



February 9, 2021

Chair Power
House Committee on the Judiciary
Subcommittee on Civil Law
Oregon Legislative Assembly
900 Court Street NE
Salem, OR 97301

RE: OGALLA Support for HB 3041

Chair Power,

I write today as Legislative Policy Chair for OGALLA: the LGBT Bar Association of Oregon to urge the subcommittee to support HB 3041, a bill that will update the Oregon Revised Statutes to clarify the manner in which LGBT identity classes are codified in Oregon law. Our current statutes provide broad protection to LGBT people, and Oregon has historically been a leader in the expansion of civil rights protection to LGBT individuals. However, due to eccentricities in the manner in which our LGBT protections were originally codified, our laws are not user-friendly, and the current frameworks may cause confusion for lay Oregonians as to the scope of protections. HB 3041 appropriately distinguishes sexual orientation from gender identity, and it ensures that both characteristics are clearly listed where appropriate in the ORS. HB 3041 does not seek to make significant substantive changes to the nature or scope of our anti-discrimination laws, but seeks only to clean up and correct their form. This clarification will make the ORS more accessible for everyone who deals with LGBT civil rights provisions, and it will more accurately reflect the lived experiences of LGBT Oregonians.

Oregon has long been a leader in the area of LGBT civil rights protections. A key enactment in that project was the 2007 Oregon Equality Act, which codified strong legal protections for LGBT Oregonians in a host of areas from employment anti-discrimination to public accommodations to education. These enactments specifically covered lesbian, gay, bisexual *and* transgender Oregonians. However, perhaps due to caution at the time, the way that these protections were codified was a bit unusual and, ultimately, inaccurate in describing the relationship between these identities. Specific statutes included only 'sexual orientation' in their lists of protected classes, alongside long-standing classes such as race,

sex or age. This, on its face, gives the impression that only sexual orientation (i.e. heterosexuality, homosexuality, bisexuality, or other sexual orientation status) is protected in each individual statutory provision. However, at the same time, a general definition of ‘sexual orientation’ was added to the general definitions section of the ORS, such that every iteration of ‘sexual orientation’ would be interpreted as follows: “‘Sexual orientation’ means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.” ORS 174.100(7). Through this, the 2007 Oregon Equality Act achieved coverage for LGBT people. However, this kludge created a confusing omission in each specific statute with respect to gender identity, and it misrepresented the relationship between gender identity and sexual orientation.

Sexual orientation and gender identity are distinct concepts and distinct aspects of an individual’s identity. That is not to say that they are categorically separate—these are complicated aspects of human identity that may overlap or interrelate for many individuals. But it is true as a general matter that an individual who is transgender may be gay, straight, bisexual, or any other sexual orientation that a person who is not transgender may have. A person who is gay may be either cisgender (that is, their gender identity corresponds to the sex they were assigned at birth) or transgender. Advocates for greater understanding of LGBT people have expended significant effort to convey the simple fact that we may not presume anything about an individual’s sexual orientation solely from their gender identity, nor vice-versa. Historically speaking, LGBT people have often faced pernicious stereotypes where individuals make assumptions about one aspect on account of the other. And legally speaking, as we approach the codification of these classes for the purposes of anti-discrimination statutes, it is important to note that these terms are not co-extensive. The gravamen of each term connotes different attributes of human identity: sexual orientation is an identity centered on a person’s sexual or romantic attraction to or romantic relationships with others; gender identity is a personal identity reflective of a person’s relationship to the gender designation they were assigned at birth, and for the purposes of statute, it covers a person’s gender presentation as well as their actual (or perceived) identity. While in practice there may be overlap between these two concepts (as indeed there may be between various identity classes), it is important that our statutes recognize them as separate aspects of identity to fully cover the range of LGBT identity experiences, and to accurately describe the substantive rights and obligations in statute.

In practice, our current statutes generally work on a substantive level where experienced practitioners understand the relationship between specific provisions and the general definition of ‘sexual



orientation.’ However, the way that these concepts are currently organized is confusing and may mislead laypersons who are not familiar with the specific mechanisms employed. Normally, terms of art in a statute are accompanied closely by definitions proximate to their own sections. A reader need only look a bit higher up in that chapter to see how a term is used when a specialized meaning is intended. But by burying the special definition of ‘sexual orientation’ in a wholly different chapter, the average Oregonian may miss this crucial distinction when attempting to interpret ORS provisions, and may not realize that gender identity is covered at all.

Clarity is also important to ensure that Oregon law continues to be correctly interpreted and applied alongside evolving Federal law in this area. Unlike Oregon statutes, Federal anti-discrimination laws generally do not *explicitly* recognize LGBT identity classes. For decades there has been considerable debate as to whether, and how, these classes may yet be covered by the term ‘sex.’ A growing body of lower court jurisprudence has recognized these protections, while some (particularly older) cases have found that LGBT people are not protected under ‘sex’ classifications. In June of 2020, the Supreme Court of the United States held in *Bostock v. Clayton Cty.*, 590 U.S. ___, 140 S. Ct. 1731 (2020)(and consolidated cases) that the class term ‘sex’ in the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964), which governs federal employment anti-discrimination law, covered sexual orientation and gender identity where employment actions were taken ‘because of sex,’ as these attributes were linked to ‘sex.’ Many questions will be worked out in subsequent litigation applying the *Bostock* holding in myriad specific contexts and circumstances. As this law evolves at the federal level, it is important for Oregon law to remain clear, specific, and straightforward, so that our laws are interpreted and applied as the people of Oregon, speaking through their representatives, actually intend them to be applied.

HB 3041 presents an opportunity to correct an inaccurate characterization of LGBT people within our statutes, and to make our statutes more transparent and accessible to everyday Oregonians seeking to determine the state of LGBT civil rights protections under Oregon law. OGALLA strongly urges this subcommittee to support this bill.

Respectfully submitted,

Nora J. Broker, *Esq.*

Legislative Policy Chair

OGALLA: The LGBT Bar Association of Oregon