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Reply to: Virginia

May 17, 2016

Via Email Only

Mayor Mike Huether
224 W. Ninth Street
P.O. Box 7402
Sioux Falls, SD 57117
mhuether@siouxfalls.org

RE: Proposed Sioux Falls Human Relations Ordinance

Dear Mayor Huether:

By way of brief introduction, Liberty Counsel is an international non-profit legal, media and policy organization with offices in Orlando, Florida; Lynchburg, Virginia; and Washington D.C. Liberty Counsel's legal practice is primarily federal. We specialize in First Amendment religious liberty matters and the protection of constitutional liberties.

Liberty Counsel writes at the request of concerned citizens, pastors, churches, and other organizations supportive of family values, within the City of Sioux Falls ("the City"), in reference to "[AN ORDINANCE OF THE CITY OF SIOUX FALLS, SD, AMENDING THE CODE OF ORDINANCES OF THE CITY BY AMENDING CHAPTER 98: HUMAN RELATIONS](#)" ("the Human Relations Ordinance" or "HRO"). The HRO was read for the second time at the Tuesday, May 3, 2016 meeting of the City Council, but further action was deferred to the City Council meeting on Tuesday, June 14, 2016, at 7:00 p.m. The Ordinance contains a number of serious infirmities, which require that it be rejected.

Unnecessary and Inappropriate Nondiscrimination Categories

First, as you know, "sexual orientation" and "sexual identity" (undefined by the HRO, but for the purposes of this analysis, understood as "gender identity") are not protected classes under South Dakota state law or United States federal law. Moreover, in South Dakota, there is no data showing "discrimination" on these additional proposed grounds is occurring in the City of Sioux Falls, nor of the necessity of this proposal. Adding these, however, to legitimate protected classes like race, sex, or religion is improper. "Religion" is a fundamental right, and is enumerated in the U.S. Constitution. The color of one's skin is a genetic unchangeable. Natural biological sex and sexual organs are genetic unchangeables, and are determined at the chromosomal level.

“Sexual orientation” and “gender identity” are thus neither fundamental rights nor fixed, objective categories. They are subjective and fluid in nature; studies and the experience of many show that they are subject to spontaneous change; and they are caused by a number of background, developmental, and exposure factors. As observed by Dr. Paul McHugh, former chief psychiatrist at Johns Hopkins Hospital, [“when children who reported transgender feelings were tracked without medical or surgical treatment at both Vanderbilt University and London’s Portman Clinic, over 70%-80% of them spontaneously lost those feelings.”](#) Dr. McHugh’s findings are emphatically confirmed by the DSM-V, which shows as many as 97.8% of gender-confused boys and 88% of gender-confused girls eventually accept their biological sex after naturally passing through puberty.¹

Factors that cause same-sex attractions or gender confusion can impact individuals at an early age, thus making it seem to an individual that “it’s the way they are,” but they remain at all times subject to the volitional and moral choice of the individual. According to the Centers for Disease Control, early childhood sexual experience (“child molestation”) factors significantly higher for those with gender confusion and same-sex attractions, when compared with gender congruent or heterosexual teens.² These categories are thus inappropriate categories to enshrine in an ordinance, especially where their inclusion will directly conflict with religious Free Exercise, and the privacy rights of actual, biological, women and girls.

No Definitions of Important Terms and Vagueness

Second, the law and basic fairness requires that a fine of up to \$10,000 be premised upon specific definitions. In that vein, **§98.001 “Definitions,” contains no definition for “sex,” and no definitions for “sexual orientation” or “sexual identity.”** Section 98.001 states that the “following definitions shall apply unless the context clearly indicates or requires a different meaning,” but if biological sex is discarded or superseded by “sexual identity,” the context cannot provide guidance. If “sex” means “the condition of being biologically male or biologically female,” then this should be clarified. “Sexual orientation” and “sexual identity” likewise are undefined. Will employers be forced to choose between protecting female employees’ privacy rights based on biological sex, on the one hand, and a claim by a male employee on the other hand that his “sexual identity” of “female” allows him access to the women’s restroom or locker room, in a place of employment or public accommodation?

