ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

LEGAL MEMORANDUM

DATE: October 12, 2015

RE: Legal Analysis of Houston Nondiscrimination Ordinance No. 2014-530 (Houston Proposition 1)

Introduction

Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for life, religious liberty, and marriage and the family. We regularly offer analysis of proposed laws and their effects on these areas of interest. Mr. Jonathan Saenz asked us to evaluate a proposed law that the citizens of Houston, Texas, will vote on November 3, 2015. Ordinance No. 2014-530 (the Ordinance) would add "sexual orientation" and "gender identity" as protected classifications in existing nondiscrimination laws.

The Proposed Ordinance has a turbulent history. The Houston City Council originally passed the Ordinance on May 28, 2014,[1] causing concerned citizens to launch a petition drive to either repeal the law or place it on the ballot. Over 54,000 Houstonians signed the petition—more than three times the number of signatures required by law—and, pursuant to the authority granted to her in the City Charter, the City Secretary certified the petition as valid and sufficient.[2]

But on August 4, 2014, the Mayor's office issued a press release announcing that the City rejected the petition for lack of sufficient valid signatures.[3] A coalition of disenfranchised citizens filed a lawsuit challenging the rejection of those signatures.[4] During that lawsuit, the Mayor took the unprecedented step of subpoenaing the sermons—and 16 other categories of private information—of five non-party pastors.[5]

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[1] Mary Benton, *Houston City Council Passes Controversial Equal Rights Ordinance*, Click2Houston.com May 28, 2014, *available at* http://www.click2houston.com/news/houston-city-council-passes-controversial-equal-rights-ordinance/26208968. All websites, unless otherwise noted, were last visited October 9, 2015.

[2] *In re Woodfill*, No. 14-0667, 2015 WL 4498229, at *2 (Tex. July 24, 2015).

[3] Mayor's Office Press Release, "HERO Repeal Petition Falls Short of Required Valid Signatures for Ballot," *available at* http://www.houstontx.gov/mayor/press/20140804.html.

[4] *In re Woodfill*, 2015 WL 4498229, at *1.

[5] Alliance Defending Freedom, "Houston, we have a problem," October 13, 2014, *available at* http://www.adfmedia.org/news/prdetail/9349.

After Alliance Defending Freedom filed a motion to quash the subpoenas, and in the face of intense national pressure, the Mayor withdrew the subpoenas.[6] The Texas Supreme Court ultimately issued a unanimous opinion concluding that the City had denied its citizens the right to vote and ordering the City to either repeal the ordinance or place it on the ballot.[7] The City Council voted to place it on the ballot.[8]

Numerous other cities and states have recently rejected laws similar to the Proposed Ordinance now facing Houston voters.[9] These cities and states properly recognized that their communities were already tolerant, and that the costs imposed by this step would far outweigh any supposed benefit.

The Ordinance Houston is considering likewise has costs that outweigh any perceived benefit. Our analysis explains that such a step will threaten basic First Amendment freedoms and expose the city of Houston to legal and financial liability. These costs and constitutional problems include the following:

- The Ordinance will allow biological men into women's bathrooms, shower rooms, and locker rooms, placing women and children at risk of voyeurism, photographing and video recording, and sexual assault;

- The Ordinance will infringe First Amendment free speech rights (see *infra* at pg. 6); and

- Because the Ordinance is not needed in Houston, the potential cost outweighs any perceived benefit (see *infra* at pg. 8).

Each of these points will be considered in turn.

[6] The City of Houston Mayor's Office, "Mayor Parker Directs City Legal Department to Withdraw Pastor Subpoenas," *available at* http://houstontx.gov/mayor/press/mayor-parker-directs-city-legal-department-withdraw-pastor-subpoenas.

[7] *In re Woodfill*, 2015 WL 4498229, at *7.

[8] Katherin Driessen, *Equal Rights Ordinance Heads to Voters in November*, Chron, *available at* http://www.chron.com/news/houston-texas/houston/article/Equal-rights-ordinance-heads-to-voters-in-November-6426461.php.

