No. 01-5531

In The
United States Court of Appeals
for the Sixth Circuit

J. BARRETT HYMAN, M.D.,

Appellant,

v.

THE CITY OF LOUISVILLE, ET AL.

Appellees.

On Appeal from the United States District Court
for the Western District of Kentucky
at Louisville

BRIEF *AMICUS CURIAE* OF PUBLIC ADVOCATE OF THE UNITED STATES, CITIZENS UNITED FOUNDATION, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, CONCERNED WOMEN FOR AMERICA, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c) and 6th Circuit Rule 26.1, *amici curiae*, Public Advocate of the United States, Citizens United Foundation, Lincoln Institute for Research and Education, Concerned Women for America, and Conservative Legal Defense and Education Fund, make the following disclosures:

1. Are said parties subsidiaries or affiliates of any publicly owned corporation?

   No, all *amici* are nonprofit corporations which have no parent companies. They are all non-stock corporations, and no person or entity owns them.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

_____ July 9, 2001
William J. Olson
Counsel for *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are nonprofit organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.

Public Advocate of the United States ("Public Advocate") was established in the District of Columbia more than 20 years ago for public education purposes related to participation in the public policy process, and is tax exempt under section 501(c)(4) of the Internal Revenue Code. In recent years, Public Advocate has become especially concerned with a national trend to extend state and local anti-discrimination laws to include sexual orientation and gender identity, both of which are inherently unintelligible and wholly subjective terms that promote arbitrary and discriminatory enforcement. This case presents such an issue, and has led Public Advocate to present this *amicus curiae* brief in favor of the appellant.

Public Advocate is being joined in this effort by four other nonprofit, educational organizations, Citizens United Foundation, the Lincoln Institute for Research and Education, Concerned Women for America, and the Conservative Legal Defense and Education Fund, each of which is tax exempt under section 501(c)(3) of the Internal Revenue Code. Each organization was separately

established in the District of Columbia or the Commonwealth of Virginia within the past 25 years for educational purposes, including participation in the public policy process.

The educational mission of each of the *amici* includes programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, each of the *amici* has conducted research on other issues involving constitutional interpretation, and several have filed *amicus curiae* briefs in other federal litigation involving constitutional issues, including briefs before the United States Supreme Court.[1]

This brief is intended to assist the Court in fully developing the issues in the matters now before this Court, with particular reference to the issue of whether the city and county ordinances in this case should be stricken as being void for vagueness.

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[1] These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief. Such written consents, in the form of letters from counsel of record for the parties, have been received and copies have been submitted to the Clerk of Court. *See* Rule 29(a), Federal Rules of Appellate Procedure.

STATEMENT OF FACTS

In February of 1999, the City of Louisville, Kentucky amended its anti-discrimination ordinance to prohibit discrimination on account of "sexual orientation or gender identity" in employment. *See* Louisville Code of Ordinances ch. 98 ("LOU. CITY ORD.") In October of the same year, Jefferson County, Kentucky amended its anti-discrimination ordinance to prohibit such discrimination, not only in employment, but also in housing and public accommodations. *See* Jefferson County Code of Ordinances ch. 92 ("JEFF. CO. ORD.")

Both ordinances contain the same definitions of "sexual orientation" — an "actual or imputed heterosexuality, homosexuality, or bisexuality." LOU. CITY ORD. section 98.16; JEFF. CO. ORD. section 92.02. The City of Louisville defines "gender identity" as either "[h]aving a gender identity as a result of a sex change surgery" or "[m]anifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness." LOU. CITY ORD. section 98.16. Jefferson County, however, defines "gender identity" simply as "manifesting an identity not traditionally associated with one's biological maleness or femaleness." JEFF. CO. ORD. section 92.02.

Following the enactment of these amendments expanding the scope of the two anti-discrimination ordinances, Dr. J. Barrett Hyman, a medical doctor specializing in gynecology in the City of Louisville, located within Jefferson County, brought suit in the United States District Court for the Western District of Kentucky, seeking a declaratory judgment that the amendments were unconstitutional. Among the several claims in his complaint, Dr. Hyman charged that the terms "sexual orientation" and "gender identity" were unconstitutionally vague, and that the provisions banning discrimination because of "sexual orientation" and "gender identity" therefore violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

On cross-motions for summary judgment, the district judge rejected all of Dr. Hyman's claims. Hyman v. City of Louisville, 132 F.Supp.2d 528 (2001), Record No. 58. The district judge specifically dismissed the vagueness claim on the ground that "[t]he definitions of 'sexual orientation' and 'gender identity' are consistent with the meanings attributed to those terms by common usage." 132 F.Supp.2d at 546.

All of Dr. Hyman's claims having been dismissed with prejudice (132 F.Supp.2d at 549, Record No. 59), Dr. Hyman timely filed a notice of appeal.

This *amicus curiae* brief is filed in support of Dr. Hyman's claim that the city and county anti-discrimination ordinances, insofar as they apply to discrimination because of "sexual orientation" and "gender identity," should be stricken as unconstitutionally void for vagueness.

SUMMARY OF ARGUMENT

Contrary to the holding of the district court below, neither the term "sexual orientation" nor the term "gender identity" is a term of "common meaning" or "common usage." Instead, the definitions of both terms contained in the two ordinances, when examined in light of contrasting definitions of such terms in other statutes and ordinances and in light of societal convention, are confusing and unintelligible to the ordinary person, and susceptible to discriminatory and arbitrary enforcement. Hence, the amendments extending the reach of the City of Louisville and Jefferson County anti-discrimination ordinances to embrace "sexual orientation" and "gender identity" are void for vagueness under the Due Process test set forth in Hill v. Colorado, 530 U.S. 703, 732 (2000).