An enactment is void for vagueness under the Due Process Clause of the Fourteenth Amendment if it fails to draw reasonably clear lines between lawful and unlawful conduct. *Smith v. Goguen*, 415 U.S. 566, 574-578 (1974). The “void-for-vagueness” doctrine requires that a law be drafted “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

¹American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, Arlington, VA, American Psychiatric Association, 2013 (451-459). See page 455 re: rates of persistence of gender dysphoria.

²Centers for Disease Control (CDC) statistics indicate that about 1 in every 5 “homosexual” teenagers had had “sexual contact” – been molested - before reaching his/her teen years. Likewise, about 1 in every 7 bisexual teenagers had been molested before reaching his/her teen years. And among the sexually unsure teenagers, about 1 in 8 had been molested before reaching his/her teen years. In stark contrast, only 1 in every 21 heterosexuals had been molested before reaching his/her teen years. See Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9–12 — Youth Risk Behavior Surveillance, Selected Sites, United States, 2001–2009, available at <http://www.cdc.gov/mmwr/pdf/ss/ss60e0606.pdf>.

enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In evaluating vagueness, a reviewing court would consider: (1) whether the law “give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly;” and (2) whether the law provides explicit standards for those applying them to avoid arbitrary and discriminatory applications. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Churches and Religious Schools

In addition to failing to provide notice of what “discrimination” is prohibited, the Ordinance purports to apply to churches and religious institutions. “Employers” are defined in § 98.001, Definitions, and this section includes churches. Per § 98.003 (a), “employers” may not discriminate on the basis of “sex,” “sexual orientation,” or “sexual identity,” whatever those terms mean. Per § 98.003 (i) religious organizations or bodies are exempt from the employment nondiscrimination provisions, **but only with respect to the “religious qualifications for employment or residence in church-owned or church-operated property.”** Churches and religious “organizations **shall not be exempt** from any provisions of this chapter relating to discrimination based upon race, color, **sex, sexual orientation, sexual identity**, ancestry, national origin, familial status or disability.” (Emphasis added).

Many churches, based upon the teachings of the Bible, church doctrine, and sincerely-held religious belief, make hiring decisions on the basis of factors which the HRO purports to prohibit, including biological sex, and whether a person is living in what the Bible defines as open sin, including sex outside of marriage (adultery, fornication, or unmarried cohabitation), unbiblical marriages (including incestuous or homosexual “marriages”), or cross-dressing or transvestism (“transgender,” “gender identity” or “sexual identity”). If the undefined terms as noted above cover any of these categories, it is unconstitutional for the City to apply this coverage to churches, religious schools, and religious organizations. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

Non-Religious Schools, Daycares and Kindergartens

The Ordinance applies to non-religious schools (public and private), including daycares and kindergartens, and would require them to allow teachers or staff to openly cross-dress in front of children. See § 98.001, Definitions, “Educational Institutions.” This will confuse the children’s concept of gender, or appropriate behavior and dress, with no recourse by the parents or the schools, daycares, or kindergartens.

In the Clark County, Nevada school district, for example, a male teacher, **Andrew Peterson**, was permitted to teach a kindergarten class while engaging in distracting “sexual identity” expression by cross-dressing in class. His woman’s hair style, makeup, and clothing, along with his speech in a contrived falsetto voice, caused children to be confused as to whether he was a man or a woman. Numerous parents sought to transfer their children to another teacher’s class, but were refused by the school district. One five-year-old became upset each time his mother referred to the teacher as “Mr. Peterson,” siding with the teacher, and stating that he was “a girl,” thus forcing the mom to choose between telling her son a lie, and telling her son about cross-dressing and sexuality, subjects which are inappropriate and harmful for a five-year-old, and which contradicted the family’s religious, ethical and moral beliefs.

