

## Testimony in Support of SB 590 / HB 1397

Human Relations - Discrimination - Protected Characteristics (Equal Opportunity for All Marylanders Act) || Maryland Senate Judicial Proceedings Committee || February 16, 2024

To Chair Smith, Vice-chair Waldstriecker, and the Members of the Senate Judicial Proceedings Committee,

**We write in strong support of the Equal Opportunity for All Marylanders Act (SB590 / HB1397).** This bill is a response to the Maryland Supreme Court's August 2023 decision [John Doe v. CRS](#) in which the Court held, among other things, that:

(1) because sex, sexual orientation, and gender identity have been individually enumerated in the Maryland Fair Employment Practices Act (MFEPA), those terms each provide separate and distinct protections for covered employees—so under Maryland law, a protection based on sex does not imply a protection based on sexual orientation or gender identity; and

(2) because sexual orientation was not specifically included in the Maryland Equal Pay for Equal Work Act (MEPEWA), but sex and gender identity were included, then the legislature purposefully meant to omit sexual orientation discrimination, and protections for sexual orientation cannot be implied from MEPEWA's ban on sex discrimination.

This interpretation of Maryland state law is directly at odds with how similar federal law concerning sex-based discrimination is understood, especially in light of the US Supreme Court's decision in [Bostock v. Clayton County](#). In that 2020 case, Justice Gorsuch wrote for the majority that it is impossible to discriminate against someone because of their sexual orientation or gender identity without simultaneously discriminating against them because of their sex.<sup>1</sup> However, according to the Maryland Supreme Court's decision, *Bostock's* logic does not apply in the same way to those terms as they are used in Maryland state law.

Put another way: despite SCOTUS's *Bostock* decision, *John Doe v. CRS* means that Maryland state law prohibitions on sex discrimination do not extend any implied prohibitions for sexual orientation or gender identity discrimination. The Court said that any additional protections must instead be specifically enumerated in every antidiscrimination clause in state law. Make no mistake, this is a massively consequential decision for Maryland law that reaches far past the specific legal questions concerning sexual orientation discrimination that spawned the case. It has huge implications for all existing and future Maryland antidiscrimination laws, and every category protected by them—extending beyond sex, sexual orientation, and gender identity to impact protections for race, religion, disability, color, creed, and all others.

The core issue this bill addresses is articulated in footnote 14 of the decision, where the Court says “The General Assembly’s practice, as we understand it, has been to specifically identify the categories it intends to protect in antidiscrimination statutes. As CRS points out, the

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<sup>1</sup>From the [Oyez summary of Bostock](#): “Discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat employees differently because of their sex—the very practice Title VII prohibits in all manifestations.”

General Assembly has explicitly included sexual orientation as a protected category (as well as sex and gender identity) in multiple statutes over the past decade.” The Court attached the footnote to the following: “Adding sexual orientation as a protected category in MEPEWA will require similar legislative action.”

The Court’s analysis is equally applicable to every other protected category not specifically enumerated in each antidiscrimination clause in state law, and for every new antidiscrimination clause to be introduced in future legislative sessions. The case boils down to this: if any protected category is not specifically included in a given antidiscrimination clause, Marylanders belonging to that protected category are not protected by the clause. Because of its far reaching impacts, this decision is a clear mandate for the General Assembly to take swift, comprehensive corrective action to remedy the significant gaps in Maryland’s antidiscrimination laws that were created by the Court’s decision. **Failure to do so exposes all Marylanders—especially the most marginalized—to harmful discrimination without any legal recourse.**

After *John Doe v. CRS*, there are many statutory protections from discrimination that were previously assumed to be in force but are now rendered nonexistent. As the Court itself demonstrates with footnote 14, the impacts of *John Doe v. CRS* extend far beyond MEPEWA and MFEPA. The *Doe* case focused on those employment law statutes as they apply to LGBTQIA+ Marylanders, but the logic of the Court’s holding clearly applies to every other antidiscrimination clause in state law and to every protected category therein.

Thus, the decision’s impacts are especially significant everywhere there are inconsistent or omitted statutory protections for sex, sexual orientation, gender identity, race, disability, religion, color, creed, and any other protected category currently in existence or yet to be added to state law. To understand the scope of the problem, we surveyed Maryland law as it existed in fall 2023 to understand how the terms for protected categories had been used across the state’s antidiscrimination clauses. We confirmed that the language in these clauses is not consistent between the statutes as to which protected categories are enumerated in the many antidiscrimination clauses. As demonstrated by *John Doe v. CRS*, the inconsistent statutory language means that there are significant holes in existing protections which leave Marylanders vulnerable to many forms of discrimination in many different circumstances.

The Equal Opportunity for All Marylanders Act is built from our survey and attempts to comprehensively plug the holes in Maryland’s antidiscrimination laws created by the state Supreme Court’s decision. The proposed Act makes existing antidiscrimination clauses consistent across state law to ensure that all Marylanders are given the most robust protections possible.<sup>2</sup> Absent this comprehensive update, Marylanders will continue to be exposed to discrimination while future piecemeal attempts to remedy *Doe* perpetuate the very problems with the language of our statutory protections that the decision revealed.

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<sup>2</sup> It’s also important to note that *John Doe v. CRS* also impacts all new bills moving forward— any proposed antidiscrimination language must now be careful to specifically and consistently enumerate every protected category intended to be covered, otherwise the new language will suffer from the same deficiencies this proposed Act aims to fix, leaving Marylanders unprotected from discrimination.

Unfortunately, we know that it is all too common for Marylanders to experience harmful discrimination in many forms and in many contexts. This discrimination causes lasting pain and ruins lives. It is not difficult to find news stories and data-driven reports from governments and institutions demonstrating this fact, and Marylanders continue to bring lawsuit after lawsuit attempting to remedy the harms they suffer as they experience many different forms of discrimination.

Without the Equal Opportunity for All Marylanders Act, people who are victims of discrimination currently have an incomplete patchwork of protections under state law. Their legal shield from discrimination has significant holes in it. We fear that, barring a comprehensive response from the General Assembly, the problems created by *Doe* leave Marylanders with inadequate options for seeking judicial recourse when they suffer harmful discrimination.

In the wake of *John Doe v. CRS*, Marylanders deserve a careful, comprehensive update to our antidiscrimination protections. The General Assembly must ensure that all people in every protected category are not subject to prejudicial discrimination and bias based on their protected characteristics in any context. The Equal Opportunity for All Marylanders Act attempts to do just that, and **for all these reasons we urge this committee to give it a favorable report.**

Respectfully submitted,

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Disability Rights Maryland  
Economic Action Maryland  
The Episcopal Diocese of Maryland  
FreeState Justice\*\*  
Maryland Center on Economic Policy  
National Women's Law Center  
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