
PRO-BUSINESS OR ANTI-GAY?
DISGUIISING LGBT ANIMUS AS ECONOMIC
LEGISLATION

Alex Reed[†]

INTRODUCTION	154
I. THE TRADITIONAL TIERED APPROACH TO EQUAL PROTECTION ANALYSIS ..	160
II. “RATIONAL BASIS WITH BITE”	161
III. THE POLITICAL RESTRUCTURING CASES	167
IV. OTHER STATES SEEK TO FOLLOW TENNESSEE’S LEAD	171
A. Montana.....	171
B. Nebraska	174
C. Michigan	176
D. Oklahoma.....	177
V. LEGAL CHALLENGES BASED ON EXISTING LAW	177
A. The Political Restructuring Argument.....	178
B. The Per Se Violation Argument	179
C. The Rational Basis with Bite Argument	181
D. The Ordinary Rational Basis Review Argument.....	184
VI. LEGAL CHALLENGES BASED ON HEIGHTENED SCRUTINY	185
A. Tennessee	187
1. The Historical Background Against Which HB 600 Was Enacted.....	187
2. The Specific Sequence of Events Leading Up to HB 600’s Passage	188
3. Procedural Departures in Enacting HB 600.....	192
4. Substantive Departures in Enacting HB 600	194
5. The Legislative History of HB 600	194
B. Montana.....	195
1. The Historical Background Against Which HB 516 Was Debated.....	195
2. The Specific Sequence of Events Leading Up to Debate on HB 516	198
3. Substantive Departures in Advancing HB 516	201
4. The Legislative History of HB 516	201
C. Nebraska	203
1. The Historical Background Against Which LB 912	

[†] Assistant Professor of Legal Studies, Terry College of Business, University of Georgia.

Was Debated..... 203

2. The Specific Sequence of Events Leading Up to Debate
on LB 912 203

3. The Legislative History of LB 912 204

D. Michigan..... 205

1. The Historical Background Against Which HB 5039
Was Introduced 205

2. The Specific Sequence of Events Leading Up to HB
5039’s Introduction..... 207

E. Oklahoma 209

1. The Historical Background Against Which HB 2245
Was Debated..... 209

2. The Specific Sequence of Events Leading Up to Debate
on HB 2245..... 210

3. Substantive Departures in Advancing HB 2245..... 211

CONCLUSION..... 212

INTRODUCTION

“Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”¹

Belmont University describes itself as “a student-centered Christian community” with more than 6,000 students located in Nashville, Tennessee.² In the spring of 2005, Belmont hired Lisa Howe to serve as the head coach of its women’s soccer program.³ Over the next five years, Howe led the team to its first NCAA tournament appearance and a conference co-championship and was named conference coach of the year in 2009.⁴ Students and alumni alike, therefore, were shocked when Belmont announced that Howe would not be returning for the 2011 season. Initially, Belmont claimed that the decision was entirely Howe’s, but within twenty-four hours the University was forced to acknowledge that Howe had not resigned voluntarily.⁵ Instead, Belmont characterized the decision as a mutual agreement that both parties recognized as being in their respective best interests.⁶ Howe, meanwhile, declined to

1. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

2. *Prospective Students*, BELMONT U., http://www.belmont.edu/prospective_students/index.html (last visited Apr. 21, 2013).

3. *Lisa Howe*, BELMONT BRUINS, http://www.belmontbruins.com/sports/w-soccer/mtt/howe_lisa00.html (last visited Apr. 21, 2013).

4. Richard Fausset, *Gay Rights a New Tune for Nashville*, L.A. TIMES, Dec. 22, 2010, at A10, available at <http://articles.latimes.com/2010/dec/21/nation/la-na-gay-nashville-20101222>.

5. Pierce Greenberg, *Coach Lisa Howe’s Dismissal Shocks Women’s Soccer Team*, BELMONTVISION.COM (Dec. 2, 2010, 11:09 PM), <http://belmontvision.com/2010/12/belmont-soccer-coach-fired>.

6. Fausset, *supra* note 4, at A10.

comment.⁷

The women of Belmont University's soccer program were more forthcoming. According to news reports, the catalyst for Howe's departure was a November 2010 team meeting in which Howe confided to her players that she was a lesbian and that she and her partner of eight years were expecting a child.⁸ After receiving a complaint from a player's father, Belmont's athletic director allegedly told Howe that if she did not resign, she would be fired.⁹ On December 2, 2010, Howe informed the team that she was leaving Belmont, and within hours the University had issued a press release confirming the separation.¹⁰

Citing "recent events concerning the employment practices of a particular Metropolitan Government contractor,"¹¹ members of the Nashville Metropolitan Council introduced a bill on January 18, 2011 to prohibit city contractors from discriminating on the basis of sexual orientation or gender identity.¹² Even before the ordinance was formally introduced, however, a state legislator announced that he intended to sponsor a bill in the upcoming legislative session that would prevent local governments from enacting LGBT-inclusive nondiscrimination ordinances.¹³

True to his word, on February 10, 2011, Representative Glen Casada introduced a bill titled the "Equal Access to Intrastate Commerce Act" (Intrastate Commerce Act) in the Tennessee General Assembly.¹⁴ Barely a page in length, the Intrastate Commerce Act had two substantive provisions: first, it sought to amend the Human Rights Chapter of the Tennessee Code to define the term sex as "mean[ing] and refer[ring] only to the designation of an individual person as male or female as indicated on the individual's birth certificate"; second, the Act sought to prohibit local governments from adopting nondiscrimination ordinances more inclusive than state law in terms of their protected classes.¹⁵ As neither sexual orientation nor gender identity is

7. *Id.*

8. Campbell Robertson, *Lesbian Coach's Exit from Belmont U. Has Nashville Talking*, N.Y. TIMES, Dec. 18, 2010, at A10, available at <http://www.nytimes.com/2010/12/18/education/18belmont.html>.

9. *Id.*

10. Greenberg, *supra* note 5.

11. Nashville, Tenn., Ordinance BL2011-838 (Apr. 8, 2011).

12. Ordinance No. BL2011-838, NASHVILLE.GOV, http://www.nashville.gov/mc/ordinances/term_2007_2011/bl2011_838.htm (last visited Apr. 21, 2013).

13. Michael Cass, *Glen Casada Working on State Bill to Stop Metro Gay Non-Discrimination Plan*, TENNESSEAN (Jan. 12, 2011), <http://blogs.tennessean.com/politics/2011/glen-casada-working-on-state-bill-to-stop-metro-gay-non-discrimination-plan>.

14. H.B. 600, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); *Bill Information for HB 600*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB0600&ga=107> (last visited Apr. 21, 2013).

15. H.B. 600; *see* TENN. CODE ANN. § 4-21-102 (2012).

a protected class under Tennessee law,¹⁶ the Act stood to preempt any LGBT-inclusive nondiscrimination ordinance enacted by the city of Nashville.

Following a contentious debate, the Nashville Metropolitan Council voted to approve CANDO—the Contract Accountability Non-Discrimination Ordinance—on April 5,¹⁷ and the Mayor signed the bill into law on April 8.¹⁸

The Intrastate Commerce Act, meanwhile, was continuing to advance through the Tennessee General Assembly. In an April 12, 2011 hearing before the House Commerce Committee, Representative Casada conceded he was not aware of any studies indicating that disparities in local nondiscrimination laws were having a negative impact on Tennessee businesses.¹⁹ Nor was Representative Casada able to identify any particular business that had chosen not to expand its operations or had ceased operating altogether due to a lack of consistency in local governments' nondiscrimination laws.²⁰ Instead, Representative Casada urged his colleagues to “be proactive not reactive” for once and suggested that “common sense” dictated a need for the Act.²¹

After being reported on favorably by two separate House committees, the Intrastate Commerce Act was brought before the full Tennessee House of Representatives on April 25, 2011.²² In response to questions from his colleagues as to whether the purpose of the Act was to repeal Nashville's CANDO ordinance, Representative Casada demurred, stating that the Act was designed to be a law of general application.²³ After one colleague described the

16. See § 4-21-102 (defining “discriminatory practices” as discrimination on the basis of race, creed, color, religion, sex, age, or national origin).

17. Chris Cannon, *Non-Discrimination Bill Passes on 3rd Reading*, NEWSCHANNEL5.COM (Apr. 5, 2011, 8:33 PM PDT), <http://www.newschannel5.com/story/14389865/council-passes-non-discrimination-bill-on-3rd-reading>; see also *Local Businesses Support Proposed Metro Nondiscrimination Bill*, CITY PAPER (Jan. 26, 2011, 9:05 PM), <http://nashvillecitypaper.com/content/city-news/local-businesses-support-proposed-metro-nondiscrimination-bill> (discussing support for the “Contract Accountability Non-Discrimination Ordinance (CANDO)”).

18. *Mayor Dean Signs Non-Discrimination Ordinance*, NEWSCHANNEL5.COM (Apr. 8, 2011, 7:36 PM PDT), <http://www.newschannel5.com/story/14414046/mayor-dean-signs-non-discrimination-ordinance>.

19. *Equal Access to Intrastate Commerce Act: Hearing on H.B. 600 Before the H. Comm. on Commerce*, 107th Gen. Assemb., Reg. Sess. 37:43-38:20 (Tenn. 2011) [hereinafter *Commerce Committee Hearing on HB 600*] (statement of Rep. Glen Casada), available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4008.

20. *Id.* at 37:13-38:20.

21. *Id.* at 37:27-38:04.

22. See *Bill Information for HB 600*, *supra* note 14.

23. *Equal Access to Intrastate Commerce Act: H.R. Deb. on H.B. 600*, 107th Gen. Assemb., Reg. Sess. 1:55:08-1:55:21 (Tenn. 2011) [hereinafter *HB 600 Floor Debate*] (statement of Rep. Glen Casada), available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4133; see also *Equal Access to Intrastate Commerce Act: Hearing on H.B. 600 Before the H. Comm. on Calendar & Rules*, 107th Gen. Assemb., Reg. Sess. 33:20-33:23 (Tenn. 2011) [hereinafter *Rules Committee Hearing on HB 600*] (statement of Rep. Glen Casada), available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4075 (characterizing

Act as homophobic, Representative Casada responded:

Let me say real clear, I've been working on this since November of this year, well before . . . it is not homophobic. Though I am deeply disturbed that . . . the City of Nashville would jump on this small Christian school . . . and inflict their morality . . . or attempt to inflict their morality upon this small Christian school, but again, that's not what this bill is about. This bill is creating a homogenous business environment across the State of Tennessee.²⁴

Later in the same debate another colleague suggested that the bill was intended as retaliation for Nashville's actions vis-à-vis Belmont University, to which Representative Casada replied, "I'm just pointing out, chairman, the hypocrisy of calling [this bill] homophobic, yet it's okay to inflict one's morality upon a private Christian school and that's not wrong."²⁵

The Intrastate Commerce Act was ultimately approved by both houses of the Tennessee legislature, and Governor Bill Haslam signed the Act into law on May 24, 2011.²⁶ Thus, after fewer than six weeks on the books, Nashville's CANDO ordinance was repealed through state legislative action.

Nashville's story is not unique, however. Following Tennessee's lead, four other states have either considered or are actively considering bills that would prohibit municipalities from expanding their local nondiscrimination ordinances to include groups beyond those recognized by the state. With one exception, debate on these bills has coincided with the introduction or adoption of the first LGBT-inclusive nondiscrimination ordinance in that particular state. Although lawmakers insist that this is merely a coincidence and steadfastly deny allegations that these bills are LGBT-centric in orientation, the evidence suggests otherwise.

By denying the discriminatory motivations underlying such legislation, supporters ostensibly seek to ensure that these bills will be evaluated under ordinary rational basis review if subjected to an equal protection challenge postenactment. This is because laws evaluated under ordinary rational basis review are typically upheld, whereas those subjected to strict or intermediate scrutiny are normally invalidated.

Application of heightened scrutiny, i.e., strict or intermediate scrutiny, is generally reserved for laws drawing certain dubious distinctions: classifications implicating a suspect class such as race, national origin, or alienage are subject to strict scrutiny while classifications affecting a quasi-suspect class such as sex or illegitimacy are evaluated under intermediate scrutiny. All other classifications are assessed under ordinary rational basis review. Laws

Tennessee House Bill 600 (HB 600) as "a bill of general application [that] applies to every town in the State of Tennessee").

24. *HB 600 Floor Debate*, *supra* note 23, at 2:08:34-2:08:57 (statement of Rep. Glen Casada).

25. *Id.* at 2:12:06-2:12:16.

26. Cameron McWhirter, *Law Riles Gay-Rights Groups*, WALL ST. J. (May 25, 2011), http://online.wsj.com/article/SB100014240527023036548045763437917847660_86.html.

motivated by a bare desire to harm a politically unpopular—albeit nonsuspect or quasi-suspect—group may, nevertheless, be struck down under a more searching form of rational basis review known as the “rational basis with bite” standard.²⁷

As neither sexual orientation nor gender identity is a suspect or quasi-suspect class under the Court’s existing equal protection jurisprudence, laws having a discriminatory impact on LGBT Americans generally will be upheld unless plaintiffs can establish that such laws are motivated solely by animus so as to warrant application of the rational basis with bite standard or, alternatively, that the laws constitute a per se violation of equal protection. The Supreme Court relied on both of these theories to invalidate the anti-LGBT state constitutional amendment at issue in *Romer v. Evans*.²⁸

Although *Romer* represented a significant legal victory for the LGBT community, the majority’s reasoning has had the unintended consequence of informing lawmakers how they may go about drafting anti-LGBT legislation to withstand an equal protection challenge. First, legislation designed to discriminate against LGBT Americans must be facially neutral, as laws explicitly targeting the LGBT community for harm will raise a presumption of animus so as to implicate the rational basis with bite standard. Second, any given piece of legislation cannot be too ambitious in terms of the harm that it seeks to inflict on the LGBT community, as laws imposing a broad and undifferentiated disability solely on LGBT Americans will constitute a per se violation of equal protection. The Intrastate Commerce Act and its progeny ostensibly satisfy these two requirements to the extent they do not reference LGBT persons specifically and apply with equal force to all categories of persons not currently recognized as a protected class under the relevant state law, rather than affecting only LGBT Americans.

This Article argues, in six Parts, that classifications based on sexual orientation or gender identity must receive heightened scrutiny so as to expose the discriminatory motivations underlying these bills and repeal the license to discriminate conferred by *Romer v. Evans*. Heightened scrutiny would allow courts to consider the specific sequence of events leading up to the introduction of these bills, the historical background against which they are being debated, and any substantive or procedural irregularities in the manner of their enactment. Application of these factors would reveal that the Intrastate Commerce Act and its progeny were written, introduced, and advanced because of—not merely in spite of—their adverse effects upon the LGBT community in contravention of the Equal Protection Clause.

Part I reviews the Supreme Court’s traditional tiered approach to equal protection analysis.

Part II examines the Court’s willingness to apply a more rigorous form of

27. See *infra* Parts I-II.

28. 517 U.S. 620 (1996).

rational basis review to invalidate laws motivated by a bare desire to harm politically unpopular groups, such as hippies, the mentally disabled, and LGBT persons.

Part III considers the Court's political restructuring cases and their implications for the Intrastate Commerce Act and its progeny. Together, these cases hold that the government cannot restructure the political process for the sole purpose of disadvantaging minorities. In eliminating local governments' ability to enact nondiscrimination ordinances more inclusive than state law in terms of their protected classes, these bills would seem to conflict with the political restructuring cases by making it more difficult for LGBT Americans, and indeed all minorities, to effectuate change at the local level of government.

Part IV explores the factual circumstances surrounding the introduction of these bills and their advancement through their respective state legislatures. Because debate on these bills has generally coincided with the introduction of the first LGBT-inclusive nondiscrimination ordinance in that particular state, the timing indicates that—notwithstanding sponsors' representations to the contrary—these bills are designed to block or repeal pro-LGBT ordinances.

Part V provides several reasons why courts are unlikely to evaluate these bills under anything more than ordinary rational basis review, such that they will almost certainly be upheld against any equal protection challenge. First, the political restructuring cases are arguably inapposite to the extent that they involve racial rather than sexual minorities. Second, whereas the state constitutional amendment invalidated in *Romer* as a per se violation of equal protection sought to prohibit all legislative, executive, or judicial action at any level of state or local government to protect homosexuals, these bills affect only local governments, such that LGBT persons may continue to seek the aid of their state governments in redressing sexual-orientation-based discrimination. Third, there is insufficient evidence of animus to trigger rational basis with bite review since these bills do not explicitly discriminate against LGBT Americans, and the available legislative history does not reflect any overt hostility on the part of the bills' supporters. Thus, a court would likely uphold the Intrastate Commerce Act and its progeny under ordinary rational basis review on the theory that these bills are conceivably related to any number of legitimate state interests, including the promotion of intrastate commerce.

Part VI demonstrates that these measures would be unconstitutional if sexual orientation and gender identity were afforded heightened scrutiny by the courts. Specifically, if the Supreme Court were to recognize sexual orientation and gender identity as quasi-suspect classifications, LGBT Americans would no longer have to convince a court that these types of bills are inexplicable by anything but animus or otherwise work a per se violation in order to prevail on an equal protection claim. Instead, litigants would need only show that a discriminatory purpose was a motivating factor in these states' decisions to enact an otherwise facially neutral law having a disparate impact on LGBT

persons. The Supreme Court has identified several factors relevant to establishing the existence of a discriminatory purpose: (1) the historical background of the decision; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedural sequence; (4) substantive departures; and (5) the legislative or administrative history.²⁹ Because application of these factors would confirm that an invidious discriminatory purpose underlay the Intrastate Commerce Act and its progeny, courts would no longer be complicit in denying LGBT Americans the equal protection of the laws.

I. THE TRADITIONAL TIERED APPROACH TO EQUAL PROTECTION ANALYSIS

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”³⁰ In application, equal protection requires that all persons similarly situated be treated alike as the Constitution “neither knows nor tolerates classes among its citizens.”³¹

The Supreme Court has developed a tiered framework for equal protection claims based upon the characteristics of the affected class.³² Although the Court purports to apply three distinct tiers of review—strict scrutiny, intermediate scrutiny, and rational basis—the only practical distinction is between classifications receiving heightened scrutiny and those afforded rational basis review, as laws subject to the former are normally invalidated whereas laws evaluated under the latter are typically upheld.³³ Indeed, one scholar has noted that although “[t]he words ‘scrutiny’ and ‘review’ suggest an examination rather than a result,” when it comes to the Court’s equal protection analysis, “looks can kill.”³⁴

The term “heightened scrutiny” encompasses both strict and intermediate scrutiny. Classifications implicating a suspect class such as race, national origin, or, in some situations, alienage are subject to the most rigorous form of review, strict scrutiny, whereas classifications affecting a quasi-suspect class such as sex or illegitimacy are evaluated under the ostensibly more lenient

29. See *infra* note 203 and accompanying text.

30. U.S. CONST. amend. XIV, § 1.

31. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *abrogated* by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

32. Seth Hilton, Comment, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?*, 28 U.C. DAVIS L. REV. 445, 450-51 (1994). Classifications infringing upon fundamental rights such as voting, interstate travel, and privacy are also subject to strict scrutiny. John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 178 (1993).

33. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011).