ARGUMENT

I. THE ORDINANCES ARE VOID FOR VAGUENESS.

A. Introduction.

Both the City of Louisville and Jefferson County anti-discrimination ordinances, which impose a civil penalty of up to $10,000.00 for a first offense,[2] contain two distinct types of protected classes, one requiring no definition apart from the naming of the class, the other defined in the statute. Those of the first type require no statutory definition because they employ commonly-used terms with self-evident meanings, including race, color, religion, ancestry, national origin, place of birth, sex, and age. Those of the second class are statutorily defined, because they do not have self-evident, common meanings. Prior to the 1999 amendments adding "sexual orientation" and "gender identity", the foremost examples of this second class were "handicap" (in the city ordinance) and "disability" (in the county ordinance).[3]

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[2] Appellant's Brief, p. 32. *See* LOU. CITY ORD. section 98.99 (A), JEFF. CO. ORD. section 92.15(A), 42 U.S.C. section 3612.

[3] To ensure that no one would mistakenly argue that a "moral" failing would qualify as a "handicap" or "disability," the two ordinances delimited each term to a "physical or mental impairment." LOU. CITY ORD. section 98.16; JEFF. CO. ORD. section 92.02. In recognition that drug use could possibly be classified as a "physical or mental impairment," however, each ordinance

Recognizing that "sexual orientation" and "gender identity," like handicap and disability, are not self-defining as are race, sex, age, and the like, the Louisville City Council and the Jefferson County Fiscal Court placed them in the statutorily-defined class. As noted above, both ordinances define sexual orientation as "[a]n individual's actual or imputed heterosexuality, homosexuality or bisexuality." The City of Louisville defined gender identity as "[h]aving a gender identity as a result of a sex change surgery" or "[m]anifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness." LOU. CITY ORD. section 98.16. The Jefferson County ordinance defined gender identify as "manifesting an identity not traditionally associated with one's biological maleness or femaleness." JEFF. CO. ORD. section 92.02.

In an attempt to limit the reach of these two new classes, both ordinances allow employers to discriminate because of "sexual orientation" and "gender identity" under a "bona fide occupational qualification" exception. LOU. CITY

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contained a specific exception limiting the scope of protection afforded a drug user. The city ordinance excludes such use whenever it "prevents an individual from performing the duties of the job in question, or would constitute a direct threat to property or safety of others" (LOU. CITY ORD. section 98.16), while the county ordinance simply excludes all "illegal use of drugs or chemicals" (JEFF. CO. ORD. section 92.02).

ORD. section 98.18(A); JEFF. CO. ORD. section 92.06(E). Additionally, both ordinances provide an exception to the reach of the new prohibition against discrimination because of "gender identity." The Louisville exception is express: "[n]othing herein shall be construed to prevent an employer from [e]nforcing an employee dress policy which policy may include restricting employees from dress associated with the other gender." LOU. CITY ORD. section 98.17(G)(1). The Jefferson County exception is implied: "[n]othing herein shall be construed to prevent an employer from … enforcing a written employee dress policy." JEFF. CO. ORD. section 92.06(F)(1).

In their attempts to define, and limit the reach of, the prohibition against discrimination because of "sexual orientation" and "gender identity," the city and the county have failed to take account of the minimum constitutional standards required of a statute or ordinance imposing substantial civil penalties. *Cf.* Belle Maer Harbor v. Charter Township of Harrison, 170 F.2d 553, 557 (6th Cir. 1999). Specifically, neither statutory definition meets the Due Process standard laid down by the United States Supreme Court in Hill v. Colorado, 530 U.S. 703 (2000).

B. The Definition of Sexual Orientation Fails the Hill Test.

According to Hill, the Due Process Clause of the Fourteenth Amendment requires a state, and any of its political subdivisions, to define the essential elements of a civil offense, such as those in the ordinances at issue in this case, to meet two independent standards: (1) the statute must "provide a person of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits;" and (2) the statute must not "authorize[] or even encourage[] arbitrary and discriminatory enforcement." *Id.*, 530 U.S. at 732. According to Chicago v. Morales, 527 U.S. 41, 52 (1999), this Due Process rule must be applied to any statute or ordinance, even one not reaching a substantial amount of constitutionally-protected conduct, when the statute or ordinance "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." The city and county ordinances' definition of "sexual orientation" fails to meet this constitutional standard.

1. The Ordinances Do Not Intelligibly Define Sexual Orientation.

The district court's opinion rested upon the claim that "sexual orientation," as defined in the Louisville and Jefferson County ordinances, has not been found

vague by the courts, has been consistently used in many statutes, ordinances and regulations, and has a common meaning based on "an abbreviated survey of contemporary reference materials." 132 F.Supp.2d at 546. Indeed, the district court concluded that, because the Louisville and Jefferson County definition of 'sexual orientation' simply reflected its "common usage," neither the term, nor its definition, was "unconstitutionally vague." 132 F.Supp.2d at 547. The sources relied upon by the court below, however, not only do not support the trial judge's claim that the Louisville and Jefferson County ordinances simply embraced the "common meaning" of "sexual orientation"; they also do not establish the claim that the definition of that term in the Louisville and Jefferson County ordinances reflects "common usage."

a. Case Precedents.

Relying on only two cited cases, the trial judge claimed that "several courts have been faced with, and discussed, 'sexual orientation' as it is used in various statutes and regulations," and "[n]one have found the term … vague in face of a Due Process Clause challenge." 132 F.Supp.2d at 546. Neither of the two cases cited by the court below support either claim. Indeed, both cases

involved racially-discriminatory actions.[4] These *amici* have discovered only one case in the country involving discrimination based upon "sexual orientation" wherein the issue of unconstitutional vagueness was raised, and that case did not involve a claim that the term, "sexual orientation," itself, was unconstitutionally vague.[5] The district court's reliance on the inapposite cases it cited was clearly erroneous.

b. Contemporary Reference Materials.

Relying upon the authority of BLACK'S LAW DICTIONARY, which defines "sexual orientation" as a "person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality, or bisexuality," the court below maintained that the city and county ordinances defining sexual orientation in relation to heterosexuality, homosexuality and bisexuality had simply embraced a "common meaning" of sexual orientation. *See* 132 F.Supp.2d at 546. But the district court clearly was mistaken. The BLACK'S LAW DICTIONARY definition, itself, has two components suggesting two

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[4] *See* State v. Palermo, 763 So. 2d 1155 (La. Ct. App. 2000); State v. Mortimer, 641 A.2d 257 (N.J. 1994).

