May 4, 2016

VIA EMAIL & HAND DELIVERY

Council President Steven Waits
Council Member Phil Gardner
Council Member Charlotte Hubbard
Council Member Mike Henderson
Council Member Chris Spurlin
Council Chambers, Oxford Town Hall
145 Hamric Drive East
Oxford, AL 36203

RE: Oxford City Council Ordinance No. 2016-18

Dear Council Members:

We are attorneys from the Southern Poverty Law Center, the American Civil Liberties Union ("ACLU"), and the ACLU of Alabama writing to impress upon you the importance of recalling Oxford City Council Ordinance No. 2016-18 (the "Ordinance").

We applaud the Oxford City Council for considering a recall of the Ordinance, especially given the negative impacts it will have in your community if enacted. Recalling the Ordinance is warranted because the Ordinance violates the U.S. Constitution and federal law. As such, the Ordinance exposes the City of Oxford to substantial legal liability as well as a loss of federal funding. In addition, the Ordinance harms already marginalized transgender individuals and leaves all residents of Oxford vulnerable to invasions of privacy, without conferring any meaningful protections.

Background

The word transgender refers to an individual whose gender identity is different from the sex they were assigned at birth. For example, a transgender boy is a person who was assigned the sex female at birth, but his gender identity is male. Gender identity is a person's deeply held sense of their own gender. Medical opinion is unequivocal that gender identity is not a choice.

The Ordinance Violates the U.S. Constitution and Federal Law

Prohibiting people who are transgender from accessing restrooms and changing facilities that correspond to their gender identity is prohibited by the U.S. Constitution as well as federal civil rights law.

Equal Protection Clause

By singling out transgender people for different and unequal treatment, the Ordinance discriminates on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment. By definition, transgender individuals are people whose gender identity is not congruent with the sex assigned to them at birth. Accordingly, discrimination against transgender persons "is sex discrimination, whether it's described as being on the basis of sex or gender." Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011); accord Macy v. Holder, EEOC Doc. 0120120821, 2012 WL 1435995, at *7 (EEOC Apr. 20, 2012). Indeed, just as it is impossible to discriminate against a person for being a religious convert without discriminating based on religion, it is impossible to treat people differently based on their transgender status without treating them differently based on sex. See Schroer v. Billington, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008); see also City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (the "simple test" for determining whether sex discrimination has occurred is whether an individual was treated "in a manner which but for that person's sex would be different" (internal quotation marks omitted)).

Differing treatment based on a person's transgender status also inherently involves impermissible discrimination based on a person's gender nonconformity. As many courts have recognized, because transgender people do not conform to sex stereotypes by definition, discrimination against an individual because he or she is transgender is a form of impermissible sex stereotyping. See, e.g., Glenn, 663 F.3d at 1317 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."); see also Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

Under the Equal Protection Clause, discrimination based on transgender status and gender nonconformity is presumptively unconstitutional and subject to heightened scrutiny. See United States v. Virginia, 518 U.S. 515, 555 (1996) ("[A]ll gender-based classifications today warrant heightened scrutiny." (internal quotation marks omitted)); Glenn, 663 F.3d at 1318-19 (same). The Ordinance discriminates against transgender people and fails heightened constitutional review because it is not substantially related to any important government interest. It is not even rationally related to any legitimate government interest. Instead, the Ordinance endangers the safety, privacy, security, and well-being of transgender individuals. For example, if a young transgender girl were to use the restroom designated for men and boys, she likely would be harassed and might be assaulted by men or boys who believed she should not be in that restroom.

Due Process Clause

The Ordinance, if enacted, would also subject Oxford to liability under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Ordinance violates this constitutional provision because it criminalizes status—here, being transgender—and empowers the police to arrest individuals for "harmless life sustaining activities" such as using restrooms and changing

rooms. Pottinger v. City of Miami, 40 F.3d 1155, 1156 (11th Cir. 1994); accord Robinson v. California, 370 U.S. 660, 666-67 (1962).

The Ordinance further violates the Due Process Clause because its broad reach and lack of enforcement mechanisms—leaving unclear, for instance, whether people risk arrest simply for failing to carry their birth certificates to the restroom at all times—render the Ordinance "so vague that it fails to give ordinary people fair notice of the conduct it punishes [and] so standardless it invites arbitrary enforcement." Johnson v. United States, 135 S. Ct. 2551, 2556 (2015); accord City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (laws are void where they "authorize and even encourage arbitrary and discriminatory enforcement").