34. *Id.*; see also Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing the most rigorous tier of scrutiny as “‘strict’ in theory and fatal in fact”).

standard of intermediate scrutiny.³⁵ Although the Supreme Court has never articulated a precise test for determining whether a group qualifies as suspect or quasi-suspect,³⁶ the Court has indicated that the individuals comprising these classes “exhibit obvious, immutable, or distinguishing characteristics,” are “a minority or politically powerless,” and have historically “been subjected to discrimination.”³⁷ Conventional equal protection analysis dictates that for a classification to survive strict scrutiny, it must further a compelling state interest and be narrowly tailored to serve that interest while classifications reviewed under intermediate scrutiny must be substantially related to an important state interest.³⁸

Classifications which do not implicate a suspect or quasi-suspect class are afforded rational basis review. Under this exceedingly deferential standard, legislative classifications are presumptively constitutional and will be upheld against an equal protection challenge so long as they are rationally related to some legitimate state interest, even if that interest is offered post hoc.³⁹ Accordingly, “the party challenging the legislation bears the burden of negating every conceivable rational basis for the classification, regardless of whether or not such a rationale—or any at all—was actually relied upon by the relevant authority.”⁴⁰

II. “RATIONAL BASIS WITH BITE”

The Supreme Court has on occasion employed a more aggressive form of rational basis review to invalidate laws targeting groups who would not otherwise receive heightened scrutiny. Referred to variously as “active”⁴¹ or “second order”⁴² rational basis review, this “rationality review ‘with bite’”⁴³ standard has yet to be formally recognized by the Court,⁴⁴ although individual

35. William M. Wilson, III, Note, *Romer v. Evans: “Terminal Silliness,” or Enlightened Jurisprudence?*, 75 N.C. L. REV. 1891, 1895-96 (1997).

36. *Id.* at 1896.

37. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

38. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 487 (1998).

39. Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2773-74 (2005).

40. *Id.* at 2773-74.

41. *Milner v. Apfel*, 148 F.3d 812, 816 (7th Cir. 1998) (internal quotation marks omitted).

42. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted).

43. Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 78 (1996).

44. Indeed, the Court has expressly disavowed any inconsistencies in its application of the rational basis test. *Heller v. Doe*, 509 U.S. 312, 319-21 (1993); *see also* Scott A. Keller,

Justices have hinted at its existence in dicta.⁴⁵ Compared to traditional rational basis review, rational basis with bite requires a tighter correlation between statutory means and ends such that even if a classification may be said to further a legitimate state interest, the classification will remain subject to invalidation if the manner in which it goes about advancing that interest is deemed too weak or attenuated.⁴⁶

The rational basis with bite standard has its origins in *United States Department of Agriculture v. Moreno*,⁴⁷ wherein the Court invalidated a law denying food stamps to any household comprised of one or more unrelated individuals.⁴⁸ In response to the government's contention that the law was designed to prevent fraud, the Court found that the challenged classification was not rationally related to that objective.⁴⁹ Specifically, the existence of separate antifraud provisions within the Food Stamp Act of 1964⁵⁰ "casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses."⁵¹ The ostensible ease with which the law could be circumvented was held to further undermine the government's position.⁵² After noting that the available legislative history indicated that the law was designed to prevent hippie communes from receiving federal food stamp assistance,⁵³ the Court famously declared, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."⁵⁴ Because the challenged classification was "not only 'imprecise,' [but] wholly without any rational basis," the Court invalidated the

Depoliticizing Judicial Review of Agency Rulemaking, 84 WASH. L. REV. 419, 435 (2009) (noting that although the Court has expanded the rational basis with bite standard to the rulemaking context, it "has not formally recognized [the standard's existence] even in the context of judicial review of legislation").

45. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (acknowledging that in certain cases the Court has "applied a more searching form of rational basis review").

46. Sunstein, *supra* note 43, at 59-62.

47. 413 U.S. 528 (1973).

48. *Id.* at 528-30.

49. *Id.* at 535-36.

50. *Id.* at 536 (citing 7 U.S.C. §§ 2014(c), 2023(b)-(c)).

51. *Id.* at 537.

52. *Id.* at 537-38.

53. *Moreno*, 413 U.S. at 534. The Conference Report indicates that the revised definition of "household" was designed "to prohibit food stamp assistance to communal 'families' of unrelated individuals." H.R. REP. NO. 91-1793, at 8 (1970) (Conf. Rep.). Senator Spessard Holland, a member of the Conference Committee, stated during floor debate that "the term 'household' was further defined so as to exclude households consisting of unrelated individuals under the age of 60, such as 'hippy' communes, which I think is a good provision in this bill." 116 CONG. REC. 44, 439 (1970).

54. *Id.* at 534. (emphasis omitted).

law as a violation of equal protection.⁵⁵

In a dissent, then-Justice Rehnquist acknowledged that while Congress may have “attacked the problem with a rather blunt instrument,” the Court erred in holding that the classification was not rationally related to the government’s legitimate stated interest in deterring fraud.⁵⁶ Stressing the deferential nature of rational basis review, Justice Rehnquist asserted that classifications of this sort need not be drawn with mathematical nicety.⁵⁷ Accordingly, under his view, the fact that the law was at once too narrow and too broad—in that not all households formed for the purpose of exploiting the federal food stamp program would be rendered ineligible while certain households formed for purposes other than obtaining food stamps would be denied assistance—should not have proven fatal under traditional rational basis review.⁵⁸

The rational basis with bite standard next appeared in *City of Cleburne v. Cleburne Living Center, Inc.*⁵⁹ At issue was the constitutionality of a zoning ordinance requiring a special use permit for the operation of homes for the mentally disabled, but not for other similarly situated facilities.⁶⁰ The Court acknowledged that mentally disabled persons exhibit certain immutable characteristics which serve to distinguish them from the general population but opined that “this difference is largely irrelevant unless the [plaintiff facility] and those who would occupy it threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.”⁶¹ After an extensive examination of the record failed to reveal a rational basis for believing that the plaintiff facility would pose any special threat to the city’s legitimate interests,⁶² the Court concluded that the ordinance rested on an “irrational prejudice” toward the mentally disabled and invalidated the

55. *Id.* at 538.

56. *Id.* at 545 (Rehnquist, J., dissenting).

57. *Id.* at 546.

58. *Id.*

59. 473 U.S. 432 (1985).

60. *Id.* at 436-37.

61. *Id.* at 448.

62. In attempting to justify its decision requiring the plaintiff facility to obtain a special use permit prior to beginning operations, the city cited the following factors: the negative attitudes of neighboring property owners, a concern that students at a nearby high school might harass the facility’s residents, a fear that the residents might be drowned given the facility’s location on a five-hundred-year flood plain, the potential for overcrowding due to the home’s relatively small size, and concerns about traffic congestion, fire hazards, and the serenity of the surrounding neighborhood. *Id.* at 448-50. The Court considered each of the proffered justifications in turn and found that they did not bear a rational relation to their stated objectives because other uses raising similar concerns were not subject to the permitting requirement. *Id.* As noted by Justice Marshall, however, under traditional rational basis review, “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” *Id.* at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted).

ordinance as applied to the plaintiff facility.⁶³

Although he agreed with the holding, Justice Marshall authored a separate opinion in which he took issue with the Court's "refusal to acknowledge that something more than minimum rationality [was] at work."⁶⁴ As support for his contention that the Court was applying some form of heightened scrutiny under the guise of ordinary rational basis review, Justice Marshall cited the Court's examination of the record and the fact that the city was ostensibly made to bear the burden of proof.⁶⁵ For Justice Marshall, this was not a situation in which the ends justified the means: "[B]y failing to articulate the factors that justify today's 'second order' rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked . . . and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny."⁶⁶

The rational basis with bite standard was most recently applied in the 1996 case of *Romer v. Evans*,⁶⁷ wherein the Court invalidated an amendment to the Colorado Constitution prohibiting all legislative, executive, or judicial action designed to protect homosexuals from discrimination.⁶⁸ In rejecting the State's argument that the amendment simply denied homosexuals special rights, the Court relied on the Colorado Supreme Court's authoritative interpretation of the amendment's impact:

The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that

63. *Id.* at 450 (majority opinion); *see id.* at 455 (Stevens, J., concurring) ("The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in [the] home."); *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 201 (5th Cir. 1984) (finding that "fears and prejudices" drove neighbors to petition the City Council against the facility), *aff'd in part, rev'd in part*, 473 U.S. 432 (1985); Brief for Respondents at 21, *Cleburne*, 473 U.S. 432 (No. 84-468), 1985 WL 669785 ("[O]ne council member testified that he paid particular attention to the neighbors' fears that retarded persons might 'walk around and scare people.'").

64. *Cleburne*, 473 U.S. at 459 (Marshall, J., concurring in the judgment in part and dissenting in part).

65. *Id.* at 458-59.

66. *Id.* at 460. Justice Marshall's preferred course of action would have been to invalidate the ordinance under intermediate scrutiny after formally recognizing the reasons for labeling the mentally disabled as a quasi-suspect class. *Id.* at 478.

67. 517 U.S. 620 (1996).

68. *Id.* at 624. In its entirety, the amendment read:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. (internal quotation marks omitted).

barred discrimination based on sexual orientation. . . . The “ultimate effect” of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.⁶⁹

The Supreme Court, therefore, understood the amendment to repeal certain municipal ordinances prohibiting sexual orientation discrimination in employment, housing, education, public accommodations, and health and welfare services.⁷⁰ The amendment was also deemed to repeal an executive order protecting state employees from sexual orientation-based employment discrimination as well as various LGBT-inclusive nondiscrimination policies adopted by the state’s universities.⁷¹ Even assuming for the sake of argument that homosexuals would still be protected by laws of general application, a point on which Justice Kennedy was not at all convinced, the Court stated:

[W]e cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protections from discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.⁷²

Thus, rather than securing the equal protection of the laws for heterosexuals by eliminating special rights for homosexuals, Amendment 2 was found to impose a significant disability on homosexuals and homosexuals alone, thereby implicating the Equal Protection Clause.

Purporting to apply ordinary rational basis review, the Court invalidated the amendment on two grounds. First, the amendment was “at once too narrow and too broad” in that it “identifie[d] persons by a single trait and then den[ied] them protection across the board.”⁷³ “The resulting disqualification of a class of persons from the right to seek specific protection from the law” was described by the Court as “unprecedented.”⁷⁴ After noting that both the rule of law and conventional notions of equal protection require “that government and

69. *Id.* at 626-27 (quoting *Evans v. Romer*, 854 P.2d 1270, 1284-85 (Colo. 1993) (en banc), *aff’d*, 517 U.S. 620 (1996)) (internal quotation marks omitted).

70. *Id.* at 623-24, 629.

71. *Id.* at 629-30.

72. *Id.* at 631.

73. *Romer*, 517 U.S. at 633.

74. *Id.*

each of its parts remain open on impartial terms to all who seek its assistance,” the Court held that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”⁷⁵

Second, the amendment appeared to be motivated by animus toward homosexuals such that it lacked a rational relationship to a legitimate state interest.⁷⁶ In response to the State’s assertions that the amendment was intended to conserve resources so that the State could focus on remedying discrimination against suspect classes and that it protected certain citizens’ freedom of association, particularly those landlords and employers harboring personal or religious objections to homosexuality, the Court held that “[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.”⁷⁷ Because Amendment 2 was “a classification of persons undertaken for its own sake” and for the additional reason that it rendered a class of persons strangers to the law, the Court invalidated Amendment 2 as a violation of equal protection.⁷⁸

In a vigorous dissent, Justice Scalia criticized the Court’s holding as an act of political will lacking any cognizable foundation in the law.⁷⁹ Responding to the argument that Amendment 2 worked a literal denial of equal protection, Justice Scalia stated:

The central thesis of the Court’s reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle . . . [a]nd it seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (*i.e.*, by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. The Court’s entire novel theory rests upon the proposition that there is something *special*—something that cannot be justified by normal “rational basis” analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.⁸⁰

Critical to Justice Scalia’s analysis was his understanding that antidiscrimination laws of general application would continue to protect homosexuals following the passage of Amendment 2.⁸¹ Accordingly, Justice

75. *Id.*

76. *Id.* at 634-35.

77. *Id.* at 635.

78. *Id.*

79. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

80. *Id.* at 639-40.

81. *Id.* at 638.

Scalia did not perceive Amendment 2 as denying homosexuals the equal protection of the laws, but only as making it more difficult for homosexuals to obtain preferential treatment under the law.⁸²

Justice Scalia was equally critical of the Court's finding that Amendment 2 did not further a legitimate state interest because it was predicated on animosity toward homosexuals.⁸³ Relying on the now overruled case of *Bowers v. Hardwick*,⁸⁴ Justice Scalia asserted that if states may lawfully criminalize homosexual conduct surely they may enact laws disfavoring the class of persons defined by that conduct.⁸⁵ Justice Scalia would have upheld Amendment 2 as being rationally related to the State's legitimate interest in "prevent[ing] piecemeal deterioration of the sexual morality favored by a majority of Coloradans."⁸⁶

Although factually dissimilar, the cases comprising the *Moreno-Cleburne-Romer* trilogy⁸⁷ share certain features in common. In each case, the Supreme Court (1) invalidated a law while purporting to apply ordinary rational basis review; (2) rejected the government's proffered justifications after an examination of the record revealed an inadequate connection between statutory means and ends; (3) determined that the only conceivable motivation for the law was animus toward the class of persons affected. The trilogy's dissents, moreover, were uniform in their accusations that the Court was surreptitiously applying a form of heightened scrutiny under the guise of ordinary rational basis review.

III. THE POLITICAL RESTRUCTURING CASES

In *Romer v. Evans*, the Supreme Court held that Amendment 2 constituted a per se violation of equal protection to the extent it declared "that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government."⁸⁸ That the Court did not cite any authority for this proposition is not altogether surprising in light of Amendment 2's supposedly "unprecedented" status. Scholars, however, have criticized Justice Kennedy for failing to reconcile his new per se rule with the political restructuring cases of the Burger era.⁸⁹ Post-*Romer*, lower courts have struggled to make sense of

82. *Id.*

83. *Id.* at 636 ("The Court has mistaken a Kulturkampf for a fit of spite.").

84. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

85. *Romer*, 517 U.S. at 641-42 (Scalia, J., dissenting).

86. *Id.* at 653.

87. Sunstein, *supra* note 43, at 60 (coining the phrase "*Moreno-Cleburne-Romer* trilogy").

88. *Romer*, 517 U.S. at 633.

89. See, e.g., Stephen M. Rich, Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After Romer v. Evans*, 109 YALE L.J. 587 (1999).

these ostensibly independent yet substantively similar doctrines, leading to instability in this area of the Court's jurisprudence.⁹⁰

The political restructuring doctrine holds that the government cannot reorganize the political process for the sole purpose of disadvantaging minorities.⁹¹ Commentators have acknowledged that the cases comprising the doctrine "are difficult to explain in light of traditional equal protection jurisprudence since they do not involve laws that expressly target a particular racial group, nor do they involve the typical showing of intentional discrimination," ostensibly making it "easy to view these cases as constitutional oddballs."⁹² The cases, nonetheless, appear to "share a concern that—absent a more stringent test for determining whether equal protection has been denied—intentional discrimination . . . may escape detection."⁹³

As a body of precedent, the political restructuring cases are generally understood to encompass three cases decided between 1967 and 1982.⁹⁴ The first was *Reitman v. Mulkey*,⁹⁵ wherein the Supreme Court invalidated a provision of the California Constitution prohibiting the State from infringing "the right of any person . . . to decline to sell, lease or rent [any part of his residential property] to such person or persons as he, in his absolute discretion, chooses."⁹⁶ The provision had been added three years earlier through the initiative process, and the California Supreme Court had determined that its "immediate design and intent . . . w[as] to overturn state laws that bore on the right of private sellers and lessors to discriminate . . . and to forestall future state action that might circumscribe this right" by establishing a constitutional right to discriminate in the private housing market.⁹⁷

Deferring to the findings of the California Supreme Court, the *Reitman* Court rejected the State's argument that the provision simply repealed existing nondiscrimination statutes and concluded that:

[The provision] struck more deeply and more widely. Private discriminations

90. *Id.* at 604-06. Justice Kennedy's failure to square these concepts is all the more egregious in light of the Colorado Supreme Court's express reliance on the political restructuring cases in finding Amendment 2 unconstitutional. See *Evans v. Romer*, 854 P.2d 1270, 1279-84 (Colo. 1993) (en banc), *aff'd*, 517 U.S. 620 (1996).

91. See Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 147 (2013).

92. Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2476 (2003).

93. *Id.*

94. Some commentators include *Romer v. Evans* among the political restructuring cases. E.g., Brodie M. Butland, *The Categorical Imperative: Romer as the Groundwork for Challenging State "Defense of Marriage" Amendments*, 68 OHIO ST. L.J. 1419, 1439 (2007). But cf. Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 250 n.270 (1997) ("Although *Romer* can be read as a political restructuring case . . . [it] is better understood as a case that turns on the presence of discriminatory animus.").

95. 387 U.S. 369 (1967).

96. *Id.* at 371.

97. *Id.* at 371, 374 (internal quotation marks omitted).

in housing were now not only free from [repealed nondiscrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.⁹⁸

Because the provision would "significantly encourage and involve the [S]tate in private discriminations," the Supreme Court deemed it unconstitutional.⁹⁹

Two years after *Reitman*, the Supreme Court issued its opinion in the second political restructuring case, *Hunter v. Erickson*.¹⁰⁰ In *Hunter*, the Supreme Court invalidated a city charter amendment requiring that ordinances regulating real property transfers on the basis of race, color, religion, national origin, or ancestry be approved by a majority of the city's voters before they could take effect, whereas all other ordinances regulating real property took effect upon passage by the city council.¹⁰¹ The amendment had been adopted through popular referendum in response to the city council's recent enactment of a fair housing ordinance.¹⁰² The Court, however, was careful to note that the amendment did not merely suspend operation of the previously enacted ordinance but also "made it substantially more difficult to secure enactment" of any housing nondiscrimination ordinances in the future.¹⁰³

Although the charter amendment was facially neutral to the extent that it did not draw distinctions among racial, religious, or ethnic groups, the Court acknowledged that the amendment's impact fell solely on minorities.¹⁰⁴ Applying strict scrutiny, the Court rejected the city's proffered justifications for the amendment and dismissed any suggestion that the implementation of the amendment through popular referendum immunized it from judicial review:

Even though [the city] might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.¹⁰⁵

The charter amendment was found to constitute "a real, substantial, and invidious denial of" equal protection because of its discriminatory impact on

98. *Id.* at 377.

99. *Id.* at 381.

100. 393 U.S. 385 (1969).

101. *Id.* at 387, 390.

102. *Id.* at 386-87.

103. *Id.* at 390.

104. *Id.* at 391.

105. *Id.* at 392-93.

minorities and minorities alone.¹⁰⁶

The third and final political restructuring case was *Washington v. Seattle School District No. 1 (Seattle Schools)*,¹⁰⁷ wherein the Court invalidated a state statute prohibiting local school boards from implementing racially desegregative busing programs.¹⁰⁸ The statute had been enacted via the initiative process in response to the Seattle school board's implementation of a mandatory busing program.¹⁰⁹ Finding *Hunter* to be controlling, the Supreme Court characterized its opinion in that case as standing for the "simple but central principle" that:

[L]aws structuring political institutions or allocating political power according to neutral principles—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may make it more difficult for minorities to achieve favorable legislation. Because such laws make it more difficult for every group in the community to enact comparable laws, they provid[e] a just framework within which the diverse political groups in our society may fairly compete. . . . But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind . . . places special burdens on racial minorities within the governmental process, thereby making it more difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.¹¹⁰

Although the city charter amendment in *Hunter* had involved an explicitly racial classification whereas the statute challenged in *Washington* only indirectly prohibited racially desegregative busing, the Court reasoned that "despite its facial neutrality there is little doubt that the [statute] was effectively drawn for racial purposes" so as to implicate *Hunter*.¹¹¹

In response to the State's argument that the statute reflected "an unexceptional example of a State's intervention in its own school system," the Court acknowledged that the State was authorized to intervene in the affairs of its local school boards, but emphasized that it had an obligation to exercise that authority in a manner consistent with the Equal Protection Clause.¹¹² The Court then held that the statute reallocated power in violation of the *Hunter* doctrine:

The [statute] removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to

106. *Hunter*, 393 U.S. at 393.