[5] *See* In re M.S.v. A.G., 896 P.2d 1365 (Cal. 1995).

quite distinct meanings for "sexual orientation," one of which is not the definition embraced by the two ordinances at issue in this case.

According to the first part of the BLACK'S definition, the term "sexual orientation" may include a person who is sexually oriented to virtually anything, including animals (bestiality), children (pedophilia), inanimate objects (fixation or fetish), or dead people (necrophilia), in that all such persons have a "predisposition or inclination toward a particular type of sexual activity or behavior." BLACK'S LAW DICTIONARY (7th ed. 1999), p. 1379.[6]

On the other hand, BLACK'S further definition of sexual orientation in terms of "heterosexuality, homosexuality and bisexuality" suggests that the term sexual orientation applies only to those sexual predispositions or inclinations in relation to other human beings. Several states, counties and cities appear to have adopted this definition. *See*, *e.g.*, CAL. GOV'T. CODE section 12926(q); DADE COUNTY, FLA., CODE OF ORDINANCES section 11A-2(18); CHICAGO, ILL., CITY ORDINANCES section 2-160-020(k). Yet even these ordinances and statutes reveal that heterosexuality, homosexuality and bisexuality are not self-defining terms,

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[6] The City of Berkeley, California, appears to have embraced a form of this broad definition, describing sexual orientation as "an individual's actual or supposed sexual preference." BERKELEY, CAL., MUN. CODE section 13.28.020(4)

but rather have quite a variety of meanings. For example, the Onondaga County, New York anti-discrimination ordinance refines the meaning of each term as a specific kind of **sexual attraction** — a heterosexual, as one attracted to persons of the opposite sex, a homosexual to persons of the same sex, and a bisexual to persons of both sexes. ONONDAGA COUNTY, N.Y., LOCAL LAW NO. 1998-B, Article III(15). In contrast, the New Jersey State anti-discrimination law defines the three terms not only in relation to an **attraction other than sexual**, but also in relation to a **degree of attraction** — a person being a homosexual, for example, if his or her "**affectional, emotional or physical** attraction or behavior … is **primarily** directed towards [a person] of the same gender." N. J. REV. STAT., section 10:5-5 (jj) (emphasis added); *see also*, *id.*, subsections (hh), (ii), and (kk).

c. Statutes, Ordinances and Regulations.

The court below claimed that the Louisville City Council and Jefferson County Fiscal Court had used the term "sexual orientation" consistently with the definition employed by the state of Minnesota and several municipalities. 132 F.Supp.2d at 546. In defining "sexual orientation," however, the Minnesota

state legislature did not even use the words "heterosexuality, homosexuality, or bisexuality," as they appear in the two Kentucky ordinances. Rather, the Minnesota definition of "sexual orientation" is "having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person…, but does not include a physical or sexual attachment to children by an adult." MINN. STAT. ANN. section 363.01(41a) (West: 2000).

Other state laws and city ordinances appear to have drawn exceptions similar to Minnesota's to bring their anti-discrimination proscriptions into harmony with societal norms concerning adult/child sex. For example, the legislature of the Commonwealth of Massachusetts defines "sexual orientation" as not "includ[ing] persons whose sexual orientation involves minor children as the sex object." MASS. GEN. L. CH. 151B, section 4(1). Similarly, the City of Lafayette, Indiana defines "sexual orientation" as "male or female homosexuality, heterosexuality and bisexuality by orientation or practice, by and between consenting adults." LAFAYETTE, IND., MUN. CODE section 2.07.010. *Accord,* COLUMBUS, OHIO, MUN. CODE C. 2331.01 (A)(12); PHOENIX, ARIZ., MUN. CODE section 18-3(17). *See* COLUMBIA, MO., MUN. CODE section 12-32.

("Sexual Orientation. Male or female homosexuality, heterosexuality and bisexuality, by preference, practice or as perceived by others, but not including sexual preference or practice between an adult and a minor.")

Additionally, the Connecticut state legislature has carved out all illegal behavior from the reach of its anti-discrimination law, stating that "'sexual orientation' means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference, but excludes any behavior which constitutes a violation of part VI of chapter 952." CONN. GEN. STAT. sec. 46a-81a. *Accord*, N.H. REV. STAT. ANN. section 354-A:2(XIV-a); R.I. GEN. LAWS section 28-5-6(13); DAVIS, CAL., MUN. CODE section 10.01.040(h); DEKALB, ILL., MUN. CODE section 49.02(r). Although there are no such express limits in the ordinances in question, would such limitations be implied? After all, in Kentucky, it is a crime to commit child abuse (KY. REV. STAT. sections 510.110, 510.120, and 510.130), to engage in sexual misconduct (KY. REV. STAT. section 510.140), or to engage in sodomy (KY. REV. STAT. sections 510.070, 510.080, 510.090, and 510.100). May persons who commit such crimes nonetheless bring complaints under the Louisville and Jefferson County ordinances? Indeed, is such illegal

behavior, and other noncriminal sexual behavior, within the scope of the ordinances' protection?

Because the two ordinances define sexual orientation to include both "actual" and "imputed" heterosexuality, homosexuality or bisexuality, it is possible to infer that the ordinances outlaw discrimination based upon either the **conditions** of heterosexuality, homosexuality and bisexuality, or upon their **practices**. That appears to have been the assumption of the court below when it likened the two ordinances to the Madison, Wisconsin and Seattle, Washington city ordinances, which expressly extend their definitions of sexual orientation to include "practice," as well as to the Atlanta, Georgia and Iowa City, Iowa ordinances, which do not. 132 F.Supp. at 546. *See* MADISON, WIS., MUN. CODE section 3.23(2)(hh); SEATTLE, WASH., MUN. CODE section 14.04.030(Q); ATLANTA, GA., MUN. CODE section 94-10; IOWA CITY, IOWA, MUN. CODE section 2-1-1.

