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ATTORNEY'S OFFICE

April 7, 2010

VIA FACSIMILE (850-606-5303)

Leon County Board of County Commissioners
301 S. Monroe Street, 5th Floor
Tallahassee, FL 32301

RE: Proposed Human Rights Ordinance

Dear Board of County Commissioners:

Please find attached a memorandum prepared at the request of the Florida Family Policy Council analyzing the legal effect and consequences of the Board's recently proposed Human Rights Ordinance. The memorandum concludes that the proposed ordinance should be rejected by the Board, because its premises and presumptions are unsupported by existing law, bad for Florida businesses, landowners, and landlords, and insensitive to the conscience rights of religious workers, organizations, and adherents.

Should you have any questions concerning the attached legal analysis, please do not hesitate to contact me.

Very truly yours,

Timothy J. Tracey
Legal Counsel

enclosures

cc: Herbert W.A. Thiele, County Attorney, via facsimile (850-606-2501)



MEMORANDUM

TO: Leon County Board of County Commissioners

CC: Herbert W.A. Thiele, County Attorney

FROM: Brian W. Raum, Senior Counsel
Austin R. Nimocks, Senior Legal Counsel
Timothy J. Tracey, Legal Counsel

RE: Proposed Leon County Human Rights Ordinance

DATE: April 7, 2010

The proposed Leon County Human Rights Ordinance attempts to add "sexual orientation" and "gender identity or expression" as protected categories in the County's non-discrimination laws. If passed, the proposed ordinance would elevate these conduct-based considerations to protected classes under county law, contrary to the applicable federal and state law. The ordinance defines "sexual orientation" as "actual or perceived homosexuality, heterosexuality, or bisexuality," while "gender identity or expression" is defined as "regardless of an individual's assigned sex at birth" or, in other words, how someone chooses to define their own sex irrespective of their physiological heritage.

The proposed ordinance should be rejected by the Board of County Commissioners, because its premises and presumptions are unsupported by science, bad for Florida businesses, landowners, and landlords, and insensitive to the conscience rights of religious workers, organizations, and adherents.

I. The Proposed Legislation is Unnecessary and Out of the Mainstream of American Culture.

The proposed human rights ordinance departs from the attitude of mainstream American government. Only twelve states and the District of Columbia have added both "sexual orientation" and "gender identity" to their housing and employment non-discrimination laws.¹ And, at the local level, only ninety-eight of the hundreds of thousands of cities and counties in America have enacted such laws.² Of the hundreds of thousands of employers in America only

¹ Human Rights Campaign, *Maps of State Laws & Policies* (Mar. 3, 2010) (available at http://www.hrc.org/about_us/state_laws.asp).

² Human Rights Campaign, *Employment Non-Discrimination Laws on Sexual Orientation and Gender Identity* (2010) (available at <http://www.hrc.org/issues/4844.htm>).

about 800 have reportedly adopted a "sexual orientation" and "gender identity" non-discrimination policy, including only 207 of the Fortune 500 businesses.³

The fact that so few states, counties, municipalities, and employers have adopted "sexual orientation" and "gender identity" non-discrimination laws and policies demonstrates that such laws and policies are unnecessary. American government and the business community enact laws and policies that are needed to remedy problems, but nothing in the proposed ordinance demonstrates the existence of any problem needing a solution. The proposed ordinance is bereft of any evidence demonstrating that "sexual orientation" or "gender identity" discrimination is a problem in Leon County.

Current federal and state law already prohibits sex discrimination and sexual harassment. Thus, under current federal and state law, employers, realtors, and landlords generally may not consider sex or sexuality when making decisions or offering their services. Put plainly, current law prohibits business owners from allowing issues of sexuality to become relevant in the workplace. Thus, the proposed ordinance is completely unnecessary and redundant of the already-governing federal and state laws.

In a free-market system, businesses, realtors, and landowners will respond to market pressures and adopt policies when a need for those policies arises. The Leon County government should follow this same theory and enact laws, especially laws with detrimental side-effects, only to remedy a demonstrated problem or concern. The proponents of the proposed human rights ordinance have not shown, and the County government has not identified, a need for the proposed ordinance; instead, the proponents are asking the Board of County Commissioners to capitulate to a persistent political agenda.

II. Classifying "Sexual Orientation" and "Gender Identity" as Immutable Protected Classes is Unsupported by Both Science and Federal and State Law.

Federal laws, such as Title VII of the Civil Rights Act of 1964, designate certain characteristics, such as race, national origin, and sex, as protected classes because they are inborn, static, and immutable.⁴ Unlike these unchangeable and permanent characteristics, "sexual orientation" and "gender identity" are fluid, and can change over time both

³ Human Rights Campaign, *Workplace Discrimination and Harassment Policies* (2009) (available at http://www.hrc.org/issues/workplace/equal_opportunity/about_equal_opportunity.asp).