107. 458 U.S. 457 (1982).

108. *Id.* at 462-63.

109. *Id.* at 461-62.

110. *Id.* at 469-70 (first and fourth alterations in original) (citations omitted) (internal quotation marks omitted).

111. *Id.* at 471.

112. *Id.* at 476.

burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, . . . the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action.¹¹³

Accordingly, the Court invalidated the statute because it did not purport to allocate governmental power on the basis of any general principle, but instead used the racial nature of the busing programs to define the governmental decisionmaking structure, “thus impos[ing] substantial and unique burdens on racial minorities.”¹¹⁴

The laws invalidated in the political restructuring cases share certain similarities with the Intrastate Commerce Act and its progeny. First, the laws deemed unconstitutional in *Reitman*, *Hunter*, and *Seattle Schools* were designed to repeal statutes, ordinances, and policies that had been enacted for the benefit of minorities, just as these bills are arguably intended to repeal ordinances and policies benefiting the LGBT community. Second, the laws invalidated in these cases did not merely repeal the statutes, ordinances, and policies that had been the catalyst for their enactment; they also made it more difficult for minorities to secure any such legal protections in the future by “lodging decisionmaking authority . . . at a new and remote level of government.”¹¹⁵ Similarly, these bills would make it more difficult for LGBT Americans—and all other minorities not currently recognized as protected classes under applicable state law—to secure enactment of nondiscrimination legislation by removing the issue from the purview of local governments.

IV. OTHER STATES SEEK TO FOLLOW TENNESSEE’S LEAD

Notwithstanding the prospect of invalidation under either the rational basis with bite standard or the political restructuring doctrine, the Intrastate Commerce Act has spawned copycat legislation in several states.

A. Montana

Montana state law currently prohibits discrimination based on race, color, religion, sex, creed, national origin, age, marital status, and physical or mental disability, but not sexual orientation, gender identity, or gender expression.¹¹⁶

113. *Washington*, 458 U.S. at 474.

114. *Id.* at 470.

115. *Id.* at 483.

116. See MONT. CODE ANN. § 49-2-303 (2011) (employment); *id.* § 49-2-304 (public accommodations); *id.* § 49-2-305 (housing); *id.* § 49-2-306 (financing and credit transactions); *id.* § 49-2-307 (education).

On April 13, 2010, the City of Missoula adopted an ordinance (the “Missoula Ordinance” or “Ordinance”) prohibiting discrimination in the areas of employment, public accommodations, and housing on the basis of sexual orientation, gender identity, or gender expression.¹¹⁷ The Missoula Ordinance was the first of its kind in the state of Montana¹¹⁸ and followed weeks of contentious debate that focused largely on public restrooms.¹¹⁹ Groups such as NotMyBathroom.com had expressed concern that men would seek to exploit the protections afforded to transgender persons by presenting themselves as female so that they could gain access to women’s restrooms for the purpose of sexually assaulting women and children.¹²⁰ Other groups, including Concerned Women for America and various religious leaders, asserted that the Ordinance would infringe upon their freedom of association and religious liberties.¹²¹ Despite strong opposition, the Missoula Ordinance ultimately passed by a wide margin, with the city council voting 10-2 in favor of the measure.¹²²

In the first meeting of the Montana Legislature following Missoula’s adoption of the Ordinance,¹²³ Representative Kristin Hansen introduced a bill to prohibit local governments from adopting nondiscrimination ordinances more inclusive than state law in terms of their protected classes.¹²⁴ Designated Montana House Bill 516 (HB 516), the bill was designed to be retroactive in effect.¹²⁵

In a February 18, 2011 hearing before the House Judiciary Committee, Representative Hansen acknowledged that although HB 516 was drafted as a bill of general application, its immediate objective was to repeal the Missoula Ordinance.¹²⁶ Representative Hansen argued that the Ordinance was preempted

117. Missoula, Mont., Ordinance 3428 (Apr. 13, 2010).

118. Keila Szpaller, *Missoula Councilors Propose Anti-Discrimination Law that Includes Sexual Orientation, Gender Identity*, MISSOULIAN (Feb. 19, 2010, 6:15 AM), http://missoulian.com/news/local/article_c35d0ec0-1d0d-11df-ae2b-001cc4c002e0.html.

119. Keila Szpaller, *Deep Rifts: Residents Pack Missoula Council Meeting on Anti-Discrimination Ordinance*, MISSOULIAN (Apr. 12, 2010, 11:35 PM), http://missoulian.com/news/local/article_e3821a34-46bf-11df-9664-001cc4c03286.html.

120. Keila Szpaller, *Citing Restroom Safety, NotMyBathroom.com Opposes Missoula Anti-Discrimination Ordinance*, MISSOULIAN (Mar. 25, 2010, 6:00 AM), http://missoulian.com/news/local/article_2fd30e58-37ba-11df-abb6-001cc4c002e0.html.

121. *Id.*; Szpaller, *supra* note 119.

122. Keila Szpaller, *Missoula City Council Makes History in Adopting Non-Discrimination Law*, MISSOULIAN (Apr. 14, 2010, 6:30 AM), http://missoulian.com/news/article_413f0c2-46d1-11df-9b94-001cc4c03286.html.

123. The Montana Legislature meets in odd-numbered years only. MONT. CONST. art. V, § 6.

124. H.B. 516, 62d Leg., Reg. Sess. (Mont. 2011).

125. *Id.*

126. *Limiting Local Ordinances to State Protected Classes: Hearing on H.B. 516 Before the H. Comm. on the Judiciary*, 62d Leg., Reg. Sess. 10:49-16:50 (Mont. 2011) [hereinafter *Judiciary Committee Hearing on HB 516*] (statement of Rep. Kristin Hansen), available at <http://leg.mt.gov/css/Committees/Session/Minutes/AudioMinutes.asp?MeetingID=12308>.

by the Montana Human Rights Act which established “a very significantly defined process for discrimination claims to be adjudicated” whereas the Missoula Ordinance created “an entirely separate process” for discrimination claims based on sexual orientation, gender identity, or gender expression.¹²⁷

After being reported on favorably by the House Judiciary Committee,¹²⁸ HB 516 came before the full House of Representatives on February 22, 2011. In her opening remarks, Representative Hansen announced that HB 516 “would tell the city of Missoula and any other local government that they cannot add as a protected class any class that does not currently exist in [Montana] Human Rights Act.”¹²⁹ She went on to note that “this [bill] would apply retroactively to the city of Missoula’s ordinance in order to keep all businesses and all entities on a level playing field” in terms of the procedures for adjudicating discrimination claims.¹³⁰ Following a brief debate, the House voted to pass the bill.¹³¹

On March 14, 2011, the Senate Local Government Committee held a hearing on HB 516. Representative Hansen appeared before the Committee to advocate in support of a “do pass” recommendation. At the outset of her testimony, Representative Hansen stated:

The reason we’re here today is that in April of last year the city of Missoula passed a local ordinance that . . . added sexual orientation, gender identity, and gender expression [as protected classes]. There’s been an effort to get those classifications placed into Montana law since 1993, and that has not successfully happened yet. These classifications were added to the Missoula ordinance along with definitions that fall outside of the Montana Human Rights Act’s definitions, and that I believe place an onerous burden on businesses or entities or nonprofits in Missoula that would be subject to this ordinance.¹³²

When another witness suggested that HB 516 was contrary to the Supreme Court’s decision in *Romer*, Representative Hansen responded, “I would totally

127. *Id.* at 2:09:20-2:09:55.

128. Charles S. Johnson, *House Committee Approves Bill to Nullify Missoula’s Equality Ordinance*, MISSOULIAN (Feb. 22, 2011, 6:00 AM), http://missoulian.com/news/local/article_365177d2-3df0-11e0-9574-001cc4c002e0.html.

129. *Limiting Local Ordinances to State Protected Classes: H.R. Deb. on H.B. 516*, 62d Leg., Reg. Sess. 6:14:00-6:15:36 (Mont. 2011) [*HB 516 Floor Debate*] (statement of Rep. Kristin Hansen), available at <http://leg.mt.gov/css/Sessions/62nd/AudioFloor.asp?MeetingID=12437>.

130. *Id.* at 6:15:39-6:15:57.

131. Charles S. Johnson, *Bill to Nullify Missoula’s Equality Ordinance Receives Backing in House*, MISSOULIAN (Feb. 23, 2011, 6:30 AM), http://missoulian.com/news/local/article_d524dd38-3f10-11e0-85cd-001cc4c002e0.html.

132. *Limiting Local Ordinances to State Protected Classes: Hearing on H.B. 516 Before the S. Comm. on Local Gov’t*, 62d Leg., Reg. Sess. 23:50-24:58 (Mont. 2011) [hereinafter *Senate Hearing on HB 516*] (statement of Rep. Kristin Hansen), available at <http://leg.mt.gov/css/Committees/Session/Minutes/AudioMinutes.asp?MeetingID=12773>.

disagree.”¹³³ She then went on to characterize the state constitutional amendment at issue in *Romer* as being “very targeted” in that it singled out a specific category of persons for discrimination whereas HB 516 merely “says you can’t single out any particular categories for additional protections other than what the Human Rights Act already provides for.”¹³⁴ The Committee subsequently voted to recommend passage by the full Montana Senate.¹³⁵

When HB 516 was brought before the Senate on March 22, 2011, however, that body voted to return the bill to the Local Government Committee.¹³⁶ On March 23, 2011, the Committee Chairman announced that he would not bring HB 516 up for a vote, meaning the bill would effectively die in committee.¹³⁷ Based on an intervening conversation with Missoula officials, the Chairman stated he did not believe HB 516 was necessary given that not a single LGBT-based discrimination claim had been filed in the eleven months since the Ordinance had taken effect.¹³⁸ He cautioned, however, that “[i]f a sufficient number of discrimination complaints are filed against Missoula businesses in the future, a bill could be introduced in another session to address the issue.”¹³⁹

B. Nebraska

Nebraska state law currently prohibits discrimination based on race, color, religion, sex, national origin, age, disability, and marital status, but not sexual orientation, gender identity, or gender expression.¹⁴⁰ In August 2011, Omaha City Councilman Ben Gray announced that sometime in the “very near future” he would introduce a bill to prohibit discrimination in employment and public accommodations on the basis of sexual orientation or gender identity.¹⁴¹ On January 10, 2012, while Councilman Gray was still in the process of drafting his ordinance, Senator Beau McCoy introduced a bill in the Nebraska

133. *Id.* at 2:24:43-2:25:08.

134. *Id.* at 2:25:09-2:26:09.

135. Charles S. Johnson, *Montana Senate Panel OKs Bill that Would Nullify Missoula Equality Law*, MISSOULIAN (Mar. 19, 2011, 7:00 AM), http://missoulian.com/news/local/article_424d85f2-51ba-11e0-bbe3-001cc4c03286.html.

136. Charles S. Johnson, *Bill to Nullify Missoula Anti-Gay Discrimination Ordinance May Die in Committee*, BILLINGS GAZETTE (Mar. 23, 2011, 4:15 AM), http://billingsgazette.com/news/state-and-regional/montana/article_74a2dc51-4ef0-53d4-842a-797ef0009fdd.html.

137. *Id.*

138. *Id.*

139. *Id.*

140. NEB. REV. STAT. §§ 48-1004, 48-1104 (2012) (employment); *id.* § 20-132 (public accommodations); *id.* § 20-318 (housing).

141. Juan Perez Jr., *Anti-Bias Ordinance to Be Revived*, OMAHA WORLD-HERALD (Aug. 19, 2011, 12:09 PM), <http://www.omaha.com/article/20110819/NEWS01/708199923>. Councilman Gray introduced a similar measure in 2010 that was narrowly defeated “after the Greater Omaha Chamber of Commerce’s executive committee, Christian-oriented policy groups,” and certain religious institutions expressed their opposition. *Id.*

Legislature to prohibit local governments from adopting nondiscrimination ordinances more inclusive than state law in terms of their protected classes.¹⁴²

Designated Nebraska Legislative Bill 912 (LB 912), Senator McCoy's bill provided, in pertinent part:

It is the purpose of this [bill] to improve intrastate commerce by ensuring that no county, municipality, or other political subdivision will subject businesses, organizations, or employers operating in Nebraska to varied and nonuniform protected classifications in nondiscrimination laws, ordinances, resolutions, rules, or policies. Further, it is the purpose of this [bill] to focus and thereby improve the effectiveness of the efforts of counties, municipalities, or other political subdivisions to punish and eliminate discrimination based on the protected classifications identified in laws enacted by the Legislature.¹⁴³

LB 912 was designed to be retroactive in effect such that any ordinances, rules, or policies adopted prior to the effective date would be rendered null and void to the extent they were inconsistent with state law.¹⁴⁴

On February 22, 2012, the Judiciary Committee heard testimony on LB 912. As the bill's sponsor, Senator McCoy was allowed to open the discussion, and he explained the purpose of the bill as follows:

LB912 does not address who is included or who is not included as a protected class, but clarifies that the creation of new protected classes be made at the state level. I think you would agree with me that discrimination does not stop at a city or a county border. If adding or removing a protected class is the right thing to do, it is the right thing to do border-to-border across Nebraska in my mind, not just in one city or one municipality. . . . A uniform list of protected classes in our state will ease the burden on businesses who would otherwise need to invest time and money that is difficult to come by in these economic times to guarantee they are following the law for each individual community and allows the appropriate authorities to investigate and address discrimination more effectively.¹⁴⁵

Six days later, Councilman Gray formally introduced his nondiscrimination ordinance in a February 28, 2012 meeting of the Omaha City Council.¹⁴⁶ Following a contentious public hearing in which assistant University of Nebraska football coach Ron Brown warned the Council that Jesus Christ would hold them personally accountable for their decisions,¹⁴⁷ the Council

142. L.B. 912, 102d Leg., 2d Sess. (Neb. 2012).

143. *Id.* § 3(1).

144. *Id.* § 3(3).

145. *Hearing on L.B. 912 Before the Comm. on the Judiciary*, 102d Leg., 2d Sess. 1 (Neb. 2012) [hereinafter *Hearing on LB 912*] (statement of Sen. Beau McCoy), available at <http://www.legislature.ne.gov/FloorDocs/102/PDF/Transcripts/Judiciary/2012-02-22.pdf>.

146. OMAHA CITY COUNCIL, MINUTES OF 6TH REGULAR MEETING: FEBRUARY 28, 2012 39-40 (2012), available at <http://www.cityofomaha.org/cityclerk/images/stories/journal/j12-02-28.pdf>.

147. Michael Kelly, *Council Hearing a Model of Civility*, OMAHA WORLD-HERALD (Mar. 11, 2012, 3:52 AM), <http://omaha.com/article/20120311/NEWS01/703119913>.

voted 4-3 to adopt the ordinance on March 13, 2012.¹⁴⁸

Although LB 912 was “indefinitely postponed” on April 18, 2012, having never received a vote in the Judiciary Committee,¹⁴⁹ Senator McCoy has indicated that he may reintroduce the measure in the future.¹⁵⁰

C. Michigan

Michigan state law currently prohibits discrimination based on race, color, religion, sex, national origin, age, height, weight, familial status, and marital status, but not sexual orientation, gender identity, or gender expression.¹⁵¹ Sixteen Michigan municipalities, however, have adopted LGBT-inclusive nondiscrimination laws.¹⁵² The earliest of these dates back to 1972, when East Lansing became the first city in the nation to prohibit discrimination based on sexual orientation.¹⁵³

On October 5, 2011, Representative Tom McMillin introduced a bill in the Michigan Legislature to prohibit local governments from adopting nondiscrimination ordinances more inclusive than state law in terms of their protected classes.¹⁵⁴ Designated Michigan House Bill 5039 (HB 5039), the bill was designed to be retroactive in effect.¹⁵⁵

HB 5039 was referred to the House Judiciary Committee on October 5, 2011 where it died without ever receiving a vote.¹⁵⁶

148. Juan Perez Jr., *Gernandt: LGBT Vote Was ‘the Right Thing to Do.’* OMAHA WORLD-HERALD (Mar. 14, 2012, 12:00 AM), <http://www.omaha.com/article/20120313/NEWS01/120319882>.

149. *Bill Information for LB 912*, NEB. LEGISLATURE, http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=15689 (last visited May 4, 2013).

150. Juan Perez Jr., *Bruning Takes on Omaha’s Gay Rights Ordinance*, OMAHA WORLD-HERALD (May 5, 2012, 2:54 AM), <http://www.omaha.com/article/20120504/NEWS01/120509871/1007>.

151. MICH. COMP. LAWS § 37.2202 (2013) (employment); *id.* § 37.2302 (public accommodations); *id.* § 37.2502 (housing).

152. *Cities with Legal Protection*, EQUALITY MICH., <http://equalitymi.org/resources/cities-with-legal-protection> (last visited May 3, 2013).

153. Todd A. Heywood, *Michigan Republican McMillin Targets Anti-Discrimination Ordinances*, AM. INDEP. (Oct. 19, 2011, 1:13 PM), <http://americanindependent.com/200021/michigan-republican-mcmillin-targets-anti-discrimination-ordinances>.

154. H.B. 5039, 96th Leg., Reg. Sess. (Mich. 2011).

155. *Id.*

156. *House Judiciary Committee Bills Record Search*, MICH. LEGIS. WEBSITE, <http://www.legislature.mi.gov/%28S%284h0hq0nh51bd2y45vrlrdjq%29%29/mileg.aspx?page=CommitteeBillRecordSearch&mySession=2011-2012&CommitteeName=Judiciary&chamber=house> (last visited May 16, 2013); Annette Kingsbury, *McMillin’s Civil Rights Bill Sparks Protest from Gay Rights Advocates in Rochester Hills*, OAKLAND PRESS (Jan. 24, 2012), http://www.theoaklandpress.com/articles/2012/01/24/news/local_news/doc4f1f2d1c85b34942050157.txt?viewmode=fullstory.

D. Oklahoma

Oklahoma state law currently prohibits discrimination in public employment on the basis of race, color, creed, national origin, ancestry, age, and handicap, but not sexual orientation, gender identity, or gender expression.¹⁵⁷ Seven Oklahoma cities, however, have adopted ordinances protecting municipal employees from discrimination on the basis of sexual orientation.¹⁵⁸ Tulsa and Oklahoma City, the two largest municipalities in the state,¹⁵⁹ added sexual orientation to their nondiscrimination policies in June 2010¹⁶⁰ and November 2011,¹⁶¹ respectively.

