RESOLUTION

RESOLVED, That the American Bar Association urges Congress to pass legislation which explicitly affirms that discrimination because of sexual orientation, gender identity/expression, sex stereotyping, or pregnancy is sex discrimination prohibited by the Civil Rights Act of 1964 and other federal statutes; and adds sex, sexual orientation and gender identity/expression protections to those statutes; and

FURTHER RESOLVED, That the American Bar Association supports enactment of the Equality Act (H.R. 2282, 115th Congress) or similar legislation that advances LGBTQ rights; and

FURTHER RESOLVED, That the American Bar Association urges all courts within the United States to recognize that religiously neutral laws of general applicability prohibiting discrimination on the basis of sex (which includes discrimination on the basis of sexual orientation or gender identity/expression) do not improperly burden the religious free exercise rights of those operating places of public accommodation. This resolution does not apply to the application of nondiscrimination laws to religious institutions to the extent that application would substantially interfere with the exercise of a fundamental religious tenet of the religious institution.
This Resolution states that: (1) discrimination because of sexual orientation or gender identity is sex discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes; and (2) federal statutory protections for religious freedom do not authorize violation of nondiscrimination laws. This Resolution also affirms that religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation. This report addresses the legal authority supporting this understanding and call to action, including two actions in particular: (1) passage by Congress of the federal Equality Act, which affirms explicitly that discrimination because of sexual orientation or gender identity is sex discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes, and that federal statutory protection for religious freedom does not authorize violation of the nondiscrimination laws; and (2) further confirmation by the United States Supreme Court and lower courts that religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation.

The ABA has adopted several policies that are consistent with this Resolution and these calls to action, including multiple resolutions supporting sexual orientation and gender identity (SOGI) nondiscrimination, as well as policies robustly supporting religious freedom together with the responsibility of government to maintain order and protect the interests of third parties. The ABA first resolved to support sexual orientation nondiscrimination in employment, housing and public accommodations in 1989 (1989 MY & 89M8), and supported nondiscrimination based on gender identity in 2006 (06A122B). In 1991, the ABA resolved to support federal legislation requiring that laws burdening religious exercise receive strict scrutiny review (91M105). Congress enacted such legislation in 1993 in the form of the federal Religious Freedom Restoration Act (RFRA).

In 2017, the ABA filed an amicus brief in the United States Supreme Court in Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al., urging the Court to affirm the judgment of the Colorado Court of Appeals below and to reject, inter alia, arguments that federal constitutional guarantees of religious free exercise excuse the refusal by a commercial business and its proprietor to serve a same-sex couple on equal terms as they serve different-sex couples, as required by the State’s nondiscrimination

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1 H.R. 2282 (115th Congress).
In 2018, the ABA resolved to support an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), that its prohibition on sex discrimination in employment by covered employers includes discrimination on the bases of sexual orientation and gender identity (18M116A).

At issue now is whether the ABA’s prior support for RFRA creates a conflict with supporting the Equality Act, and whether the ABA should continue to affirm as a friend-of-the-court its support for nondiscrimination by places of public accommodation notwithstanding a religious objection. Longstanding case law and the ABA’s existing policies support an understanding that religious liberty protections including RFRA do not authorize discrimination against others in the public sphere. Because RFRA does not excuse otherwise unlawful discrimination, there actually is no conflict between RFRA and the Equality Act. Consequently, the Equality Act’s provision confirming that RFRA does not provide a defense to discrimination claims under the Equality Act does not change what RFRA actually does protect.