Yet, a comparative analysis of statutes and ordinances, not cited by the district court, indicate that the distinction between **being** a heterosexual, homosexual, or bisexual person, and **acting** like one, demands greater precision than is provided by the definition in the Louisville and Jefferson County

ordinances. For example, some state laws and municipal ordinances expressly confine sexual orientation to "predisposition or inclination." Thus, the Nevada state legislature has defined sexual orientation as "having or being perceived as having an **orientation** for heterosexuality, homosexuality, or bisexuality." NEV. REV. STAT. section 610.010(5) (emphasis added). The Rhode Island legislature has explained that its definition, identical to Nevada's, is "intended to describe the **status** of persons." R.I. GEN. LAWS 28-5-6(13) (emphasis added). *Accord*, N.H. REV. STAT. ANN. section 354-A:2(XIV-a). The Broward County, Florida ordinance describes sexual orientation as a "condition of being heterosexual, bisexual or homosexual," or "the perception" of such a condition or association with others in such a condition. BROWARD COUNTY, FLA., ORD. 16½-3(43).

Other state laws and local ordinances, by contrast, embrace a more expansive definition, **explicitly** extending protection to **behavior**, not just "predisposition or inclination." For example, the New Jersey state law defines "sexual orientation" to include the "practice," as well as the "inclination, … identity or expression," of heterosexuality, homosexuality or bisexuality. N.J. REV. STAT., section 10:5-5 (hh). Likewise, the King County, New Jersey, anti-

discrimination ordinance defines sexual orientation as "male or female heterosexuality, bisexuality or homosexuality, and includes a person's attitudes, preferences, beliefs and practices pertaining to sex." KING COUNTY CODE section 12.18.020(J). *Accord*, COOK COUNTY, ILL., ORD. 93-0-13, Art. II(Q) and (S); CHAMPAIGN, ILL., MUN. CODE section 17-3; URBANA, ILL., MUN. CODE section 12-39; BLOOMINGTON, IND., MUN. CODE section 2.21.030(24); LAFAYETTE, IND., MUN. CODE section 2.07.010; COLUMBIA, MO., MUN. CODE section 12-32; COLUMBUS, OHIO, MUN. CODE section 2331.01(A)(12); TOLEDO, OHIO, MUN. CODE section 554.01(I). By using only the general and undefined categories of heterosexuality, homosexuality and bisexuality, the Louisville City Council and the Jefferson County Fiscal Court have failed to come to grips with the inherent ambiguity and subjectivity of these terms, putting people at risk of violating the law without affording them an intelligible standard to guide their actions.

2. The Definition of Sexual Orientation Is Unconstitutionally Vague.

As the above survey of state laws and local ordinances reveals, the court below erred when it concluded that "sexual orientation," as defined in the

Louisville City and Jefferson County ordinances, has a "common meaning." Rather, the term has a variety of different possible meanings. And neither of the two ordinances in this case has spelled out with sufficient specificity the reach of the term. Does "sexual orientation," as defined in the two ordinances, include **behavior** as well as **predisposition**? Does it include a predisposition for sex with minors, but not the practice of such sex? Is the predisposition to engage in sex prohibited by these ordinances, law but not the practice of such sex? There is no way for persons who must obey this law to know what discriminatory behavior the two ordinances prohibit.

These questions are not based upon "hypertechnical theories as to what the [ordinances] cover," as was the case in Hill v. Colorado, *supra* 530 U.S., at 733. On the contrary, supported by language in the various statutes and ordinances from other jurisdictions referred to above, setting forth legislatively-refined definitions of heterosexuality, homosexuality and bisexuality, and thus, limiting the scope of those otherwise ambiguous and open-ended terms, they arise from considerations of fundamental fairness and reason. Moreover, these questions are not based upon public policy differences regarding the reach of laws prohibiting discrimination on the basis of sexual orientation. Rather, they

are based upon the Due Process principle that, without more definitive terminology, legal prohibitions, such as those outlawing discrimination on the basis of sexual orientation, as inadequately defined in the two ordinances at issue in this case, fail "to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [they] prohibit…" and "authorize[] or even encourage[] arbitrary and discriminatory enforcement." *See id.*, at 732.

With respect to lack of reasonable opportunity, it must be emphasized that neither anti-discrimination ordinance contains an explicit "scienter requirement." Unlike the statute upheld in Hill, a person may be found in violation of these anti-discrimination ordinances without any evidence of a *mens rea*, that is, without knowing, or even having reason to know, of another's sexual orientation. All that need be proved is an *actus reus*, that a person was discriminated against "because of" his or her "actual or imputed heterosexuality, homosexuality, or bisexuality."

As the Supreme Court of California has recently observed in In re M.S., *supra*, 896 P.2d 717, 718, "'[b]ecause of' … connotes a causal link between the victim's characteristic and the offender's conduct," which may be established solely by evidence that an alleged discriminatory act was a "substantial factor" in

the commission of an offense. And, as Justice Kennard pointed out in his concurring opinion in that case, "[d]eceptively simple in appearance, the words 'because of' … mask a host of difficult problems," due to the complexities of the human mind and of causation. *Id.*, at 730-33. While the California justices rejected a vagueness challenge to the "because of" language in the state's "hate crime" statute, it did so ultimately because the statute required proof of "specific intent." *See id.*, at 1375-76.

There is no specific intent requirement in the Louisville and Jefferson County ordinances. Rather, they approach strict liability, requiring only proof of a causal connection between an alleged discriminatory act and an "actual or imputed" sexual orientation without regard to the actor's knowledge or perception.

In contrast, the Berkeley, California City Council has imposed a *mens rea* requirement as a safeguard, requiring proof of "discrimination based on **actual knowledge** of sexual orientation" and "discrimination based on **supposition or assumption** of sexual orientation" to support a finding of "[d]iscrimination on the basis of sexual orientation." *See* BERKELEY, CAL., MUN. CODE, sections 13.28.010 and 13.28.020(B)(4).

Lawmakers cannot rightfully omit a *mens rea* element in the definition of an offense when the chief element of that offense could be a wholly subjective predisposition or inclination that may not even be reasonably apparent, much less known. Yet, the Louisville City Council and Jefferson County Fiscal Court have done just that here. Without an explicit scienter requirement, ordinances prohibiting discrimination based upon sexual orientation are hopelessly vague, failing to distinguish between "innocent conduct and conduct calculated to cause harm." *See* Chicago v. Morales, 527 U.S. 21, 50-51 (1999).

