ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

The Harms of Fairness for All

The Victims of Fairness for All

<u>FFA harms women</u> by violating fairness in athletics and women-only programs, and by violating privacy rights in showers, locker rooms, and other private spaces.

Under FFA, men who identify as women must be given access to all women's programs, opportunities, and even private facilities such as showers and locker rooms. Although FFA allows fitness centers, spas, and other private facilities to be "designated for women," it is unlawful gender identity discrimination to deny a man use of those facilities if he asserts a female identity. In fact, FFA guarantees a "right of access" for individuals to use private facilities based on their gender identity.

Similarly, FFA mandates that in all federally-funded programs (such as college athletics or programs for women-owned businesses), men who identify as women must be given access to those programs when deemed "appropriate." This creates an open door for hostile judges and government agencies to make such determinations—just as the Obama Administration did in May 2016 when it determined that it was appropriate to open female showers, locker rooms, and other private spaces at all public schools to biological males.

<u>FFA harms children and families</u> by impacting the ability of faith-based adoption and foster care providers to serve these families and exposing children to harmful medical and psychological treatments.

Across our country, there are thousands of faith-based organizations that, with the help of federal funds, serve children and families in their communities by providing food and clothing, educational and social services, and desperately needed adoption and foster care services. FFA requires that all federally funded programs—even those operated by a church—must abandon their teachings on marriage and what it means to be male and female as a condition of receiving the funding. Under FFA, many of these organizations will be forced to close down their programs, hurting the many families and children served by them.

Even worse, FFA denies children in our nation's foster care system access to counseling that explores all options when they experience confusion about their gender identity. FFA instead mandates a one-way street that requires children be affirmed in their gender confusion, which includes giving them puberty blockers, hormone therapy, and even permanently sterilizing surgeries.

<u>FFA harms the marketplace</u>, including business owners, their employees, and the customers they serve.

Business owners don't lose their constitutional freedoms when they grow their business to more than 15 employees. But FFA threatens such business owners who serve everyone but can't express

every message or celebrate every event. It would impose government-mandated uniformity of thought, conscience, and speech, including on very personal and foundational beliefs like marriage and human sexuality.

FFA would also subject businesses to significant liability because it would require them to open up private, sex-specific spaces like showers and locker rooms to members of the opposite sex. This would force both their female employees and their female customers to share these private areas with men. Additionally, this legislation would likely force businesses to include puberty blockers, cross-sex hormones, and "sex reassignment" surgery in their employee health plans, even in violation of their convictions.

FFA harms ministries, including churches, religious schools and colleges, non-profit organizations, and the communities they serve.

FFA significantly threatens the many social service organizations who serve the most vulnerable among us. For example, it would forbid most employers and recipients of federal aid or funding from living out their beliefs about marriage or human sexuality. Thus, a federally-funded shelter for women who have experienced abuse could be required to admit a man who asserts a female identity.

FFA impacts the constitutional rights and individual autonomy of religious schools and colleges. For example, religious educational institutions could no longer require both students and their parents to affirm and live consistent with the school's teachings on marriage and human sexuality. And all school programs that receive federal funding are subject to SOGI non-discrimination provisions, which could impact everything from hiring individuals to oversee the program to whether religious codes of conduct can be applied to those programs.

All religious organizations, educational institutions, and non-profits could also risk being required to allow their property to be used for same-sex ceremonies or other events that violate their religious beliefs. For example, a church could face a lawsuit seeking to declare that its gymnasium must be used in ways that conflict with church doctrine or teachings just because it's available for rent by the public.

Simply put, FFA exposes churches, religious schools, and nonprofits to unprecedented government regulation and legal liability under federal law.

Analysis of Fairness for All

Adds SOGI to Federal Law

FFA adds sex, sexual orientation, and gender identity as protected classifications to several federal non-discrimination laws, including: places of public accommodation, employment (both federal government employment and private employment), housing, all federally funded programs (including adoption and foster care funding), jury service, credit, and refugee resettlement.

Impact on Privacy in Showers, Locker Rooms, and other Private Spaces.

1. Places of Public Accommodation: Under FFA, all places of public accommodation would be required to open up female-only showers, locker rooms, and similar facilities to men who assert a female identity. While a "fitness center, spa, or similar place" can limit use

of their facilities to persons of specific sex, those facilities cannot discriminate based on SOGI. Thus, the man who asserts a female identity could demand access to the female fitness center or spa, and failure to give him access would be gender identity discrimination. The only protection FFA affords in such scenarios is requiring places of public accommodation to provide additional privacy accommodations "within the facility" (i.e., within the changing room or locker room). In other words, the fitness center should install privacy curtains in the women's locker room, but it cannot exclude men who identify as female from entering or refuse to provide them services that are offered to women.

2. Federally Funded Programs: FFA permits sex-specific programs when "necessary to the essential operation of the program"—a vague and undefined term. However, the programs must treat a person consistent with their gender identity "where appropriate to accomplish the purpose of the program." So if the government decides that a federally-funded battered women's shelter must admit a man who claims a female identity because doing so is "appropriate," then the shelter would have no recourse under FFA despite the need to provide a safe, non-threatening environment for women escaping abuse by men.

