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SENT VIA FACSIMILE, U.S. MAIL & EMAIL

Council Members of Montgomery County  
5<sup>th</sup> Floor, Council Office Building  
100 Maryland Avenue  
Rockville, MD 20850

county.council@montgomerycountymd.gov

Re: Bill No. 23-07 Non-discrimination/Gender

Dear Council Members:

Advocates for Faith and Freedom is a non-profit public interest law firm. We seek to resolve disputes through education of public officials of the constitutional rights our clients. When necessary, we proceed to litigation to secure these rights. We have been contacted by Derwood Alliance Church, Women's Christian Temperance Union of Maryland, Parents and Friends of Ex-Gays & Gays, and other interested individuals and organizations. They have sought our assistance concerning proposed Bill No. 23-07.

### **RELEVANT FACTS**

It is our understanding that the County Council for Montgomery County is presently considering adopting revisions to Chapter 27 of the Montgomery County Code. Bill No. 23-07 will add a definition for "gender identity" as follows:

Gender identity means an individual's actual or perceived gender, including a person's gender-related appearance, expression, image, identity, or behavior, whether or not those gender-related characteristics differ from the characteristics customarily associated with the person's assigned sex at birth.

Additionally, "gender identity" will be added as a protected classification throughout Chapter 27. Furthermore, subsection (k) will be added to Article 27-19 as follows:

An employer may require an employee to adhere to reasonable workplace appearance, grooming, and dress standards that are not precluded by any provision of state or federal law. However, an employer must allow an employee to appear, groom, and dress consistent with the employee's gender identity.

Chapter 27 fails to provide a religious exemption in the vast majority of circumstances upon which this ordinance would apply. In addition to the lack of a religious

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exemption, our clients are concerned with the threat to public safety that will result when persons suffering from gender identity disorder have the legal right to choose the restrooms, locker rooms, and other facilities that are normally reserved to persons based upon their natural gender. Further, our clients are very concerned that this reckless bill will give sexual predators access to individuals in the most vulnerable of situations.

Although section 27-10(c) states that “[t]his division does not apply to accommodations and that are distinctly private or personal,” we have no reason to believe that this exemption is intended to be used to prevent persons from entering facilities – such as restrooms and locker rooms – in a manner inconsistent with their natural biological gender. In fact, it appears that the attorney for the County Council is recommending that the County Council intentionally leave the applicability of section 27-10(c) ambiguous so that the Human Rights Commission can interpret and apply the relevant sections at their subjective whim.

Our clients’ concern was affirmed by Council Member Leventhal in an exchange of e-mails. The e-mail exchange was prompted by an e-mail sent to the Council members from a concerned mother as follows:

*Please do not pass the proposed transgender law. As it stands, it will permit transgenders with male genitals into the women’s lockerrooms and restrooms. This is indecent. Spend the money and build transgenders separate facilities. I have a 10 year old daughter who uses the locker room at the Germantown Indoor Pool. She must undress in front of women who she also sees naked as there are no changing rooms there (just bathrooms and showers). Under this law, she could be changing right next to a person with male genitals. A naked person with male genitals. This is not right. This is indecent and immoral. This could also happen, and undoubtedly will happen, in the schools around the county. Please do not do this. Our children deserve protection from our laws.*

Council Member Leventhal responded with the following:

*I cannot absolutely put to rest your concern that girls might find themselves in a locker room or dressing room in the presence of a person who expresses or asserts herself as a woman but who still has male genitals, but based on my own sense of the prevalence of that condition in the population, I think the likelihood of that occurring is remote. For the same reason, I do not think it would be cost-effective to build a third category of restroom, dressing room or locker room facilities. I just don’t think they would be used much.*

## **LEGAL ANALYSIS**

### **Vagueness under the 14th Amendment**

A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. *Grayned v. City of*

*Rockford*, 408 U.S. 104, 108-09 (1972). To pass constitutional muster, statutes must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and must provide explicit standards for those who apply the law in order to avoid arbitrary and discriminatory enforcement. *Miller v. Maloney Concrete Company*, 63 Md.App. 38, 49 (1985) (ordinance was held unconstitutional because the term “nuisance” was impermissibly vague). It has been recognized that a statute is so vague as to violate the Due Process Clause of the United States Constitution where its language does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, or stated otherwise, where its language is such that people of common intelligence must necessarily guess at its meaning. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *U.S. Civil Service Commission v. National Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973).