By addressing directly the relationship between the Equality Act and RFRA, this Resolution enables the ABA to dispel any perceived tensions between this SOGI nondiscrimination bill and federal religious liberty protections, and to continue to urge both legislatures to enact and courts to enforce protections against SOGI discrimination.5

Discussion

In *Masterpiece Cakeshop*, the Supreme Court majority of six justices observed that, while “religious and philosophical objections [to same-sex couples marrying] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”6 The Court supported that general rule with reference to its 1968 *per curiam* opinion in *Newman v. Piggie Park Enterprises, Inc.*7 *Piggie Park* considered this principle in the context of a white proprietor of a chain of barbeque restaurants whose religious beliefs called for

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5 This Resolution and report only address religious objections to nondiscrimination laws, not objections based on rights of free speech, expressive conduct, or expressive association. For example, compare the Supreme Court’s general rejection of religion-based exemptions to civil rights laws in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, __ U.S. __, 138 S.Ct. 1719, 1727 (2018), with the Court’s deferral of the free speech questions in that case for a future day. *Id.* at 1728-1729.

6 *Id.* at 1727.

segregation of white and black people.⁸ Black would-be patrons generally were refused service, though occasionally were served from a kitchen window and directed to take their food from the premises before eating.⁹ The Supreme Court not only affirmed the lower courts’ rejection of the owner’s religious liberty defense against the black would-be patron’s Civil Rights Act claim, but deemed the defense “patently frivolous.”¹⁰

The clarity and forcefulness of the Piggie Park decisions on this point might be expected today, given the legal and social consensus against race discrimination that has evolved since then. But the federal law was still new in 1968. And en route to the current national consensus that our civil rights laws serve essential public interests, it faced not only religion-based objections but other serious legal challenges as well.¹¹

In multiple contexts thereafter, the Court recognized the importance of distinguishing between protected freedom of religious belief and limits on the ability to invoke those beliefs to justify discrimination in publicly regulated activities.¹² Now, by citing Piggie Park as it did in Masterpiece Cakeshop, the Supreme Court has confirmed there is to be consistent application of the general principle that religious beliefs do not excuse unlawful discrimination by place of public accommodation whether the discrimination is based on race or sexual orientation.

It should not be surprising that the issue of a religious objection to a law barring sexual orientation discrimination reached the U.S. Supreme Court via an appeal from a state court concerning enforceability of a state law. At present, Title II of the Civil Rights Act does not bar such discrimination either explicitly or as a form of sex discrimination.¹³ A

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⁸ See 256 F. Supp. 941, 944 (D.S.C. 1966) (noting that the owner’s “‘religious beliefs compel him to oppose any integration of the races whatever’”), rev’d in part, 377 F.2d 433, 437-438 (4th Cir. 1967) (reversing to hold that the Civil Rights Act applied to defendant’s restaurants), aff’d, 390 U.S. at 400.

⁹ 256 F. Supp. at 944, 946-947.

¹⁰ 390 U.S. at 402, n.5.

¹¹ See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (rejecting argument that Commerce Clause provided insufficient authorization for Title II of the Civil Rights Act’s prohibition against racial segregation of business establishments); Katzenbach v. McClung, 379 U.S. 294 (1964) (finding discrimination by places of public accommodation imposed sufficient burdens on interstate commerce to affirm constitutionality of Civil Rights Act).

¹² See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (religious school’s freedom to teach religious doctrine against interracial relationships did not entitle it to preferential tax status if it acted on that doctrine to the detriment of students); Loving v. Virginia, 388 U.S. 1 (1967) (rejecting religious justification for laws banning interracial marriage). See also United States v. Lee, 455 U.S. 252 (1982) (business owner had religious right to refuse to participate in Social Security system on his own behalf but could not impose that belief on employees by refusing to pay on their behalf).

¹³ 42 U.S.C. § 2000a. Compare, for example, the nondiscrimination implications of the sex discrimination bans in Title VII, Title IX, the Fair Housing Act, the Equal Credit Opportunity Act, and the Affordable Care
A substantial and growing number of state courts have considered religious objections to state and local nondiscrimination laws, and systematically have rejected the religious exemption claims in a manner consistent with *Piggie Park*. These decisions also are consistent with the body of state case law similarly rejecting religious exemption arguments in the context of state and local laws forbidding marital status discrimination.