On February 6, 2012, Representative Mike Reynolds introduced a bill in the Oklahoma Legislature to prohibit local governments from adopting public employment nondiscrimination ordinances more inclusive than state law in terms of their protected classes.¹⁶² Designated Oklahoma House Bill 2245 (HB 2245), the bill was designed to be retroactive in effect.¹⁶³

On February 27, 2012, the House Judiciary Committee held a hearing on HB 2245 that lasted approximately two minutes.¹⁶⁴ Representative Reynolds described the bill as “allow[ing] cities to understand that they need to comply with what’s currently state law with regards to nondiscrimination ordinances.”¹⁶⁵ The Committee thereafter voted 6-5 against sending HB 2245 before the full Oklahoma House.¹⁶⁶

V. LEGAL CHALLENGES BASED ON EXISTING LAW

As of August 2012, only one of these bills—Tennessee’s Intrastate Commerce Act—had been enacted into law. The other four bills all met with

157. OKLA. STAT. tit. 74, § 954 (2012).

158. Joy Hampton, *Reynolds Seeks to Restrict City Policies on Discrimination*, NORMAN TRANSCRIPT (Feb. 25, 2012), <http://normantranscript.com/x1222572692/Reynolds-seeks-to-restrict-city-policies-on-discrimination>.

159. See U.S. CENSUS BUREAU, PLACES IN OKLAHOMA LISTED ALPHABETICALLY (2012), available at <http://quickfacts.census.gov/qfd/states/40000lk.html>.

160. P.J. Lassek, *Sexual Orientation Added to Protected-Classes List*, TULSA WORLD, (June 18, 2010, 6:26 AM), http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20100618_11_A1_Amjrtf152022.

161. Clifton Adcock, *Amid Debate, the Oklahoma City Council Voted to Add ‘Sexual Orientation’ to the City’s Nondiscrimination Policy*, OKLA. GAZETTE (Nov. 23, 2011), <http://www.okgazette.com/oklahoma/article-13641-protective-measures.html>.

162. H.B. 2245, 53d Leg., 2d Sess. (Okla. 2012); *Bill Information for HB 2245*, OKLA. ST. LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2245&Session=1200> (last visited May 3, 2013).

163. Okla. H.B. 2245.

164. *Hearing on H.B. 2245 Before the H. Comm. on the Judiciary*, 53d Leg., 2d Sess. 15:10-17:10 (Okla. 2012) [hereinafter *Hearing on HB 2245*].

165. *Id.* at 15:20-15:33 (statement of Rep. Mike Reynolds).

166. *Id.* at 17:10-17:30.

varying degrees of success before ultimately being left to die in committee. Because several legislators have indicated they intend to reintroduce these bills in an upcoming legislative session, and given that the Intrastate Commerce Act is currently the subject of an equal protection challenge in Tennessee state court,¹⁶⁷ the constitutionality of these measures under the Court's existing equal protection jurisprudence merits examination.

A. The Political Restructuring Argument

At first glance, these bills appear to allocate governmental power in violation of the *Hunter* doctrine by relying on the LGBT-inclusive nature of these ordinances to restructure the decisionmaking process. Each of these bills was introduced in response to a city's consideration or adoption of an LGBT-inclusive nondiscrimination ordinance, just as the measures invalidated in the political restructuring cases were enacted as responses to the implementation of laws or policies benefiting African Americans.¹⁶⁸ Similar to the laws invalidated in *Reitman*, *Hunter*, and *Seattle Schools*, moreover, these bills do not merely repeal the disfavored ordinances but make it substantially more difficult for homosexuals and transgender persons to secure any legal protections in the future "by lodging decisionmaking authority . . . at a new and remote level of government,"¹⁶⁹ the state. The plaintiffs challenging the Intrastate Commerce Act have raised this very argument, asserting that "in addition to depriving gay and transgender people of existing protections, [the Act] restructured the political process in Tennessee to make it more difficult for gay and transgender people to secure legal protections for themselves."¹⁷⁰

Despite superficial similarities, however, these bills are readily distinguishable from the political restructuring cases. First, an argument can be made that these bills allocate political power according to neutral principles in that they make it more difficult for every group of persons not currently recognized as a protected class under state law to secure legal protections against discrimination. The procedural burden created by these bills stands to

167. See Complaint, *Howe v. Haslam*, No. 11-0778-II (Tenn. Ch. Ct. Davidson Cnty. June 13, 2012) [hereinafter Complaint]; *Case Summary: Case No. 11-0778-II*, CHANCERY CT. CLERK & MASTER: DAVIDSON COUNTY, <http://www.nashvillechanceryinfo.org/CaseDetail.aspx?CaseID=61556> (last visited May 3, 2013). Plaintiffs include Lisa Howe, three members of the Nashville Metro Council, the Tennessee Equality Project, and the Tennessee Transgender Political Coalition, among others. Although a trial court judge dismissed the case for lack of standing in June 2012, plaintiffs are appealing the ruling. See Bear A-M Rodgers, *LGBT Versus Tennessee Lawsuit Dismissed?*, EXAMINER (June 18, 2012), available at <http://www.examiner.com/article/lgbt-versus-tennessee-law-dismissed>.

168. Michigan's HB 5039 is the sole exception. See *supra* Part IV.C.

169. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483 (1982).

170. Plaintiffs' Motion for Relief from the Court's January 25, 2012 Order at 26, *Howe v. Haslam*, No. 11-0778-II (Tenn. Ch. Ct. Davidson Cnty. Mar. 26, 2012).

fall on a diverse and virtually infinite number of groups, whereas the laws invalidated in the political restructuring cases were found to disadvantage a single, discernible class of persons. Consequently, prospective litigants would have difficulty mounting a successful equal protection challenge based on the Court's political restructuring cases because although LGBT Americans stand to be disadvantaged by these bills, they are not unique in that regard.

Second, the laws invalidated in *Reitman*, *Hunter*, and *Seattle Schools* sought to impose procedural burdens on the basis of a suspect classification, race.¹⁷¹ This fact likely explains Justice Kennedy's hesitance to adopt the reasoning of the Colorado Supreme Court in *Romer*.¹⁷² After conceding that "*Hunter* and *Washington* are indeed cases which involved racial minorities," the Colorado Supreme Court asserted that the principle underlying the political restructuring cases "clearly is not one that can logically be limited to the 'race' context."¹⁷³ Had Justice Kennedy wished to expand the *Hunter* doctrine beyond its racial confines, the Colorado Supreme Court's decision would have afforded the perfect opportunity to do so. Instead, Justice Kennedy chose to invalidate Amendment 2 on the heretofore unknown theory that it worked a literal denial of equal protection. Opponents wishing to challenge these bills on the theory that they disadvantage LGBT Americans vis-à-vis the political process must therefore seek to establish a per se violation of equal protection consistent with the Supreme Court's holding in *Romer*.

B. The Per Se Violation Argument

The notion of a per se violation of equal protection comes from Justice Kennedy's observation: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."¹⁷⁴ Justice Kennedy was, of course, referring to Colorado's Amendment 2, which not only repealed all existing state and local laws barring discrimination on the basis of sexual orientation, but also prohibited any future

171. *James v. Valtierra*, 402 U.S. 137, 140-41 (1971) (finding *Hunter* inapplicable where challenged distinctions not based on race); Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1027 (1996) ("A law that imposes special political process burdens on classes not defined by race does not directly implicate the [*Hunter*] trilogy."); John Daniel Dailey & Paul Farley, *Colorado's Amendment 2: A Result in Search of a Reason*, 20 HARV. J.L. & PUB. POL'Y 215, 234-35 (1996) ("*Hunter* and its progeny call for strict scrutiny *only* where the political process has been restructured to place unusual burdens upon racial minorities."). *Contra* Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75, 123-24 (asserting there is no reason to limit the holdings of the political restructuring cases to suspect classes).

172. 517 U.S. 620, 625-26 (1996).

173. *Evans v. Romer*, 854 P.2d 1270, 1281 (Colo. 1993) (en banc), *aff'd*, 517 U.S. 620 (1996).

174. *Romer*, 517 U.S. at 633.

legislative, executive, or judicial action at any level of state or local government designed to protect homosexuals.¹⁷⁵ It was this imposition of “a broad and undifferentiated disability on a single named group” that led Justice Kennedy to invalidate Amendment 2 as a literal violation of equal protection.¹⁷⁶

To date, no other law has been found to constitute a per se violation of equal protection and given the factual dissimilarities between Amendment 2 and the Intrastate Commerce Act and its progeny, it appears highly unlikely that a court would rely on the per se rule to invalidate these measures. Whereas Amendment 2 explicitly targeted homosexuals for unequal treatment, the bills under consideration disadvantage homosexuals and transgender persons only indirectly.

As discussed above, the disability imposed by these bills falls on every conceivable group of persons other than those already recognized as protected classes under state law. Because the states considering these bills do not recognize sexual orientation, gender identity, or gender expression as protected classes,¹⁷⁷ LGBT Americans stand to be disqualified from the local political process in that they will be forced to garner the support of their state legislatures if they wish to secure protection against discrimination. LGBT Americans are not the only class of persons to be so disadvantaged, however. Veterans, single parents, obese persons, students, and any other group not recognized as a protected class under state law but wishing to be afforded protection against discrimination are likewise relegated to enlisting the support of their state legislatures. Unlike Amendment 2 then, which “withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination,”¹⁷⁸ these bills would only indirectly harm homosexuals along with a multitude of other groups thereby rendering the Intrastate Commerce Act and its progeny distinguishable from *Romer*.

The disability imposed by these bills, moreover, is not as severe as the “across the board” disqualification that existed in *Romer*. Because Amendment 2 prohibited all legislative, executive, or judicial action at any level of state or local government to protect homosexuals, gays and lesbians could “obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution.”¹⁷⁹ In contrast, the Intrastate Commerce Act’s proscription against LGBT-inclusive nondiscrimination measures applies only to local governments such that LGBT Tennesseans may still secure protection against discrimination by convincing their state legislators to amend the Tennessee Human Rights Act. By charting a middle course between the philosophical ideal of a government that is fully open on

175. *Id.* at 624.

176. *Id.* at 632.

177. *See supra* Part IV.

178. *Romer*, 517 U.S. at 627.

179. *Id.* at 631.

impartial terms to all of its citizens and the constitutionally impermissible shuttering of government and all its parts to certain disfavored groups, the Intrastate Commerce Act and its progeny would likely avoid invalidation as a per se violation of equal protection.

C. The Rational Basis with Bite Argument

Alternatively, opponents will argue that these bills should be invalidated under the rational basis with bite standard because they reflect a bare desire to harm LGBT Americans. To prevail on this theory, litigants will have to show that the proffered justification for these bills—facilitating intrastate commerce—is merely a pretext designed to conceal LGBT animus.

The Supreme Court has predicated a finding of animus on two factors, the presence of either of which is necessary but not sufficient to trigger rational basis with bite review. The first is a facially discriminatory law of the sort invalidated in *Cleburne* and *Romer* while the second is overtly hostile legislative history, such as was present in *Moreno* and *Cleburne*.¹⁸⁰ Unlike the measures invalidated in *Cleburne* and *Romer*, which explicitly targeted mentally disabled and homosexual persons, respectively, for unequal treatment, these bills do not facially discriminate against LGBT Americans. The legislative history for these bills, moreover, does not reflect any overt animosity on the part of the bills' supporters toward the LGBT community.¹⁸¹ Rather, in response to direct questioning from their legislative colleagues, the sponsors of the relevant bills in Tennessee and Montana expressly disavowed any intent to harm or otherwise disadvantage their LGBT constituents.¹⁸² Because neither of the factors necessary to trigger rational basis with bite review are present, a court would likely decline to apply heightened scrutiny in

180. See *supra* Part II.

181. Montana's HB 516 is unique in that the bill's sponsor, Representative Kristin Hansen, has openly acknowledged that HB 516 is designed to repeal the Missoula Ordinance whereas the sponsors of the other four bills have assiduously avoided acknowledging their bills' impact on any particular ordinance. See *supra* notes 126-127 and accompanying text. Although Representative Hansen's candor as to the purpose of her bill arguably presents a stronger case for application of the rational basis with bite standard, her statements are readily distinguishable from the overtly hostile legislative history at issue in *Moreno* and *Cleburne*. In those cases, the Supreme Court invalidated a law under the rational basis with bite standard where the measure's proponents either expressed an explicit desire to harm the targeted class as in *Moreno* or openly predicated their support on the irrational fears and prejudices of their constituents as in *Cleburne*. See *supra* Part II. Representative Hansen, in contrast, has not expressed an explicit desire to harm LGBT Montanans, nor has she cited the irrational fears and prejudices of her constituents as her motivation for sponsoring the bill. Instead, Representative Hansen has predicated her opposition to the Missoula Ordinance on an ostensibly sincerely held belief that it is preempted by state law and stands to unduly burden the business community.

182. *HB 600 Floor Debate*, *supra* note 23, at 2:07:30-2:08:58 (statement of Rep. Glen Casada); *Senate Hearing on HB 516*, *supra* note 132, at 2:24:43-2:26:09.

favor of traditional rational basis review.

Of the three cases comprising the Court's rational basis with bite jurisprudence, *Romer* is arguably the most relevant to any equal protection challenge brought against these bills. In addition to providing the most recent articulation of the rational basis with bite standard, *Romer* invalidated a law born of animus toward homosexuals, a similar albeit less inclusive class than the one implicated by these bills. Although opponents may be tempted to seize on this superficial similarity to argue that these bills are unconstitutional under settled Supreme Court precedent, Amendment 2 worked a far more fundamental change in the law than does the Intrastate Commerce Act or any of its progeny such that *Romer* actually counsels against application of rational basis with bite in this particular context.

A recurring theme throughout the Supreme Court's opinion in *Romer* was the ostensibly unprecedented nature of Amendment 2 as reflected by its "sheer breadth."¹⁸³ Indeed, Amendment 2 not only repealed all existing state and local laws barring discrimination on the basis of sexual orientation but also prohibited any future legislative, executive, or judicial action at any level of state or local government designed to protect homosexuals.¹⁸⁴ As discussed above, however, the disability imposed by these bills is not as severe as the "across the board" disqualification wrought by Amendment 2 such that members of the LGBT community may continue to seek redress against discrimination via their state governments.

The "[s]weeping and comprehensive" change effectuated by Amendment 2 was also evident from the laws that it stood to repeal. These measures included (1) ordinances enacted by the cities of Aspen, Boulder, and Denver prohibiting sexual orientation discrimination in housing, employment, education, public accommodations, insurance, and health and welfare services; (2) an executive order issued by Colorado's governor prohibiting sexual orientation discrimination in public employment; and (3) various provisions prohibiting sexual orientation discrimination by state colleges.¹⁸⁵ Additionally, the Supreme Court concluded that "[i]t is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."¹⁸⁶ Although the Court did not decide the latter issue, but instead assumed that homosexuals would continue to be protected by laws of general application, Justice Kennedy was by no means convinced on this point such that it appears to have been a factor in the Court's ultimately finding that the "sheer breadth [of Amendment 2] is so discontinuous with the reasons offered for it that the amendment seems

183. *Romer*, 517 U.S. at 632.

184. *Id.* at 624.

185. *Id.* at 627-30.

186. *Id.* at 630.

inexplicable by anything but animus toward the class it affects.”¹⁸⁷

These bills, in contrast, are relatively narrow in scope such that they do not stand to work as dramatic a shift in the legal landscape as did Amendment 2. Indeed, given their exclusive focus on local governments, these bills would not repeal or otherwise affect LGBT-oriented (1) executive orders issued by the governor; (2) regulations promulgated by a state administrative agency;¹⁸⁸ (3) statutes duly enacted by the state legislature; (4) rulings by a state court; or (5) policies adopted by a state college or university. For the same reason, these bills do not risk depriving LGBT Americans of the protection of generally applicable state statutes prohibiting arbitrary discrimination. Lastly, because these bills are being introduced in response to a local government’s consideration or adoption of the first LGBT-inclusive nondiscrimination ordinance in that particular state,¹⁸⁹ these bills stand to repeal, at most, one city ordinance¹⁹⁰ of relatively narrow application, whereas Amendment 2 would have invalidated a litany of existing ordinances extending a wide array of protections. These bills are, therefore, distinguishable from Amendment 2 in terms of their immediate and prospective effects on the LGBT community such that *Romer* is arguably inapposite.

The Supreme Court has invalidated a law under the rational basis with bite standard on only three occasions in the last forty years, leading one scholar to characterize the standard “as a kind of magical trump card, or perhaps joker, hidden in the pack and [only] used on special occasions.”¹⁹¹ Lower courts, meanwhile, have not understood the *Moreno-Cleburne-Romer* trilogy to require

187. *Id.* at 632. Justice Kennedy stated, “even if, *as we doubt*, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights.” *Id.* at 631 (emphasis added).

188. Michigan’s HB 5039 is the sole exception, as it would apply to state agencies as well as local governments. *See* H.B. 5039, 96th Leg., Reg. Sess. (Mich. 2011).

189. Michigan’s HB 5039 and Oklahoma’s HB 2245 are exceptions to this general rule in that the ordinances they stand to repeal were enacted months, and in some cases years, prior to the relevant bill’s introduction in the state legislature. *See supra* notes 153, 158-161 and accompanying text. Moreover, although Nashville, Tennessee had previously enacted an ordinance prohibiting sexual orientation and gender identity discrimination in public employment, that measure did not have any impact on private employers. Julie Bolcer, *Nashville Passes Nondiscrimination Ordinance*, *ADVOCATE* (Sept. 17, 2009, 10:00 AM ET), <http://www.advocate.com/news/daily-news/2009/09/17/nashville-passes-nondiscrimination-ordinance>.

190. Michigan’s HB 5039 and Oklahoma’s HB 2245 are, once again, exceptions to this general rule in that ordinances in approximately fifteen Michigan cities would be repealed by HB 5039 while ordinances in approximately seven Oklahoma cities would be repealed by HB 2245. In terms of their impact, however, Michigan’s HB 5039 would have a much broader effect than Oklahoma’s HB 2245. Specifically, HB 5039 would repeal a wide variety of ordinances prohibiting sexual orientation discrimination in employment, housing, public accommodations and other areas whereas HB 2245 would only repeal ordinances prohibiting sexual orientation discrimination in public employment. *See supra* Part IV.C-D.

191. Sunstein, *supra* note 43, at 61.

the application of anything more than traditional rational basis review.¹⁹² These facts, when considered in light of the facial neutrality and innocuous legislative history of the bills in question, suggest that the Intrastate Commerce Act and its progeny will be subject to ordinary rational basis review.

D. The Ordinary Rational Basis Review Argument

Unable to invoke the *Hunter* doctrine, establish a per se violation of equal protection, or trigger rational basis with bite review, opponents will have no choice but to argue that these bills lack a rational relation to a legitimate state interest. Although the Supreme Court has taken pains to assert that the rational basis standard “is not a toothless one,”¹⁹³ the Court’s equal protection jurisprudence suggests otherwise. Indeed, the extraordinarily deferential nature of rational basis review is evident from the Supreme Court’s oft-quoted statement:

On rational-basis review, a classification . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction [o]n the record has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.¹⁹⁴

Because these bills are conceivably related to any number of legitimate state interests including (1) promoting intrastate commerce by easing regulatory burdens on business; (2) reducing congestion in state courts by limiting possible bases for discrimination lawsuits; and (3) preserving state authority by prohibiting local governments from seeking to apply their laws extraterritorially, a court is likely to uphold the Intrastate Commerce Act and its progeny against an equal protection challenge under ordinary rational basis review.¹⁹⁵

192. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 761 (2011).

193. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

194. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314-15 (1993) (alteration in original) (citations omitted) (internal quotation marks omitted).