The constitutional shortcoming resulting from the lack of a scienter component is compounded by the failure to delimit the words, "heterosexuality, homosexuality and bisexuality." May a prospective employer inquire, for example, into a person's sexual predisposition for the purpose of determining whether that predisposition includes an inclination to, or history of, forcible rape or sodomy, adultery or indiscriminate promiscuity, fornication, incest, polygamy, polyandry, pedophilia, pederasty, nymphomania, bestiality or necrophilia? Could such inquiries be considered permissible because they might uncover inimical behavior, or actions contrary to the laws of Kentucky?

Or may such inquiries be permitted because the ordinances provide that discrimination against persons with protected sexual orientations may be made if it comes under the rubric of a "bona fide occupational requirement?" LOU. CITY ORD. sections 98.17(D), 98.18(A); JEFF. CO. ORD. section 92.07(A)(1). For example, may a physician, such as appellant Dr. Hyman, ask questions about a person's sexual habits for the purpose of determining whether that person might pose an unreasonable risk of harm to his female patients? May he ask questions about a person's sexual activities to determine if that person might pose an unreasonable risk of inappropriate sexual behavior in relation to his female patients? Without more specific guidelines than those contained in these ordinances, an employer would ask such questions at his peril.

These risks are compounded by the nature of the governmental agency authorized to enforce the two ordinances, and the scope of its enforcement powers. Composed of part-time appointees of the City Mayor and the County Judge, with the approval of the City Council and Fiscal Court, respectively, the joint city-county Human Relations Commission is authorized not only to investigate and enforce the anti-discrimination ordinances, but also to "issue … affirmative action orders" requiring compliance. LOU. CITY ORD. section 40.08.

Additionally, the Commission is empowered to enforce the ordinances by means of a "confidential hearing process" that does not guarantee to a person charged with a violation of the ordinance access to the evidence submitted to the Commission in support of an anti-discrimination complaint. *See*, *e.g.*, LOU. CITY ORD. section 98.05(G). Such confidentiality and secrecy may seem to be protections of the accused, but where the accused would ordinarily want to avoid the publicity that the disclosure of the mere filing of a charge would bring, they operate to insulate the initial enforcement decisions from the scrutiny of the public, thereby increasing the likelihood of arbitrary and discriminatory enforcement. Such discretionary initiative power, outside the realm of political and legal accountability, necessarily entrusts lawmaking to the case-by-case judgment of the Commission, a delegation that is no less unconstitutional than entrusting such lawmaking to the unaccountable "moment-to-moment judgment of the policeman on his beat." *See* Kolender v. Lawson, 461 U.S. 352, 360 (1983).

Like the anti-loitering ordinance struck down in Chicago v. Morales, *supra*, at 57-58, the Louisville City and Jefferson County ordinances, having

failed to make sufficient textual distinctions between lawful and unlawful conduct, grant unconstitutional discretion to the enforcement officials.

C. The Definition of Gender Identity Fails the Hill Test.

As it did with respect to "sexual orientation," the court below also insisted that "gender identity" was a term of "common meaning" and "common usage." 132 F.Supp.2d at 546. Citing three federal cases, the trial judge insisted that "[w]hile 'gender identity' is less commonly addressed by courts, those that have attempted to define the term have done so consistently." *Id.*, 132 F.Supp.2d at 546. None of the cases cited, however, made any attempt whatsoever to address "gender identity" as a legal term, much less as a legal term in an anti-discrimination statute. Indeed, the Supreme Court case cited by the district judge did not even use the term, "gender identity," at all.[7]

[7] *See* Farmer v. Brennan, 511 U.S. 825, 828 (1994); Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999); Smith v. Palmer, 24 F.Supp.2d 955, 959, n. 3 (N.D. Iowa 1998).

The fact that the Minnesota state law,[8] and the Atlanta, Georgia,[9] Iowa City, Iowa,[10] Madison, Wisconsin,[11] San Francisco, California,[12] Seattle,

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[8] MINN. STAT. ANN. section 363.01(41a): "[H]aving or perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."

[9] ATLANTA, GA., MUN. CODE section 94-10: "[S]elf-perception as male or female, and shall include a person's identity, expression, or physical characteristics, whether or not traditionally associated with one's biological sex or one's sex at birth, including transsexual, transvestite, and transgendered, and including a person's attitudes, preferences, beliefs, and practices pertaining thereto, including but not limited to assumption of male or female identity by appearance or medical treatment."

[10] IOWA CITY, IOWA, MUN. CODE, section 2-1-1: "A person's various individual attributes, actual or perceived, in behavior, practice or experience, as they are understood to be masculine and/or feminine."

[11] MADISON, WIS., MUN. CODE section 3.23(2)(t): "[T]he actual or perceived condition, status or acts of 1) identifying emotionally or psychologically with the sex other than one's biological or legal sex at birth, whether or not there has been a physical change of the organs of sex; 2) presenting and/or holding oneself out to the public as a member of the biological sex that was not one's biological or legal sex at birth; 3) lawfully displaying physical characteristics and/or behavioral characteristics and/or expressions which are widely perceived as being more appropriate to the biological or legal sex that was not one's biological or legal sex at birth, as when a male is perceived as feminine or a female is perceived as masculine; 4) being physically and/or behaviorally androgynous."

[12] SAN FRANCISCO, CAL., ADMINISTRATIVE CODE chapter 12A, section IIA: "[A] person's various individual attributes as they are understood to be male and/or female."

Washington,[13] and Tucson, Arizona[14] municipal codes — all cited by the court below to establish that "gender identity" has a common meaning — used "gender identity" as a legal standard, does not establish that "gender identity" is a term with a common meaning. Indeed, no two of these laws contain the same "gender identity" definitions.[15] Moreover, none of those laws contains the "gender identity" definition found either in the Louisville ordinance or in the Jefferson County ordinance. In fact, the definition of "gender identity" in the Louisville ordinance does not even square with the one in the Jefferson County ordinance. So, despite their overlapping jurisdictions, even the Louisville City Council and the Jefferson County Fiscal Court could not come up with a common definition.

