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Reply to: Minnesota

March 24, 2016

VIA EMAIL - rep.glenn.gruenhagen@house.mn
Representative Glenn Gruenhagen
Minnesota House of Representatives
487 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, Minnesota 55155

RE: Analysis of HF 3396 - SF 3002 and gender-specific accommodations

Dear Representative Gruenhagen:

Liberty Counsel is a legal, media and policy organization with an emphasis on First Amendment religious liberty issues.

I have reviewed HF 3396 and its Senate companion SF 3002, sponsored by Senator Newman. This legislation provides clarification to existing law, that, for purposes of the Minnesota Human Rights Act ("MHRA"), "a person's sex is either male or female as biologically defined," and that with some reasonable exceptions, restrooms, locker rooms, dressing rooms, and other similar places shall be reserved for the biological sex for which they are designated.

This legislation is a necessary extension of existing Minnesota law, as interpreted by the Minnesota Supreme Court case *Goins v. West Group,* 635 N.W.2d 717 (Minn.2001). *Goins* held that an employer's designation of employee restroom use based on biological gender is not "discrimination" in violation of the MHRA's definition of "sexual orientation." The plaintiff male in that case argued that it was "sexual orientation" discrimination under the MHRA for his employer to deny him access to the restroom reserved for actual, biological women, because he had adopted a female identity, or otherwise claimed to be a woman.

While the Minnesota Supreme Court made the right decision in that case, it did so while noting the absence of "more express guidance from the legislature." *Id.* at 723. *Goins* has not been overruled, and the weight of authority nationwide agrees with that case. However, the Minnesota legislature should avail itself of this excellent and necessary opportunity to provide that guidance, for the following reasons:

- Under *Goins,* while an employer *may* protect women's privacy from invasion by members of the opposite sex, an employer is not currently *required* to do so. This

legislation would close the loophole, and make it clear that both sexes, but particularly women and children, have a right of privacy in areas reserved for private bodily functions, and it does so based on objective biological sex.

- The legislation uses "sexual orientation" as already defined in the MHRA, and ensures that anyone, whether heterosexual, homosexual, or "transgendered," may use a restroom based on biological sex, which is the only objective method of preserving the safety and privacy of all.

- The legislation provides exceptions for small children accompanying an opposite-sex parent; disabled people accompanying an opposite-sex caregiver; emergency personnel; and maintenance personnel.

- The legislation would also permit use of an opposite-sex restroom in a "bona fide" emergency (which could include emergency incontinence where no bathroom is otherwise available). The facts and circumstances would reveal that a man dressed as a woman, for instance, is using an inappropriate restroom, where the appropriate restroom is clearly available, and this use would be a violation of the law.

- The legislation applies to and protects both sexes, but it is particularly designed to protect women and children from the safety, privacy, and personal dignity violations imposed by adult males claiming access to private areas.

- Numerous federal court decisions have held that it is appropriate to limit the use of restrooms and lockers on the basis of biological sex. *See, e.g., Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* No. CIV.A. 3:13-213, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015) (rejecting female "transgender" claim of access to male restrooms and lockers); *G.G. v. Gloucester County School Board,* 2015 WL 5560190 at *9 (E.D. Va. 2015) (rejecting female "transgender" claim of access to male restrooms and lockers); others have found no "discrimination" based on "transgender" status: *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir.2007); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995); *Braninburg v. Coalinga State Hosp.,* No. 1:08–cv–01457–MHM, 2012 WL 3911910, at *8 (E.D.Cal. Sept.7, 2012) ("it is not apparent that transgender [sic] individuals constitute a 'suspect' class"); *Jamison v. Davue*, No. S–11–cv–2056 WBS, 2012 WL 996383, at *3 (E.D.Cal. Mar.23, 2012) (so-called "transgender" individuals do not constitute a 'suspect' class, so allegations that defendants discriminated...are subject to a mere rational basis review"); *Kaeo–Tomaselli v. Butts*, No. 11–cv–00670 LEK, 2013 WL 399184, at *5 (D.Haw. Jan.31, 2013) (noting the plaintiff's status as a claimed "transgender" person did not qualify the plaintiff as a member of a protected class and explaining the court could find no "cases in which transgender [sic] individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05–cv–1032–NRB, 2009 WL 229956, *13 (S.D.N.Y. Jan.30, 2009) (explaining that because such individuals are not a protected class for the purpose of Fourteenth Amendment analysis, claims that a plaintiff was subjected to "discrimination" based on his status as a transvestite are subject to rational basis review).