195. The Intrastate Commerce Act presents a particularly strong case for being upheld against an equal protection challenge. The proffered justification for the Act—promoting intrastate commerce by creating a uniform regulatory environment favorable to business—appears all the more credible in light of the Act’s initial endorsement by the Tennessee Chamber of Commerce & Industry. Representative Casada specifically referenced the Chamber’s support in urging his colleagues to pass HB 600. *HB 600 Floor Debate*, *supra* note 23, at 1:53:45-1:53:59 (statement of Rep. Glen Casada). After subsequently receiving

VI. LEGAL CHALLENGES BASED ON HEIGHTENED SCRUTINY

The fact that the Intrastate Commerce Act and its progeny are likely to withstand an equal protection challenge is not mere happenstance. Rather, heeding the lessons of *Romer*, anti-LGBT lawmakers have drafted and debated these bills in a manner designed to foreclose the application of heightened scrutiny and instead ensure that the bills are upheld under ordinary rational basis review.

Although *Romer* represented a significant legal victory for the LGBT community, the Supreme Court's failure to recognize sexual orientation as a suspect classification necessarily limited *Romer*'s precedential value in advancing the cause of LGBT rights nationally. Indeed, in winning the battle against Amendment 2, LGBT Americans may have lost the broader war for equality as *Romer* had the unintended consequence of providing lawmakers a clear set of guidelines for how they may go about drafting anti-LGBT legislation to withstand an equal protection challenge. First, legislation designed to discriminate against LGBT Americans must be facially neutral, as laws explicitly targeting the LGBT community will raise a presumption of animus. Second, any given piece of legislation cannot be too ambitious in terms of the harm that it seeks to inflict on the LGBT community, as laws imposing "a broad and undifferentiated disability" on LGBT Americans will constitute a per se violation of equal protection. By adhering to these two principles, lawmakers recognize that they may discriminate against LGBT Americans consistent with the Supreme Court's opinion in *Romer*.¹⁹⁶

The Intrastate Commerce Act and its progeny, thus, suffer from a "disadvantage of deliberate obfuscation"¹⁹⁷ in that, although they are born of the same animus that lead the Supreme Court to invalidate Amendment 2, they are ostensibly constitutional because they achieve their objective without

requests for a clarification of its position, the Tennessee Chamber issued the following statement: "Our position is now, and has historically been, that employment standards from the government should be consistent across the state and not create additional burden on companies that are endeavoring to be competitive and provide jobs to all Tennesseans based on their individual qualifications and merit." Amanda Terkel, *Tennessee Anti-Gay Bill, Backed by State Chamber of Commerce, Puts Big Business in a Tough Spot*, HUFFINGTON POST (July 23, 2011, 6:12 AM ET), http://www.huffingtonpost.com/2011/05/23/tennessee-anti-gay-bill-chamber-commerce-business_n_865581.html (internal quotation marks omitted). A few days after HB 600 passed both houses of the state legislature, however, the Tennessee Chamber withdrew its support, stating that because the bill "has turned into a debate on diversity and inclusiveness—principles which we support—we are now officially opposing this legislation in its present form." McWhirter, *supra* note 26.

196. Because "the Equal Protection Clause allows the States wide latitude" whenever "social or economic legislation is at issue," it is not surprising that lawmakers would seek to disguise anti-LGBT measures as ordinary economic legislation. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). In addition to insulating the measures against any equal protection challenge postenactment, the ostensibly pro-business nature of these bills is also helpful in securing their initial passage.

197. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

targeting LGBT Americans too explicitly or harming LGBT Americans too severely. More troubling still is the fact that these bills are but a single manifestation of a broader phenomenon. In light of the social, political, and economic gains made by the LGBT community in recent years, anti-LGBT legislators ostensibly recognize that facially discriminatory laws stand less and less chance of success. Consequently, many of the discriminatory bills being introduced today do not explicitly target LGBT Americans, but are instead designed to have a disparate impact on the LGBT community.¹⁹⁸ Contrary to Justice Souter's admonition then, it appears that equal protection has indeed "become an exercise in which the winners are the ones who hide the ball,"¹⁹⁹ at least insofar as LGBT rights are concerned. Accordingly, the Supreme Court must afford heightened scrutiny to classifications based on sexual orientation and gender identity²⁰⁰ in order to expose the discriminatory motivations underlying facially neutral bills and repeal the license to discriminate conferred by *Romer*.²⁰¹

198. A. Nicole Kwapisz, *Classification of Homosexuals Under the Equal Protection Clause: Forward-Looking Disparate Impact Test*, 5 DEPAUL J. FOR SOC. JUST. 71, 74 (2011).

199. *Gratz*, 539 U.S. at 298 (Souter, J., dissenting).

200. Judges and commentators alike have found that classifications based on sexual orientation or gender identity warrant heightened scrutiny. *See, e.g.*, *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 436-40 (S.D. Ohio 1994), *rev'd in part, vacated in part*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996); *Watkins v. U.S. Army*, 847 F.2d 1329, 1345-49 (9th Cir. 1988), *withdrawn en banc*, 875 F.2d 699 (9th Cir. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368-70 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990); Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996); Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385 (2010); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); *see also* Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (informing Congress that the Department of Justice would not defend section 3 of the Defense of Marriage Act given the Department's determination that classifications based on sexual orientation warrant heightened scrutiny).

201. Although the recent challenges to Proposition 8 and the Defense of Marriage Act may provide the Court an opportunity to determine the appropriate level of scrutiny for classifications based on sexual orientation, neither case concerns classifications based on gender identity. Accordingly, even if the Court were to hold that classifications based on sexual orientation warrant heightened scrutiny, classifications based on gender identity would be unaffected, and transgender persons would remain vulnerable to discrimination under the *Romer* framework until such time as the Court had cause to determine the appropriate level of scrutiny for classifications based on gender identity. While this Article argues that the Supreme Court must afford heightened scrutiny to classifications based on sexual orientation and gender identity, the author does not mean to suggest that the

If the Supreme Court were to recognize sexual orientation and gender identity as quasi-suspect classifications, LGBT Americans would no longer have to convince a court that these types of bills are “inexplicable by anything but animus”²⁰² to prevail on an equal protection claim. Instead, litigants would need only show that a discriminatory purpose was a motivating factor in the state’s decision to enact an otherwise facially neutral law,²⁰³ where a discriminatory purpose “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon” the LGBT community.²⁰⁴

The Supreme Court has identified several factors relevant to establishing the existence of a discriminatory purpose such as: (1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedural sequence; (4) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and (5) the legislative or administrative history underlying the decision, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.²⁰⁵ Because application of these factors would reveal that an invidious discriminatory purpose underlay the passage of the Intrastate Commerce Act and its progeny, courts would no longer be complicit in denying LGBT Americans the equal protection of the laws.

A. Tennessee

1. The Historical Background Against Which HB 600 Was Enacted

HB 600 was one of four anti-LGBT bills introduced in Tennessee’s 107th General Assembly. Tennessee Senate Bill 49 (SB 49) would have made it illegal for elementary and middle school teachers to discuss homosexuality.²⁰⁶ Tennessee House Bill 1153 (HB 1153) would have allowed students to express anti-gay views in the classroom so long as the opinions were consistent with the child’s religious beliefs.²⁰⁷ Tennessee House Bill 2279 (HB 2279) would

challenges to Proposition 8 or Defense of Marriage Act are the appropriate or most desirable vehicles for doing so, or that the Supreme Court should attempt to address these questions in a single case.

202. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

203. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

204. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

205. *Arlington Heights*, 429 U.S. at 267-68.

206. S.B. 49, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

207. H.B. 1153, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

have made it illegal for transgender persons to use public restrooms which did not correspond to their biological sex.²⁰⁸ Although HB 1153 died in committee without ever receiving a hearing²⁰⁹ and HB 2279 was withdrawn just days after its introduction, ostensibly because its sponsor had threatened to “stomp a mudhole” into any transgender woman who attempted to use the same department store dressing room as his wife or daughters,²¹⁰ SB 49, or the “Don’t Say Gay” bill, passed the Senate only to subsequently fail in the House.²¹¹ The historical background against which HB 600 was enacted, therefore, indicates that a discriminatory purpose was a motivating factor in the legislature’s decision to pass HB 600 such that the Act would not withstand heightened scrutiny.

2. The Specific Sequence of Events Leading Up to HB 600’s Passage

As discussed in greater detail above, Nashville enacted its CANDO ordinance in response to the controversy surrounding Lisa Howe’s departure from Belmont University.²¹² Even before CANDO was formally introduced, however, Representative Casada announced that he would be sponsoring a bill in the upcoming legislative session to prevent local governments from enacting LGBT-inclusive nondiscrimination ordinances.²¹³

The specific sequence of events leading up to HB 600’s passage suggest that the bill was written, introduced, and enacted as a direct response to Nashville’s CANDO ordinance. The concept behind HB 600, moreover, does not appear to have originated with Representative Casada, but instead with the Family Action Council of Tennessee (FACT), a political advocacy group whose stated mission is to “promote and defend a culture that values the traditional family.”²¹⁴ Indeed, in 2009, FACT’s president acknowledged that one of his organization’s goals was to prevent local governments from adopting LGBT-inclusive nondiscrimination ordinances: “Tennessee has its own problems with the homosexual agenda. . . . We are seeing our major cities now pushing for [] very strong pro-homosexual antidiscrimination ordinances.”²¹⁵

208. H.B. 2279, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

209. *Bill Information for HB 1153*, TENN. GEN. ASSEMBLY <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1153&ga=107> (last visited May 5, 2013).

210. Michelle Garcia, *Tennessee Senate Pulls Controversial Anti-Trans Bill*, ADVOCATE (Jan. 13, 2012, 6:47 PM ET), <http://www.advocate.com/news/daily-news/2012/01/13/tennessee-senate-pulls-controversial-antitrans-bill>.

211. Tom Humphrey, ‘Don’t Say Gay Bill’ to Die with Adjournment of 107th, KNOXVILLE NEWS SENTINEL (Apr. 29, 2012, 9:07 PM), <http://blogs.knoxnews.com/humphrey/2012/04/dont-say-gay-bill-to-die-with.html>.

212. See *supra* Introduction.

213. Cass, *supra* note 13.

214. FAMILY ACTION COUNCIL TENN., <http://factn.org> (last visited May 5, 2013).

215. Complaint, *supra* note 167, ¶ 20 (alterations in original) (internal quotation marks

On January 4, 2011, FACT's chairman sent an email alerting recipients of an "[u]rgent [m]eeting" scheduled for January 12, 2011 to discuss the "Metro Ordinance on Sexual Orientation."²¹⁶ In pertinent part, the email provided:

[We] are hosting a meeting next Wednesday morning, January 12th to inform you about an ordinance pending before Metro Council (launched due to the Belmont controversy and set for final vote on February 1st!) that, according to the [Nashville] City Paper, would require all businesses doing business with Metro "to have written policies that ban discrimination against employees based on sexual orientation or gender identity" (i.e. gays, lesbians, bi-sexuals and transgenders). I can assure you that the sponsors want it to apply to all subcontractors and sub-vendors that are a party to any Metro contract as well.

The meeting will lay out the wide-reaching impact of this ordinance, what can be done to defeat it, and the next item on the homosexual agenda if this passes (which is to require all businesses domiciled in Davidson County to adopt these same policies).

Our speakers will include Metro Councilman and State Representative-elect Jim Gotto, who will discuss the local government process, State Representative Glen Casada, who will address new legislation at the state level directed against this issue, and former State Senator David Fowler, President of the Family Action Council of Tennessee, who will lay out the not-so-apparent legal ramifications of such an ordinance and what we can do to oppose it.²¹⁷

The meeting took place as scheduled, with newly sworn-in Representative Gotto and Representative Casada in attendance.²¹⁸ According to press reports, attendees discussed "the advantage of framing the debate as a business issue rather than a moral, Christian one," while at the same time reviewing literature "decr[ying] the 'immorality' of homosexuality."²¹⁹ Shortly after the meeting, Representative Casada told a reporter that sometime in the near future he would be introducing a bill "say[ing] that local governments don't have the option of requiring the business community to perform certain social functions."²²⁰ Approximately one month later, Representative Casada introduced the Equal Access to Intrastate Commerce Act in the 107th General Assembly.

omitted). FACT has previously described homosexuality as a "dangerous lifestyle that is physically and emotionally destructive." *Id.* ¶ 19 (internal quotation marks omitted).

216. Nate Rau, *Conservative Leaders Meet to Discuss Proposed Extension of Nondiscrimination Ordinance*, TENNESSEAN (Jan. 12, 2011), <http://blogs.tennessean.com/politics/2011/conservative-leaders-in-response-to-proposed-extension-of-nondiscrimination-ordinance>.

217. *Id.* (emphasis omitted).

218. Joey Garrison, *Business Leaders, Christian Conservatives Work with GOP to Defeat Nondiscrimination Bill*, CITY PAPER (Jan. 12, 2011, 10:31 AM), <http://nashvillecitypaper.com/content/city-news/business-leaders-christian-conservatives-work-gop-defeat-nondiscrimination-bill>.

219. Jeff Woods, *Anti-Gay Bias Ordinance Creates Questions of Business, Bigotry*, CITY PAPER (June 19, 2011, 9:05 PM), <http://nashvillecitypaper.com/content/city-news/anti-gay-bias-ordinance-creates-questions-business-bigotry> (internal quotation marks omitted).

220. Cass, *supra* note 13 (internal quotation marks omitted).

The Intrastate Commerce Act's progression through the Tennessee state legislature was a regular topic of discussion on FACT's blog. In a posting dated January 31, 2011, FACT characterized the CANDO ordinance as "a social agenda pure and simple" that did nothing to create jobs or stimulate the economy.²²¹ The post then went on to announce:

That is why The Family Action Council of Tennessee's sister political organization, known as Family Action of Tennessee,²²² is bringing to the legislature a bill that would take away the power of local governments to thwart intra-state commerce that would come from the creation of a hodgepodge of new regulations on business, including the creation of new civil rights not recognized under state or federal law.

Some might say, "Why does The Family Action Council of Tennessee care about some economic issue? This is just a smoke-screen to thwart the advancement of civil rights by those who want to engage in homosexual conduct and dress opposite their biological sex." The answer is simple. When moms and dads lose jobs, when economic opportunities are lessened, then that is not good for families. We believe small businesses are important to the economy, but the smallest, most fundamental, and most fragile engine of economic productivity that drives the whole train is the family.

While we cannot take on every issue impacting business, it is important to step in when that issue undermines not only the economic well being of families, but God's design for human sexuality—sex within the confines of marriage.²²³

The post concluded by noting that FACT would oppose any comparable legislation seeking to protect "porn addicts" or those engaging in "adulterous relationships in the workplace."²²⁴

On April 7, 2011, FACT uploaded a video of an exchange between David Fowler, FACT's president, and Representative Casada in which the pair discussed the House Commerce General Subcommittee's decision to favorably report the Intrastate Commerce Act.²²⁵ At one point during the interview, Representative Casada stated, "let me say first, David, I could not have gotten this out [of the Commerce Subcommittee] if it hadn't been for your efforts."²²⁶ Speaking to the video's viewers, Fowler then explained:

[B]esides what I do, Representative Casada is talking to members on the floor,

221. J.R., *No CAN-DO*, FAM. ACTION COUNCIL TENN. BLOG (Jan. 31, 2011, 1:57 AM), <http://factn.org/no-can-do>.

222. Family Action of Tennessee's stated mission is "to preserv[e] and strengthen[] Tennessee's families and marriages, esteeming life as a gift from God, and protecting religious liberty through Tennessee's public policies." *Welcome*, FAM. ACTION TENN., <http://www.familyactiontn.org> (last visited May 5, 2013).

223. J.R., *supra* note 221.

224. *Id.*

225. FamilyActionCouncil, *HB 600 Passes Commerce Subcommittee*, YOUTUBE (Apr. 7, 2011), <http://www.youtube.com/watch?v=Bc2OSNbrwco&feature=plcp>.

226. *Id.*

dropping by their offices, trying to get a pulse for things, [and] relaying that information back to me, so it's a very cooperative kind of process and you have to have a strong sponsor who's really behind your bill, willing to work for your bill, and Representative Casada, we thank you that you were that guy for us.²²⁷

The day after the House voted to pass the Intrastate Commerce Act, Fowler sent an email to Mae Beavers, sponsor of the companion legislation in the Senate.²²⁸ Fowler appeared to be concerned that Senator Beavers—who had only recently become the bill's sponsor after another senator unexpectedly withdrew his support²²⁹—was not prepared to speak on the bill. In his email, Fowler counsels:

The bill itself is not that complicated We don't need more regulation of business and business sure doesn't need the 348 different cities coming up with their own ideas of what a discriminatory practice is. That's the line and you just repeat it like Glen Casada did last night when the bill passed the House 73 to 24.

Will the homosexuals be upset? . . . Sure. But to be honest, they seem to be rather resigned on this bill.²³⁰

Senator Beavers's reliance on Fowler was further demonstrated during a May 9, 2011 hearing before the Senate Committee on State and Local Government. After Senator Beavers quoted an opinion of the Tennessee Attorney General, a member of the Committee inquired whether that opinion had been prepared specifically for HB 600.²³¹ Senator Beavers paused for a moment and then responded, "I see [David] Fowler shaking his head 'yes,' and it was written for this piece of legislation."²³² When another colleague asked a follow-up question, Senator Beavers answered, "I would have to yield to [David] Fowler on that, if he could answer that question because I cannot."²³³ The Committee then went into recess to allow Fowler to respond to the member's question.²³⁴ After answering the question, however, Fowler did not step down so that the Committee could be called back into order and Senator

227. *Id.*

228. Jeff Woods, *Document Dump Shows Christian Right Scripted Sen. Mae Beavers on Anti-Gay Law*, NASHVILLE SCENE (Nov. 8, 2011, 10:53 AM), <http://www.nashvillescene.com/pitw/archives/2011/11/08/document-dump-shows-christian-right-scripted-sen-mae-beavers-on-anti-gay-law>.

229. *Equal Access to Intrastate Commerce Act: Hearing on S.B. 632 Before the S. Comm. on State & Local Gov't*, 107th Gen. Assemb., Reg. Sess. 2:44-3:10 (Tenn. 2011) [hereinafter *Senate Hearing on SB 632*] (statement of Sen. Mae Beavers), available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4234.

230. Woods, *supra* note 228 (internal quotation marks omitted).

231. *Senate Hearing on SB 632*, *supra* note 229, at 09:15-10:10 (statement of Sen. Stacey Campfield).

232. *Id.* at 10:10-10:15 (statement of Sen. Mae Beavers).

233. *Id.* at 11:30-11:38.

234. *Id.* at 11:40-11:42.

Beavers could resume answering questions.²³⁵ Instead, Fowler remained at the podium and answered several additional questions on the bill.²³⁶

Given that the Intrastate Commerce Act was written, introduced, and enacted in response to Nashville's adoption of an LGBT-inclusive nondiscrimination ordinance, the specific sequence of events leading up to the Act's passage suggests that the Tennessee General Assembly was motivated, at least in part, by a discriminatory purpose such that the Act would not withstand heightened scrutiny.

3. Procedural Departures in Enacting HB 600

The process by which HB 600 was enacted is unusual both in terms of the number of bills filed and legislators' refusal to extend what is ostensibly a perfunctory professional courtesy.

