To: Office of the Attorney General of Texas

From: Texas Values

Re: Authority of the Behavioral Health Executive Council to adopt a rule prohibiting certain discriminatory conduct by licensed social workers (RQ-0391-KP)

Date: January 15, 2021

INTRODUCTION

When the Texas Legislature confers authority on a state agency to carry out express functions or duties, it does not give the agency a blank check to enact any regulations it wants or to go beyond the clear, unambiguous language of the authorizing statute. Protected classifications are created by legislatures in response to systemic, concrete, and ongoing discrimination. It is solely the prerogative of the Texas Legislature to make that determination – not an entity like the Behavioral Health Executive Council (Council).

In 2019, the Texas Legislature specifically declined to add sexual orientation and gender identity as protected classifications under state law that applies to professional conduct by social workers. The Texas Legislature considered this matter and chose not to approve such a change in statewide public policy. Thus, the Behavior Health Executive Council is without authority to add the controversial and legally problematic new classifications of sexual orientation and gender identity to state law for the field of social workers.

The U.S. Supreme Court's recent decision in *Bostock v. Clayton County,* 139 S. Ct. 2049 (2019) does not provide legal support for the Council to unilaterally add sexual orientation and gender identity to statewide standards of conduct for social workers. *Bostock* was narrowly

construed to apply to sex discrimination claims under Title VII – and not to any other federal or state law.

Finally, the adoption of 22 TAC 781.301(1) violates the Texas Religious Freedom Restoration Act (RFRA) and discriminates against people of faith who hold millenia-old views regarding marriage and what it means to be male and female; and it also empowers LGBT activists with tools to punish people of religious faiths who adhere to those views. The mere existence and protections by the Texas Religious Freedom Restoration Act (RFRA) are not reason enough to plunge head first into a collision of the First Amendment with the most recent political demand of the day.

DISCUSSION

The Proposed Rule Violates Unambiguous Statutory Language and Legislative Intent

Texas law currently prohibits discrimination in the social work profession on the basis of "sex, race, religion, national origin, color, or political affiliation." Tex. Occ. Code Sec. 505.004. See also, Tex. Occ. Code Sec. 505.451. This list provides an exhaustive, and unambiguous, list of the protected classifications for the profession. The Council is bound to this list. And it has authority to regulate discrimination in the profession based on these grounds—but no other. Despite arguments by the Council otherwise, the Texas Legislature has consistently rejected efforts to insert sexual orientation and gender identity ("SOGI") classifications into state law.

The Council argues that the inclusion of SOGI classifications "comports with the Legislature's intent" because the legislature prohibits discrimination based other specified characteristics listed above. Thankfully, the law does not work this way. An unelected agency cannot simply decide that a characteristic has received sufficient societal acceptance so as to become a protected class. Protected classifications are created by legislatures in response to systemic, concrete, and ongoing discrimination against politically powerless groups. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973) (discussing political powerlessness as indicia of a suspect category).

Not only does the unambiguous language of the relevant code sections preclude the expansion of protected classifications, but the legislative history surrounding this section and efforts to amend it further preclude the Council's efforts to add other classifications.

During the 86th Regular Session of the Texas Legislature, at least 10 separate bills[1] were filed purporting to prohibit types of discrimination on the basis of "sexual orientation" or "gender identity" including HB 517[2], SB 154[3], and HB 1190[4]. Significantly, HB 517 was filed to allow the government to punish social workers, counselors, and other mental health providers, by labeling their work as "engaging in unprofessional conduct" and subject to punishment if they worked with people from a Christian perspective on issues of sexual orientation and gender identity. This bill sought to create new classifications and statutory definitions for sexual orientation and gender identity in state law. This bill, like several others filed during the same session, sought to ban the free expression of religious beliefs for social workers as defined by Chapter 505, the same chapter from which the Council incorrectly claims authority to adopt a rule that includes SOGI classifications. A representative of the National Association of Social Worker Texas Chapter, even registered in favor of HB 517 on behalf of the organization. If the authority to adopt such a rule already exists, why bother filing or supporting legislation purporting to give that very authority? More importantly, if the Council believes it already has authority to implement such a rule, why bother seeking an opinion from the Office of the Attorney General of Texas? These both demonstrate that the relevant sections of state law do not create SOGI as protected classifications nor give the Council the authority to elevate SOGI to protected classifications.