[9] Within just the past year the legislatures of Idaho, Wyoming, and North Dakota declined to add sexual orientation and gender identity to their nondiscrimination laws. So have the following cities: Berea, KY (October 2014), Fountain Hills, AZ (November 2014), Beckley, WV (December 2014), Glendale, AZ, which hosted this year's Super Bowl (January 2015), Bardstown, KY (March 2015), Charlotte, NC (March 2015), Scottsdale, AZ (March 2015), Elkhart, IN (July 2015), and Goshen, IN (August 2015). Voters in both Fayetteville, AR and Springfield, MO, recently repealed the addition of sexual orientation and gender identity to their nondiscrimination laws.

I. The Proposed Ordinance Will Allow Men Access to Women's Bathrooms, Shower Rooms, and Locker Rooms, Placing Women and Children at Risk.

The Proposed Ordinance would require Houston businesses and places open to the general public[10] to open all gender-segregated facilities to members of the opposite biological sex. Section 17-51(a) makes it "unlawful for any place of public accommodation or any employee or agent thereof to discriminate…on the basis of any protected characteristic."

Gender identity is a protected characteristic[11] and defined as "an individual's innate identification, appearance, expression, or behavior as either male or female, although the same *may not correspond to the individual's body or gender*...."[12] As a result, biological men would have ready access to women's bathrooms, showers, and locker rooms. Because the Proposed Ordinance protects gender identity, not just gender expression, even biological males who present as *male* (i.e. are not dressed as female) will have access to women's facilities. This places women and girls at risk of voyeurism, assault, and worse.

Numerous men have used laws like the Proposed Ordinance to gain access to women's facilities in order to violate the privacy of women and girls. For example, according to the University of California at Berkeley Police Department, a man dressed in women's clothing was spotted photographing women in a UC Berkeley locker room. He also was spotted leering at a young woman as she changed clothes in a locker room.[13] Similarly, police in Everett, Washington, arrested a male voyeur wearing a bra and wig who was entering the women's rest room to observe the girls and women inside. He also admitted that he took a shower in a girls' locker room for "sexual gratification."[14] In Los Angeles, a man donned bra, wig and female clothing to gain access to a women's bathroom at a Macy's Department Store so he could secretly video-record the women and girls inside.[15] Before he was caught, he recorded "hours" of

[10] *See* Proposed Ordinance, Sec. 17-2 (Employer, Place of public accommodation); Sec. 14-51(a); Sec. 17-61.

[11] Proposed Ordinance, Sec. 17-2 (Protected Characteristic).

[12] Proposed Ordinance, Sec. 17-2 (Gender Identity) (emphasis added).

[13] Jeffrey Butterfield, *Man Disguised as Woman Allegedly Sneaks into RSF Women's Locker Room, Takes Pictures*, The Daily Californian, October 13, 2010, *available at* http://archive.dailycal.org/article.php?id=110753; Jessica Green, *Cross-Dressing Peeping Tom Lurking on Cal Campus*; NBC Bay Area, Oct. 13, 2010, *available at* http://www.nbcbayarea.com/news/local/Cross-Dressing-Peeping-Tom-Lurking-on-Cal-Campus-104878219 html; Anneli Rufus, *Cross-dressing Peeper Infiltrates Cal Women's Locker Room*, East Bay Express, October 12, 2010, *available at* http://www.eastbayexpress.com/92510/archives/2010/10/12/cross-dressing-peeper-infiltrates-cal-womens-locker-room.

[14] *Police: Man in bra and wig found in women's bathroom*, KOMOnews.com, March 16, 2012, *available at* http://www.komonews.com/news/local/Police-Man-spotted-in-womens-bathroom-wearing-bra-wig-142987265.html.