In all, Representative Casada filed six bills seeking to preempt or repeal Nashville's CANDO ordinance. Three of these bills were filed on February 7, 2011, and each one was titled the "Equal Access to Local Government Contracts and Services Act."²³⁷ These bills would have prohibited municipalities from requiring government contractors to comply with any nondiscrimination provisions more inclusive than state law in terms of their protected classes.²³⁸ On February 10, 2011, House leadership assigned the bills to the State and Local Government Committee, and Representative Casada withdrew all three bills that same day.²³⁹

The next three bills were filed on February 10, 2011, and each one was titled the "Equal Access to Intrastate Commerce Act."²⁴⁰ In addition to prohibiting municipalities from adopting nondiscrimination ordinances more inclusive than state law in terms of their protected classes, two of these bills would have prohibited cities from adopting ordinances more generous than state or federal law in terms of health insurance benefits, the minimum wage, or family leave requirements.²⁴¹ On February 16, 2011, House leadership

235. *Id.* at 11:55-13:10.

236. *Id.* at 13:10-22:55.

237. H.B. 329, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); H.B. 330, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); H.B. 331, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

238. *See supra* note 237.

239. *Bill Information for HB 329*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0329&ga=107> (last visited May 5, 2013); *Bill Information for HB 330*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0330&ga=107> (last visited May 5, 2013); *Bill Information for HB 331*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0331&ga=107> (last visited May 5, 2013).

240. H.B. 598, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); H.B. 600, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); H.B. 601, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

241. *See* Tenn. H.B. 598; Tenn. H.B. 601.

assigned these three bills to the Commerce Committee, whose chairperson promptly reassigned all three bills to the Commerce General Subcommittee.²⁴² Besides HB 600, the only one of these bills to receive any consideration by the Commerce General Subcommittee was Tennessee House Bill 598.²⁴³ In an April 8, 2011 blog post, FACT provided its readers with an update on the status of HB 598:

About three weeks ago, in anticipation of the passage of CAN-DO, state Rep. Glen Casada . . . tried to pass House Bill 598, which would have prohibited Metro's ordinance. But when the votes were counted in the House Commerce Subcommittee on a key amendment, there were more "no's" than "yes's." So, Rep. Casada took a step back and tried a different way to undo CAND-DO, this time with a better result.

Over time it became clear that some Subcommittee members were having trouble getting a grasp on what House Bill 598 did and didn't do, and opponents of the measure were more than happy to feed the confusion.

That's when Rep. Casada wisely decided to simplify the issue to the one issue on which there was growing agreement and began to push House Bill 600.²⁴⁴

The Commerce General Subcommittee ultimately deferred HB 598 for "summer study."²⁴⁵

At various times during HB 600's progression through the General Assembly, moreover, legislators proposed amendments seeking to exempt Davidson County from the reach of the bill.²⁴⁶ None of these amendments were successful,²⁴⁷ and at least one legislator indicated that this marked a departure from the General Assembly's normal procedures:

I ask you to vote in favor of this amendment which would take Davidson

242. *Bill Information for HB 598*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0598&ga=107> (last visited May 5, 2013); *Bill Information for HB 600*, *supra* note 14; *Bill Information for HB 601*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0601&ga=107> (last visited May 5, 2013).

243. *Bill Information for HB 598*, *supra* note 242.

244. JR, *Will Legislature Undo CAN-DO?*, FAM. ACTION COUNCIL TENN. BLOG (Apr. 8, 2011, 2:38 AM), <http://factn.org/will-legislature-undo-can-do>.

245. *Equal Access to Local Government Contracts and Services Act: Hearing on H.B. 598 Before the Gen. Subcomm. of the H. Comm. on Commerce*, 107th Gen. Assemb., Reg. Sess. 0:39-42 (Tenn. 2011) (statement of Rep. John Lundberg, Chairman, Gen. Subcomm., H. Comm. on Commerce), available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4108.

246. *Commerce Committee Hearing on HB 600*, *supra* note 19, at 1:02:55-1:09:15 (statement of Rep. Brenda Gilmore); *HB 600 Floor Debate*, *supra* note 23, at 1:47:06-1:51:20 (statement of Rep. Brenda Gilmore); *Equal Access to Intrastate Commerce Act: S. Deb. on S.B. 632*, 107th Gen. Assemb., Reg. Sess. 4:07:15-4:10:28 (Tenn. 2011) [hereinafter *SB 632 Floor Debate*] (statement of Sen. Joe Haynes), available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4266.

247. See sources cited *supra* note 246.

County out of the law. And this is nothing any different than we've done previously. I've been a [member of the legislature for five years] . . . and we have always honored legislators' requests if they want to remove their counties out of legislation, and I'm asking the same thing that other legislators have asked [for] previously.²⁴⁸

To the extent this characterization is accurate, and provided that it is unusual for a legislator to file six competing versions of what is essentially the same bill, these facts would appear to suggest that a discriminatory purpose was a motivating factor in the legislature's decision to pass HB 600 such that the Act would not withstand heightened scrutiny.

4. Substantive Departures in Enacting HB 600

Several of the legislators supporting HB 600 acknowledged that although they were strong advocates of local control such that they normally would have opposed a bill like HB 600, the need for uniformity vis-à-vis antidiscrimination practices was ostensibly so great as to override these otherwise compelling concerns.²⁴⁹ Because "the factors usually considered important by [these legislators] strongly favor a decision contrary to the one reached," the evidence suggests that a discriminatory purpose underlay HB 600.

5. The Legislative History of HB 600

Statements by various legislators confirm that although Representative Casada characterized HB 600 as a bill of general application,²⁵⁰ a number of his colleagues understood the bill to be a direct response to Nashville's adoption of an LGBT-inclusive nondiscrimination ordinance.²⁵¹

248. *Commerce Committee Hearing on HB 600*, *supra* note 19, at 1:08:31-1:09:00 (statement of Rep. Brenda Gilmore).

249. *Id.* at 47:42-50:58 (statement of Rep. Jimmy Matlock) ("I had early on concerns about trumping the locals. I've always felt locals should take precedence and what they do, we should respect. In this particular instance, [however], . . . I have great concerns that if this [bill] is not passed that it would bring confusion . . ."); *SB 632 Floor Debate*, *supra* note 246, at 4:05:27-4:05:32 (statement of Sen. Mae Beavers) ("[M]any of you are going to say, well we don't want to tell local governments what to do."); *id.* at 4:15:08-4:15:25 (statement of Sen. Jack Johnson) ("I am very sympathetic to the argument that we need to be very careful here in the General Assembly about dictating things down to our local government or mandating things to our local government, but Senator Beavers said it quite well; when it comes to nondiscrimination practices, we should be consistent across this state."); *id.* at 4:19:39-4:20:35 (statement of Sen. Mike Faulk) ("I have serious concern about the state government telling municipalities and counties what they should and should not be doing, but . . . if ever a state statute cried for uniformity, it would be those discrimination laws.")

250. *Rules Committee Hearing on HB 600*, *supra* note 23, at 33:20-33:33 (statement of Rep. Glen Casada); *HB 600 Floor Debate*, *supra* note 23, at 1:55:08-1:55:21 (statement of Rep. Glen Casada).

251. *See, e.g., Rules Committee Hearing on HB 600*, *supra* note 23, at 33:11-33:18 (statement of Rep. Mike Turner) ("This is your attempt to legislate Nashville's ordinances on

Representative Casada's own statements, moreover, reveal that he vehemently opposed the CANDO ordinance and was inclined to view the ordinance and its effects as matters of morality. Asked why he was attempting to intervene in Nashville's internal affairs, Representative Casada responded:

I guess my question is, and it's not related to the bill—the reason I'm carrying this bill is to make sure that we're homogenous on our laws as it refers to doing business—but my question is why would the City of Nashville try to react the way they did to a private Christian college that wanted to hire and fire someone at their willing, and why did the City of Nashville deem it necessary to jump on a small, private Christian school to inflict their morality on that small school.²⁵²

Later in the same debate, another legislator characterized HB 600 as “anti-gay” and asserted, “I think there's nothing homogeneous about this bill, but I think there's a lot that is homophobic about this bill.”²⁵³ In response, Representative Casada stated:

Let me say real clear, I've been working on this since November of this year, well before . . . it is not homophobic. Though I am deeply disturbed that . . . the City of Nashville would jump on this small Christian school of Belmont and inflict their morality . . . or attempt to inflict their morality upon this small Christian school. But again, that's not what this bill is about. This bill is creating a homogeneous business environment across the State of Tennessee.²⁵⁴

Thus, while not necessarily pretextual, Representative Casada's proffered justification for HB 600—facilitating intrastate commerce—appears dubious in light of his strong personal opposition to the CANDO ordinance. The legislative history, therefore, suggests that a discriminatory purpose was at least a motivating factor in the legislature's decision to pass HB 600 such that the Act would not withstand heightened scrutiny.

B. Montana

1. The Historical Background Against Which HB 516 Was Debated

HB 516 was one of three LGBT-related bills introduced in Montana's 62nd Legislature. Although all three bills were ultimately defeated, two of the bills stood to advance, rather than hinder, the cause of LGBT equality. The defeat of these latter two bills indicates that the legislature may have been motivated by a discriminatory purpose in advancing HB 516.

discrimination?"); *HB 600 Floor Debate*, *supra* note 23, at 2:14:46-2:14:48 (statement of Rep. Sherry Jones) (“[T]his is all about Nashville.”); *SB 632 Floor Debate*, *supra* note 246, at 4:14:23-4:14:27 (statement of Sen. Thelma Harper) (“This impacts Nashville only.”).

252. *HB 600 Floor Debate*, *supra* note 23, at 1:55:32-1:55:59 (statement of Rep. Glen Casada).

253. *Id.* at 2:07:57-2:08:03 (statement of Rep. Jeanne Richardson).

254. *Id.* at 2:08:34-2:08:58 (statement of Rep. Glen Casada).

Montana Senate Bill 276 (SB 276) would have formally decriminalized same-sex sexual relations.²⁵⁵ Under the Montana Code, “[d]eviate sexual relations” is defined as “sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal”²⁵⁶ and is punishable by up to ten years in prison or fifty thousand dollars in fines.²⁵⁷ The Montana Supreme Court invalidated the law as applied to consenting same-sex adults in 1997,²⁵⁸ and in 2003 the U.S. Supreme Court invalidated an analogous Texas statute.²⁵⁹ Nonetheless, the Montana Legislature has been steadfast in its refusal to strike the offending language from the Montana Code.²⁶⁰

After being reported favorably by the Senate Judiciary Committee and receiving the backing of the full Montana Senate,²⁶¹ SB 276 died in the House Judiciary Committee following a hearing in which legislators repeatedly equated homosexuality with bestiality and pedophilia.²⁶² The Committee Chairman, Representative Ken Peterson, has previously relied on the relatively narrow holdings of the aforesaid court opinions to argue that at least two offenses remain prosecutable under Montana’s deviate sexual conduct statute:

[The first] is the “recruitment” of non-gays. “Homosexuals can’t go out into the heterosexual community and try to recruit people, or try to enlist them in homosexual acts,” Peterson says. He provides an example: “Here, young man, your hormones are raging. Let’s go in this bedroom, and we’ll engage in some homosexual acts. You’ll find you like it.” Peterson hasn’t actually seen this happen, he says, because “I don’t associate with that group of people at all . . . I’ve associated with mainstream people all my life.”

The [second] . . . is the public display of homosexuality “In my mind, if they were engaging in acts in public that could be construed as homosexual, it would violate [the deviate sexual conduct statute]. It has to be more than affection. It has to be overt homosexual acts of some kind or another . . . If kissing goes to that extent, yes. If it’s more than that, yes.”²⁶³

255. S.B. 276, 62d Leg., Reg. Sess. (Mont. 2011).

256. MONT. CODE ANN. § 45-2-101(21) (2011) (internal quotation marks omitted).

257. *Id.* § 45-5-505(2).

258. *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

259. *Lawrence v. Texas*, 539 U.S. 558 (2003).

260. *Generally Revise Deviate Sexual Conduct Laws: Hearing on S.B. 276 Before the H. Comm. on the Judiciary*, 62d Leg., Reg. Sess. 4:33-4:53 (Mont. 2011) [hereinafter *House Hearing on SB 276*] (statement of Jamee Greer, Mont. Human Rights Network), <http://leg.mt.gov/css/Committees/Session/Minutes/AudioMinutes.asp?MeetingID=12816> (noting that similar legislation had been defeated in 1991, 1993, 1999, 2001, and 2003).

261. *Bill Information for SB 276*, MONT. LEGISLATURE, [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=276&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=276&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=) (last visited May 5, 2013).

262. *House Hearing on SB 276*, *supra* note 260, at 43:34-48:56, 1:11:44-1:12:40, 1:14:50-1:17:30.

263. *Etc.*, MISSOULA INDEP. (Apr. 7, 2011), <http://missoulanews.bigskypress.com/missoula/etc/Content?oid=1423534> (second and fifth alterations in original).

The House Judiciary Committee voted to table SB 276 on March 18, 2011, with Chairman Peterson and Representative Hansen voting in the affirmative.²⁶⁴

In opposing a March 29, 2011 motion that would have forced SB 276 out of the Judiciary Committee and brought it before the full House, Chairman Peterson argued that the deviate sexual conduct statute “should not be repealed because of situations it might apply in,” while another committee member asserted that SB 276 was an affront to “[s]cripture, natural law and eternal law.”²⁶⁵ The motion failed by nine votes, with Chairman Peterson and Representative Hansen voting in the negative.²⁶⁶

Montana House Bill 514 (HB 514), meanwhile, would have added sexual orientation, gender identity, and gender expression to the list of protected classes recognized by the state.²⁶⁷ Upon its introduction, HB 514 was referred to the House Judiciary Committee.²⁶⁸ Following a February 18, 2011 hearing,²⁶⁹ the Committee voted 14-6 to table the bill, effectively killing it.²⁷⁰ Among those voting in favor of the tabling motion were Chairperson Peterson and Representative Hansen.²⁷¹ Similar legislation was introduced and rejected in 2009,²⁷² 2007,²⁷³ 2005,²⁷⁴ and 2001.²⁷⁵

The historical background against which HB 516 was debated, therefore, indicates that a discriminatory purpose was a motivating factor in the legislature’s decision to advance HB 516, such that the bill would not have

264. MONT. HOUSE OF REPRESENTATIVES, COMM. ON JUDICIARY, MINUTES OF MEETING: MARCH 18, 2011, at 4 (2011), available at http://data.opi.mt.gov/legbills/2011/Minutes/House/110318JUH_Hm1.pdf.

265. Charles S. Johnson, *Montana House Refuses to Blast Gay Sex Ban Bill Out of Committee*, BILLINGS GAZETTE (Mar. 29, 2011, 4:56 PM), http://billingsgazette.com/news/local/article_2d3cf86a-90c8-52c2-ada2-4e34819bec98.html (internal quotation marks omitted).

266. MONT. H. JOURNAL, 62d Leg., Reg. Sess. 4 (Mar. 29, 2011), available at <http://data.opi.mt.gov/legbills/2011/HJrnl/HJ0070.pdf>.

267. H.B. 514, 62d Leg., Reg. Sess. (Mont. 2011).

268. *Bill Information for HB 514*, MONT. LEGISLATURE, [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=514&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=514&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=) (last visited May 5, 2013).

269. *Protect Sexual Orientation and Gender Identity and Expression: Hearing on H.B. 514 Before the H. Comm. on the Judiciary*, 62d Leg., Reg. Sess. 1:23:11-2:03:31 (Mont. 2011) [hereinafter *Judiciary Committee Hearing on HB 514*], <http://leg.mt.gov/css/Committees/Session/Minutes/AudioMinutes.asp?MeetingID=12308>.

270. MONT. HOUSE OF REPRESENTATIVES, COMM. ON JUDICIARY, BUSINESS REPORT: FEBRUARY 21, 2011 (2011), available at <http://data.opi.mt.gov/legbills/2011/Minutes/House/Exhibits/juh42aad.pdf>.

271. *Id.*

272. H.B. 252, 61st Leg., Reg. Sess. (Mont. 2009).

273. S.B. 371, 60th Leg., Reg. Sess. (Mont. 2007).

274. S.B. 199, 59th Leg., Reg. Sess. (Mont. 2005).

275. H.B. 438, 57th Leg., Reg. Sess. (Mont. 2001).

withstood heightened scrutiny had it become law.

2. The Specific Sequence of Events Leading Up to Debate on HB 516

As discussed in greater detail above, on April 13, 2010 Missoula became the first city in the State of Montana to adopt an LGBT-inclusive nondiscrimination ordinance.²⁷⁶ Because the Montana Legislature does not meet in even-numbered years,²⁷⁷ state lawmakers opposed to the measure were not given an opportunity to intervene and preclude the ordinance from taking effect. On December 29, 2010, however, Representative Hansen submitted a bill drafting request to the Montana Legislative Services Division for what would ultimately become HB 516.²⁷⁸ The request contained a handwritten note from Dallas Erickson to the bill drafter: “Valencia, Rep. Kristen Hansen has give[n] Harris Himes and I permission to work with you on [HB 516]. Please keep us posted when you get to it.”²⁷⁹

Erickson, described in local press reports as “a longtime morality crusader,” is the head of two Montana-based advocacy groups: Montana Citizens for Decency Through Law and Montana Help Our Moral Environment.²⁸⁰ In an April 11, 2010 op-ed opposing the Missoula Ordinance, Erickson stated:

To begin with let me make it clear that I do not hate homosexuals (or anyone else) and that I am not homophobic. I do consider homosexuality a sin that, just like adultery and fornication, will lead to sadness and sorrow.

...
This bill will have many consequences, if passed into law, which should concern people who care about our moral environment, especially as we slouch toward Gomorrah[.]

...
This could be called the “bathroom” or the “peeping Tom protection ordinance,” as it will allow any man, for example, who says he is “gender confused” to use the little girl’s bathroom or shower or locker rooms and sexual offenders would be included. . . . Talk about declaring open season on

276. Szpaller, *supra* note 122.

277. See MONT. CONST. art. V, § 6 (“The legislature shall meet each odd-numbered year in regular session of not more than 90 legislative days.”).

278. *Bill Information for HB 516*, MONT. LEGISLATURE, [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=516&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=516&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=) (last visited May 5, 2013).

279. Letter from Michael D. Silverman, Exec. Dir., Transgender Legal Def. & Educ. Fund, to Ron Arthun, Member, Mont. State Senate 3-4 (Mar. 21, 2011) [hereinafter Silverman Letter] (first alteration in original), *available at* http://www.transgenderlegal.org/media/uploads/doc_368.pdf.

280. Keila Szpaller, *Proposed Bill Would Nullify Missoula Anti-Discrimination Ordinance*, MISSOULIAN (Jan. 21, 2011, 5:15 AM), http://missoulian.com/news/local/proposed-bill-would-nullify-missoula-anti-discrimination-ordinance/article_bc70eaa2-251b-11e0-b5b3-001cc4c002e0.html.

our children and on the privacy and safety of our wives and daughters and sisters! So to make a handful of “gender identity” people feel safe we are going to make well over half the population of Missoula apprehensive and unsafe?

This ordinance would require any business dealing with youth, in any respect, to hire homosexuals and cross-dressers and others. The Catholic Church and the Boy Scouts of America did not have a molestation problem because they allowed molesters to become priests but because they allowed homosexuals to become priests. They stopped doing that and the problem has almost disappeared.