During the 85th Regular Session of the Texas Legislature, Rep. Bernal filed housing discrimination legislation (HB 192[5]) that included SOGI language. This bill was reported out of committee after a hearing by a slim 4-3 vote, but failed to pass the House. These bills were highly controversial and were opposed by Texas Values and other entities and individuals publicly and in a House Committee hearing. Specific opposition included the negative impact these bills would have on Christians and other people of faith who follow religious teaching on issues of sexuality and gender, so much that during the 86th Texas Legislature these SOGI bills were labeled "Ban the Bible" bills.

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[1] https://txvaluesaction.org/texans-respond-to-liberal-banthebible-bill-efforts/

[2] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB517

[3] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB154

[4] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB1190

[5] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=HB192

During the 84th Regular Session of the Texas Legislature, Senator Rodriguez and coauthors introduced SB 856[6], a public accommodation bill with a definition for sexual orientation. This bill was referred to committee and died without receiving a hearing. During the 83rd Regular Session of the Texas Legislature, Rep. Villarreal introduced a measure (HB 238) that included a definition for "gender identity or expression." This legislation was considered in a public hearing and ultimately failed to pass the House. These bills were highly controversial and were opposed by Texas Values and other entities and individuals.

The default position for protected classifications is the recognition that the legislature, with its duly elected representatives, had specific reasons for including the classifications that it did include, and for excluding those that it excluded or refused to add to state law. It is also important to note the Texas Legislature's process for a bill to become law is quite thorough, allowing for the necessary scrutiny for policy that applies statewide; including substantial time, public committee hearings and floor debates in the Texas House and Senate, and the final analysis and approval of the Governor. Furthermore, the votes cast on these important statewide policies by the Texas Legislature are cast by elected officials that are accountable to voters in Texas.

The Council is a nine-member board, with 8 members being appointed by the four associated disciplines, and one public member appointed by the Governor. It is not the place of the Council to substitute its own judgement, or to infer what the Legislature would have wanted by broadening the list of protected classifications not listed in the relevant statute. Efforts to add sexual orientation and gender identity to create a new category or legal classification for discrimination purposes to state law have been ample over recent years, and in 2019 specifically for "unprofessional conduct" for "a social worker licensed under Chapter 505" (HB 517). And time and again, the Legislature has refused to elevate SOGI to protected status.

On page 4 of this request, the Council argues that "including...sexual orientation, and gender identity and expression to this list comports with the Legislature's intent." This assertion is clearly false. We don't have to guess as to the Legislature's intent as it was clearly expressed when it refused to pass HB 517, as previously discussed. If the Texas Legislature wanted to add such new legal classifications for social workers, it would have chosen to when the opportunity

[6] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=SB856

presented itself. It did not. And lastly, if the Council had the authority to add such language and new classifications for social worker conduct, then there would have been no reason to push for such a change in law as indicated by HB 517.

The Proposed Rule Incorrectly Relies on *Bostock*

The Council argues that the inclusion of SOGI classifications is supported by the recent U.S. Supreme Court *Bostock* decision. This is false, as the *Bostock* court specifically rejected the notion that its opinion should have any impact on other federal or state laws:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.

Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1753 (2020) (emphasis added).

The Supreme Court was very clear that its ruling in *Bostock* only applied to sex discrimination claims under Title VII—and not to any other federal or state law. That ruling does not support the Council's effort to read SOGI into Texas state law.

The Proposed Rule Violates Texas RFRA and Discriminates Against People of Faith

The Council suggests that even if "sex" was not intended by the Texas Legislature to include SOGI, there is no reason why including such language would not nevertheless be in line with the Legislature's intent. However, as the Supreme Court recognized in *Obergefell v. Hodges*, 576 U.S. 644 (2015), marriage is viewed by many people as a "gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."

SOGI language raises many concerns about the impact of such language on people of faith. When "sexual orientation" and "gender identity" are elevated to the status of a protected class, the effect is to ban disagreement on LGBT issues by enforcing a sexual orthodoxy – using SOGI issues as a sword to punish people of faith.

One such example is Christian cake artist Jack Phillips, who in good conscience refused to use his creative talents to create custom wedding cakes that had a message of celebrating same-sex marriage. Jack believed he was serving Christ through each cake he created. He turned down

other requests for cakes celebrating issues which violated his Christian beliefs, such as Halloween-themed requests.

