Kansas Equality Coalition

Our mission is to end discrimination based on sexual orientation and gender identity, and to ensure the dignity, safety, and legal equality of all Kansans.

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Testimony in opposition to HB2260
House Committee on the Judiciary
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Greetings Mr. Chairman and members of the committee. I am here today in opposition to HB2260.

HB2260 is a complex and convoluted bill, the intent of which is difficult to understand without careful study. The intent of this bill is to do one thing: Invalidate all non-discrimination policies in the state of Kansas that do not exactly match Chapter 44, Article 10 of Kansas Statutes, known as the "Kansas Acts Against Discrimination" (KAAD).

It seeks to accomplish this goal by making a number of assertions:

- It declares that the government shall not "burden a person's exercise of religion" unless it's for a "compelling government interest." (Sec. 2(a))

- It requires that the government prove, case-by-case and with "clear and convincing evidence," that any application of a law or rule is in the government's compelling interest. (Sec. 2(a))

- It asserts that "compelling government interest" includes, but is not limited to, prisons and child welfare. There are no other compelling government interests defined. (Sec. 1b1A, Sec 1(b)(1)(B))

- It declares that prohibiting discrimination in employment, housing, or public accommodations is not a "compelling government interest," unless it's what's defined in KAAD. This is the only area of law that gets singled out as not being a compelling government interest. (Sec. 1(b)(2))

- Any person who believes their free exercise of religion is "likely" to be burdened may sue for an injunction, for protective orders, for damages, and for court and attorney fees. (Sec. 2(b))

The application is incredibly broad. The bill as written will apply to the "executive, legislative and judicial branches and any and all agencies, boards, commissions, departments, districts, authorities or other entities, subdivision or parts whatsoever of state and local government as well as any person acting under color of law." (Sec. 1(e))

In practice, this will apply to every public school district, Regent's university, community college, and independent commission, as well as every incorporated city, and county in the state of Kansas. Many of these entities have non-discrimination ordinances and policies that go beyond what's in KAAD; some specifically prohibit discrimination based on sexual orientation and/or gender identity.

The Kansas Constitution, in Article 12, guarantees home rule to incorporated cities. It's through this home-rule provision that cities across Kansas have, for over 50 years, passed their own local non-discrimination ordinances:

> "A charter ordinance is an ordinance which exempts a city from the whole or any part of any enactment of the legislature as referred to in this section and which may provide substitute and additional provisions on the same subject."
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> […]

> "Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government."

In practice, municipal home rule is whatever the legislature says home rule is. The legislature may preempt municipal home rule by enacting a statute that limits cities in a particular area, and has done so in a number of instances.

Counties, unlike cities, do not have a constitutional guarantee of home rule. Instead, the legislature has granted counties home rule in statute:

> "K.S.A. 19-101a. Home rule powers; limitations, restrictions and prohibitions; procedure. (a) The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restrictions or prohibitions:"
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> […]
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> "(c) Same; powers to be liberally construed. The powers granted counties pursuant to this act shall be referred to as county home rule powers and they shall be liberally construed for the purpose of giving to counties the largest measure of self-government."

The statute lists 38 specific preemptions on counties' home rule authority.

Unified school districts, Regent's universities, and community colleges have all been granted authority by the legislature to regulate their own affairs. In addition to eminent domain, police powers, and taxation, these institutions have used their powers to expand upon the provisions of the Kansas Acts Against Discrimination. Many include protections from discrimination for their faculty and students based on sexual orientation, and in some cases gender identity.

The legislature has seen fit to preempt the home rule powers of Kansas' cities and counties in a number of areas, many of which have been the subject of recent controversies.

One example is the recent statewide ban on smoking in many public places. As the members of this body are undoubtedly aware, until 2010 Kansas cities had been regulating public smoking with an array of dissimilar ordinances; in 2010, the legislature enacted a uniform, statewide ban on smoking in public places. Part of that legislation contains a clear and unmistakable preemption clause, nullifying certain local ordinances, while allowing others to stand:

> "K.S.A. 21-6114 Nothing in this act shall prevent any city or county from regulating smoking within its boundaries, **so long as such regulation is at least as stringent as that imposed by this act**. In such cases the more stringent local regulation shall control to the extent of any inconsistency between such regulation and this act."