[15] Robert J. Lopez, *Man wore dress, wig to videotape women in bathroom, deputies say*, Los Angeles Times, May 14, 2013, *available at* http://articles.latimes.com/2013/may/14/local/la-me-ln-man-videotape-women-in-restroom-20130514.

video of women and girls by pointing his camera under restroom stalls while women and girls were in them.[16]

Imagine the sense of violation these women and girls must feel. It is similar to that felt by children in Rome, Georgia, when a fifty-one year old man dressed as a woman entered a women's restroom and proceeded to strip in front of young girls,[17] and by that felt by a high school girls' swim team that was subjected to a man who identifies as a woman sprawling naked in their locker room.[18] In each of these cases, the privacy of women and girls was violated, they were subjected to leering eyes and being videotaped, or they were exposed to male genitalia. This does violence to their sense of security and well-being. In fact, these types of privacy violations have even caused some organizations to reverse course. Due to voyeurism in gender-neutral bathrooms, the University of Toronto recently created gender-specific bathrooms to provide a "safe space for [] women."[19]

Men dressed as women have even perpetrated actual violence against women. Pursuant to a law similar to the Proposed Ordinance, Christopher Hambrook used women's attire to gain access to two women's shelters in Toronto. He then sexually assaulted two different women. Hambrook does not identify as transgender; he is a heterosexual male sexual predator. And he used a law like the Proposed Ordinance to gain access to his victims.[20] Then there is the case of Patrick Hagan, who identifies as a "cross dresser." When questioned by a woman about his presence in the women's bathroom, he responded by punching her in the mouth. The woman lost five teeth as a result.[21]

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[16] John Cadiz Klemack and Jonathan Lloyd, *Man Disguised as Woman Recorded "Hours" of Mall Restroom Video: Investigators*, 4 NBC Southern California, May 16, 2013, *available at* http://www.nbclosangeles.com/news/local/Secret-Recording-Store-Mall-Antelope-Valley-Palmdale-Restroom-207541101.html.

[17] Larry Hartstein, *Cross-dressing man arrested for exposure at Walmart*, The Atlanta Journal-Constitution, March 25, 2010, *available at* http://www.ajc.com/news/news/local/cross-dressing-man-arrested-for-exposure-at-walmar/nQddG/; *Police: Man Undresses in Front of Children in Walmart Restroom*, WSB-TV Atlanta, March 24, 2010, *available at* http://www.wsbtv.com/news/news/police-man-undresses-in-front-of-children-in-walma/nJckr/.

[18] Alyssa Newcomb, *Transgender Student in Women's Locker Room Raises Uproar*, ABCNews, November 3, 2012, *available at* http://abcnews.go.com/blogs/headlines/2012/11/transgender-student-in-womens-locker-room-raises-uproar/; Todd Starnes, *College Allows Transgender Man to Expose Himself to Young Girls*, Fox News Radio, N.D., *available at* http://radio.foxnews.com/toddstarnes/top-stories/college-allows-transgender-man-to-expose-himself-to-young-girls.html.

[19] Ramisha Farooq, *University of Toronto alters bathroom policy after two reports of voyeurism*, thestar.com, October 5, 2015, *available at* http://www.thestar.com/news/crime/2015/10/05/university-of-toronto-alters-bathroom-policy-after-two-reports-of-voyeurism html.

[20] Christina Blizzard, *Shocking case proves 'Toby's Law' is flawed*, Toronto Sun, February 15, 2014, *available at* http://www.torontosun.com/2014/02/15/shocking-case-proves-tobys-law-is-flawed; Sam Pazzano, *A sex predator's sick deception*, Toronto Sun, February 15, 2014, *available at* http://www.torontosun.com/2014/02/15/a-sex-predators-sick-deception; Sam Pazzano, *Predator who claimed to be transgender declared dangerous offender*, Toronto Sun, February 26, 2014, *available at* http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender.

[21] Geoff Dougherty, *Cross-dressing man sentenced for battery*, St. Petersburg Times, Sept 25, 1999, *available at* http://www.sptimes.com/News/92599/Pasco/Cross_dressing_man_se.shtml.

There is also the disturbing case from 2012 in Dallas involving "Paula" Witherspoon, a man who was convicted in 1990 of sexual assault with a child and indecency involving sexual contact with a child. Both children were teenage girls. He is a registered sex offender. But in 2012, Witherspoon was spotted wearing women's clothing going into the women's bathroom in Dallas, where he would have access to young girls. He was ticketed by a Dallas policeman. But Witherspoon claimed to be "transgender," and said that he had every right to use the bathroom with women and girls.[22]

The Proposed Ordinance will allow these types of violations of women and children to occur in Houston. Any business that refuses to allow men who identify, appear, express, or behave like women to access women's facilities will be subject to criminal prosecution.