Is this really what the majority of Missoulians want? I don’t think so. I hope those who do not support it will not be intimidated by those whose only goal, no matter the threat to freedom, privacy and children’s safety, is to protect a lifestyle that has caused death and disease to millions and is contrary to the way that God created us.²⁸¹

Speaking in support of HB 516, Erickson offered analogous testimony before the House Judiciary Committee²⁸² and the Senate Local Government Committee.²⁸³ Erickson separately testified against (1) SB 276 on the grounds that it represented an attempt to normalize homosexuals’ deviant lifestyle;²⁸⁴ and (2) HB 514 on the basis that it would discriminate against people of faith.²⁸⁵

Himes, in turn, is the pastor of the Big Sky Christian Center in Hamilton, Montana and routinely testifies before legislative bodies on behalf of the Montana Eagle Forum.²⁸⁶ Speaking at the Missoula City Council meeting

281. Dallas Erickson, Op-Ed., *Nondiscrimination Ordinance: Rule is a Threat to Our Liberties*, MISSOULIAN (Apr. 11, 2010, 9:22 AM), http://missoulian.com/news/opinion/columnists/article_555bb06c-4647-11df-b8f6-001cc4c03286.html.

282. *Judiciary Committee Hearing on HB 516*, *supra* note 126, at 2:31:36-2:34:03 (statement of Dallas Erickson, Mont. Citizens for Decency Through Law).

283. *Senate Hearing on HB 516*, *supra* note 132, at 1:03:31-1:05:59 (statement of Dallas Erickson, Mont. Citizens for Decency Through Law).

284. *House Hearing on SB 276*, *supra* note 260, at 34:20-38:52 (statement of Dallas Erickson, Mont. Citizens for Decency Through Law); *Generally Revise Deviate Sexual Conduct Laws: Hearing on S.B. 276 Before the S. Comm. on the Judiciary*, 62d Leg., Reg. Sess. 13:55-20:20 (Mont. 2011) [hereinafter *Senate Hearing on SB 276*] (statement of Dallas Erickson, Mont. Citizens for Decency Through Law), <http://leg.mt.gov/css/Committees/Session/Minutes/AudioMinutes.asp?MeetingID=12215>.

285. *Judiciary Committee Hearing on HB 514*, *supra* note 269, at 1:41:29-1:43:19-1:38:21 (statement of Dallas Erickson, Mont. Citizens for Decency Through Law).

286. Charles S. Johnson, *Debate on Bills to Limit, Expand Gay Rights Tense at Montana Legislature*, MISSOULIAN (Feb. 19, 2011, 6:15 AM), http://missoulian.com/news/local/article_00971d24-3b9b-11e0-b663-001cc4c03286.html; Laura Lundquist, *Hamilton Pastor Turns Self In for Alleged Fraud; Authorities Seek 2nd Suspect*, MISSOULIAN (Sept. 28, 2011, 11:45 PM), http://missoulian.com/news/state-and-regional/article_c8ccaa92-ea47-11e0-b2d6-001cc4c03286.html. The Montana Eagle Forum describes itself as “a conservative pro-family organization working in our communities and state to influence public policy on issues that affect our traditional family values, our

during which the ordinance was debated and ultimately approved, Himes pleaded, “I beg you, I beg you to remember also for the sake of your souls this is a sin and you should not support it.”²⁸⁷ Thereafter, Himes appeared before the House Judiciary Committee to testify in support of HB 516. After reading his prepared testimony, a committee member asked Himes if religious organizations should be free to discriminate against LGBT Americans and, if so, on what basis.²⁸⁸ Himes responded: “Yes, they should be able to discriminate . . . and the religious reason is that . . . it is God himself who says that homosexuality is an abomination, and he has various punishments for that, too.”²⁸⁹ Asked what those punishments were, Himes answered, “the punishment in Leviticus 20:13 is this—if a man lies with a male as he lies with a woman, both of them have committed an abomination; they shall surely be put to death. That’s the punishment.”²⁹⁰ Like Erickson, moreover, Himes appeared before (1) both the House and Senate Judiciary Committees to oppose SB 276²⁹¹ and (2) the House Judiciary Committee to oppose HB 514.²⁹²

Representative Hansen, meanwhile, conceded that the concept for HB 516 originated with a local public policy group. When asked by a reporter why she, as a legislator from Havre, would introduce a bill seeking to repeal an ordinance in Missoula, Representative Hansen stated that she was carrying the bill on behalf of the Montana Family Foundation.²⁹³

The Montana Family Foundation is a self-described “pro-family values” organization dedicated to protecting “the traditional family.”²⁹⁴ The Foundation’s president, Jeff Laszloffy, is the former speaker pro tempore of the Montana House of Representatives.²⁹⁵ Speaking to supporters on February 23,

freedoms as outlined by the U.S. Constitution and place the highest regard for God.” *Who We Are*, MONT. EAGLE F., <http://www.montanaeagleforum.org/Who%5FWe%5FAre/> (last visited June 22, 2012).

287. Silverman Letter, *supra* note 279, at 3 (internal quotation marks omitted).

288. *Judiciary Committee Hearing on HB 516*, *supra* note 126, at 2:52:12-2:53:09 (statement of Rep. Ellie Hill).

289. *Id.* at 2:53:20-2:54:02 (statement of Harris Himes, Mont. Eagle Forum).

290. *Id.* at 2:54:21-2:54:38.

291. *House Hearing on SB 276*, *supra* note 260, at 24:56-34:17 (statement of Harris Himes, Mont. Eagle Forum); *Senate Hearing on SB 276*, *supra* note 284, at 20:57-27:27 (statement of Harris Himes, Mont. Eagle Forum).

292. *Judiciary Committee Hearing on HB 514*, *supra* note 269, at 1:35:40-1:37:01 (statement of Harris Himes, Mont. Eagle Forum).

293. *House Passes Bill to Strike Missoula Ban on Discrimination Against Gays*, BILLINGS GAZETTE (Feb. 23, 2011, 7:53 PM), http://billingsgazette.com/news/state-and-regional/montana/article_ef0ba7b3-95ae-551f-bd39-0948cadd8bea.html.

294. *Welcome*, MONT. FAM. FOUND., <http://montanafamily.org/welcome-to-the-montana-family-foundation> (last visited May 5, 2013); *House Passes Bill to Strike Missoula Ban on Discrimination Against Gays*, *supra* note 293 (“In 2004, [the Foundation] led the successful effort to put a constitutional amendment on Montana’s ballot to ban same-sex marriages.”).

295. John Kelleher, *Montana Family Foundation: Traditional Family Values Are Under Assault*, HAVRE DAILY NEWS (Aug. 30, 2010),

2011, Laszloffy characterized HB 516 as “a bill to prevent municipalities from passing gay rights laws.”²⁹⁶ Following the second of three House votes on HB 516, Laszloffy stated, “it’s sad to see how many legislators have walked away from God’s plan,” referring to the thirty-nine lawmakers who voted against the bill.²⁹⁷ Like his colleagues, Laszloffy appeared before the House Judiciary Committee and the Senate Local Government Committee to support HB 516,²⁹⁸ and before the House Judiciary Committee to oppose HB 514.²⁹⁹

Finally, as discussed in greater detail above, Representative Hansen repeatedly acknowledged that although HB 516 was drafted as a bill of general application, its immediate objective was to repeal the Missoula Ordinance.

Given that HB 516 was written, introduced, and advanced in response to Missoula’s adoption of an LGBT-inclusive nondiscrimination ordinance, the specific sequence of events indicates that a discriminatory purpose was a motivating factor in the legislature’s decision to advance HB 516, such that the bill would not have withstood heightened scrutiny had it become law.

3. Substantive Departures in Advancing HB 516

When a member of the House Judiciary Committee asked Representative Hansen how she was able to reconcile her support of HB 516 with her advocacy for limited government and local control, Representative Hansen stated that in this particular instance she felt “no hypocrisy” in arguing that Missoula’s actions were preempted by state law.³⁰⁰ Thus, had HB 516 been enacted, a court may have found that a discriminatory purpose underlay the statute to the extent that “factors usually considered important by [Representative Hansen and certain of her colleagues] strongly favor[ed] a decision contrary to the one reached.”³⁰¹

4. The Legislative History of HB 516

Statements by various legislators reveal that although Representative Hansen characterized HB 516 as bringing uniformity to the state’s antidiscrimination laws,³⁰² a number of her colleagues perceived the bill to be

<http://www.havredailynews.com/cms/news/story-187974.html>.

296. Silverman Letter, *supra* note 279, at 4.

297. *Id.* at 5 (internal quotation marks omitted).

298. *Judiciary Committee Hearing on HB 516*, *supra* note 126, at 2:25:23-2:25:39 (statement of Jeff Laszloffy, Mont. Family Found.); *Senate Hearing on HB 516*, *supra* note 132, at 39:39-43:53 (statement of Jeff Laszloffy, Mont. Family Found.).

299. *Judiciary Committee Hearing on HB 514*, *supra* note 269, at 1:37:07-1:38:03 (statement of Jeff Laszloffy, Mont. Family Found.).

300. *Judiciary Committee Hearing on HB 516*, *supra* note 126, at 3:05:20-3:05:21 (statement of Rep. Kristin Hansen).

301. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

302. *Judiciary Committee Hearing on HB 516*, *supra* note 126, at 2:09:20-2:09:50

motivated by anti-LGBT bias.³⁰³ Speaking on the House floor, Representative Michele Reinhart directly challenged Representative Hansen's proffered justification for the bill:

Proponents of this bill have talked about having uniformity with the application of the [Montana] Human Rights Act and the same processes that apply to other forms of discrimination; and yet given the opportunity to have that same due process for people under the law, House Judiciary tabled the very bill that would do exactly that. House Bill 514 . . . would have put protections for the lesbian, gay, bisexual, and transgender community under the Human Rights Act. That would have given them the uniformity they wanted and yet, they voted no and they tabled it. So I'd submit to you that argument is just a straw man for taking away local control. If they really did want to have this, they would add these protections to the Human Rights Act. This bill was targeted by specific religious organizations who promote discrimination against members of our community.³⁰⁴

Similarly, Senator Shannon Augare noted that most of Representative Hansen's concerns regarding uniformity would be addressed if sexual orientation, gender identity, and gender expression were added to the Montana Human Rights Act's list of protected classes.³⁰⁵ When asked if she would support such action, Representative Hansen answered in the negative.³⁰⁶

Thus, Representative Hansen's proffered justification for HB 516—ensuring uniformity in the state's antidiscrimination laws—appears dubious in light of her vote to table HB 514 and her opposition to amending the Montana Human Rights Act. The legislative history, therefore, suggests that a discriminatory purpose was at least a motivating factor in the legislature's decision to advance HB 516, such that the bill would not have withstood heightened scrutiny had it become law.

(statement of Rep. Kristin Hansen); *Limiting Local Ordinances to State Protected Classes: H. Deb. on H.B. 516*, 62d Leg., Reg. Sess. 6:15:36-6:15:58 (Mont. 2011) [hereinafter *HB 516 Floor Debate*] (statement of Rep. Kristin Hansen), <http://leg.mt.gov/css/Sessions/62nd/AudioFloor.asp?MeetingID=12437>; *Senate Hearing on HB 516*, *supra* note 132, at 15:44-32:50 (statement of Rep. Kristin Hansen).

303. *HB 516 Floor Debate*, *supra* note 302, at 6:17:03-6:17:18, (statement of Rep. Diane Sands) ("I would contend that regardless of the intentions of the good representative from Havre, the clear intention of the majority of the supporters who testified in Judiciary call for the imposition of a particular, ultraconservative religious perspective through state law."); *id.* at 6:24:39-6:24:53, (statement of Rep. Ellie Hill) ("Our local ordinance [in Missoula] was targeted by this body . . . because of who it seeks to protect.").

304. *Id.* at 6:36:13-6:36:59 (statement of Rep. Michele Reinhart).

305. *Senate Hearing on HB 516*, *supra* note 132, at 1:55:55-1:56:40 (statement of Sen. Shannon Augare).

306. *Id.* at 1:56:41-1:56:50 (statement of Rep. Kristin Hansen).

C. Nebraska

1. The Historical Background Against Which LB 912 Was Debated

Although LB 912 was the only LGBT-related bill introduced in Nebraska's 102nd Legislature, the defeat of pro-LGBT bills in prior sessions suggests that the legislators may have been motivated by a discriminatory purpose in advancing LB 912.

Since 1993, and most recently in 2007, the Nebraska Legislature has routinely rejected bills that would prohibit employment discrimination on the basis of sexual orientation.³⁰⁷ Nebraska Legislative Bill 475 (LB 475), introduced on January 17, 2007 by Senator Ernie Chambers of Omaha, would have prohibited public and private employers from discriminating on the basis of sexual orientation and expressly authorized cities to enact their own LGBT-inclusive nondiscrimination ordinances.³⁰⁸ During floor debate on LB 475, one of the lawmakers opposing the bill equated homosexuality with pedophilia while another expressed concerns about “unleash[ing] such things on [an] unsuspecting public.”³⁰⁹ Legislators thereafter voted to indefinitely postpone the bill.³¹⁰

2. The Specific Sequence of Events Leading Up to Debate on LB 912

As discussed in greater detail above, on August 18, 2011 Omaha City Councilman Ben Gray announced that he would introduce an LGBT-inclusive nondiscrimination ordinance sometime in the “very near future.”³¹¹ Because the first session of the 102nd Legislature adjourned on May 26, 2011³¹² and the second session would not convene until January 4, 2012,³¹³ state lawmakers were unable to introduce legislation preempting the ordinance before the start of the new year. On January 10, 2012 however, while Councilman Gray was still in the process of drafting his ordinance, Senator McCoy introduced LB 912

307. L.B. 475, 100th Leg., 1st Sess. (Neb. 2007); L.B. 759, 99th Leg., 1st Sess. (Neb. 2005); L.B. 19, 97th Leg., 1st Sess. (Neb. 2001); *see also* Memorandum from the Williams Inst., Nebraska–Sexual Orientation and Gender Identity Law and Documentation of Discrimination 1 & n.1 (Sept. 2009) (noting that virtually identical bills were also proposed, and failed to pass, during the 1993 and 1997 legislative sessions), *available at* <http://www.escholarship.org/uc/item/9w82f50b>).

308. L.B. 475, 100th Leg., 1st Sess. (Neb. 2007).

309. Martha Stoddard, *Gay Discrimination Ban Again Fails to Become Nebraska Law*, OMAHA WORLD-HERALD, May 23, 2007, at 1A (internal quotation marks omitted).

310. *Id.*

311. *See supra* note 141 and accompanying text.

312. LEG. JOURNAL, 102d Leg., 1st Sess. 1819 (Neb. 2011), *available at* <http://nebraskalegislature.gov/FloorDocs/102/PDF/Journal/r1journal.pdf>.

313. LEG. JOURNAL, 102d Leg., 2d Sess. 75 (Neb. 2012), *available at* <http://nebraskalegislature.gov/FloorDocs/102/PDF/Journal/r2journal.pdf>.

to prevent local governments from adopting nondiscrimination ordinances more inclusive than state law in terms of their protected classes.³¹⁴ In a February 20, 2012 interview, Gray characterized LB 912 as an attempt to preempt the Omaha City Council from acting to protect its LGBT citizens, noting “[t]he timing [was] suspicious.”³¹⁵

The specific sequence of events thus indicates that a discriminatory purpose was a motivating factor in the legislature’s decision to advance LB 912, such that the bill would not have withstood heightened scrutiny had it become law.

3. The Legislative History of LB 912

Statements by various legislators reveal that although Senator McCoy characterized LB 912 as a bill to harmonize antidiscrimination laws statewide,³¹⁶ other legislators understood that the bill would render Omaha’s consideration of an LGBT-inclusive nondiscrimination ordinance moot.³¹⁷

Furthermore, Senator McCoy’s proffered justification for LB 912—ensuring uniformity in the state’s antidiscrimination laws so as to “ease the burden on business”³¹⁸—appears dubious in light of his testimony before the Judiciary Committee. Seeking to emphasize the bill’s ostensibly narrow scope, Senator McCoy stated: “Under the Nebraska Fair Employment Act, an employer is defined as having 15 or more employees. Omaha defines . . . employer . . . as six or more employees. LB 912 would continue to allow Omaha’s more comprehensive definition of employer to continue.”³¹⁹ Citing the aforementioned definitional disparity, Senator Brenda Council of Omaha asked, “isn’t that the same issue that is purported to be at the root of LB 912, that there are differences in the application of the antidiscrimination laws?”³²⁰ Senator Council then asserted: “I thought I understood the reason for your introduction of LB 912 was to have uniformity. And if it’s your belief . . . that LB 912 doesn’t affect that level of uniformity, then I guess I question where there’s an advantage to enacting LB 912.”³²¹ In response, Senator McCoy stated: “Well, I think we’re talking about somewhat different things perhaps, Senator Council, if I may expand on that. Again, as I mentioned in my opening, what you’re speaking of is not changed by LB 912, nor do I desire to

314. See *supra* note 142 and accompanying text.

315. *Nebraska to Debate Bill Outlawing Local Gay Protections Laws*, ON TOP MAG. (Feb. 20, 2012), <http://www.ontopmag.com/article.aspx?id=11006&MediaType=1&Category=26> (internal quotation mark omitted).

316. *Hearing on LB 912*, *supra* note 145, at 1-2 (statement of Sen. Beau McCoy).

317. *Id.* at 8-10 (statement of Sen. Brad Ashford).

318. *Id.* at 1 (statement of Sen. Beau McCoy).

319. *Id.* at 2.

320. *Id.* at 3 (statement of Sen. Brenda Council).

321. *Id.* (alteration in original).

change that.”³²²

Even more telling is an exchange between Senator Council and Senator McCoy regarding LB 912’s retroactivity. After Senator Council mistakenly asserted that age was not a protected class under state law such that Omaha’s ban on age-based discrimination stood to be repealed if LB 912 were enacted,³²³ the following conversation occurred:

SENATOR McCOY: I’d be happy to address that concern if it’s a concern that the committee would have. It’s not my intent to create any sort of a difference between what is state statute and what is Omaha city ordinance as to age.

SENATOR COUNCIL: Okay. But under your bill, the only way to make it consistent would be to amend state statute to include age; or . . . Omaha couldn’t prosecute allegations of age discrimination because it’s not a stated protected class.

SENATOR McCOY: Well again, I would stand ready to address that if we need to. I’m not aware . . . that there is a difference between state statute and city statute; may be mistaken on age.

SENATOR COUNCIL: . . .[S]ince state statute doesn’t cover age but Omaha covers age, the willingness to address it in that regard would require . . . Nebraska statute to be amended. So the question is if Omaha’s ordinance provides for a protected class covering gays, lesbians, bisexual, and transgender and current Nebraska statute doesn’t, would the same process be open to be pursued in that instance? Let’s assume Omaha covers [LGBT persons] and Nebraska doesn’t. Would your bill be open to amending Nebraska statute to cover those areas?

SENATOR McCOY: Wouldn’t want to speak to a hypothetical, Senator Council. That’s not currently in city of Omaha ordinance, and so because of that it’s impossible for me to define how that would operate in that particular environment.³²⁴

The fact that Senator McCoy failed to correct Senator Council is odd, particularly since he references Nebraska’s Age Discrimination in Employment Act in the text of his bill.³²⁵ Yet it is the eagerness with which Senator McCoy vowed to remedy any disparity between state and local law in regards to age as contrasted with his hesitancy to do the same for sexual orientation or gender identity that reveals the true discriminatory purpose underlying the bill.

D. Michigan

1. The Historical Background Against Which HB 5039 Was Introduced

HB 5039 was one of three LGBT-related bills introduced in Michigan’s

322. *Id.* at 4 (statement of Sen. Beau McCoy).