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in rental housing or in employment, as well as federal cases rejecting religious exemption arguments to justify sex or age discrimination in employment.

**Two Federal Standards of Review**

To assess whether federal religious free exercise rights are likely to be in conflict with the SOGI nondiscrimination protections to be codified explicitly by the Equality Act, it is helpful to begin by identifying the standard of review that would apply. Federal law currently provides two arguably relevant sources of religious free exercise rights that could be invoked as a defense to claims under the Equality Act: the First Amendment to the U.S. Constitution and RFRA. Each is considered in turn.

**The First Amendment**

Prior to 1990, the U.S. Supreme Court analyzed First Amendment-based religious free exercise claims using a strict scrutiny test. Under that test, a religious believer may object to enforcement of a law by showing that the law imposes a substantial burden on her or his religious practice. Upon such a showing, the government nonetheless may enforce the law or policy upon demonstrating that it serves a compelling governmental interest in the least restrictive manner.

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15 See, e.g., Smith v. Fair Emp. & Housing Comm’n, 12 Cal. 4th 1143, 913 P. 2d 909, 925 (Cal. 1996) (rejecting landlord’s religious exercise defense because fair housing law did not substantially burden religious exercise); Swanner v. Anchorage Equal Rights Comm’n, 874 P.2d 274 (Alaska 1994) (rejecting landlord’s religious defense to marital status discrimination claim of unmarried different-sex couple); Minnesota ex rel. McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985) (religious rights of health club owners—self-described born-again Christians—did not excuse owners’ violation of state law by refusing to employ “individuals living with but not married to a person of the opposite sex; a young, single woman working without her father’s consent or a married woman working without her husband’s consent; a person whose commitment to a non-Christian religion is strong; and someone who is ‘antagonistic to the Bible,’ which according to Galatians 5:19-21 includes fornicators and homosexuals.”).


18 Sherbert, 374 U.S. at 398; Yoder, 406 U.S. at 205.
The Supreme Court has explained how that test should work in situations in which there is conflict between the religious rights of one running a business and third parties whose interests would be harmed. For example, in *United States v. Lee*, the owner objected on religious grounds to paying into the Social Security system for himself and for his employees.\(^\text{19}\) Applying the strict scrutiny test, the Court held that he could withhold payment on his own account for when he was self-employed because Congress provided that accommodation in the statute, however, he could not withhold payment for his employees.\(^\text{20}\) To do so would be to impose his religious beliefs to the detriment of his employees, who were entitled to benefit from the federal retirement system.\(^\text{21}\)

*Employment Division v. Smith*

The Court reevaluated our constitutional history in this area in 1990 in a case concerning whether a Native American man who used peyote during a traditional religious ritual had First Amendment protection such that he could not be denied unemployment benefits upon being terminated from his job for having done so.\(^\text{22}\) Confirming that religious liberty is a core value, the Court nonetheless concluded that the First Amendment “has not been offended” by burdens that are “merely the incidental effect of a generally applicable and otherwise valid provision,”\(^\text{23}\) and that laws of general application “could not function” if they were continually subject to challenge on religious grounds.\(^\text{24}\) The Court thus concluded that religiously neutral laws of general applicability are to be reviewed according to a rational basis standard;\(^\text{25}\) strict scrutiny review is only warranted when a law or its enforcement targets religious beliefs or practices.\(^\text{26}\)

\(^{19}\) *United States v. Lee*, 455 U.S. at 254.

\(^{20}\) *Id.* at 257-262.

\(^{21}\) *Id.* at 261 (observing that, “When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”).


\(^{23}\) 494 U.S. at 878.

\(^{24}\) *Id.* at 880. *Accord Bob Jones Univ.*, 461 U.S. at 604.

\(^{25}\) *Employment Div.*, 494 U.S. at 882.