Some Ordinance supporters protest that there are laws in place against voyeurism and sexual assault. But those laws only apply after the crime has been committed—they do not prevent voyeurism or assault. Previously, if a man was seen going into the women's restroom, store personnel would stop him and notify the police. But the Proposed Ordinance would remove a barrier of protection that has always existed, and make it easier for sexual predators to commit these types of crimes.

The Proposed Ordinance is also arguably unconstitutional. While no Open Bathrooms Policy like the one contained in the Proposed Ordinance has yet been challenged in court, there are federal appellate court decisions holding that individuals in various states of undress have a constitutional right to privacy. The Ninth Circuit Court of Appeals noted that "[w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from . . . strangers of the opposite sex[] is impelled by elementary self-respect and personal dignity."[23] And the Tenth Circuit has explained that a person's constitutional right to privacy is violated where a government policy or conduct allows a member of the opposite sex to view him or her while "engag[ing] in personal activities, such as undressing, using toilet facilities, or showering."[24]

The City Council proposes to violate the privacy of women and children and place them at risk of sexual predators. It also arguably violates their constitutional right to privacy. The citizens of Houston have a responsibility to protect women and children, not invade their privacy, trample their constitutional rights, and place them at risk of abuse.

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[22] Ray Villeda, *Transgender Woman: Convictions Irrelevant to Citation*, NBCDFW.com, May 3, 2012, *available at* http://www.nbcdfw.com/news/local/Transgender-Woman-Convictions-Irrelevant-to-Citation-149923975.html.

[23] *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963).

[24] *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982). *See also Lee v. Downs*, 641 F.2d 1117, 1119-20 (4th Cir. 1981) (noting that men are "entitled to judicial protection of their right of privacy denied by the presence of female[s] . . . in positions to observe the men while undressed or using toilets").

II. The Proposed Ordinance Will Infringe First Amendment Speech Rights.

Both the United States and Texas Constitutions protect freedom of religion, conscience, and expression.[25] The constitutional right to free speech "includes both the right to speak freely *and the right to refrain from speaking*."[26] A long line of U.S. Supreme Court precedent establishes that the government cannot force citizens or organizations to convey messages that they deem objectionable; nor may it punish them for declining to convey such messages.[27]

Most of the major religions in our nation—including many Christian denominations, the Church of Jesus Christ of Latter Day Saints, Judaism, and Islam—have beliefs about sexual behavior, including the official belief that homosexual conduct is immoral. Business owners who are adherents of those religions may object to promoting or publishing certain messages that contradict their sincerely held religious beliefs.

In many of its applications, the Proposed Ordinance would violate the First Amendment freedom from compelled speech by requiring businesses in the "expressive services" industries to promote messages and ideas that are contrary to their religious beliefs about human sexuality—such as promoting marriage as something other than a union of one man and one woman.

A Kentucky court recently held a similar Lexington ordinance unconstitutional under the First Amendment to the United States Constitution when applied to a business person who declined to promote a message that would violate his religious beliefs.[28] The Proposed Ordinance, if enacted, will suffer from the same constitutional infirmities as the Lexington law, because it does not provide exemptions for businesses that decline to create speech or promote events that conflict with the owners' conscience convictions.

Most businesses, including those owned by people of faith, already serve customers who identify as gay, lesbian, and transgender. But some business owners, because of their religious beliefs, cannot provide services for certain expressive events, such as same-sex ceremonies. Similarly, some business owners are unable to create messages that are contrary to what their faith teaches them is correct. It also may be that some marriage therapists will not be able to

[25] *See* U.S. Const. amend. I; Tex. Const. Art. 1, § 8.

[26] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added).

[27] *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995) (government may not require a public-accommodation parade organization to facilitate the message of a gay-advocacy group); *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality) (government may not require a business to include a third party's expression in its billing envelope); *Wooley*, 430 U.S. at 717 (government may not require citizens to display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not require a newspaper to include a third party's writings in its editorial page).