Jack disagreed with same-sex marriage, but disagreement on the basis of his conviction that marriage is the union of a biological man and woman does not signal discrimination. It signals someone living according to the dictates of their sincerely held religious beliefs. This is not the same as invidious discrimination, which is rooted in unfair, socially debilitating attitudes or ideas about individuals' worth, proper social status, or actions. *Loving v. Virginia,* 388 U.S. 1 (1967). Interracial marriage bans were an example of invidious discrimination.

An even more on-point example involved Julea Ward, a graduate student at Eastern Michigan University (EMU) who was expelled from her counseling program because of her beliefs about human sexuality. In January 2009, Julea was assigned a potential client seeking assistance regarding a homosexual relationship. Recognizing the potential values conflict with the client, and knowing she could not affirm the client's homosexual relationship without violating her religious beliefs regarding extra-marital sexual relationships, Julea asked her supervisor how to handle the matter. Consistent with ethical and professional standards regarding referral, Ward was advised to reassign the potential client to a different counselor, which she did. Shortly thereafter, EMU informed Julea that the only way she could stay in the counseling program would be if she agreed to undergo a "remediation" program.

In December 2012, the U.S. Court of Appeals for the Sixth Circuit ruled in favor of Julea Ward. In a strongly worded opinion, the court held that "a reasonable jury could conclude that Ward's professors ejected her from the counseling program because of hostility toward her speech and faith...." *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012). The court continued:

> [W]hat did Ward do wrong? Ward was willing to work with all clients and to respect the school's affirmation directives in doing so. That is why she asked to refer gay and lesbian clients (and some heterosexual clients) if the conversation required her to affirm their sexual practices. What more could [EMU's] rule require? Surely, for example, the ban on discrimination against clients based on their religion (1) does not require a Muslim counselor to tell a Jewish client that his religious beliefs are correct if the conversation takes a turn in that direction and (2) does not require an atheist counselor to tell a person

of faith that there is a God if the client is wrestling with faith-based issues. Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination.

Id. at 735 (emphasis added). The *Ward* litigation highlights a growing threat to religious liberty within the counseling and social work professions.

The Council argues that the Texas Religious Freedom Restoration Act (RFRA) provides certain safeguards for people of faith concerned about what SOGI could mean to their ability to practice their profession. The Texas RFRA, codified in Civil Practice and Remedies Code Chapter 110, follows its federal predecessor in mandating that a government agency may not substantially burden a person's free exercise of religion *unless* it is "in the furtherance of a compelling governmental interest." Some are no doubt already planning to argue that the state's compelling interest in outlawing alleged SOGI discrimination justifies the burden it imposes on people of faith. This is an ever-present threat to religious freedom.

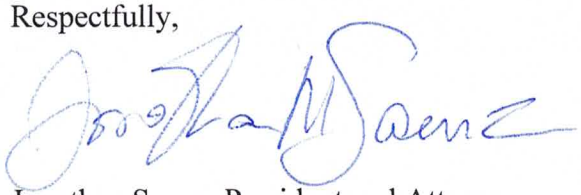
Unfortunately, Texas' RFRA is not guaranteed to provide the ultimate protection against such burdens. While there is value provided by Texas' RFRA statute, it must be noted the highly litigious and aggressive efforts of advocates for sexual orientation and gender identity who want to punish, put out of business, (and sometimes incarcerate) Bible-believing Christians and other people of faith on these issues. This likely means the issue will be left for a court to decide who wins after significant damage is already done.

CONCLUSION

In closing, we urge the Texas Attorney General's Office to rule that the Behavioral Health Executive Council does not have the statutory authority to adopt 22 Tex. Admin. Code 781.301(1) which includes new legal classifications based on sexual orientation and gender identity. Both Texas statutory law and legislative history and intent make it clear that the Behavioral Health Executive Council does not possess authority to add legally problematic new classifications of sexual orientation and gender identity to state law because adoption of such a proposed rule runs directly counter to the clear will of the Texas Legislature. The Texas Legislature specifically declined to add sexual orientation and gender identity as protected classifications under state law when it rejected HB 517 – a bill that specifically applied to social workers and Chapter 505 of the Texas Occupations Code. Further, *Bostock* specifically rejected application beyond sex

discrimination claims under Title VII. Any effort to insert SOGI language into state law on the basis of *Bostock* goes beyond its scope. Finally, rules such as the one proposed and in question here by the Behavioral Health Executive Council have often been used as a weapon to punish reasonable and sincere people of faith by banning disagreement. A sexual orthodoxy such as this provides no discernable benefit to those with which it resonates and could have harmful ripple effects for future religious freedom issues.

Respectfully,



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