Public Accommodations – Restrooms and Locker Rooms

The Ordinance would apply to “Public Accommodations,” including restrooms, locker rooms, and other places where privacy has traditionally been expected, due to private bodily functions and the potential of various stages of undress or nudity for the purposes of changing clothes. The Ordinance would change this, and would allow men to enter all such places otherwise reserved for women and girls, so long as they simply claim a female identity (whether sincere or not). See § 98.001, Definitions, “Public Accommodations.” The HRO applies vice versa, but beyond the privacy implications for men, the threat posed by “transgender” biological females accessing men’s facilities has thus far been insignificant.

[Liberty Counsel’s webpage on “transgender” incidents](#)³ details fifty (50) incidents of men dressed as women observing, videoing, groping, molesting, attacking, raping, exposing their penises to, or otherwise assaulting or frightening women and children, primarily girls. Sixteen (16) of those incidents occurred in locker rooms or bathrooms, with two in a women’s shelter. Several ordinances or laws explicitly permitted “gender identity” access by men claiming to be women. This was the case in both the Clay Scott Francis and Christopher Hambrook examples.

Women’s Shelter Example

The Ordinance would require any women’s shelter in Sioux Falls, to admit any man claiming to be “transgender,” simply upon that man’s own word. Under a similar law, in Toronto, Canada, [Christopher Hambrook](#) was admitted to two different women’s shelters because he claimed to be a woman, and called himself “Jessica.”⁴ In February 2012, one of his victims went to bed, and awoke to find Hambrook assaulting her. “Her tights had been pulled down past her bottom and her bathing suit had been pulled to the side,” court documents reveal. “She yelled at [Hambrook], demanding to know what he was doing. He simply covered his face with his hands, said ‘Oops!’ and started giggling.” In a second incident, he stalked a deaf and homeless woman living in the shelter, and “grabbed [her] hand and forcibly placed it on his crotch area while his penis was erect.”⁵

Bathroom/Locker Examples

The Ordinance would require the admission of an individual like [Thomas Lee Benson](#) (39) into bathrooms and locker rooms. A “cross-dressing, convicted sex offender released to community supervision,” “Mr. Benson has been known to dress as a female to gain access to undressed minor females by frequenting restrooms, dressing rooms, changing rooms, aquatic centers and pool locker rooms.”⁶ Benson “keeps going to locations where children congregate.” Benson was arrested at an aquatic park when he went inside dressed as a woman and made contact with a little girl in the ladies’ locker room. He had been caught in the women’s dressing room at an Oregon athletic club; a dressing room at Portland’s Mt. Scott Community Center in 2007, and was again caught in a women’s dressing room at a

³ <http://www.lc.org/transgender>

⁴ <http://www.lifesitenews.com/news/sexual-predator-jailed-after-claiming-to-be-transgender-in-order-to-assault;>
<http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender;>
[http://www.torontosun.com/2014/02/15/a-sex-predators-sick-deception.](http://www.torontosun.com/2014/02/15/a-sex-predators-sick-deception)

⁵ <http://www.torontosun.com/2014/02/15/shocking-case-proves-tobys-law-is-flawed>

⁶ http://www.oregonlive.com/milwaukie/index.ssf/2012/05/cross-dressing_sex_offender_re.html

Nordstrom store in 2009, all dressed in women's attire. "Benson said he wants people to know he's addicted to cross-dressing and he's vowed to stop; however he is not certain he can change."⁷ **"My drug of choice is women's clothing," he said. "The high I get is by having people look at me and say, 'You are a woman.'" "Yes I have done things in the past that are bad, but I would also remind people I do not go around having sex with young girls anymore, and I have not been doing that in over 15 years,"** he said.⁸

The Ordinance would allow a **Clay Scott "Colleen" Francis** into bathrooms and locker rooms, to engage in "sexual identity" expression, just like the Washington state "nondiscrimination" law, which ultimately permitted him to sit **"with her [sic] legs open with her [sic] male genitalia showing"** in the Evergreen State College women's locker room **in front of women and schoolgirls from local schools**, which used the College swim team facilities. His interpretation of what was permitted by the "gender identity or expression" "nondiscrimination" law and policy was adopted by Evergreen State College, as well as the Thurston County prosecutor's office, despite the actual presence of minors. He remains free to continue doing so today. Further details of his case are discussed in a **November 2, 2012 letter to the Thurston County, WA prosecutor's office.**⁹