The Religious Freedom Restoration Act

The Employment Division v. Smith decision received considerable public critique, which prompted Congress to pass the Religious Freedom Restoration Act three years later to “restore” strict scrutiny review when a law or policy is challenged as imposing an improper burden on religious free exercise.\(^{27}\) RFRA makes findings, including that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”\(^{28}\) It cites Sherbert v. Verner\(^ {29}\) and Wisconsin v. Yoder\(^ {30}\) as illustrating the compelling interest test, otherwise known as strict scrutiny, to be required due to the new federal statute. Subsequent litigation led the Supreme Court to determine that RFRA offers a defense against applications of federal law claimed to impose a wrongful burden on religious exercise, but not against state or local laws.\(^ {31}\)

**RFRA and the Equality Act**

Regarding potential concerns whether support for the Equality Act is inconsistent with support for the rights protected by RFRA, there are at least two reasons why there is no conflict.

First, as a partial resolution, RFRA creates a defense against actions by government, not actions by private parties.\(^ {32}\) The Equality Act includes explicit protections against SOGI discrimination within the Civil Rights Act of 1964 and other federal statutes, which provide remedies enforceable by private parties. As to actions by such parties, there obviously is no conflict because RFRA does not apply.

Second, even when the government enforces provisions of the Civil Rights Act on behalf of those protected, RFRA still does not justify otherwise forbidden discrimination. The Sixth Circuit recently considered the relationship between RFRA and Title VII in EEOC v. R.G & G.R. Harris Funeral Homes, a case in which Aimee Stephens, a funeral home director, was fired because of her gender identity by the business owner who asserted

\(^{27}\) 42 U.S.C. § 2000bb et seq.


\(^{30}\) 406 U.S. 205 (1972).


\(^{32}\) EEOC v. R.G & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018); Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 410 (6th Cir. 2010) (“Congress intended RFRA to apply only to suits in which the government is a party.”).
RFRA as a defense. Because the government enforced Title VII on behalf of Ms. Stephens, RFRA applied, requiring the courts to test whether Title VII survives strict scrutiny review. After a detailed analysis, the court confirmed that the civil rights law does prevail because it serves compelling interests in preventing discrimination, and does so in the least restrictive manner.

Addressing the nature of the government’s interest in enforcing Title VII, the Circuit explained, “Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person — Stephens — to suffer discrimination, and such an outcome is directly contrary to the EEOC’s compelling interest in combating discrimination in the workforce. See, e.g., United States v. Burke, 504 U.S. 229, 238, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) (“[I]t is beyond question that discrimination in employment on the basis of sex ... is, as ... this Court consistently has held, an invidious practice that causes grave harm to its victims.”). The Circuit then further confirmed the point in an authoritative footnote:

Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute. See, e.g., EEOC v. Miss. Coll., 626 F.2d 477, 488–89 (5th Cir. 1980). As the Supreme Court stated, the “stigmatizing injury” of discrimination, “and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.” Roberts v. U.S. Jaycees, 468 U.S. 609, 625, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); see also EEOC v. Pac. Press Publ’g Ass’n, 676 F.2d 1272, 1280 (9th Cir. 1982) (“By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a ‘highest priority.’ Congress’ purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.”), abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991).

33 EEOC v. R.G & G.R. Harris Funeral Homes, 884 F.3d at *20.
34 Id.
35 Id.
36 Id. at *20, fn.12. See also, e.g., North Coast Women’s Care Medical Group, 44 Cal.4th at 1158 (noting that the civil rights law “furthers California’s compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation”); State by McClure v. Sports and Health Club, Inc., 370 N.W.2d at 853 (government has an overriding compelling interest in prohibiting discrimination in employment and public accommodations).
Addressing the other element of the compelling interest test, the Circuit held that Title VII forbids nothing more than the workplace discrimination that is the object of the statute, and thus is the least restrictive means for serving the compelling interest.37