[28] *Hands On Originals, Inc. v. Lexington-Fayette Urban Co. Human Rights Comm'n*, Opinion and Order (Fayette Circuit Court, No. 14-CI-04474) (Apr. 27, 2015), *available at* http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf.

provide marriage counseling for same sex couples. And some faith-based adoption agencies may not be able to place children with those who are unmarried or in a same-sex relationship. Because the Ordinance does not provide an exemption to protect rights of conscience, the enactment of the Ordinance will allow discrimination complaints to be filed against business owners who are simply trying to operate their businesses consistent with their faith.

Some examples help illustrate the problem.

Donald and Evelyn Knapp are ordained ministers. They own and operate a for-profit wedding chapel in Coeur d'Alene, Idaho, called the Hitching Post. Late in 2014, the city of Coeur d'Alene told the Knapps that a local nondiscrimination law required them to solemnize same-sex ceremonies, even though that violated their religious convictions.[29] The Knapps had to retain attorneys to bring a lawsuit on their behalf, challenging the constitutionality of the nondiscrimination law as applied to them.[30]

Barronelle Stutzman owns Arlene's Flowers in Richland, Washington. For her entire 40-year career she has served and employed people who identify as gay and lesbian. Barronelle serves a lot of weddings. She carefully creates each wedding floral arrangement, designing the flowers to communicate the beauty and joy of the event. She then transports the flowers to the wedding location and decorates the venue with her floral designs. But while Barronelle serves all customers, her religious beliefs about marriage will not allow her to use her artistic talents to create floral arrangements for same-sex ceremonies. When one of her long-time clients asked her to create the floral arrangement for his same-sex ceremony, Barronelle declined. The customer easily found another florist. But he and his same-sex partner filed a complaint against Barronelle anyway pursuant to Washington's sexual-orientation nondiscrimination law. Barronelle had to retain attorneys to represent her. She is now involved in an all-consuming lawsuit, with the possibility of ruinous fees, fines, and penalties.[31]

It is also important to note that the Proposed Ordinance includes a broad grant of enforcement power to a government official.[32] As Houstonians observed last year with the Houston Mayor's unlawful subpoenas and disenfranchisement of voters, it is highly concerning when those who could be driven by political will are given the authority to police First Amendment freedoms.

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[29] Alliance Defending Freedom, "Govt tells Christian ministers: Perform same-sex weddings or face jail, fines," October 18, 2014, *available at* http://www.adfmedia.org/News/PRDetail/9364. For additional information regarding the Knapps, including their relevant court filings, see "Knapp v. City of Coeur d'Alene," *Alliance Defending Freedom*, *available at* http://www.adflegal.org/detailspages/case-details/knapp-v.-city-of-coeur-d-alene.

[30] *Id*. For additional information regarding the Knapps, including their relevant court filings, see "Knapp v. City of Coeur d'Alene," *Alliance Defending Freedom*, *available at* http://www.adflegal.org/detailspages/case-details/knapp-v.-city-of-coeur-d-alene.

[31] For more information about Barronelle Stutzman and Arlene's Flowers, including links to relevant legal documents, see "State of Washington v. Arlene's Flowers | Ingersoll v. Arlene's Flowers," *Alliance Defending Freedom*, *available at* http://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman.

[32] *See* Proposed Ordinance, Sec. 17-33, Sec. 17-43, Sec. 17-52, Sec. 17-62.

III. Because the Proposed Ordinance is Not Needed in Houston, the Potential Cost Outweighs Any Perceived Benefit

Houston does not have a problem with discrimination that would justify the addition of the big-government bureaucratic systems and expenses associated with nondiscrimination laws. Historically, nondiscrimination laws have been enacted because of systemic, invidious discrimination. For example, Congress enacted the Civil Rights Act of 1964 because entire parts of the country were closed to people of color.[33] Black Americans were denied the opportunity to vote, excluded from the skilled trades, and denied access to many hotels, restaurants, and theaters, which were for whites only.[34] Their children were forced to attend segregated, inferior schools.[35] And the threat of lynching had long been an ever-present reality for black Americans, with some 2,500 lynchings occurring from 1870 or so through the 1950s.[36]