⁴ *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 190 (3d Cir. 2009) (holding that Title VII "protects all individuals from discrimination motivated by the immutable characteristics specified in the statute"); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976) (holding that "a sex-differentiated hair length regulation" is not protected by Title VII because "[h]air length is not an immutable characteristic for it may be changed at will"); *Baker v. California Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974) (reasoning that Title VII protects "characteristics which the applicant, otherwise qualified, ha[s] no power to alter"); *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (11th Cir. 1975) (ruling that, under Title VII, "[e]qual employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin"); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973) (holding that Title VII prohibits "discriminatory deprivation of equal opportunity because of immutable race, national origin, color, or sex classification") (emphasis in original).

spontaneously and deliberately.⁵ Furthermore, they cannot be divided into discrete categories that are objectively determined by scientific methods. Rather, these categories define certain behaviors. Because of the inconsistent and varying nature of sexual behaviors, they have not been traditionally utilized as the cornerstones of social workplace policy.

A. Sexual Behavior Should Not Be Treated As An Immutable Characteristic.

Early studies on the origins of "homosexuality" raised the possibility of a "gay gene." More recent, extensive, and scientifically sound research, however, does not support such a possibility. The American Psychiatric Association concludes, "there are no replicated scientific studies supporting any specific biological etiology for homosexuality."⁶ The Council for Responsible Genetics states, "to date, no conclusive link between genetics and sexual orientation has been found."⁷

In fact, the best and most recent research finds the primary factor in the development of homosexual behavior is *environmental*, not genetic. For instance, two population-based research projects from Scandinavia, both published in 2008, studied homosexual behavior in sets of identical twins. Identical twins share 100% of their genes. If homosexual behavior were genetic, every time one twin believed that they were born a homosexual, the other twin would then also be a born homosexual 100% of the time. But that is not what these studies uncovered. Instead, they found that when one twin defined themselves as a homosexual, the other twin also defined themselves as a homosexual only 10% or 11% of the time. These two research studies, which involved almost 17,000 participants, concluded that homosexual behavior is *not* genetically determined.⁸ The findings of these Scandinavian studies are also supported by an extensive research project from Australia.⁹

A large-scale study from America, drawn from a nationally representative sample, not only concurs with the Scandinavian and Australian findings, but also identified specific

⁵ Title VII also prohibits discrimination on the basis of "religion." While "religion" is not necessarily an inborn characteristic, the freedom of religion is a fundamental right protected by the First Amendment to the United States Constitution. U.S. Const. amend. I. Neither "sexual orientation" nor "gender identity" claim similar constitutional protection.

⁶ Gay, Lesbian and Bisexual Issues by the American Psychiatric Association available at www.healthyminds.org.

⁷ Council for Responsible Genetics (2006). "Brief on Genetic Determinism." Available on the web at www.gene-watch.org.

⁸ Langstrom, N., Rahman, Q., Carlstrom, E., & Lichtenstein, P. (2008). Genetic and environmental effects on same-sex sexual behavior: A population study of twins in Sweden. *Archives of Sexual Behavior*. DOI 10.1007/s10508-008-9386-1; Santilla, P., Sandnabba, N.K., Harlaar, N., Varjonen, M., Alanko, K., von der Pahlen, B. (2008). Potential for homosexual response is prevalent and genetic. *Biological Psychology*, 77, 102-105.

⁹ Bailey, J.M., Dunne, M.P., & Martin, N.G. (2000). Genetic and environmental influences on sexual orientation and its correlates in an Australian twin sample. *Journal of Personality and Social Psychology*, 78 (3), 524-536.

socialization factors underlying homosexuality.¹⁰ Additional environmental factors also were identified by a Danish study involving two million Danes.¹¹

Another research study involving a genome wide scan of male sexual orientation was published in 2005. This study found *no part of the entire human genome* linked to same-sex attraction in any statistically significant way.¹² As opposed to other legal classifications, "sexual orientation" is *not* inborn.

The American Academy of Pediatrics states, "No one knows for sure what causes a person to be gay, bisexual, or straight. There are probably a number of factors. ... The reasons can vary from one person to another."¹³ This acknowledgement, by a highly regarded professional organization, further highlights crucial distinctions between "sexual orientation" and traditional legal classifications, namely the cause for inclusion in a traditionally protected group is known (*i.e.*, the nation of birth) and does *not* differ among individuals.

Traditional legal classifications, such as race and sex, are not fluid or malleable. One is born a member of a particular race or sex, and it is not possible for that characteristic to fluctuate or vary across a lifetime. That is not the case with "sexual orientation." As an example, a longitudinal study published in 2008 by the American Psychological Association in *Developmental Psychology* found that 67% of the women studied changed their "sexual orientation" at least once and 36% had changed it two or more times. Only 33% of these women retained the same "sexual orientation" across a ten-year time period.¹⁴ Other studies also have observed fluidity in "sexual orientation."¹⁵

Unlike traditional legal classifications, "sexual orientation" also can change both spontaneously and deliberately. A 2002 article published in the prestigious journal, *Professional Psychology: Research and Practice*, reviewed research concerning "sexual orientation" change. This review revealed that "sexual orientation" is *not* an immutable trait and can be altered by some individuals through various means, such as psychotherapy or religion.¹⁶ This finding was additionally supported by the research of Dr. Robert Spitzer, a psychiatrist who was instrumental in declassifying "homosexuality" as a mental disorder. Dr. Spitzer's research confirmed that

¹⁰ Bearman, P.S., & Bruckner, H. (2002). Opposite-sex twins and adolescent same-sex attraction. *American Journal of Sociology*, 107 (5), 1179-1205.