Another example of legislative preemption of city and county home rule is in the state's liquor control act:

> "K.S.A. 41-208. Power to regulate alcoholic liquor. (a) Except as specifically provided in the Kansas liquor control act, the power to regulate all phases of the manufacture, distribution, sale, possession, transportation and traffic in alcoholic liquor and the manufacture of beer regardless of its alcoholic content, is vested exclusively in the state and shall be exercised as provided in the Kansas liquor control act. **No city or county shall enact any ordinance or resolution which is in conflict with the provisions of the Kansas liquor control act and any such ordinance or resolution shall be null and void**."
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> "(b) Nothing contained in this section shall be construed as preventing any city from enacting ordinances declaring acts prohibited or made unlawful by this act as unlawful or prohibited in

> such city and prescribing penalties for violation thereof, but the minimum penalty in any such ordinance shall not be less than the minimum penalty prescribed by this act for the same violation, nor shall the maximum penalty in any such ordinance exceed the maximum penalty prescribed by this act for the same violation."

There are many other examples in statute where the legislature has preempted specific home rule powers granted to cities and counties, and to the regulatory and policy-making powers of educational institutions.

What is important to note here is this: legislative preemption of city or county ordinances, and of educational policies, are clearly stated in the preempting statute. The preemption language shown above is consistent with a series of Kansas Supreme Court decisions.

From City of Beloit v. Lamborn (182 Kan. 288, 321 P.2d 177):

> "[L]egislative intent to reserve to the state exclusive jurisdiction to regulate must be clearly manifested by statute before it can be held that the state has withdrawn from the cities power to regulate in the particular area."

From Leavenworth Club Owners Assn. v. Atchison (208 Kan. 318, 492 P.2d 183.):

> "Section 5 (d) of Article 12 requires a liberal construction of the powers and authority granted cities for the purpose of giving to cities the largest measure of self-government. This provision simply means that the home rule power of cities is favored and should be upheld unless there is a sound reason to deny it. Where the legislature has acted in some area a city's power to act in the same area should be upheld unless the legislature has clearly preempted the field so as to preclude city action. Unless there is actual conflict between a municipal ordinance and a statute, the city ordinance should be permitted to stand."

Lastly, from Hutchinson Human Relations Comm. v. Midland Credit Management, Inc. (213 Kan. 308, 517 P.2d 158), where the Court upheld a city's right to enact and enforce ordinances in the area of non-discrimination:

> "An intent on the part of the legislature to retain exclusive jurisdiction to legislate in a given area must be clearly shown, and where such an intent cannot be gathered from the statutes themselves, whatever extrinsic evidence there may be of such an intention must be clear and convincing before the power for regulate can be said to have been withdrawn from cities."
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> […]
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> "We discern no essential conflict between the Kansas Act Against Discrimination (K.S.A. 44-1001, et seq., as amended) and the Hutchinson Ordinance on Human Relations. While the two relate generally to the same subject, they do not clash. The ordinance appears simply to supplement the statute rather than to counteract or be at cross purposes with it. The ordinance follows the statute in many respects but the authority possessed by the Hutchinson Commission is, in fact, more restricted and circumscribed than that reposed in the Kansas Anti-discrimination Commission."
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> […]
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> "The Kansas Act Against Discrimination contains no preemptive provision whatever among its numerous sections and we view the omission of a provision of that kind as having significance. In Blue Star Supper Club, Inc. v. City of Wichita, 208 Kan. 731, 735, 495 P.2d 524, we said that the omission of a preemptive provision in a statute relating to private clubs could not be viewed

> as unintentional, since the legislature was undoubtedly aware of the manner in which state-wide preemption may be accomplished."

Instead of explicitly preempting cities, counties, and the rest of the entities enumerated in Section 1(e), and withdrawing their power to regulate discrimination within their jurisdictions, HB2260 makes an end-run around constitutional and statutory home rule. It grants to *individuals* the right to preempt local ordinances. It allows the local laws and policies to stand, but gives anyone who believes they are "likely" to be harmed by those laws and policies immediate standing to sue.