The Sixth Circuit in *Harris Funeral Homes* points out that the Supreme Court apparently also reads Title VII as necessarily prevailing when an employee’s interest in equal treatment encounters an employer’s religion-based wish to discriminate.38 Discussing *Burwell v. Hobby Lobby Stores, Inc.*,39 the Circuit noted that:

the majority opinion stated that its decision should not be read as providing a “shield” to those who seek to “cloak[ ] as religious practice” their efforts to engage in “discrimination in hiring, for example on the basis of race.” 134 S.Ct. at 2783. As the *Hobby Lobby* Court explained, “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” Id. We understand this to mean that enforcement actions brought under Title VII, which aims to “provide[e] an equal opportunity to participate in the workforce without regard to race” and an array of other protected traits, see id., will necessarily defeat RFRA defenses to discrimination made illegal by Title VII.40

Justice Kennedy’s separate *Hobby Lobby* concurrence reinforces this conclusion by emphasizing that protected exercises of religion must not “unduly restrict other persons,

37 Id. at *23, citing Redhead v. Conf. of Seventh-Day Adventists, 440 F.Supp.2d 211, 222 (E.D.N.Y. 2006) (“the Title VII framework is the least restrictive means of furthering” the government’s interest in avoiding discrimination), adhered to on reconsideration, 566 F.Supp.2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.*, 216 F.Supp.2d 763, 810–11 (S.D. Ind. 2002) (“[i]n addition to finding that the EEOC’s intrusion into [the employer’s] religious practices is pursuant to a compelling government interest,” — i.e., “the eradication of employment discrimination based on the criteria identified in Title VII” — “we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.”). See also, e.g., *North Coast Women’s Care Medical Group*, 44 Cal.4th at 1158 (“there are no less restrictive means for the state to achieve that [nondiscrimination] goal”); *State by McClure*, 370 N.W.2d at 853 (same, and observing that “when appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination”).

38 Id.


40 *Harris Funeral Homes*, 884 F.3d at *23.
such as employees, in protecting their own interests, interests the law deems compelling.”

The Supreme Court’s recent confirmation that our civil rights laws serve compelling interests in the least restrictive way, and reliance in Masterpiece Cakeshop on its Piggie Park decision rejecting a religious defense as “patently frivolous,” is consistent with perhaps the most famous of the early cases testing and affirming the constitutionality of the Civil Right Act. In Heart of Atlanta Motel, Inc. v. United States, the Supreme Court observed that “The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’” The Court explained that the Act was designed to address both the “moral and social wrong” and the disruptive effects of discrimination, which together meant that places of public accommodation have “no ‘right’ to select [their] guests as [they] see[,] fit, free from governmental regulation.” Justice Goldberg reinforced the human-impact point in his concurrence, observing that “Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.”

The Equality Act proposes to codify case law interpreting the sex discrimination provisions of the Civil Rights Act and other federal statutes as covering SOGI discrimination, and to make other changes to create greater consistency across those laws. Like the existing statutes, the Equality Act will serve compelling interests in preventing discrimination, and will do so in the least restrictive manner. Accordingly, whether the law’s protections would be enforced by government or private parties, its nondiscrimination requirements would prevail both against RFRA-based objections entitled to strict scrutiny review, and against First Amendment-based religious objections subject to rational basis review. In sum, ABA support for the Equality Act would be consistent with the ABA’s longstanding support for sexual orientation and gender identity nondiscrimination protections, and would not create any new conflict with the ABA’s continuing support for RFRA.

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41 Hobby Lobby, 134 S.Ct. at 2787 (emphasis added).
43 Id. at 357-358.
44 Id. at 292 (internal quotation marks omitted). See also Romer v. Evans, 517 U.S. 620, 631 (1996) (nondiscrimination laws “protect[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society”).
Conclusion

The Supreme Court has long recognized that our Nation's commitment to civic equality requires enforcement of civil rights laws that govern the public sphere despite the religious objections of some to the equal treatment of certain others. In keeping with existing ABA policy and Goals III and IV of the ABA’s Mission, the ABA should supports the Equality Act, a federal bill to make explicit that discrimination because of gender identity or sexual orientation is sex discrimination prohibited by the Civil Rights Act of 1964 and other federal nondiscrimination laws, and that federal statutory protections for religious freedom do not authorize violation of those nondiscrimination laws. Add in one sentence about the second resolved clause?

