



Angela Jackson, Chair  
Iowa Civil Rights Commission  
Grimes State Office Building  
400 E. 14<sup>th</sup> Street  
Des Moines, IA 50319

July 13, 2016

Dear Chair Jackson:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. I am writing in regard to an Iowa Civil Rights Commission [ICRC] publication entitled “Sexual Orientation & Gender Identity: A Public Accommodations Provider’s Guide to Iowa Law.”<sup>1</sup> Specifically, I wish to address the portion of the publication that pertains to First Amendment rights.

The publication contains the following statement:

Does This Law Apply to Churches?

Sometimes. Iowa law provides that these protections do not apply to religious institutions with respect to any religion-based qualifications when such qualifications are related to a bona fide religious purpose. Where qualifications are not related to a bona fide religious purpose, churches are still subject to the law’s provisions. (e.g. a child care facility operated at a church or a church service open to the public).

The approach taken by the ICRC plainly violates both the Free Exercise Clause and the Establishment Clause of the First Amendment of the United States Constitution.

The ICRC takes such a narrow view of “bona fide religious purpose” that it is difficult to determine what activities, if any, would fall within that category. Church services are almost always open to the public. Part of the purpose of having a church (or synagogue, mosque, etc.) is not only to preach to the converted, but also to win new converts. This necessitates having worship services open to the public. Usually one aspect of religious life is discussing the temporal demands that God places upon believers that affect one’s fate in the next life. This message is usually disseminated at worship services when believers are gathered together. If a religious group believes that God forbids blood transfusions, or eating pork, or attempting to

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<sup>1</sup> Iowa Civil Rights Commission, *Sexual Orientation & Gender Identity: A Public Accommodations Provider’s Guide to Iowa Law* [hereinafter “SOGI pamphlet”], <https://icrc.iowa.gov/sites/default/files/publications/2012/SOGIPublicAccom.pdf>.



change one's physical sex to accord with one's gender identity, at some point that topic will likely be addressed in a worship service that is open to the public. And however gentle and welcoming the speaker tries to be in delivering the message, a doctor, bacon-eater, or transgender person will arguably feel unwelcome. If the pastor of the church pens an op-ed in a local newspaper expressing his religiously-based objection to recognizing transgenderism as a valid lifestyle choice, a transgender person could easily claim that the pastor was "Directly or indirectly advertising or publicizing that the patronage of persons of any particular sexual orientation or gender identity is unwelcome, objectionable, not acceptable, or not solicited."<sup>2</sup>

The ICRC's apparent misunderstanding of religious belief and practice is a many-splendored thing. In the SOGI pamphlet, the ICRC states that a child care facility operated at a church is subject to the public accommodation nondiscrimination provisions. Again, the ICRC appears to fundamentally misunderstand life in a religious community. One reason churches have child care facilities is so the faithful can have their children cared for in an environment that reflects and supports their religious beliefs. Any parent who takes his or her child to a preschool run by a church has to expect that the preschool will reflect the church's beliefs. A mere nondiscrimination statute cannot trump the First Amendment. Parents and churches are still free to teach children that a man cannot truly become a woman, and vice versa, regardless of how much surgical and chemical intervention occurs.<sup>3</sup> It would violate the religious liberty rights of church preschool teachers and religious individuals to require them to address a three-year-old boy who thinks he is a girl as "her" if, based on their religious beliefs, they believe it to be an impossibility for a physical boy to be a girl.<sup>4</sup>

The ICRC's interpretation of the nondiscrimination statute is explicitly directed toward churches. Directing what churches can say and how they manage their affairs is a patent

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<sup>2</sup> *Id.*

<sup>3</sup> *Watson v. Jones*, 80 U.S. 679, 728-29 (1871).

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

<sup>4</sup> SOGI pamphlet, *supra* note 1.

What Types of Actions Could Be Illegal Harassment?

Harassment includes, but is not limited to: . . .

Intentional use of names and pronouns inconsistent with a person's presented gender.



violation of the Establishment Clause. This unconstitutional interference includes the requirement that individuals be allowed to access bathrooms and shower facilities in accord with their “gender identity,” not their sex. Actions speak louder than words. If a church teaches that a person’s gender is determined by his physical sex, but is forced to allow a man who identifies as a woman to use the women’s restroom, the church’s religious witness is undermined. The same is true if, say, a church has certain beliefs about modesty and interactions between the sexes, but is required to allow a physical boy who identifies as a girl to play on the church girls’ softball team and change in the girls’ locker room. The church’s religious witness is undermined when there is a forced divergence between its actions and its beliefs. This is tantamount to the government telling a church what it may and may not believe.

The ICRC’s interpretation of the nondiscrimination statute also violates the Establishment Clause because it interferes with a church’s ability to discipline its members. A religious organization that cannot require its members to adhere to standards of belief and conduct will not survive. The ICRC’s interpretation of the nondiscrimination statute would allow an individual to triumph in an intra-church dispute by calling in the secular authority. For example, imagine that a man tells his pastor that he identifies as a woman and wants to use the women’s restroom. The pastor says no, because the church’s religious beliefs are that one’s gender is dictated by one’s physical sex, and refusing to live in accord with one’s physical sex is defiance against God. The aggrieved parishioner then goes to the ICRC and asks the ICRC to overrule the pastor and declare that he must be allowed to use the women’s restroom. This is an unconstitutional interference with the inner workings of a church. As the Supreme Court has written:

The right to organize voluntary religious associations to assist in the expression and dissemination of religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.<sup>5</sup>

Furthermore, because the First Amendment contains a guarantee of free speech, parents and teachers – and every other American – are free to use whatever pronoun they wish when addressing others. Forcing a person to address another person by the latter’s preferred pronouns, no matter how ridiculous, is not American. This entire undertaking is Soviet. It is not aimed solely at speech. It is aimed at two other things as well: thought control and establishment of the new religion of nondiscrimination. If you control what people can say, you control what they

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<sup>5</sup> *Watson v. Jones*, 80 U.S. 679, 728-29 (1871).



think. No one will allow himself to think an unapproved thought for fear it might slip out. As Justice Jackson wrote:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>6</sup>

Rallying the country to defeat Nazi Germany and Imperial Japan was an insufficient reason to override the First Amendment rights of Jehovah's Witnesses. The state's interest in ensuring people's feelings are not hurt through the use of disfavored pronouns is, by comparison, nonexistent.

Please publicly repudiate and withdraw the pamphlet discussed herein. If you do not, I still have faith that the courts will do so for you.

A handwritten signature in black ink, appearing to read "Peter Kirsanow".

Peter Kirsanow  
Commissioner

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<sup>6</sup> West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 642 (1943).