¹¹ Frisch, M. & Hviid, A. (2006). Childhood family correlates of heterosexual and homosexual marriages: A national cohort study of two million Danes. *Archives of Sexual Behavior*, 35, 533-547.

¹² Mustanski, B.S., Dupree, M.G., Nievergelt, C.M., Bocklandt, S., Schork, N.J., & Hamer, D.H. (2005). A genomewide scan of male sexual orientation. *Human Genetics*, 116 (4), 272-278.

¹³ Gay, Lesbian, and Bisexual teens by the American Academy of Pediatrics available at www.aap.org.

¹⁴ Diamond, L.M. (2008). Female bisexuality from adolescence to adulthood: Results from a 10-year longitudinal study. *Developmental Psychology*, 44 (1), 5-14.

¹⁵ Empowering Parents of Gender Discordant and Same-Sex Attracted Children by the American College of Pediatrics available at www.acpeds.org.

¹⁶ Throckmorton, W. (2002). Initial empirical and clinical findings concerning the change process for ex-gays. *Professional Psychology: Research and Practice*, 33, 242-248.

"homosexuality" is mutable under some circumstances.¹⁷ The American College of Pediatrics agrees and concludes that sexual reorientation can occur.¹⁸

Referring specifically to female sexuality, two UCLA professors state, "Scholars from many disciplines have noted that women's sexuality tends to be fluid, malleable, shaped by life experiences, and capable of change over time... multiple changes in sexual orientation are possible ... [due to] social, cognitive, and environmental influences."¹⁹

No other traditional legal classification is fluid, variable across the life span, or changeable, either spontaneously or intentionally. Yet all those attributes are characteristic of "sexual orientation."

"Sexual orientation" also cannot be divided into discrete categories in the way that other traditional legal classifications can (*i.e.*, sex is divided into the male and female categories). Dividing "sexual orientation" into three categories, such as homosexual, heterosexual, and bisexual, is arbitrary and factually inaccurate. As both the American Psychiatric Association and the American Psychological Association make clear, "sexual orientation" lies along a continuum from exclusive homosexual behavior, to various forms of bi-sexual behavior, to exclusive heterosexual behavior, and to an orientation in which individuals are not attracted to *either* sex.²⁰ Thus, there are not three, but *innumerable* "sexual orientations." Which of these countless variations will be legally protected, and which will not?

All other legal classifications have unambiguous and scientifically sound definitions upon which to rely for categorization. That is not the case with "sexual orientation." According to the authors of the most comprehensive and representative survey of sexuality in American history, individuals in various "sexual orientation" groups are not readily identifiable because definitions are not clear or precise. They conclude, "homosexuality is fundamentally a multidimensional phenomenon that has manifold meanings and interpretations, depending on context and purpose."²¹ Based on the ambiguity of that definition, it is not surprising that no scientific method exists for classifying individuals. Lisa Diamond of the University of Utah, one of the preeminent researchers in this area states, "[t]here is currently no scientific or popular consensus ... that definitively 'qualify' an individual as lesbian, gay, or bisexual . . ."²² There cannot be a legal classification of individuals that relies on ambiguous definitions without scientific methods for precise categorization.

¹⁷ Spitzer, R.L. (2003). Can some gay men and lesbians change their sexual orientation? 200 participants reporting a change from homosexual to heterosexual orientation. *Archives of Sexual Behavior*, 32 (5), 403-417.

¹⁸ Empowering Parents of Gender Discordant and Same-Sex Attracted Children by the American College of Pediatrics available at www.acpeds.org.

¹⁹ A New Look at Women's Sexuality & Sexual Orientation by Linda D. Garnets and Leticia Anne Peplau available at www.csw.ucla.edu.

²⁰ Gay, Lesbian and Bisexual Issues by the American Psychiatric Association available at www.healthyminds.org; Answers to Your Questions About Transgender Individuals and Gender Identity by the American Psychological Association available at www.apa.org.

²¹ Lauman, E.O., Gagnon, J.H., Michael, S. (1994). *The social organization of sexuality: Sexual practices in the United States*. Chicago: University of Chicago Press.

²² Diamond, L.M. (2003). New paradigms for research on heterosexual and sexual minority development. *Journal of Clinical Child and Adolescent Psychology*, 32 (4), 490-498.