The definition for “gender identity” is so vague that no individual of ordinary intelligence can possibly know when they are violating Chapter 27. Pursuant to the definition of “gender identity,” an individual can choose a gender without limitation whatsoever. Bill No. 23-07 requires every “owner, lessee, operator, manager, agent, or employee of any place of public accommodation in the County” to avoid discriminating against any individual employee, customer, member, or other person they contact based upon that individual’s self-identification of being a male or female, regardless of their biological condition. However, this is an impossible condition because it requires the public accommodator to have foreknowledge of the private mental impressions, thoughts, and disabilities for each person with whom the public accommodator comes into contact. In other words, Bill No. 23-07 requires mind-reading.

There is no circumstance under which a clothing store will know, using this new definition of a “gender identity,” whether to lead an individual to the men’s or ladies’ dressing room. Likewise, a health club will have no way to protect its members from persons entering into the men’s or women’s locker rooms at will without risking the chance that the person the club stops may claim a non-natural gender. Furthermore, it will be impossible for a police officer to know whether a sexual predator in a park restroom sincerely claims the opposite gender or is using it as a front to abuse children. Most importantly, the County itself does not know how it will be implementing this new law, as admitted in its report to the County Council. Instead, it appears the County Council will leave the application and implementation to the Human Rights Commission without any guidelines concerning accommodations that are distinctly private or personal.

#### *Right to Privacy under the Federal and State Constitutions*

Maryland courts have adopted a cause of action for the invasion of privacy based upon the intrusion upon an individual’s seclusion as defined by *Restatement (Second) of Torts* § 652(B). This cause of action has specifically been applied to protect individuals in their use of restroom facilities and for the purpose of protecting individuals from having their bare bodies exposed to persons of the opposite sex. See e.g., *New Summit Assoc. Ltd. Partnership v. Nistle*, 73 Md.App. 351 (1987); *Hudson v. Goodlander*, 494 F.Supp. 890 (D.C. Md. 1980); *Lee v. Downs*, 641 F.2d 1117 (4<sup>th</sup> Cir. 1981). In each of these cases, a violation of the plaintiff’s

right to privacy was found due to the fact that a person of the opposite sex had the opportunity to view the plaintiff in a restroom or jail facility. "Most people ... have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating." *Hudson*, 494 F.Supp. at 1119. It is also important to note that a person's privacy may be violated even where there is no proof that any individual actually observed the plaintiff in a vulnerable position. *Nistle*, 73 Md.App. at 360. Rather, the plaintiff only needs to show that the plaintiff's privacy was, may have been, or may be in the future exposed to third parties. *Id.* However, in order for a plaintiff to obtain damages, he or she will be required to show evidence of actual invasion of privacy by the defendant. *Id.*

The female residents of Montgomery County clearly have a right of privacy that prohibits all persons of the opposite sex – or persons naturally born a male – from using a restroom, locker room, or other similar facility designated for females. The same is true in reverse for the male residents of Montgomery County. It is ridiculous to place the desires of persons suffering from gender identity disorder in front of the constitutional rights and safety of 99% of the residents in Montgomery County. There can be no compelling interest on the part of the County that would justify infringing upon the privacy rights of its residents.

### CONCLUSION

Therefore, Advocates for Faith & Freedom is prepared to initiate a lawsuit on behalf of our clients in the event that Montgomery County adopts Bill No. 23-07. Please contact me if you have any questions.

Kind regards,  
ADVOCATES FOR FAITH & FREEDOM



Robert H. Tyler  
General Counsel

RHT:lkj

cc: Derwood Alliance Church  
Woman's Christian Temperance Union of Maryland  
Parents and Friends of Ex-Gays & Gays