Respectfully submitted,

Victor Marquez
Chair, Commission on Sexual Orientation and Gender Identity
12/10/2018
GENERAL INFORMATION FORM

Submitting Entities: ABA Commission on Sexual Orientation and Gender Identity

Submitted By: Victor Marquez, Chair, Commission on Sexual Orientation and Gender Identity

1. Summary of Resolution

This Resolution would affirm that: (1) discrimination because of sexual orientation or gender identity is sex discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes; and (2) federal statutory protections for religious freedom do not authorize violation of nondiscrimination laws. This Resolution also affirms that religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation.

2. Approval by Submitting Entity

The Commission on Sexual Orientation and Gender Identity approved this resolution by vote on its members on 12/10/2018.

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

No.

4. What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?

This resolution is consistent with prior policy supporting laws that protect free exercise of religion and the case law resolving how those laws relate to religiously neutral laws of general applicability on other subjects, including nondiscrimination. See 89M8, 06A122B, 91M105.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

n/a
6. **Status of Legislation**

This resolution is in anticipation of the reintroduction of the Equality Act H.R.2282; S.1006. The Equality Act would provide consistent and explicit non-discrimination protections for LGBTQ people across key areas of life, including employment, housing, credit, education, public spaces and services, federally funded programs, and jury service.

7. **Plans for Implementation of the Policy if Adopted by the House of Delegates**

The policy will provide authority for supporting legislation concerning sexual orientation and gender identity nondiscrimination, and related religious liberty concerns, and for preparation and filing of one or more ABA *amicus curiae* briefs in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy.

8. **Cost to the Association (both direct and indirect costs).**

Adoption of this Resolution would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. **Disclosure of Interest**

There are no known conflicts of interest to this recommendation.

10. **Referrals**

This Resolution will be referred to the following entities:

- Government and Public Sector Lawyers Division
- Law Practice Division
- Judicial Division
- Law Student Division
- Senior Lawyers Division
- Young Lawyers Division
- Section of Business Law
- Section of Civil Rights and Social Justice
Section of Dispute Resolution
Section of International Law
Section of Labor and Employment Law
Section of Litigation
Section of State and Local Government Law
Section of Tort Trial and Insurance Practice
All Commissions of the Office of Diversity and Inclusion

11. **Contact Persons (prior to meeting)**

Skip Harsch  
Director, ABA Commission on Sexual Orientation and Gender Identity  
321 N. Clark St.  
Chicago, IL 60654  
312.988.5137  
[Skip.harsch@americanbar.org](mailto:Skip.harsch@americanbar.org)

12. **Contact Persons (who will present the report to the House)**

Victor M. Marquez, Esq.  
The Marquez Law Group  
649 Mission Street, 5th Floor  
San Francisco, 94102  
Cell: (415) 314-7831  
[victormarquezesq@aol.com](mailto:victormarquezesq@aol.com)
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution would affirm that: (1) discrimination because of sexual orientation or gender identity is sex discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes; and (2) federal statutory protections for religious freedom do not authorize violation of nondiscrimination laws. This Resolution also affirms that religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the issue of whether the ABA’s prior support for RFRA creates a conflict with supporting the Equality Act, and whether the ABA should continue to affirm as a friend-of-the-court its support for nondiscrimination by commercial businesses notwithstanding an owner’s religious objection.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The Resolution will enable the ABA to resolve any perceived tensions between SOGI nondiscrimination laws and policies and religious liberty objections thereto, and to continue to urge both legislatures to enact and courts to enforce effective protections against SOGI discrimination.

4. Summary of Minority Views

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary. The Section will work with other ABA entities, as necessary, on wording and scope of this Resolution.