Furthermore, as the American Psychological Association attempts to explain, "sexual orientation is different from sexual behavior because it refers to feelings and self-concept. Individuals may or may not express their sexual orientation in their behaviors."²³ No other traditional legal classification is determined by subjective information. Rather, they are established by objective fact.

Traditional legal classifications legitimately allow the categorization of individuals into discrete subgroups that are clearly definable and objectively determined through scientifically reliable means, and involve individual characteristics that are innate, static, and immutable. "Sexual orientation" shares none of those attributes and therefore differs in significant and monumental ways from other traditional legal classifications.

B. Sexual Behavior Is Not Treated As An Immutable Characteristic By Federal and State Courts.

The federal circuit courts have uniformly rejected the notion that "sexual orientation" should be treated as a protected class under federal constitutional law.²⁴ These courts have recognized precisely what the scientific data shows: "Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."²⁵

For instance, in *High Tech Gays*, a class action suit was brought challenging the U.S. Department of Defense's policy of conducting expanded investigation into the backgrounds of persons identifying themselves as "homosexual" for secret and top secret security clearances.²⁶ In analyzing the class members' equal protection challenge, the Ninth Circuit considered whether "sexual orientation" constitutes a "suspect" or "quasi-suspect" class under federal law.²⁷ The court concluded "that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny."²⁸ The court explained: "Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."²⁹

The Ninth Circuit's analysis follows United States Supreme Court precedent that has reserved "suspect" and "quasi-suspect" classifications for "immutable characteristic[s]

²³ Sexual Orientation and Homosexuality by the American Psychological Association available at www.apa.org.

²⁴ See *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Secretary of Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

²⁵ *Woodward*, 871 F.2d at 1076.

²⁶ *High Tech Gays*, 895 F.2d at 569.

²⁷ *Id.* at 571.

²⁸ *Id.* at 574.

²⁹ *Id.* at 573.

determined solely by the accident of birth.”³⁰ Thus, legislative classifications based on characteristics such as race, gender, and alienage are subject to heightened protection.³¹ But classifications that are more undefined or “amorphous” are not protected.³² For instance, the Supreme Court refused to extend “suspect” or “quasi-suspect” class status to children of low income mothers because “they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.”³³ Only when “immutable characteristics over which individuals have little or no control” are at issue, has the Supreme Court provided heightened protection,³⁴ and when the United States Supreme Court was presented with the opportunity to deem “sexual orientation” a protected class, it declined to do so.³⁵

Florida courts have similarly held that “sexual orientation” is not a protected class.³⁶ Sexual behavior “does not involve a fundamental right or a suspect class and is thus reviewed under the rational basis test.”³⁷ For this very reason, neither the Florida Civil Rights Act³⁸ nor any other statewide law prohibits discrimination based on “sexual orientation.”³⁹

Accordingly, federal and state courts have consistently recognized that sexual behavior is necessarily different in character than the classifications typically afforded heightened protection under federal and state law. Characteristics such as race and gender are immutable. Sexual behavior is, by nature, changeable. Indeed, the existence of thriving organizations such as Exodus International⁴⁰ and Parents and Friends of Ex-Gays⁴¹ stand as a testament to this variability.⁴² Accordingly, federal and state courts have quite properly held that sexual behavior is not immutable. It would be anomalous then for the Board of County Commissioners to simply disregard these multiple holdings and afford sexual behavior special legal protections.

³⁰ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

³¹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985).

³² *Cleburne*, 473 U.S. at 445 (explaining that the “amorphous” nature of class of mentally disabled individuals counseled against deeming it quasi-suspect).

³³ *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

³⁴ *Kahn v. Shevin*, 416 U.S. 351, 359 (1974) (Brennan, J., dissenting).

³⁵ *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that Colorado’s Amendment 2 “fails . . . th[e] conventional [rational basis] inquiry”); see also *High Tech Gays*, 895 F.2d at 573 (noting that “the [Supreme] Court has never held homosexuality to a heightened standard of review”).

³⁶ *Cox v. Florida Dep’t of Health & Rehab. Servs.*, 656 So.2d 902, 903 (Fla. 1995) (observing that “constitutional validity” of classification based on sexual behavior is reviewed “on the rational-basis standard for equal protection”); *In re Florida Bd. of Bar Exam’rs*, 358 So.2d 7, 9 (Fla. 1978) (considering “whether there is a rational connection between homosexual orientation and fitness to practice law”) (emphasis added); *In re Adoption of Doe*, 2008 WL 5006172, at *27 (Fla. Cir. Ct. 2008) (holding that “sexual orientation” is “not . . . a suspect class and is thus reviewed under the rational basis test”).

³⁷ *In re Adoption of Doe*, 2008 WL 5006172, at *27.

³⁸ Fla. Stat. §§ 760.01-760.11.

³⁹ Human Rights Campaign, *Florida Non-Discrimination Law* (Mar. 9, 2007) (available at http://www.hrc.org/your_community/863.htm).