The Ordinance would allow a **Martin "Marty" Ortiz** to cross-dress on the job, and insist on using the women's restroom over the objections of nearly 40 female employees, with no recourse by a Sioux Falls employer. Employed at the Billings, MT Wal-Mart, the offensive "sexual identity" behavior of Mr. Ortiz included actions such as **urinating in the women's restroom while standing up, with the stall door open, and refusing to use the single-space "family" restroom.** **Mr. Ortiz is still working hard to overcome the privacy rights of women and girls.**¹⁰

The Ordinance would make it legal for an individual like **Norwood Smith Burns** (51) to enter women's restrooms and locker rooms with impunity, and would prevent his exclusion or arrest until he made an overt act. Mr. Burns went to a Georgia Wal-Mart "wearing a dark woman's suit, black high heels, red nail polish, green eye shadow and women's jewelry," before he "undressed in the women's restroom on Sunday in front of several children" and "ordered women out of the restroom as they tried to enter it" and "show[ed] off his white girdle and dark thong underwear" in the women's section of the store.¹¹

Real Estate and Realtors

The Ordinance would apply to realtors, making it "discriminatory" for a realtor to refuse to show a house to individuals presenting a "sexual identity" of the opposite sex, despite such being a good indicator of gender confusion, instability or sexual fetishism. Thus, the Ordinance would have made it illegal for a Sioux Falls realtor to reject the appointment of an individual like **Jeffrey Wayne Shumate**, who dressed as a woman for a property showing with a real estate agent, and then tried to rape and kill her.¹² "We don't know why he decided to dress in women's clothing and we don't know his motivation," said Cpl. Michele Pihera with

⁷ http://www.oregonlive.com/oregon-city/index.ssf/2011/10/cross-dressing_sex_predator_se.html

⁸ <https://allisonslaw.wordpress.com/tag/thomas-lee-benson/>

⁹ https://www.liberty.edu/media/9980/attachments/110212_-_Ltr_-_Thurston_County_Prosecutor.pdf

¹⁰ <http://genderexpansionproject.org/gep-staff-volunteers/>

¹¹ <http://www.wsbtv.com/news/news/police-man-undresses-in-front-of-children-in-walmar/nJckr/> ;

<http://www.ajc.com/news/news/local/-cross-dressing-man-arrested-for-exposure-at-walmart/nQddG/>

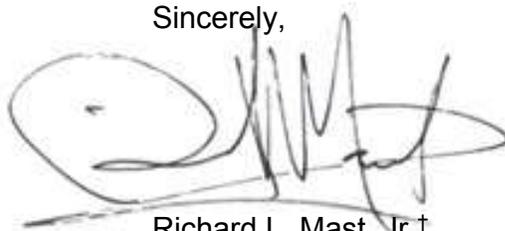
¹² <http://www.wsbtv.com/news/local/real-estate-agent-says-she-was-attacked-man-dresse/33425296>

the Gwinnett County Police Department. The real estate agent was showing Mr. Shumate a home in Gwinnett County, GA, on a Wednesday morning, but “when she (the real estate agent) got there she felt uneasy about the situation. She didn’t want to go inside the home by herself,” Pihera said. Because the realtor would not go inside with him, “after Shumate exited the home, he attacked” her “on the front porch, according to investigators. She was able to track down a passing car, and they called 911.” “She tried to fight off the offender and she tried to run away and ultimately that probably saved her life,” Pihera said.

There are many more examples like these. The City has an obligation to protect women and girls from men invading private areas reserved for women. The City should not infringe upon the religious liberties of private businesses, churches and religious organizations in their employment decisions. The City should not override the rights of parents of students in schools to shield their children from gender confusion or inappropriate expressions of sexuality. For these reasons and others, therefore, the HRO should be rejected.

Should you have any questions about any of the points contained in this letter, please don’t hesitate to contact me at 407-875-1776.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard L. Mast, Jr.', written over a horizontal line.

Richard L. Mast, Jr.†

RLM/vab
CC:

Sioux Falls City Council:

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