covered entities simply because they are more likely to be aware of it than of interpretive rulings or rules.

Furthermore, much of the power and value of discrimination law comes not when an individual sues or files a complaint after the fact, but instead when entities know something is illegal and decide to not do it in the first place, very often adopting internal policies prohibiting the practice. This helps prevent discrimination in the first place, before it happens. On the other hand, rulings and rules interpreting statutes are typically only known by, and followed by, the types of large entities who employ lawyers and other personnel to stay on top of the latest regulatory trends.

We believe the value added by clear statutory protections in housing and employment is worth the slightly increased but small risk of being less likely to win a sex discrimination case in the public accommodations context.

### **3. Protecting LGBT people in employment and housing would not mean giving up on public accommodations.**

We agree with the ACLU that protecting lesbian, gay, bisexual and especially transgender people from discrimination in public accommodations is very important. The outrageous demagoguery surrounding the use of restrooms and other single-sex spaces by transgender people has been infuriating and harmful. There is probably no current issue in public policy on which perceptions about common sense and actual evidence are farther apart.

But as the ACLU itself has recognized on this very issue of separating employment/housing from public accommodations protections, making progress often necessitates compromise. In 2015, Utah legislators introduced a bill that protected gay and transgender people from discrimination in employment and housing only. With opponents citing concerns about transgender people in bathrooms and other single-sex spaces, the bill would not have passed if public accommodations protection had been included. Nevertheless, like all of the major national LGBT-rights groups, the ACLU

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<sup>5</sup> In fact, Congress's failure to pass pending protection from anti-gay discrimination was erroneously used by some federal courts to rule against gay plaintiffs in Title VII cases.

enthusiastically backed the bill, calling the protections in employment and housing “historic,” “much-needed,” and “essential.” The group’s Utah chapter “strongly” supported the bill and encouraged the state legislature to pass it.<sup>6</sup> The legislature did so with an overwhelming affirmative vote.<sup>7</sup>

We recognize that Utah was unique, and not a model for other states, in terms of its extraordinary exemption of all religious organizations from compliance with civil rights laws. But Utah did show that even a very conservative state can make significant progress for gay and transgender people. It is our understanding that people in Utah are generally pleased with their new, albeit incomplete, protections. We do not understand why Pennsylvania is different from Utah when it comes to political compromise that falls short of the comprehensive protection we all ultimately desire.

Holding out for a comprehensive bill in Pennsylvania that won’t pass while we wait for uncertain judicial action at some unknown date does nothing to defend the rights of transgender people in any area of law. Pennsylvania legislators have a chance to make historic, much-needed, and essential progress. It would be an historic error to pass up that opportunity.

It is also critical to note that an important consequence of passing protection in housing and employment will be to enlist new allies and to empower LGBT people themselves for the larger battle against discrimination. For the first time, many legislators in Pennsylvania will vote “yes” on legislation protecting LGBT people. That shatters a ceiling. It shows that we can protect LGBT people from discrimination without sacrificing fundamental religious liberties or encroaching on the legitimate interests of others. And it empowers LGBT people themselves, protected for the first time in their homes and in their jobs, to press for full legal rights. The recent achievement of comprehensive protection in Massachusetts was the capstone on an effort that took disciplined and measured effort.

#### **4. The legislative model is the most viable path that will securely protect LGBT Pennsylvanians from discrimination.**

Like the ACLU, we want comprehensive protection from discrimination for LGBT people. At the moment, there is no certain protection in any of these areas. The question is, how do we get from where we are to where we would like to be?

An obvious path is through the state legislature. We believe there is a good chance to make historic progress on employment and housing in the very near future,

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<sup>6</sup> See <https://www.aclu.org/news/aclu-utah-lauds-bill-providing-protections-gay-and-transgender-utahns> (March 4, 2015).

<sup>7</sup> On March 19, 2015, after an outcry from some LGBT-rights activists over expansive protections for religious liberty in the new Utah law, a senior staff attorney for the ACLU’s LGBT and HIV Project called the legislation an “important achievement” while also writing that it should not be a model for future bills because of its broad exemption (pre-existing in Utah law and applicable to all classes) for all religious organizations. The writer also mentioned the lack of protection in public accommodations in the new Utah law, but the thrust of the concern was religious exemptions. <https://www.aclu.org/blog/why-utah-no-utopia-lgbt-equality-despite-progress>. The Pennsylvania bills prohibiting employment and housing discrimination contain no such broad carve-out for religious organizations.

possibly in this session. There is much less chance of making any progress legislatively in the near future if we demand passage of protection in every area at one time. This is the painful lesson from thirteen years of legislative advocacy in Pennsylvania that have produced no protection. At this time, our choice is not between making incomplete progress or making complete progress. It is between making incomplete progress or no progress at all.

While the ACLU “recognize[s] the importance of achieving explicit protections” via legislation, an all-or-nothing strategy is not a viable path to victory in the Pennsylvania legislature. A real legislative strategy requires making hard choices when the day of reckoning comes.

The ACLU says that we have “alternative paths through state and federal litigation and administrative advocacy.” These paths, as we have noted, are poorly lit and have no clear endpoint in sight. However much we may support litigation for LGBT rights, and however much we may accept the legal theories that underlie that litigation, we cannot be certain that litigation alone will work. And, even if litigation is successful, it will not be as valuable to LGBT people as clear statutory language.

The good news is that state lawmakers do not have to make a choice between a legislative path and a judicial or administrative one. In the LGBT rights movement, as in other civil-rights movements, the lesson of history is that we should be pressing on *all* fronts, that the various forums of public policy debate are not hermetically sealed from one another, and that progress in one arena can fuel progress in others. Let’s make that progress in Pennsylvania where, and how, we can.