⁴⁰ See <http://www.exodusinternational.org/>.

⁴¹ See <http://www.pfox.org/>.

⁴² See also *Parents & Friends of Ex-Gays, Inc. v. Government of the Dist. Office of Human Rights*, No. 08-003662, slip op. at 5-6 (D.C. Super. Ct. June 26, 2009) (holding that “ex-gays” are “protected from discrimination” under law barring discrimination on account of sexual orientation).

C. Ignoring Gender Identity Disorder Will Cause Harm.

The notion of “gender identity” stems from Gender Identity Disorder (GID), an established mental illness recognized by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders.⁴³ Persons suffering with GID are described as individuals who are severely uncomfortable with, and often desire to change, their biological sex.⁴⁴ Both supporters and opponents of “gender identity” laws recognize that those individuals who struggle to embrace their biological sex are suffering from a psychiatric disorder.⁴⁵ Yet, advocates of “gender identity” laws routinely remove the word “disorder” from the illness to dilute the fact that they are advocating for the normalization of a serious cognitive condition.

Like many similar bills which ignore this serious mental illness, the proposed ordinance defines “gender identity” as “a gender-related identity . . . regardless of an individual’s assigned sex at birth.” It expressly ignores the psychiatric roots of those suffering from GID, codifies the idea that a person’s sex is a state-of-mind (rather than a biological fact), supports the fiction that one can arbitrarily change his or her “gender” through a simple decision or declaration, and grants legal protection for those who misguidedly choose to do so. The “gender identity” concept seeks to create heightened legal protection for persons commonly known as “transgender.” A “transgender” person is one who subjectively identifies as being a member of the opposite sex from that which he or she was born.⁴⁶ If the Board of County Commissioners chooses to enshrine such a radical concept into county law, it will adopt an ineffective political solution to a serious, often ignored, psychiatric disorder.

Those who support “gender identity” laws seek to deny the true psychiatric concerns associated with GID and, instead, embrace that condition as normal. In contrast, the opponents of “gender identity” laws emphasize that individuals suffering from GID need help, support, and psychiatric counseling,⁴⁷ not legal protection that normalizes their mentally-impaired lifestyle choices. Consider for a moment the societal consequences of enacting laws which prevented intervention into the lives of those suffering from heightened cases schizophrenia or bi-polar disorder. If the behaviors of those afflicted with these disorders were protected by a federal law, then the policy would place anti-social behavior above the welfare and safety of society as a whole. Alternatively, if the County Commissioners enacted a non-discrimination law protecting individuals who live with multiple distinct identities or personalities, the citizens of Leon County would be outraged at such a misplaced effort to help those suffering with Dissociative Identity Disorder (DID), which, like GID, is a recognized psychiatric disorder. Yet, the proposed ordinance seeks to do precisely this—value the anti-social behaviors of a few more than the needs of society and children.

⁴³ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders IV (1994).

⁴⁴ See http://en.wikipedia.org/wiki/Gender_identity_disorder (“[A] condition in which a person has been born one gender, usually on the basis of their sex at birth . . . , but identifies as belonging to another gender, and feels significant discomfort or the inability to deal with this condition.”).

⁴⁵ <http://www.transgenderlaw.org/resources/translaw.htm>.

⁴⁶ <http://en.wikipedia.org/wiki/Transgender>.

⁴⁷ <http://www.nlm.nih.gov/medlineplus/ency/article/001527.htm> (recognizing that the “recommended” treatment for those suffering from GID is “individual or couples therapy”); <http://www.thehealth.com/consumer/disorders/genderiden.html> (noting that “[p]sychological therapy can alter the course of gender identity disorder”).

Clearly then, it is nonsensical to adopt legal protections to wholly insulate the harmful side effects of a recognized psychiatric problem. For good reason, we are unaware of an instance where the Board of County Commissioners has enacted similar legislation for any other recognized mental illness. If society begins ignoring the needs of those afflicted with mental illnesses—denying them treatment, care, medication, and counseling, in favor of political protection—the consequences will be unfortunate and devastating.

It is precisely for this reason that the vast majority of courts have been unwilling to extend Title VII's existing prohibitions against "sex" (or gender) discrimination to individuals suffering from GID.⁴⁸ The courts have been concerned about "all the ramifications to society of such a broad view."⁴⁹ Even the handful of courts that have been willing to countenance the possibility of a "gender stereotyping" claim under Title VII have recognized that the concepts surrounding the theories of transsexualism stem from a "[d]isorder . . . represent[ing] a profound disturbance of the individual's sense of identity with regard to maleness or femaleness."⁵⁰ These courts have acknowledged that there may be instances where a person is legitimately discriminated against because of their mental illness or disability, but that, ultimately, protecting and encouraging mentally ill people in their impaired choices runs contrary to the best interests of society. The wisdom of these courts should not be overlooked by the Board of County Commissioners.