3. Educational Institutions: Likewise, educational institutions can maintain separate facilities for men and women unless the government decides that opening up female facilities to men who identify as women is "appropriate." Given that the Obama Administration made that exact determination in its May 2016 Dear Colleague Letter, we should expect a similar outcome under FFA.

4. Employers: FFA requires most employers to allow employees to use facilities consistent with the gender identity, as long as the employer reasonably accommodates an employee who objects to sharing private facilities with members of the opposite sex. Far less than 1% of the population identifies as transgender, meaning that employers are going to have to make costly expenditures to ensure that they have sufficient accommodations available to many among the remaining 99% who would not be comfortable sharing a changing room or locker room with members of the opposite sex.

Vastly Expanding Public Accommodations Law

FFA greatly expands what qualifies as a "place of public accommodation" to include financial services, medical and mental health services, transportation services, funeral services, and any store or online retailer that employs more than 15 people.

There are two categories of places that are exempt:

1. Facilities used primarily for religious purposes: Houses of worship, denominational and church administrative offices, religious schools and colleges, religious camps and retreat centers, and facilities owned by a religious non-profit are generally exempt. However, if property owned by a religious organization is open to the public and used for commercial purposes not related to the teaching, promotion, or expression of religion, then it is no longer exempt. Thus, if a church frequently rents out its gymnasium to community groups for non-religious purposes, the gymnasium would likely be considered a place of public accommodation and subject to the SOGI requirements.

2. Limited exemption for medical and mental health services: Medical providers can decline to provide certain services as long as it declines for all patients without regard to SOGI. If a Catholic hospital only performs mastectomies to treat cancer, it can decline to perform the procedure for a woman who asserts a male identity and wants the procedure in order to present as a male. But if the hospital performs mastectomies for cosmetic purposes, then it would be required to perform the procedure for the transgender individual.

   Marital counseling is only exempt if the counselor who only provides martial counseling to opposite-sex couples is willing to refer a same-sex couple to another counselor. Additionally, all counseling offered by a minister is exempt.

   Finally, both medical and mental health providers can make "evidence-based medical determinations" and may refer a patient to another provider the physician/counselor believes it is in the patient's best interest. This language is incredibly vague and provides little meaningful protection. For example, if a doctor attempted to assert this section to protect against having to prescribe puberty blockers the doctor does not believe are in a child's best interest, a court could easily find that the doctor's decision was not "evidence-based" and require the doctor to violate his best judgment.

Limited Religious Exemptions in Federally Funded Programs

FFA imposes SOGI non-discrimination requirements on all federally funded programs, requiring recipients of federal funds to adopt SOGI policies and practices in order to continue to receive funding. FFA provides limited exceptions for religious organizations:

1. The SOGI non-discrimination requirements apply to all programs offered by a religious organization that receive the federal funding. If a church receives federal funds to operate a food pantry, the operation of the pantry would be subject to the SOGI requirements.

2. Religious organizations are not required to change their internal governance, leadership criteria, name, or the decorations in their facilities as a condition of receiving federal funds. But this might not protect those specific programs provided by the religious organization that are federally funded from being required to change their governance, policies, and practices to comply with the conditions attached to the federal funding.

3. Counseling programs operated by religious groups cannot be disqualified based on the religious content of their marriage or family counseling (meaning that they can teach that marriage is between a man and woman and that a person should embrace their biological sex) as long as the counseling program remains open to everyone regardless of SOGI.

4. Religious organizations cannot be denied funding for safety or infrastructure improvements (such as FEMA funds) based on their religious beliefs or practices.

Creation of New Adoption/Foster Care "Voucher" Program

FFA imposes SOGI non-discrimination requirements on any entity that receives federal funds to perform adoptions or foster care placements unless the entity participates in a new "indirect funding program." The "indirect funding program" creates federally funded certificates (i.e., vouchers worth at least $3,000) that are given to prospective parents who want to adopt or foster a child to cover the cost of qualifying to adopt.

A private adoption/foster care provider can decline to accept a certificate from a family seeking to adopt for any reason, but they must refer the family to another provider willing to provide the requested services. Thus, a faith-based provider could decline to accept a certificate to help a same-sex couple become qualified to adopt as long as the faith-based provider refers the couple to an alternative organization.

States cannot prohibit a licensed adoption/foster care provider from participating in the certificate program, nor can a state require a provider to perform services in a particular instance (such as agreeing to work with a same-sex couple) as a condition of participating in the certificate program.

FFA attempts to include protections for adoption/foster care providers. It prohibits state governments from enforcing a state law that infringes protections for religious adoption/foster care providers when federal money involved. Additionally, state governments cannot deny or revoke the license or certification of a religious adoption/foster care provider because of its religious teachings or practices.