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[13] SEATTLE, WASH., MUN. CODE section 14.04.030(J): "[A] person's identity, expression, or physical characteristics, whether or not traditionally associated with one's biological sex or one's sex at birth, including transsexual, transvestite, and transgendered, and including a person's attitudes, preferences, beliefs, and practices pertaining thereto."

[14] TUCSON, ARIZ., MUN. CODE section 17-11(h): "[A]n individual's various attributes as they are understood to be masculine and/or feminine and shall be broadly interpreted to include pre- and post-operative transsexuals, as well as other persons who are, or are perceived to be, transgendered."

[15] Even a cursory reading of the laws relied upon by the district court to establish a common meaning of gender identity reveals that the meanings range from the absolutely subjective definition in the Atlanta, Georgia ordinance to a possibly objective definition in the Minnesota statute, and from the relatively brief definition in the Iowa City, Iowa ordinance to the complex and clinical definition in the Madison, Wisconsin city code.

Not only does "gender identity" lack a common meaning; it is also not a term of common usage. The term does not even appear in many anti-discrimination statutes and ordinances which include sexual orientation.[16] Indeed, protection against discrimination on the basis of "gender identity" appears in the Minnesota anti-discrimination statute as a subset of "sexual orientation."[17] Yet, the Gay, Lesbian & Straight Education Network (GLSEN) claims that sexual orientation anti-discrimination policies do not cover discrimination based upon "gender identity."[18] Even in San Francisco, the city's Human Rights Commission has found it necessary to promulgate over several pages of guidelines to administer the law against "gender identity" discrimination. Those guidelines, in turn, read like a graduate school text on sexual sociology or psychology. *See* Appendix A.

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[16] *See, e.g.*, CAL. GOV'T. CODE section 12920-12928; CONN. GEN. STAT. ANN. section 46a-81a; HAW. REV. STAT. section 368-1; MASS. GEN. LAWS ch. 151B, section 4(1); NEV. REV. STAT. section 613.330; N.H. REV. STAT. ANN. section 354-A:1; BROWARD COUNTY, FLA., CODE ORD. section 16½-3; COOK COUNTY, ILL., HUMAN RIGHTS ORD. article II; PHOENIX, ARIZ., CITY CODE section 18-3; BLOOMINGTON, IND., MUNI. CODE section 2.21.030.

[17] *See* MINN. STAT. ANN. section 363.01(41a) (West 2000).

[18] http://www.aclu.org/issues/gay/GLSEN.html.

In other words, "gender identity" is **neither** a term of common meaning **nor** a term of common usage, but a new term in search of a meaning and in search of a usage. Except for the Lexington, Kentucky ordinance, the court below found **not one** statute or city ordinance that had embraced the definition of "gender identity" found in the Louisville ordinance. To give the term meaning, Lexington and Louisville appear to have come up with a new and unique, two-part definition. First, they define "gender identity" as "[h]aving a gender identity as a result of a sex-change surgery." Second, they define it also as "manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness."[19] Neither definition offers any meaningful guidance regarding proscribed conduct.

The first definition is practically unintelligible. Except for the rare case of an hermaphrodite[20] undergoing sex-change surgery, no person's "gender identity"[21] could possibly be the "result" of sex-change surgery. On the

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[19] *Compare* Lexington-Fayette Co. Code Ord. section 2-33 *with* Louisville City Ord. section 98.16.

[20] Hermaphroditism is indicated by the actual presence of both male and female gonadal tissue in the same individual. Dorland's Illustrated Medical Dictionary 811 (29th ed. 2000).

[21] "Gender identity" is defined medically as "a person's concept of himself as being male and masculine or female and feminine, or ambivalent….

contrary, people who undergo sex-change surgery surely do so as a "result" of their subjectively perceived "gender identity,"[22] not the other way around, hoping that such a physiological change will bring their bodies into conformity with their inner feelings of sexuality. A person may claim that his or her "gender identity" is the "result" of a sex-change operation, but how is another to know or find out if that identity was not the "cause," rather than the "result," of a sex-change operation? If an employer were to ask, would such a question be evidence of a prohibited discriminatory act? And how is an employer to know that a prospective employee had such an operation, unless that prospect chooses to disclose it? Even then, how is the employer to know if the person is telling the truth or just simply taking advantage of the law? The first definition of "gender identity" in the Louisville ordinance leaves unresolved these critical questions. Rather, under this definition, a person's "gender identity" depends solely upon a subjective representation of each individual, without any objectively ascertainable standards.

It is the private experience of gender role." Dorland's Illustrated Medical Dictionary, *supra*, at 874.

[22] *See, e.g.*, Farmer v. Brennan, *supra*, 511 U.S. at 829; Powell v. Schriver, *supra*, 175 F.3d at 111; Smith v. Palmer, *supra*, 24 F.Supp.2d at 959, n.3.

The second definition of the Louisville ordinance is equally unmanageable, dragging every covered employer into a sexual morass. According to this definition, a person's "gender identity" is to be determined "for reasons other than dress." Such a definition is a totally artificial construct, completely divorced from reality. "Cross-dressing" is the very hallmark of the transgendered culture,[23] as can be readily discerned from the guidelines developed by the San Francisco, California, Human Rights Commission to enforce that city's prohibition against discrimination on the basis of "gender identity." *See* Appendix A. According to that Commission, the dress is a critical element in determining the identities of whole categories of persons who qualify for such protection. *See* Appendix A, Definitions II.B. 1-4.

By going behind the dress of a person in determining "gender identity," the Louisville definition requires employees to suffer potential liability for potentially make-believe claims based on the secret world of the claimant. By removing dress as a manifestation of "gender identity", the Louisville definition of "gender identity" is nonsensical. How can one discern whether a person is

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[23] "Petitioner … has been diagnosed … as a transsexual … is biologically male … and apparently wears clothing in a feminine manner, as by displaying a shirt 'off one shoulder' …." Farmer v. Brennan, *supra*, 511 U.S. at 829.

acting in a way not "traditionally associated" with his or her "biological" sex without observing the way that a person is dressed? After all, people still reflect their sexual anatomy primarily by their dress.