III. Passing the Proposed Ordinance Will Create Unneeded Legal and Administrative Problems for Florida Businesses.

Adding "gender identity" and "sexual orientation" as protected classes to county law creates unworkable situations for Florida businesses of all sizes. Indeed, the proposed ordinance reaches any employer "who has five or more employees." Especially during these difficult economic times, new administrative regulations and hassles for business are not only unproductive, they are disruptive.

⁴⁸ See *Elsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Creed v. Family Exp. Corp.*, No. 06-0465, 2009 WL 35237, at *5-6 (N.D. Ind. Jan. 5, 2009); *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286-87 (E.D.Pa. 1993); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 370 (E.D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 402 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978); *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 WL 9446, at *2 (D.D.C. June 12, 1985); *Emanuelle v. U.S. Tobacco Co., Inc.*, No. 85-8165, 1987 WL 19165, at *1 (D. Ill. Oct. 27, 1987), *aff'd mem.*, 886 F.2d 332 (7th Cir. 1989); *James v. Ranch Mart Hardware, Inc.*, No. 94-2235, 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994); *Rentos v. Oce-Office Sys.*, No. 95-7908, 1996 WL 737215, at *6 (S.D.N.Y. Dec. 24, 1996); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 WL 302, at *3-4 (D.N.J. Sept. 10, 1975), *aff'd mem.*, 538 F.2d 319 (3d Cir. 1976), *cert. denied*, 429 U.S. 897 (1976); *Terry v. E.E.O.C.*, No. 80-408, 1980 WL 334, at *3 (E.D. Wis. Dec. 10, 1980).

⁴⁹ *Ulane*, 742 F.2d at 1086.

⁵⁰ *Schroer v. Billington*, 424 F. Supp. 2d 203, 210 (D.D.C. 2006) (quoting Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 564 (4th ed. 2000)). See also *Smith v. City of Salem*, 378 F.3d 566, 571-75 (6th Cir. 2004) (calling GID a "[d]isorder" characterized by "a disjunction between an individual's sexual organs and sexual identity"); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 655, 658 n.8 (S.D. Tex. 2008) (identifying transsexualism as a "[d]isorder" in which there is a "[p]ersistent discomfort with [one's] sex or [a] sense of inappropriateness in the gender role of [one's] sex") (quoting Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 581 (4th ed. 2000)).

A. The Proposed Ordinance Creates Unmanageable Privacy Issues for Employers.

Glaringly absent from the proposed ordinance is guidance to employers about handling issues such as access to bathrooms, restrooms, and locker rooms. The proposed ordinance prohibits employers from “discriminat[ing] against an individual with respect to . . . conditions . . . of employment because of . . . gender identity or express, sexual orientation, or physical characteristic.” It specifically forbids an employer to “[l]imit, segregate, or classify an employee in a way which would . . . adversely affect the status of an employee” There is every indication that, under the proposed ordinance, businesses will no longer be able to segregate their most necessary facilities by sex. If a man claims that his “gender identity” is that of a woman,⁵¹ a business cannot deny him access to the women’s restroom, where most Florida female workers will be uncomfortable with, offended by, or even threatened by the presence of a man. Following this flow of the illogic, businesses will no longer be able to segregate men and women in any setting, or for any purpose, because to do so would violate the ordinance. Instead, businesses would be forced to defer to the professed (not actual) gender of each individual, which can change at any time, without regard to biological reality.⁵²

In the handful of places where non-discrimination laws similar to the proposed ordinance are already in effect, those suffering from GID have already used society’s ignoring of their disease to file lawsuits claiming the right to use restrooms reserved for members of the opposite sex. Nine years ago, the Minnesota Court of Appeals ruled that a man must be permitted to use a women’s restroom.⁵³ The Minnesota Supreme Court later reversed the decision, but the Court of Appeals’ opinion shows how some courts will construe provisions like the ones proposed here.⁵⁴

Moreover, in July of 2009, the Maine Human Rights Commission ruled that a fifth grade boy who self-identified as a “girl” must be permitted to use the girls’ restroom at school.⁵⁵ Just two months earlier, the same Human Rights Commission ordered a Denny’s restaurant to allow a male customer, who self-identified as a “woman,” to use the ladies’ room or face liability for discrimination.⁵⁶ Similar such cases will no doubt arise in Leon County if the Board of County Commissioners creates a county code of this otherwise anti-social behavior which puts the misguided desires of a few above the needs of others.

In addition to these legal concerns, the proposed ordinance creates many administrative problems for businesses. Where persons are free to subjectively define their own sex, without

⁵¹ The definitional idea of “gender identity” is especially disturbing in this context because there exists no temporal component to one’s choice to identify themselves as the opposite sex. Nor does there need to exist any particular need for a necessity of this definition. Thus, individuals not afflicted with GID (e.g., sexual predators) can abuse an open-ended law, like the proposed ordinance, to accomplish their anti-societal agenda.

⁵² The proposed ordinance also leaves unanswered whether employers must construct new or additional facilities to address these privacy concerns.