Similarly, the Americans With Disabilities Act (the "ADA"), which prohibits discrimination in places of public accommodation because of a person's disability, was enacted in 1990 precisely because Congress determined that there was a pattern of widespread, invidious discrimination against people who struggled with various disabilities.[37] There was actual, "well-catalogued"[38] evidence that such discrimination was presently occurring.[39] Congress found that 8.2 million disabled people wanted to work but had been excluded from the job market because of their disability.[40] Those who were able to find work typically were unable to find it on equal terms with the non-disabled. For example, a 1989 U.S. Census Bureau study revealed that disabled men earned 36 percent less than their non-disabled counterparts, while disabled women earned 38 percent less.[41] This discrimination was described as both "serious" and "pervasive."[42]

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[33] *See, e.g.*, Steven G. Anderson, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1220 (1992) ("Prior to the passage of the Civil Rights Act of 1964, racial discrimination was widespread and seemingly overt."); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 425 (2010) (noting that at the time of the passage of the Civil Rights Act of 1964 and shortly thereafter "the presumption was one of widespread discrimination.").

[34] Michael J. Fellows, *Civil Rights - Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387, 395 (2004).

[35] *Id*.

[36] Robin Morris Collin, *Brown and Me: Brown's Theory of an Educational Remedy for Citizenship*, 9 How. Scroll Soc. Just. L. Rev. 73, 78 (2006).

[37] Harvard Law Review, *I. Constitutional Law A. Constitutional Structure*, 114 HARV. L. REV. 179, 187 (2000).

[38] *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

[39] Lowell P.Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 Temp. L. Rev. 387, 390 (1991) (explaining that a 1986 Harris poll demonstrated widespread discrimination against disabled people).

[40] Molly M. Joyce, *Has the Americans with Disabilities Act Fallen on Deaf Ears? A Post-Sutton Analysis of Mitigating Measures in the Seventh Circuit*, 77 Chi.-Kent L. Rev. 1389, 1393 (2002).

[41] *Id*.

[42] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 416 (1991) (*quoting* U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES at 159 (1983)).

That type of systemic, invidious discrimination is absent in Houston. The city is not closed to people because of any of the proposed protected classifications—including "sexual orientation" and "gender identity"—the way whole parts of the Country were once closed to black Americans. Rather, the business community is voluntarily hiring and serving everyone fairly and equally.[43] The people of Houston are already treating one another with dignity and respect. This nondiscrimination law is not needed.

Although the Ordinance is not needed, it will likely prove costly if enacted. As explained above, it will place the privacy and safety of women and girls at risk. In addition to infringing constitutional privacy guarantees, it will infringe First Amendment freedoms. As a result, the Ordinance is likely to be held unconstitutional.

Federal law provides a civil action against state and local governments, like Houston, for the deprivation of federal constitutional rights. This means that private citizens may sue state and local governments in federal court when they believe their constitutional rights are being infringed. And when those lawsuits are successful, federal law allows courts to order the government to pay for the challengers' attorneys. [44]

These types of lawsuits are known as "Section 1983 lawsuits," because the federal statute authorizing them and providing attorneys fees begins in Section 1983 of Title 42 of the United States Code. Section 1983 lawsuits can be expensive to litigate, which means that they can have high attorney fee awards. They can easily run into the low hundreds of thousands of dollars,[45] and can go much higher. For example, the state of Massachusetts agreed to pay $1,200,000.00 in