The Louisville command to prospective employers to disregard a person's dress is thrown into utter confusion when examined in light of the further command that, **after employment**, an employer may enforce "an employee dress policy which may include restricting employees from dress associated with the other gender."[24] Does the first command mean that a prospective employer may **not** pay attention to the dress of a prospective employee because of a concern that the prospective employee, if hired, may balk at the employer's dress code?

These ambiguities in the Louisville ordinance also attend the Jefferson County ordinance, which defines "gender identity" simply as "[m]anifesting an identity not traditionally associated with one's biological maleness or femaleness," without the Louisville instruction to disregard dress.[25] Yet, the Jefferson County ordinance also states that its prohibition against discrimination because of "gender identity" should not be "construed to prevent an employer

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[24] LOU. CITY ORD. section 98.17(G)(1).

[25] JEFF. CO. ORD. section 92.02(N).

from … enforcing a written employee dress policy; or … designating appropriate restroom and shower facilities."[26] In light of this exception, may a prospective employer ask a prospective employee, who exhibits by his or her dress a "gender identity" other than "traditionally associated with one's biological maleness or femaleness," whether that prospect would have difficulty conforming to a dress code or honoring separate restroom and shower facilities?

Moreover, what determines whether any particular action is not "traditionally associated with one's **biological** maleness or femaleness"? If a male applies for a bank teller or secretarial job, professions long dominated by females, does the very application manifest an identity not traditionally associated with a male? According to some, any time a male looks and acts in a "way other people expect a … 'girl' to look and act," then he is entitled to protection from discrimination. *See* GLSEN, "Adding Sexual Orientation & Gender Identity to Discrimination & Harassment Policies in School," http://www.aclu.org/issues/gay/GLSEN.html. With male and female roles changing in today's society, by what standard do "other people" expect a male or female to look and act? These ordinances provide no direction. Rather, the

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[26] JEFFERSON CO. ORD. section 92.06(F).

Human Rights Commission is left at large to define what is "traditionally associated with one's biological maleness or femaleness" and to determine whether an employer acted upon one or more of those traditions in making an employment decision, disregarding, of course, the dress of the alleged victim of discrimination.

According to the rule in Hill v. Colorado, *supra*, the Due Process test of vagueness demands that the language of an ordinance make sense to a person of ordinary intelligence. Neither definition of "gender identity" in these two ordinances meets that test. Not only do the two ordinances fail to provide an intelligible guide to ordinary persons, but, as pointed out above, they contain no express requirement that the alleged discrimination involves scienter. Rather, the Louisville City Council and Jefferson County Fiscal Court have left the definition of complex sociological and psychological phenomena to the unfettered discretion of the Human Rights Commission. Such discretion is no different from the discretion granted to the police in the City of Chicago to distinguish between a baseball crowd idling outside Wrigley Field and a street gang looking for a rumble, found to be unconstitutionally vague in Chicago v. Morales, *supra*, at 59-65.

CONCLUSION

For the foregoing reasons, these *amici* urge this Court to rule that the 1999 amendments to the Louisville and Jefferson County ordinances extending protection from discrimination to persons "because of" sexual orientation and gender identity violate the Due Process Clause of the Fourteenth Amendment and are void for vagueness, and to reverse the district court's order dismissing Dr. Hyman's complaint.

Respectfully submitted,

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APPENDIX A

Compliance Guidelines

to Prohibit

Gender Identity Discrimination

San Francisco Administrative Code Chapter 12A, 12B, 12C
San Francisco Municipal/Police Code Article 33

City and County of San Francisco

Human Rights Commission
25 Van Ness Ave., Suite 800
San Francisco, CA 94102-6033

December 10, 1998

Table of Contents

I. PURPOSE

It is the law and policy of the City and County of San Francisco to eliminate discrimination based on gender identity in San Francisco and in City & County of San Francisco contracting.

The Human Rights Commission developed these guidelines to:

A. Implement the provisions of San Francisco Administrative Code Chapters 12A, 12B, 12C and San Francisco Police Code Article 33 regarding discrimination complaints based on gender identity;

B. Create a flexible implementation plan designed to provide guidance to agencies, business establishments and organizations seeking to comply with the law.

II. DEFINITIONS

The following definitions will apply in the construction and implementing of the guidelines described herein:

A. Gender Identity
"Gender identity" will mean a person's various individual attributes as they are understood to be male and/or female.

B. Transgender
"Transgender" is used as an umbrella term that includes female and male cross dressers, transvestites, drag queens or kings, female and male impersonators, intersexed individuals, pre-operative, post-operative and non-operative transsexuals, masculine females, feminine males, all persons whose perceived gender or anatomic sex may be incongruent with their gender expression, and all persons exhibiting gender characteristics and identities which are perceived to be androgynous.

1. Female or Male Cross Dressers
"Female or Male Cross Dressers" refers to individuals who occasionally wear clothing that is perceived to be conflicting with their anatomical genital structure.

2. Transvestites
"Transvestites" are synonymous with female or male cross dressers who are heterosexual.

3. Drag Queens or Kings
"Drag Queens or Kings" refers to female or male cross dressers who are lesbian, gay, or bisexual.

4. Female or Male Impersonators
"Female or Male Impersonators" refers to individuals who impersonate a different gender for entertainment purposes.

5. Intersexed
"Intersexed" refers to individuals who are born with some male and some female sexual characteristics, particularly an anomaly of the external genitalia or internal reproductive organs.

6. Pre-operative Transsexuals
"Pre-operative Transsexuals" refers to individuals who identify as one gender at all times, which gender is perceived to conflict with their congenital reproductive anatomy, and who are either about to begin or are in the process of achieving gender confirmation surgery. This may also include individuals who have undergone or are undergoing partial gender confirmation (e.g., hormonal treatment).

7. Post-operative Transsexuals
"Post-operative Transsexuals" refers to individuals who identify as one gender at all times, which gender is perceived to conflict or known to have conflicted

with their congenital reproductive anatomy, and who have undergone gender confirmation surgery. This may include individuals who have undergone partial gender confirmation (e.g., partial surgery).