323. *Id.* at 5 (statement of Sen. Brenda Council).

324. *Id.* at 5-6.

325. L.B. 912, 102d Leg., 2d Sess. (Neb. 2012).

96th Legislature. Although all three bills were ultimately defeated, two of the bills stood to advance, rather than hinder, the cause of LGBT equality. The defeat of these latter two bills suggests that legislators may have been motivated by a discriminatory purpose in advancing HB 5039.

Michigan Senate Bill 1063 (SB 1063) would have added sexual orientation, gender identity, and gender expression to the list of protected classes recognized by the state.³²⁶ SB 1063 was referred to the Senate Government Operations Committee, where it died without ever receiving a hearing.³²⁷ Similar legislation was introduced and rejected in 2009,³²⁸ 2007,³²⁹ 2005,³³⁰ 2003,³³¹ 2001,³³² and 1999.³³³

Michigan Senate Bill 45 (SB 45) would have enacted an LGBT-inclusive ban on bullying in public schools.³³⁴ After being reported favorably by the Senate Education Committee, SB 45 was referred to the Senate Judiciary Committee, where it died without ever receiving a hearing.³³⁵ Similar

326. S.B. 1063, 96th Leg., Reg. Sess. (Mich. 2012).

327. *Bill Information for SB 1063*, MICH. LEGIS. WEBSITE, <http://www.legislature.mi.gov/%28S%28jpefwgjq0dbpcu55gkw3x1n2%29%29/mileg.aspx?page=getobject&objectname=2012-SB-1063&query=on> (last visited May 6, 2013).

328. H.B. 4192, 95th Leg., Reg. Sess. (Mich. 2009); *Bill Information for HB 4192*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(1pflgtjtl3yepcvajso2hn45\)\)/mileg.aspx?page=getObject&objectName=2009-HB-4192](http://www.legislature.mi.gov/(S(1pflgtjtl3yepcvajso2hn45))/mileg.aspx?page=getObject&objectName=2009-HB-4192) (last visited May 7, 2013).

329. H.B. 4160, 94th Leg., Reg. Sess. (Mich. 2007); *Bill Information for HB 4160*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2007-HB-4160](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2007-HB-4160) (last visited May 7, 2013).

330. H.B. 4956, 93d Leg., Reg. Sess. (Mich. 2005); S.B. 787, 93d Leg., Reg. Sess. (Mich. 2005); *Bill Information for HB 4956*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2005-HB-4956](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2005-HB-4956) (last visited May 7, 2013); *Bill Information for SB 787*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2005-SB-0787](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2005-SB-0787) (last visited May 7, 2013).

331. H.B. 4850, 92d Leg., Reg. Sess. (Mich. 2003); S.B. 609, 92d Leg., Reg. Sess. (Mich. 2003); *Bill Information for HB 4850*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2003-HB-4850](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2003-HB-4850) (last visited May 7, 2013); *Bill Information for SB 609*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2003-SB-0609](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2003-SB-0609) (last visited May 7, 2013).

332. H.B. 4661, 91st Leg., Reg. Sess. (Mich. 2001); *Bill Information for HB 4661*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2001-HB-4661](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2001-HB-4661) (last visited May 7, 2013). This bill, however, did not address gender identity or expression. *See* Mich. H.B. 4661.

333. H.B. 5107, 90th Leg., Reg. Sess. (Mich. 1999); *Bill Information for HB 5107*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=1999-HB-5107](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=1999-HB-5107) (last visited May 7, 2013). This bill also did not address gender identity or expression. *See* Mich. H.B. 5107.

334. S.B. 45, 96th Leg., Reg. Sess. (Mich. 2011).

335. *Bill Information for SB 45*, MICH. LEGIS. WEBSITE, <http://www.legislature.mi.gov/%28S%28jpefwgjq0dbpcu55gkw3x1n2%29%29/mileg.aspx?page=getobject&objectname=2011-SB-0045&query=on> (last visited May 7, 2013).

legislation was introduced and rejected in 2009,³³⁶ 2007,³³⁷ 2006,³³⁸ 2003,³³⁹ and 2000.³⁴⁰

Moreover, “[a]lthough Michigan has adopted modern criminal sexual conduct laws based upon the Model Penal Code, the legislature still has not repealed the old sodomy and gross indecency statutes, which criminalize homosexual behavior.”³⁴¹

2. The Specific Sequence of Events Leading Up to HB 5039’s Introduction

On May 22, 2011, the American Family Association of Michigan (AFA-Michigan)³⁴² reported that Governor Haslam had signed HB 600 into law and announced that “AFA-Michigan will be urging lawmakers in Lansing to introduce the same legislation.”³⁴³ Speaking with reporters in early 2012,

336. H.B. 5093, 95th Leg., Reg. Sess. (Mich. 2009); S.B. 159, 95th Leg., Reg. Sess. (Mich. 2009); *Bill Information for HB 5093*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2009-HB-5093](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2009-HB-5093) (last visited May 7, 2013); *Bill Information for SB 159*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2009-SB-0159](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2009-SB-0159) (last visited May 7, 2013).

337. H.B. 4162, 94th Leg., Reg. Sess. (Mich. 2007); S.B. 107, 94th Leg., Reg. Sess. (Mich. 2007); *Bill Information for HB 4162*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2007-SB-0159](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2007-SB-0159) (last visited May 7, 2013); *Bill Information for SB 107*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2007-SB-0107](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2007-SB-0107) (last visited May 7, 2013).

338. H.B. 5616, 93d Leg., Reg. Sess. (Mich. 2006); S.B. 1156, 93d Leg., Reg. Sess. (Mich. 2006); *Bill Information for HB 5616*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2006-HB-5616](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2006-HB-5616) (last visited May 7, 2013); *Bill Information for SB 1156*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2006-SB-1156](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2006-SB-1156) (last visited May 7, 2013).

339. H.B. 4957, 92d Leg., Reg. Sess. (Mich. 2003); S.B. 92, 92d Leg., Reg. Sess. (Mich. 2003); *Bill Information for HB 4957*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2003-HB-4957](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2003-HB-4957) (last visited May 7, 2013); *Bill Information for SB 92*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2003-SB-0092](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2003-SB-0092) (last visited May 7, 2013).

340. H.B. 5259, 90th Leg., Reg. Sess. (Mich. 2000); *Bill Information for HB 5259*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(5vuvz055ek4itbejdrka2e55\)\)/mileg.aspx?page=getObject&objectName=2000-HB-5259](http://www.legislature.mi.gov/(S(5vuvz055ek4itbejdrka2e55))/mileg.aspx?page=getObject&objectName=2000-HB-5259) (last visited May 7, 2013).

341. Memorandum from the Williams Instit., Michigan—Sexual Orientation and Gender Identity Law and Documentation of Discrimination 15 (Sept. 2009) (footnotes omitted), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Michigan.pdf>.

342. AFA-Michigan’s parent organization has been labeled an anti-gay hate group by the Southern Poverty Law Center. *Intelligence Files: American Family Association*, S. POVERTY L. CENTER, <http://www.splcenter.org/get-informed/intelligence-files/groups/american-family-association> (last visited May 8, 2013).

343. *Baptist Press* — “Gender Identity” Repeal Bill Goes to Tennessee Governor, AM. FAM. ASS’N MICH. (May 22, 2011), <http://www.afamichigan.org/2011/05/22/baptist-press->

AFA-Michigan's president, Gary Glenn, stated, "Rep. McMillin and I discussed this legislation in a meeting of pro-family lawmakers at the state Capitol in June and in private conversations before and after It's simple and straightforward, providing that local governments cannot create special 'protected class' status on the basis of homosexual behavior or cross-dressing."³⁴⁴ According to Glenn, HB 5039 was needed to protect religious institutions and organizations from the "discrimination and persecution they've regularly suffered under so-called 'gay rights' laws such as passed in a handful of Michigan cities."³⁴⁵

The strength of Glenn and Representative McMillin's relationship is evident from AFA-Michigan's website. Upon clicking on the "About Us" tab, the reader is directed to an excerpt from a 2001 article providing:

The following is a statement by Auburn Hills Mayor Tom McMillin in a year-end report to his supporters:

The brightest development in 2000 in Michigan was the rise to prominence of the American Family Association of Michigan and its leader, Gary Glenn.

In all of the issues I mention above (so-called "gay rights" ordinances in Ferndale and Royal Oak, the Boy Scouts' stand on homosexuality, and [the University of Michigan's] "How to be Gay" class), Gary was really the leader for our cause.³⁴⁶

The remainder of the site is devoted to condemning LGBT individuals as disease-ridden sinners bent on destroying Christian America.³⁴⁷

On April 6, 2012, Representative McMillin issued a press release discussing the status of HB 5039.³⁴⁸ The statement began by characterizing HB 5039 as "an effort to preserve the civil rights discussion at the state level" so as to avoid "an inconsistent patchwork of laws regarding civil rights."³⁴⁹ The piece then went on to state:

After a request for action from the ACLU, a state senator has announced plans to introduce a bill that will expand [state law] to include those living a homosexual or transgender lifestyle. I agree with the ACLU that this debate should be at the state level, although I disagree with expanding the definition of protected class to include those who engage in a particular lifestyle. I am

gender-identity-repeal-bill-goes-to-tennessee-governor.

344. Andy Birkey, *Conservatives Plot to Roll Back LGBT Protections*, AM. INDEP. (Mar. 5, 2012, 3:16 PM), <http://americanindependent.com/213033/conservatives-plot-to-roll-back-lgbt-protections> (internal quotation marks omitted).

345. *Id.* (internal quotation marks omitted).

346. See *About AFA of Michigan*, AM. FAM. ASS'N MICH., <http://www.afamichigan.org/2004/01/01/aboutus> (last visited May 8, 2013) (internal quotation marks omitted).

347. See AM. FAM. ASS'N MICH, <http://www.afamichigan.org> (last visited May 8, 2013).

348. Press Release, Rep. Tom McMillin, Statement on Elliott-Larsen Civil Rights Act (Apr. 6, 2012) (on file with author).

349. *Id.*

also particularly concerned about the discriminatory nature of so-called “non-discrimination ordinances” that some cities have adopted.³⁵⁰

Representative McMillin gave some indication of what he meant by “the discriminatory nature of so-called non-discrimination ordinances” during an October 2011 interview in which he asserted:

[I] know that the local special rights ordinances are used to discriminate against groups like the Boy Scouts in Detroit, a Christian-owned printing business in Ypsilanti who didn’t want to print items for an event celebrating something he views as sinful, and is likely to be used against Christian-owned coffee shops in the Traverse City area.³⁵¹

The specific sequence of events, therefore, suggests that Representative McMillin was motivated, at least in part, by a discriminatory purpose, such that HB 5039 would not have withstood heightened scrutiny had it become law.

E. Oklahoma

1. The Historical Background Against Which HB 2245 Was Debated

HB 2245 was one of five LGBT-related bills introduced in Oklahoma’s 53rd Legislature. Of the four bills that were defeated, one would have advanced, rather than hindered, the cause for LGBT equality. Oklahoma Senate Bill 265 would have added sexual orientation and gender identity to the list of classes protected under Oklahoma’s hate crimes statute.³⁵² Oklahoma House Bill 1461, meanwhile, would have strengthened the state’s existing anti-bullying laws, yet because certain LGBT-specific provisions included in the original text were stricken from subsequent versions, HB 1461 ultimately died a hostile bill.³⁵³ Both of the remaining anti-LGBT bills were sponsored by Representative Reynolds. In addition to HB 2245, Representative Reynolds introduced Oklahoma House Bill 2195 which would have implemented the U.S. military’s former “Don’t Ask, Don’t Tell” policy in the Oklahoma National Guard.³⁵⁴

The only bill to be enacted into law, moreover, served to institutionalize discrimination against the LGBT community. Oklahoma Senate Bill 837 (SB 837) was designed to modernize and revise Oklahoma’s various

350. *Id.*

351. Heywood, *supra* note 153 (internal quotation marks omitted).

352. S.B. 265, 53d Leg., 1st Sess. (Okla. 2011); *Bill Information for SB 265*, OKLA. ST. LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB265&Session=1100> (last visited May 7, 2013).

353. H.B. 1461, 53d Leg., 1st Sess. (Okla. 2011); *Bill Information for HB 1461*, OKLA. ST. LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1461&Session=1100> (last visited May 7, 2013).

354. H.B. 2195, 53d Leg., 2d Sess. (Okla. 2012).

nondiscrimination statutes.³⁵⁵ In relevant part, the bill sought to strike the term “handicap” and replace it with the word “disability.”³⁵⁶ Mimicking the language of the Americans with Disabilities Act,³⁵⁷ SB 837 defined “disability” as “a physical or mental impairment which substantially limits one or more of such person’s major life activities.”³⁵⁸ The bill, however, went on to specify that the term disability “does not apply to an individual because of sexual orientation or the sexual preference of the individual or because that individual is a transvestite.”³⁵⁹ Thus, SB 837 not only failed to extend nondiscrimination protections to the LGBT community, but also both implied that LGBT Americans are somehow disabled and inappropriately used the term “transvestite” to refer to transgender persons.

Separately, “Oklahoma laws included a statute prohibiting employment of openly gay teachers in public schools” as late as 1990,³⁶⁰ and the Oklahoma House of Representatives passed a bill in 1999 that would have barred “known homosexuals” from working in public schools.³⁶¹

Finally, although Oklahoma’s same-sex sodomy statute is similar to the provision invalidated in *Lawrence v. Texas*,³⁶² the legislature has not removed the offending language from the Oklahoma Code.³⁶³

The historical background against which HB 2245 was debated, therefore, indicates that a discriminatory purpose was a motivating factor in the legislature’s decision to advance HB 2245, such that the bill would not have withstood heightened scrutiny had it become law.

2. The Specific Sequence of Events Leading Up to Debate on HB 2245

As discussed in greater detail above, Representative Reynolds introduced HB 2245 in response to Oklahoma City’s adoption of an LGBT-inclusive nondiscrimination ordinance.³⁶⁴

Representative Reynolds, moreover, has a long history of opposing LGBT equality. As already noted, he introduced a bill to implement the U.S. military’s former “Don’t Ask, Don’t Tell” policy in the Oklahoma National

355. S.B. 837, 53d Leg., 1st Sess. (Okla. 2011).

356. *Id.*

357. *See* Americans with Disabilities Act of 1990 § 2, 42 U.S.C. § 12102 (2011).

358. Okla. S.B. 837.

359. *Id.*

360. Memorandum from the Williams Inst., Oklahoma—Sexual Orientation and Gender Identity Law and Documentation of Discrimination 1 (Sept. 2009), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Oklahoma.pdf>.

361. *Id.* at 6 (internal quotation marks omitted).

362. 539 U.S. 558, 563 (2003).

363. OKLA. STAT. tit. 21, § 886 (2013) (“Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment . . . not exceeding ten (10) years.”).

364. *See supra* note 161 and accompanying text.

Guard on the very same day that he introduced HB 2245. Furthermore, in 2009, Representative Reynolds signed the *Oklahoma Citizens' Proclamation for Morality* authored by Representative Sally Kern.³⁶⁵ Representative Kern gained notoriety in 2008 when she asserted that homosexuality is “the biggest threat . . . our nation has [ever faced], even more so than terrorism or Islam.”³⁶⁶ In pertinent part, her proclamation provides:

WHEREAS, deeply disturbed that the Office of the president of these United States disregards the biblical admonitions to live clean and pure lives by proclaiming an entire month to an immoral behavior [i.e., LGBT Pride Month in June of each year];

NOW THEREFORE, BE IT RESOLVED that we the undersigned elected officials of the people of Oklahoma, religious leaders and citizens of the State of Oklahoma, appealing to the Supreme Judge of the world, solemnly declare that the HOPE of the great State of Oklahoma and of these United States, rests upon the Principles of Religion and Morality as put forth in the HOLY BIBLE[.]³⁶⁷

The specific sequence of events preceding debate on HB 2245, thus, confirms that a discriminatory purpose was a motivating factor in the legislature's decision to advance HB 2245, such that the bill would not have withstood heightened scrutiny had it become law.

3. Substantive Departures in Advancing HB 2245

During the exceptionally brief hearing on HB 2245, a member of the House Judiciary Committee asked Representative Reynolds how he could reconcile his support of HB 2245 with his general legislative philosophy favoring limited government and local control.³⁶⁸ Representative Reynolds responded, “I think if a city wanted to pass a speed limit . . . that said speed can be 80, I don't think we'd have any problem reconciling it; I consider this a similar situation.”³⁶⁹ The committee member then noted that “protections [for] city employees [is] something that is traditionally and has always been left to the municipalities themselves much like most of the city code, so I wouldn't agree with your comparison of the state highway.”³⁷⁰ When asked again how he was able to reconcile his bill with notions of limited government,

365. Greg Horton, *More than 100 People Sign State Rep. Sally Kern's Proclamation*, OKLA. GAZETTE (July 15, 2009), <http://www.okgazette.com/oklahoma/article-4090-more-than-100-people-sign-state-rep-sally-kerns-proclamation.html>.

366. IWantDemocracyNow, *Oklahoma State Rep. Says Gays Biggest Threat to US*, YOUTUBE (Mar. 11, 2008), http://www.youtube.com/watch?v=G_y3-ckuM3E.

367. SALLY KERN, OKLAHOMA CITIZEN'S PROCLAMATION FOR MORALITY (2009) (emphasis omitted), available at <http://ftpcontent.worldnow.com/griffin/NEWS9/PDF/0906/OKMoralityProclamation.pdf>.

368. *Hearing on HB 2245*, *supra* note 164, at 15:38-15:51.

369. *Id.* at 15:52-16:07 (statement of Rep. Mike Reynolds).

370. *Id.* at 16:10-16:33.

Representative Reynolds answered, “if you’re discussing the issue we can do that, but if you’re asking how I reconcile it with limited government I just gave you as good a description as I can.”³⁷¹ Because “the factors usually considered important by [Representative Reynolds] strongly favor”³⁷² respecting cities’ decisions to adopt LGBT-inclusive nondiscrimination ordinances, HB 2245 appears to have been motivated by a discriminatory purpose, such that it would not have withstood heightened scrutiny had it become law.

CONCLUSION

The Intrastate Commerce Act and its progeny were introduced, advanced, and in one case enacted, “‘because of,’ not merely ‘in spite of,’ [their] adverse effects upon [the LGBT community].”³⁷³ Nonetheless, these measures are likely to be upheld against any equal protection challenge on the grounds they are rationally related to promoting intrastate commerce.

This outcome was made possible by the Supreme Court’s ruling in *Romer*. Although initially hailed as the most significant legal victory for LGBT Americans in our nation’s history, the *Romer* decision has had the unintended consequence of furnishing lawmakers with a virtual “how-to” manual for drafting anti-LGBT legislation. Such measures will be upheld provided they are neither facially discriminatory toward LGBT Americans nor overly ambitious in terms of the harm they seek to inflict on the LGBT community.

The Supreme Court must recognize sexual orientation and gender identity as quasi-suspect classes so that facially neutral laws having a disparate impact on the LGBT community may be subjected to closer scrutiny than is permitted under ordinary rational basis review. By allowing courts to consider the specific sequence of events leading up to the introduction of these types of bills, the historical background against which they are being debated, and any substantive or procedural irregularities in the manner of their enactment, heightened scrutiny would ensure that courts are no longer complicit in denying LGBT Americans the equal protection of the laws.

371. *Id.* at 16:34-16:48 (statement of Rep. Mike Reynolds).

372. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

373. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).