⁵³ *Goins v. West Group*, 619 N.W.2d 424, 429 (Min. App. 2000).

⁵⁴ *Goins v. West Group*, 635 N.W.2d 717, 723 (Minn. 2001).

⁵⁵ Abigail Curtis, *State Rules in Favor of Young Transgender*, Bangor Daily News, July 1, 2009, available at <http://www.bangordailynews.com/detail/109732.html>.

⁵⁶ Abigail Curtis, *Panel Backs Transgender Woman in Restroom Case*, Bangor Daily News, May 20, 2009, available at <http://www.bangordailynews.com/detail/106487.html>.

regard to their biological heritage, there is no circumstance under which a business would know whether to object to any given employee's (or prospective employee's) handling of any sex-specific circumstance. Whether a circumstance involves the completion of an employment application, and a prospective employee's designation of themselves as either "male" or "female," or the usage of intimate employment facilities (like restrooms, locker rooms, etc.),⁵⁷ or even issues involving uniforms or dress codes, the proposed ordinance places employers in constantly legally-compromising circumstances. Indeed, the practical absurdities of applying such a rule are countless. Once the law permits citizens to subjectively define their own sex, chaos and disorder are inevitable byproducts.

Also, the proposed ordinance raises the possibility that employers will have to provide benefits to same-sex "spouses." It specifically mandates that the "terms, conditions, or privileges of employment" cannot vary based on "gender identity" or "sexual orientation." If an employer provides benefits for the opposite-sex spouses of its employees, then it presumably it must do the same for same-sex "spouses." Such a requirement will increase costs for Florida businesses operating in the county and provide an incentive for them to relocate elsewhere.

The ordinance's apparent directive of benefits for same-sex "spouses" also raises concerns under the Florida Marriage Amendment.⁵⁸ While Florida law limits the definition of "spouse" to a member of a "legal union between one man and one woman as husband and wife,"⁵⁹ the proposed ordinance appears to legally mandate recognition of persons participating in a same-sex relationship. To the extent the proposed ordinance conflicts with existing Florida law defining marriage, the proposed ordinance is invalid and improper.

B. The Proposed Ordinance Creates Problems for Individuals Employed Within the County.

Because the proposed ordinance largely ignores the needs of Florida workers, the efforts to create rights for a few will result in a hostile work environment for others, resulting in unwanted and unnecessary conflict and litigation.

Every citizen of the county possesses privacy rights, as well as the right to enforce his or her entitlement to privacy.⁶⁰ A right-to-privacy claim clearly applies to individuals in their use of restroom facilities, and protects them from having their bodies exposed to members of the opposite sex.⁶¹ This right of privacy is not extinguished when one enters the workplace.

⁵⁷ This point is especially poignant regarding an employer's imposed duty to provide a safe and secure workplace. Yet, with the imposition of a law like the proposed ordinance, a business is legally unable to protect its female employees from sexual predators, voyeurs, and other sexual deviants who self-identify as women in order to gain access to areas that they would otherwise be unable to access for the advancement of their perverted agenda. A business' inability to distinguish between employees actually suffering from GID and those who desire to manipulate such a poorly drafted law places the employer in a perpetually untenable practical and legal whirlwind.

⁵⁸ Fla. Const. art. 1, § 27.

⁵⁹ Fla. Stat. § 741.212(3).

⁶⁰ Restatement (Second) of Torts § 652(B).

⁶¹ *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981).

For instance, a teacher in Minnesota was forced to sue her employer in federal court because its decision to permit a sexually-confused man to use the women's restroom created a sexually hostile work environment.⁶² Similarly, in New Jersey, another female employee had no choice but to sue her employer (for sexual harassment and a hostile work environment) because of its decision to allow a man, who declared his "gender identity" to be that of a woman, to use the all-female facilities and elements of a women's corporate locker room.⁶³ Though the legal claims were rejected, the cases and circumstances that led to their filing are demonstrative of the increased litigation and legal costs that will be imposed on businesses by non-discrimination provisions like the proposed ordinance.

IV. The Proposed Ordinance Will Subject Religious Organizations to Increased Litigation and Costs.

The proposed ordinance provides no exemptions to religious organizations from its prohibitions on "sexual orientation" and "gender identity" discrimination. The existing exemption only permits religious organizations to make employment decisions on the basis of *religion*. "A religious corporation, association, or society" is permitted "to employ individuals of a particular *religion*." A religious educational institution or church may "limit employment or give preference to members of the same *religion*." The proposed ordinance is ominously silent with regard to discrimination based on "sexual orientation" and "gender identity."

A similarly worded religious exemption in Title VII has been narrowly interpreted; allowing religious organizations only to make employment decisions "on the basis of religion."⁶⁴ The Title VII exemption does not, for instance, allow a religious organization to terminate an employee for an out-of-wedlock pregnancy because of the organization's religious beliefs about extramarital sexual conduct.⁶⁵ The employer is still subject to charges of sex discrimination under Title VII. Likewise, the proposed ordinance here is likely to be construed narrowly, and "sexual orientation" and "gender identity" discrimination by a religious individual or organization would not be exempted from the proposed ordinance's coverage.