Even if a heightened standard of review were applied in those cases, the result would be the same as under rational basis review. A policy of limiting bathroom and locker room facilities on the basis of birth sex is "substantially related to a sufficiently important government interest." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir.2011) (*quoting Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47, (1985)). Such a policy is based on the need to ensure personal privacy to disrobe, shower or use the restroom outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts. *See, e.g., Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1224 (10th Cir.2007) (the use of women's public restrooms by a biological, cross-dressing male could result in liability for employer, and such a motivation constitutes a legitimate, nondiscriminatory reason).

Despite this weight of authority in Minnesota and around the country, HF 3396 - SF 3002 has become necessary, because public accommodations, educational institutions and employers are nevertheless rejecting the privacy rights of females, including those of female students, and female employees. Where "Gender Identity" claims have been permitted to override common-sense biological privacy rights in restrooms and lockers, the following documented events have occurred:

Locker Example - Clay Scott "Colleen" Francis: Lewd exhibitionist male cross-dresser Clay Scott Francis engaged in "gender identity or expression" under Washington's "nondiscrimination" law by **"sitting with her [sic] legs open with her [sic] male genitalia showing"** in the Evergreen State College women's locker room **in front of women and schoolgirls from local schools**, which used the College swim team facilities. His interpretation of what was permitted by the "gender identity or expression" law and policy was adopted by Evergreen State College, as well as the Thurston County prosecutor's office, despite the actual presence of minors. He remains free to continue doing so today. Further details of his case are discussed in the November 2, 2012 letter to the Thurston County, WA prosecutor's office.[1]

Without this legislation, another "Colleen" Francis would be free to legally expose his male genitals to women and girls in Minnesota university and school locker rooms, over the objections of female employees, teachers and minor students.[2]




Employment Example - Martin "Marty" Ortiz: Employed at a **Wal-Mart** in Billings, Montana, Mr. Ortiz engaged in "gender identity or expression" by cross-dressing on the job, and insisting on using the women's restroom over the objections of nearly 40 female employees. The offensive behavior of Mr. Ortiz included actions such as

[1] https://www.liberty.edu/media/9980/attachments/110212_-_Ltr_-_Thurston_County_Prosecutor.pdf
[2] http://gendertrender.wordpress.com/2012/10/07/olympia-wa-school-officials-state-gender-identity-provision-overrides-title-ix-equality-for-girls-swim-teams/

urinating in the women's restroom while standing up, with the stall door open, and refusing to use the single-space "family" restroom.

Without this legislation, another "Marty" Ortiz would be able to engage in this behavior in Minnesota, over the objections of female coworkers, and over the objection of his concerned supervisor.


Child Rapist Example - Paul Ray "Paula" Witherspoon: Mr. Witherspoon, **a convicted serial child rapist,** engaged in "gender identity or expression" by **frightening a woman in a hospital restroom designated for use by women and girls,** while wearing earrings, a skirt, and a large bulky ankle GPS device worn by paroled felons considered likely to re-offend. His parole had been previously revoked at least twice: in 2007 when Witherspoon was charged with assault and returned to prison until 2010, and again when he was arrested in 2011 for sending out pornographic photos of himself over the internet. Nevertheless, Lambda Legal representative Ken Upton claimed that **pedophilic male serial sex offenders** like Mr. Witherspoon **should be allowed to access private women and girls' facilities regardless of legal gender status** as long as he and other men are "using the bathroom in a way that is consistent with the gender that they live in day in and day out".[3] Without this legislation, a Paul "Paula" Witherspoon would be able to use bathrooms, locker rooms, and other private facilities over the objections of Minnesota women and girls, based on municipal ordinances like those in Minneapolis.

As you also may be aware, on March 23, 2016 the North Carolina legislature passed and the governor signed similar legislation to HF 3396 - SF 3002, reserving restrooms to the use of the biological sex for which they are designated, and eliminating the ability of rogue municipalities to abolish the privacy rights of citizens. It is time for other state legislatures nationwide to do the same, including Minnesota.

For these reasons, Liberty Counsel supports HF 3396 - SF 3002. Liberty Counsel greatly appreciates your leadership on this issue. Should you have questions about any of the points contained in this letter, I would be happy to discuss at 407-875-1776.

Sincerely,

Richard L. Mast, Jr.†

[3] http://www.nbcdfw.com/news/local/Transgender-Woman-Convictions-Irrelevant-to-Citation-149923975.html
†Licensed in Virginia
RLM/ajr