This is an unprecedented surrender of legislative powers. In no other area of Kansas law are individuals given the right to disobey lawful ordinances, and then given a cause of action to sue for damages merely by the existence of those ordinances.

Our cities, counties, educational institutions, and other agencies have adopted these ordinances and policies in good faith, and out of a desire to make our communities better places to live. The last thing they expect from their legislature is to have this time-bomb dropped in their laps.

HB2260 is, indeed, a ticking time-bomb that is being dropped into the lap of every county, city, university, community college, school district, and state agency with non-discrimination policies that are more inclusive or restrictive than the Kansas Acts Against Discrimination.

Should the provisions of HB2260 become law, that time-bomb is set to go off the morning of July 1, 2012. Anyone who wants to claim a burden on their practice of religion will be able to do so, and will be able to immediately go to court. All they have to show is a "likelyhood" that their religious freedom will be burdened; they are not required to demonstrate any *actual* burden.

The only way for these jurisdictions to avoid being sued under the provisions of HB2260 is to immediately repeal those portions of their local laws that differ from KAAD; otherwise, as of July 1, it will be "open season" for anti-gay extremists and their lawyers.

That this bill is targeted at the lesbian, gay, bi and transgender Kansans is beyond doubt. In testimony supporting this bill in 2011, the lobbyist for the Catholic Conference referred specifically to local ordinances protecting LGBT Kansans from discrimination. Again, the only substantive differences between local ordinances and policies, and the provisions of the Kansas Acts Against Discrimination, are those local protections based on sexual orientation and gender identity.

Given last year's testimony by the proponents, any claims by proponents today that HB2260 isn't about sexual orientation and gender identity are nothing but spin and sophistry.

The legislature is inviting chaos with this bill. Public schools with inclusive non-discrimination policies, and even those without, may find themselves unable to prevent anti-gay name-calling. Any child who claims, or whose parents claim, that hurling anti-gay epithets in school is a religious practice could assert their preemptive rights under this bill. Teachers and coaches could single out LGBT kids for different treatment, raising barriers to their participation in certain school activities while claiming a religious exemption.

In every legislative session since 2007, Kansas Equality Coalition has proposed legislation that would add sexual orientation and gender identity to the Kansas Acts Against Discrimination. At every hearing, the opponents claim that adding those two classes to statute would generate countless lawsuits. Also at every hearing, we have demonstrated, through data provided by other states with similar legislation, that the opponents are incorrect – that the number of cases will hover between 3% and 6% of the Kansas Human Relations Commission's caseload.

Now it's our turn to make the same argument. Should HB2260 become law as its currently proposed, we can't imagine a scenario where anti-gay extremists won't immediately begin the process of litigating

every ordinance and policy inclusive of sexual orientation and gender identity. Should you enact this into statute, you are opening every affected city, county, school district, and so on, to endless litigation for having done nothing more than this legislature, and the Constitution of the State of Kansas, gives them the power to do.

There are four possible remedies we would recommend to improve this legislation:

- Strike Section 1(b)(2), which creates an exclusion to "compelling government interest; or
- Clearly preempt all local non-discrimination ordinances, in the manner demanded by the Kansas Supreme Court; or
- Amend HB2260 with substitute language proposed in last year's hearing by the ACLU; or
- Let this bill die in committee.

I will close with Justice Prager's words in the Hutchinson Human Relations Comm. v. Midland Credit Management opinion:

> We would be hard pressed to say at this point in time and history that legislation designed to eliminate the poison of discrimination from our midst is not a proper exercise of the police power. Recent experience has gone far to demonstrate, particularly in urban communities, that discrimination against minorities has a direct and detrimental impact on the orderly processes of government, the peace and tranquility of a community, and the health, safety and general well-being of its residents.
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> Problems arising from racial and other forms of discrimination are especially common in population centers; the cancer of injustice toward members of minority groups is peculiarly virulent on the local scene; discrimination is essentially a people problem, and must eventually be dealt with and solved by people in the localities where they live.

Thank you for your time and attention. I am happy to stand for questions.