A broader religious exemption is required to protect and accommodate the First Amendment free exercise and free speech rights of religious individuals and organizations. Many religious individuals and organizations adhere to certain moral precepts regarding sexual behavior. Accordingly, religiously motivated business owners and organizations are constitutionally entitled to refrain from hiring particular individuals to do certain tasks, and to refrain from offering their services under particular circumstances. Yet, although these individuals and organizations are constitutionally entitled to conduct themselves in accordance with their religious convictions, under the proposed ordinance, their actions will likely be characterized as "sexual orientation" or "gender identity" discrimination, and charges brought against them.

⁶² *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002).

⁶³ *Opilla v. Parker*, No. L-3749-03, 2006 WL 2787047, at *1 (N.J. Super. Ct. App. Div. Sept. 29, 2006).

⁶⁴ 42 U.S.C. § 2000e-1(a); see also *E.E.O.C. v. Mississippi College*, 626 F.2d 477, 484 (5th Cir. 1980)

⁶⁵ *Vigars v. Valley Christian Ctr. of Dublin*, 805 F. Supp. 802 (N.D. Cal. 1992); see also *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) ("Title VII still applies, however, to a religious institution charged with sex discrimination.").

This constitutional dilemma currently exists in the State of New Mexico, where, like the proposed ordinance, "sexual orientation" is a protected category in the governing human rights law.⁶⁶ Recently, a New Mexico photography company refused to photograph a same-sex "wedding" ceremony because its owners would violate their religious principles by using their artistic talents and abilities to endorse the message that marriage can exist between two individuals of the same sex.⁶⁷ The business owners were not motivated by "sexual orientation" discrimination, but rather by their constitutionally protected religious convictions. Nevertheless, discrimination charges were filed against the New Mexico photography company, alleging that the business owners discriminated on the basis of "sexual orientation."⁶⁸ Just last month, the New Mexico Human Rights Commission ruled that the company had engaged in unlawful discrimination.⁶⁹ This real-world example tangibly represents the direct clash that often arises between "sexual orientation" and "gender identity" laws and business owners' religious convictions.

The Board of County Commissioners should exempt all individuals and organizations whose conduct is protected by the First Amendment. The simplest, most effective way of achieving this result is by adopting a straightforward religious exemption, one which reads as follows: "The prohibitions of 'sexual orientation' and 'gender identity or expression' discrimination under the Human Rights Ordinance do not apply to: (1) the conduct of a religious organization, (2) the religiously motivated conduct of any organization, and (3) the religiously motivated conduct of an individual who is acting according to the dictates of his or her sincerely held religious beliefs." This short exemption sufficiently protects the free exercise rights of all Leon County citizens, both organizations and individuals. Anything less would expose the constitutional rights of Leon County citizens to unnecessary infringement.

This existing religious exemption in the proposed ordinance is also narrowly limited to where a religious organization is hiring individuals who "perform work connected with the beliefs, tenets and doctrines" of the organization. This narrowly crafted language arguably does not apply to the hiring of many positions within the religious organization, which include, for example, janitorial staff, information technology staff, or administrative staff. Aside from the fact that a court should not be asked to determine whether an employee's work is "connected with the beliefs" of the organization,⁷⁰ the proposed exemption is simply inadequate to protect the constitutional rights of religious organizations. That exemption should be amended to state: "It is not a discriminatory employment practice for a religious corporation, association, or society, or any employer motivated by religious beliefs, to limit employment to individuals who adhere to the beliefs, tenets, and doctrines of the employer, and agree to conduct themselves in accordance with those beliefs, tenets, and doctrines."

⁶⁶ N.M. STAT. § 28-1-7(F).

⁶⁷ <http://www.lifesitenews.com/ldn/2008/jan/08013004.html>

⁶⁸ <http://www.lifesitenews.com/ldn/2008/jan/08013004.html>

⁶⁹ Sue Major Holmes, *NM Commission Rules Photographer Discriminated Against Gay Couple*, LAS CRUCES SUN-NEWS (April 11, 2008), at http://www.lcsun-news.com/ci_8893673; see also <http://www.alliancedefensefund.org/news/story.aspx?cid=4467>.

⁷⁰ *Serbian Eastern Orthodox Diocese for the U.S. and Canada v. Milivojevich*, 426 U.S. 696, 709 (1976) (condemning "civil determination[s] of religious doctrine").

For all these many reasons, the proposed Human Rights Ordinance is harmful to Leon County citizens and businesses. It is hostile to businesses and runs counter to the county's cultural and religious interests. The county should not set the fictitious standard of equating sexual behavior with immutable characteristics. Moreover, the County Commissioners should not force businesses into unmanageable, unworkable, and most importantly, unprofitable situations. In short, the proposed ordinance must be rejected.