The Ordinance also violates transgender individuals' right to privacy protected by the Due Process Clause. There is a "constitutionally protected 'zone of privacy'" that includes an "individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 598-99 (1977); see also Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457, 465 (1977) (recognizing "constitutionally protected privacy rights in matters of personal life"). The Constitution protects information maintained as private to preserve a person's "personal security and bodily integrity," Kallstrom v. City of Columbus, 136 F.3d 1055, 1062 (6th Cir. 1998), and information that is highly intimate, such as details about "private sexual matters," Bloch v. Ribar, 156 F.3d 673, 685 (6th Cir. 1998). For a transgender man, using the restroom designated for women and girls—as would be required under the Ordinance—would force him to disclose to complete strangers the fact that he is transgender, which could lead to violence and harassment and endanger his personal security and bodily integrity. Love v. Johnson, No. 15-11834, 2015 WL 7180471, at *5 (E.D. Mich. Nov. 16, 2015) (holding that requiring individuals to disclose their transgender status "directly implicates their fundamental right of privacy").

Violations of Federal Civil Rights Laws

Title IX of the Education Amendments of 1972, which prohibits discrimination based on sex in public schools and in any education program that receives federal financial assistance, protects students from discrimination based on their gender identity, gender nonconformity, and transgender status.[1] Just

[1] Statement of Interest of the United States, G.G. ex rel. Grimm, Exhibit B (Letter from James A. Ferg-Cadima, Acting Deputy Ass't Sec'y for Policy, Office for Civil Rights, U.S. Dep't of Educ.), submitted in G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 4:15-cv-54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), rev'd 2016 WL 1567467 (4th Cir. Apr. 19, 2016); Letter from Adele Rapport, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Dr. Daniel E. Cates, Superintendent, Twp. High Sch. Dist. 211 (Nov. 2, 2015), (Rapport Letter), available at http://www.nytimes.com/interactive/2015/11/02/us/document-letter-from-the-us-dept-of-education-to-daniel-cates.html. The Department of Education explained that 34 C.F.R. § 106.33, which authorizes schools to provide separate restrooms based on "sex," does not address how to assign restrooms to a student whose gender identity is not consistent with the sex assigned to them at birth and, thus, issued its opinion to clarify.

The Department of Education and the U.S. Department of Justice have also entered into binding settlement agreements requiring school districts to allow transgender students to use restrooms and other sex-segregated facilities that correspond to their gender identity. See Resolution Agreement, Downey Unified School District, OCR Case No. 09-12-1095, at 1 (Oct. 8, 2014), available at http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf;

last month, a federal appeals court specifically ruled that excluding transgender students from using the same restrooms as other students violates Title IX. G.G. v. Gloucester Cty. Sch. Bd., — F.3d. —, 2016 WL 156747 (4th Cir. Apr. 19, 2016). The court held that the Department of Education's interpretation of Title IX's implementing regulations—which provide that schools must treat transgender students consistent with their gender identity when separating students into sex-segregated facilities such as restrooms—is entitled to controlling deference. See id.

The Ordinance also conflicts with Title VII of the Civil Rights Act of 1964, which requires employers to provide transgender employees access to restrooms that match their gender identity. See Lusardi v. McHugh, EEOC DOC 0120133395, 2015 WL 1607756 (EEOC April 1, 2015). Restroom policies that single out transgender people violate Title VII, regardless of whether they were "motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort." Lusardi, 2015 WL 1607756, at *9 (citing Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012)). Accordingly, the judge in Lusardi found that the U.S. military impermissibly discriminated against a transgender Alabamian woman when they denied her access to a multiple occupancy female restroom.

The Ordinance Fails to Promote Public Safety

The Ordinance fails to promote the safety of non-transgender people. Prior to the passage of the Ordinance, it was already illegal for a person to enter a restroom or changing facility to assault or injure another. Moreover, protecting transgender people from discrimination in public accommodations, including restrooms and changing facilities, has resulted in no increase in public safety incidents in any jurisdiction anywhere in the United States. Sexual assault prevention and domestic violence organizations have reached consensus that laws like the Ordinance are unnecessary and harmful. See National Task Force to End Sexual and Domestic Violence Against Women, National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community (April 21, 2016), available at http://4vawa.org/4vawa/2016/4/21/full-and-equal-access-for-the-transgender-community.

The Ordinance Intrudes on the Privacy of All Oxford Residents and Is Bad for Business

The Ordinance also implicates the privacy rights of Oxford residents who are not transgender. The very women and children the Ordinance purports to protect may be forced to carry their birth certificates in their wallets and submit to "gender inspections" in order to gain access to the restroom. Any woman who is not traditionally feminine-looking or not dressed in a feminine manner could be stopped and subjected to intrusive questioning, inviting humiliation and stigma. Moreover, it is bad for businesses when customers are subjected to such treatment when accessing the restroom or changing facilities.

Resolution Agreement, Arcadia Unified School District, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, at 3 (July 24, 2013), available at http://www.justice.gov/crt/about/edu/ documents/arcadiaagree.pdf.

Conclusion

We again applaud the Oxford City Council for considering a recall of the Ordinance. Please be advised, however, that the Southern Poverty Law Center, the ACLU, and the ACLU of Alabama will be forced to consider legal action in the event that the Oxford City Council fails to recall or repeal the Ordinance.

Thank you in advance for your careful consideration of this important matter.

Sincerely,

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