[43] A survey of the Fortune 500 companies headquartered in Houston, Texas, *see* http://gov.texas.gov/files/ecodev/Fortune_500.pdf, demonstrates that most companies voluntarily include sexual orientation and gender identity in their equal employment opportunity policies. *See, e.g.*, Phillips 66 (http://hr.phillips66.com/Policies/Employment-Policies.aspx), Enterprise Products Partners LP (http://asp.hrc.org/issues/workplace/organization_profile.asp?organization_id=14996&search_id=1&search_type=Quick), FMC Technologies (https://secure.ethicspoint.com/domain/media/en/gui/20623/principles.pdf) SYSCO Corp (http://asp.hrc.org/issues/workplace/organization_profile.asp?organization_id=4910&search_id=1&search_type=Quick), Kinder Morgan (http://www.kindermorgan.com/work/careers/job_postings.aspx), Quanta Services, (http://investors.quantaservices.com/download/Code+of+Ethics+%26+Business+Conduct+-+The+Quanta+Way.pdf), Spectra Energy (http://www.spectraenergy.com/Careers/Search-US-Jobs/), KBR (https://www kbr.com/careers). According to the Human Rights Campaign, the largest advocate for "lesbian, gay, bisexual, and transgender Americans," the 89% of Fortune 500 companies already prohibit discrimination on the basis of sexual orientation, and 66% prohibit discrimination on the basis of gender identity." *See* http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500.

[44] *See* 42 U.S.C. §§ 1983, 1988 (providing that persons who successfully demonstrate that a state or local law is unconstitutional under the Constitution of the United States may recover costs and attorneys' fees). *See also* Martin A. Schwartz, *Attorney's Fees in Civil Rights Cases – October 2009 Term*, 27 TOURO L. REV. 1 (October 19, 2011), *available at* http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1041&context=lawreview.

[45] *See Attorneys' Fees in Federal Civil Rights Lawsuits Part One*, 2011 (4) AELE MO. L. J. 101, 103-04 (April 2011) (noting that the U.S. Supreme Court upheld an attorney fee award of $245,456.25 in a fairly routine, "modest case"), *available at* http://www.aele.org/law/2011all04/2011-04MLJ101.pdf.

attorney fees in a Section 1983 case known as *McCullen v. Coakley*.[46] In that case, the U.S. Supreme Court found that a Massachusetts "buffer zone" law around an abortion clinic violated the free speech rights of a pro-life advocate. Similarly, the state of Minnesota was ordered to pay attorneys fees of $1,374,928.31 in a case known as *Republican Party of Minnesota v. White*,[47] while the state of Vermont was ordered to pay nearly $1,400,000.00 in a case known as *Randall v. Sorrell*.[48] Both those Section 1983 cases also involved freedom of speech claims.

Even cases decided on motion without a trial, and are not appealed, can be costly. For example, in *Gros v. New Orleans*, the court found that the city of New Orleans' law had violated the free speech rights of the plaintiff-pastors. There was no trial and very limited discovery, but the city was still ordered to pay $163,847.63 in attorney fees and costs.[49]

Conclusion

This Proposed Ordinance is bad public policy. It places women and children at risk. It has the power to compel people to speak messages they do not want to speak or face criminal convictions and fines. It exposes Houston taxpayers to hundreds of thousands of dollars (or more) if the law is held unconstitutional. There seems to be no systemic invidious discrimination in Houston that would justify taking these legal and financial risks.

Very sincerely yours,

ALLIANCE DEFENDING FREEDOM

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[46] *See* Shira Schoenberg, "Massachusetts pays $1.2 million in attorneys' fees in abortion clinic buffer zone case," Mass Live, December 23, 2014, *available at* http://www.masslive.com/politics/index.ssf/2014/12/massachusetts_pays_12_million html.

[47] *See, e.g.*, *Republican Party of Minn. v. White*, 456 F.3d 912, 922 (8th Cir. 2006). A free online version of this case is available at http://openjurist.org/456/f3d/912/republican-party-of-minnesota-v-white-l-e-nyu-l-e-c-f-j. In this online version, the citation is to paragraphs 37-38.

[48] *See* "*State to pay campaign finance case fees*," Rutland Herald, September 7, 2007, *available at* http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20070907/NEWS03/709070363/1004/NEWS03.

[49] *See Gros v. New Orleans City*, No. CIV.A. 12-2322, 2014 WL 2506464, at *18 (E.D. La. June 3, 2014) *on reconsideration in part*, No. CIV.A. 12-2322, 2014 WL 3894371 (E.D. La. Aug. 8, 2014). A free online version of this case is available at http://www.leagle.com/decision/In%20FDCO%2020140604D04.xml/Gros%20v.%20New%20Orleans%20City.