8. Non-operative Transsexuals
"Non-operative Transsexuals" refers to individuals who identify as one gender at all times, which gender is perceived to conflict with their congenital reproductive anatomy, and who either have no intention of achieving full gender confirmation surgery or who may or may not be undergoing any medical treatment in relation to their gender identity, for whatever reason.

9. Male-To-Female (MTF) Transsexuals
Individuals who have started, are in the process, or have partially or fully transitioned from male to female.

10. Female-to-Male (FTM) Transsexuals
Individuals who have started, are in the process, or have partially or fully transitioned from female to male.

11. Masculine Females
"Masculine Females" refers to biological females who have or are perceived to have masculine characteristics. They may have either a feminine or masculine gender identity, and will usually identify with their body if asked to specify.

12. Feminine Males
"Feminine Males" refers to biological males who have or are perceived to have feminine characteristics. They may have either a masculine or feminine gender identity, and will usually identify with their body if asked to specify.

C. Agency

Any non-profit or publicly-owned organization providing services accessible to the public, including but not limited to, psychiatric institutions, AIDS service organizations, medical and dental offices, housing agencies, and jails.

III. CONDUCT AND DEMEANOR

A. The agency, business establishment, or organization will make reasonable effort to serve male-to-female transsexuals equitably with other women, and female-to-male transsexuals equitably with other men. The agency, business establishment or organization will make every effort to provide appropriate and equitable treatment to transgendered individuals regardless of where they are on the continuum of gender identity transition. Masculine females who express a female gender identity should be treated as women; feminine males who express a male gender identity should be treated as men.

B. The Human Rights Commission recommends that agencies, business establishments, and organizations require all staff, administration and employees to receive continuing education in gender identity related issues.

C. City contractors must, and agencies, business establishments, and organizations should

clearly communicate this non-discrimination policy regarding gender identity to all staff, administration, employees and clients.

D. Any individual, employer, agency, landlord, or business establishment, will not tolerate disrespectful language or behavior from its staff, administration, employees, customers or clients towards or about transgendered individuals.

1. Individuals have the right to be addressed with names, titles, pronouns and other terms indicating gender based on their gender identity. The refusal of employers, co-workers, business owners and other persons to address individuals based on their gender identity is a form of harassment.

2. The gender identity of a person, except as legally required, may not be questioned. Someone who is perceived to be transgendered may not be placed in a situation where the person will have to unwillingly reveal his or her congenital reproductive anatomy. Challenging someone's gender may be considered as harassment, and an invasion of privacy.

3. It is a form of harassment to make and act upon assumptions about an individual's sexual orientation based upon that individual's gender attributes or identity.

IV. SEX-SPECIFIC FACILITIES, SERVICES AND REGULATIONS

A. The agency, business establishment, or organization will make reasonable efforts to serve male-to-female transsexuals equitably with other women, and female-to-male transsexuals equitably with other men in sex-specific facilities. The agency, business establishment or organization will make every effort to provide appropriate and equitable accommodation to transgendered individuals regardless of where they are on the continuum of gender identity transition. Masculine females who express a female gender identity should be treated as women; feminine males who express a male gender identity should be treated as men.

B. Agencies, business establishments and organizations will not deny admission to any person who displays one current and official identification document as proof of the requisite sex, to any service, facility, privilege, advantage, accommodation, or opportunity which lawfully distinguishes between persons on the basis of sex, including but not limited to social services, health services, educational services, recreation services and programs, dormitories, bathrooms, locker rooms, dressing or changing rooms, showers or similar services, accommodations, opportunities, or facilities. Any rule, regulation, policy or practice making lawful distinctions based on sex will be applied equally to any person displaying one current and official identification document as proof of the requisite sex.

C. Where a person seeks access to any service, facility, privilege, advantage, accommodation, or opportunity covered by subsection (B) of this Section or seeks application of any rule, regulation, policy or practice covered by subsection (B) of this Section, and said person is unable to display a current and official identification document which would entitle such person to access or application pursuant to subsection (B) of this Section, the person must be provided reasonable accommodation to facilitate access or

application consistent with the gender identity publicly and exclusively asserted, or intended to be asserted by the person over a period of time.

D. Transgendered people have an equal and binding right to the access and safe use of those facilities which are segregated by sex. Access and use of a sex-specific facility may not be denied to any individual with gender conforming identification as defined in Section IV. subsection (B). These facilities include, but are not limited to restrooms, bathrooms, locker rooms, dressing or changing rooms, showers or similar facilities, where the design and use of the facility permit use by any individual without infringing on the privacy of other users.

E. It is the intent of the Human Rights Commission that programs, services and facilities are accessible to, and functional for transgendered people where the general public is concerned.

F. In sex-specific facilities where nudity in the presence of other people is unavoidable (e.g., communal shower rooms in gyms), it is permissible to have a temporary requirement that only post-operative women be allowed in the women's facility and post-operative men be allowed in the men's facility. Under these circumstances, the agency, business establishment or organization shall make reasonable effort to accommodate transgendered or transsexual individuals. For example, sex-specific facilities should be inspected for the availability of one person at-a-time bathroom or restroom, or installing doors or curtains to create private cubicles. Attention should be given to the stress created for the transgendered or transsexual individual under these circumstances and every effort should be made to integrate the individual into the gender expressed, not to single him or her out.

G. No reasonable accommodation shall be required where an agency, business establishment or organization can demonstrate that the accommodation would impose an undue and intolerable economic hardship on its operation or can demonstrate that the assertion of a particular gender identity is intended to avoid criminal prosecution, defeat creditors, unlawfully claim inheritance or to otherwise defraud.

V. EMPLOYMENT

A. Employers may not discriminate against any individual in any aspect of employment including but not limited to, recruitment, selection, hiring, wages, hours and conditions of employment, promotion, training, development, and evaluation of its employees based upon the individual's publicly and exclusively asserted gender identity, or any declaration of intention to change the individual's perceived gender.

B. Transgendered employees may not be discriminated against in the provision, eligibility or utilization of employee health, welfare or vacation benefits and programs.

C. Employers have the right to implement employee dress codes including those according to gender. Transsexual employees have the right to comply with sex-specific dress codes according to their gender identity.

D. An employee's gender identity or intention to undergo treatment may not be cause for dismissal or refusal to hire.

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