BUT, FFA creates two big loopholes to these protections for adoption/foster care providers:

1. They can be required to perform services if required by federal law. Thus, if HHS issues a rule requiring providers to work with same-sex couples, then a faith-based provider would not be protected under FFA.

2. States can require providers to perform services if it is part of an agreement that is funded exclusively from state funds. For example, if a state requires all adoption providers to do recruitment work and provides state-funded grants to cover the cost, then the state can require a faith-based provider to recruit same-sex couples (even if the provider could potentially later decline to perform specific services for that couple).

Notably, FFA defines SOGI discrimination as refusing to place a child with otherwise qualified parents because of the parents' SOGI. It is also SOGI discrimination to treat a child inconsistent with their gender identity or to subject the child to any practice or treatment that seeks to change the child's sexual orientation or gender identity (i.e., so-called "conversion therapy").

Finally, FFA does NOT supersede state or local adoption/foster care laws (including SOGI laws), unless such laws directly conflict with this section. It is thus uncertain to what extent this would prevent states from finding other ways to impose SOGI requirements on faith-based adoption/foster care providers.

Protections for Religious Employees and Certain Employers

While FFA adds SOGI to federal employment non-discrimination laws, it provides for some protections for both religious employees and religious employers:

1. Protections for Religious Employees: FFA imposes a duty on an employer to undertake an affirmative and bona fide effort to find ways to accommodate a religious employee. It further raises the bar of how "undue hardship" is defined, meaning that it is more difficult for an employer to decline to accommodate an employee's religious practices.

FFA also protects the freedom of an employee to express religious, political, or moral beliefs in the workplace in a reasonable, non-disruptive, and non-harassing manner. An employer cannot fire an employee for lawful expression outside of work regarding the employee's beliefs about marriage or that sexual activity should be limited to within marriage. BUT, it does not protect speech about gender identity outside of work, an area where protections are more necessary than ever.

2. Protections for Religious Employers: FFA exempts all churches, religious organizations, religious schools and colleges, and religious non-profits from claims of SOGI discrimination. It further clarifies that the prohibition on sex discrimination (which does apply to religious employers) should not be interpreted to include SOGI. This would supposedly prevent a court from interpreting "sex" to include SOGI, as has happened in several appellate court decisions (such as ADF's case, *Harris Funeral Home*).

   Notably, a religious employer whose primary purpose is to deliver medical services is NOT EXEMPT from SOGI requirements, exposing religious hospitals and non-profit clinics to potential liability.

No Significant Protections in Housing

FFA inserts SOGI in all federal housing laws, and it provides no meaningful additional protections for religious organizations. It merely allows a religious organization to limit the sale, rental, or occupancy of property owned by the organization to "persons who adhere to its religious beliefs, observances, tenets, or practices."

Replacing DOMA Language

FFA repeals the Defense of Marriage Act and inserts new language saying that federal government recognizes marriages that are valid in the state where the marriage was entered.

Expansive New Federal Anti-Bullying Law

FFA requires all K-12 schools to adopt anti-bullying policies that are based on SOGI and other protected classifications, rather than protecting all students from bullying. It defines bullying very broadly to include any student speech or conduct that creates a "hostile or abusive educational environment … including acts of verbal, nonverbal, physical aggression or intimidation." This could be used to force students to use inaccurate pronouns, because doing so could create a "hostile" educational environment for a transgender student.

FFA does provide some protections for student free speech and free exercise rights. It prohibits schools from denying any student the right to free speech or assembly or permit unlawful viewpoint discrimination. And schools cannot punish a student's expression of religious, political, or philosophical beliefs in the classroom or at school activities when such expression takes place in the same context that other expression of other beliefs is allowed.

Additional Protections for Religious Schools and Colleges

FFA prohibits both federal and state governments from taking any adverse action against a religious educational institution because of its religious mission. It further prohibits an accrediting agency from taking an adverse action against a religious educational institution for noncompliance with a standard that would require the institution to violate its religious mission.

Protections Against Religious Tests

FFA prohibits any government from excluding a person from an occupation because of the person's religious beliefs or affiliations. And the government cannot disqualify a person for a political office based on the person's religious beliefs or affiliation.

Protection for Tax-Exempt Status

An organization's beliefs or practices concerning marriage, family, or sexuality shall not be a basis for determining whether an organization is tax exempt.

Ineffective and Confusing Non-Retaliation and Preemption Provisions

One of the main promises of FFA proponents is that it would pre-empt state and local SOGI laws to create national, uniform application. FFA does not live up to this promise.

1. FFA prohibits the government from taking adverse action against a person who invokes the few exemptions or protections that exist under FFA; BUT it does not supersede any law unless the law was being enforced to punish a person for invoking FFA.
2. FFA prohibits adverse action that is inconsistent with the religious exemptions under federal employment or public accommodations laws; BUT it does not invalidate other laws that apply to religious employers or public accommodations (i.e., state SOGI laws).

Because of the confusing language and explicit authorization for state SOGI laws, it is unlikely that FFA will provide any meaningful pre-emption of state and local SOGI laws.