



## **CONCERNS WITH THE PROPOSED CITY OF JACKSON NDO (February 5, 2017)**

### **1. INTERNAL CONFLICT IN THE ORDINANCE:**

The proposed nondiscrimination ordinance (NDO) mandates no religious discrimination as well as no discrimination on the basis of sexual orientation/gender identity (SOGI). Both categories cannot be enforced at the same time – they are on a collision course. The constitutional right of the Free Exercise of Religion should always prevail over a statutorily created right.

The US Supreme Court *Obergefell* case also emphasizes this conflict. Justice Kennedy created a new constitutional right based upon “personal identity” or “self-autonomy.” However, the application of this newly created right is not limited to same-sex marriage. The Court also stated it is grounded in all the rights contained in the Bill of Rights, including the First Amendment. Therefore, both sides on this issue have their personal identity protected under *Obergefell*.

Moreover, the religious exemption contained in the NDO does not work as advertised. Just Google this issue and you will find numerous cases against churches and individuals under similar NDO’s where the free exercise rights of businesses and individuals were not protected. The harassment and expense of defending against a claim makes it cost prohibitive for a business or person to try to protect those rights.

### **2. THIS NDO COERCES BUSINESSES AND CITIZENS:**

There is no protection for individuals or businesses in this proposed NDO. The potential financial penalty is \$500.00/day (Sec. 15-49(a)). At \$15,000.00 per month it would not take long to destroy a local small business person who fights an allegation of discrimination under the NDO.

Further, the NDO is extremely intrusive regarding the investigation and information that can be required if a complaint is made. There is no protection for churches or other membership organizations having to provide sensitive or proprietary information at the request of the City such as membership lists or other private information.

The Section 15-45(a) exception offers little real protection to churches and no protection to businesses or individuals. For example, all employees of churches are not exempted. Moreover, it is clearly unconstitutional to require adherence to some denominational standard to claim the protection of this exception. This standard turns First Amendment jurisprudence on its head. The First Amendment protects individuals and organizations, not just particular denominations.

### **3. THIS NDO VIOLATES FREE SPEECH/FREEDOM OF CONSCIENCE:**

Traditional views of family/sexuality will be squelched and prosecuted under this NDO. Government coercion on divisive issues in the community is never an exercise of good governance.

Coerced speech is unconstitutional. The US Supreme Court has repeatedly ruled that a person cannot be forced to propound or communicate a message that violates his or her religious beliefs or conscience. To illustrate the principle, a Jewish or Muslim baker should not be required to participate in an event or ceremony by providing services that violate their faith. Should a Jewish bakery be forced to make a cake with a swastika for an anti-Israel rally? Should a Muslim baker be forced to bake a cake with the image of Mohammed on top? The answer is obvious. This NDO could force a gay photographer to participate in and photograph a Traditional Family Rally that violates his or her conscience, or force a Catholic to participate in a pro-LGBT ceremony or event.

Does the City of Jackson really want to become the arbiter of which religious views are permissible or allowed?

#### **4. CONSTITUTIONAL VAGUENESS/DUE PROCESS ISSUES:**

All citizens are entitled to clear definitions in a law so they can know what is prohibited. The definitions in this NDO are not clear. Everyone is entitled to prior notice of proscribed conduct. What constitutes a wrongful act under this NDO? It is not clear and depends on the perception of the person who claims to be aggrieved (Sec. 15-41(c)). Section 15-41(m) attempts to contradict this, however, the same result is reached based on the definitions of "gender identity" and "sexual orientation," both of which refer to the complainant's identity, not the perpetrator. How is a business person supposed to know ahead of time that a 6'6" white man perceives himself to be a 5'6" Asian woman? Or that someone perceives herself as a lesbian? This is an impossible standard to enforce.

Also, there are many due process issues with this NDO. For example, what rights do defendants have if a complaint is filed against them? How are hearings conducted? Who decides? Is a defendant even entitled to notice of the specific charges against him or her? What standard of proof is going to be applied to these cases? What appeal rights are available? This is not an exhaustive list of the due process problems, it is merely illustrative of the issues involved.

Another concern is with the NDO attempting to expand the jurisdiction of the Jackson County Circuit Court (Sec. 15-46(k)). This is the sole prerogative of the state legislature.

#### **5. TRANSGENDER BATHROOM ISSUES:**

This NDO will require businesses and schools to permit biological men/boys to use the showers/locker rooms/bathrooms of women/girls. Does the City of Jackson really approve of adult men entering showers and locker rooms where teenage or younger girls are also present? This is the exact issue being litigated in the *Planet Fitness* lawsuit pending in the Michigan Court of Appeals. The proposed NDO clearly violates the privacy rights of others using the facilities.

The proposed NDO also facilitates the possible commission of criminal activity in such settings. If a man perceives himself as a woman and undresses and takes a shower with a teenage girl, this would be the crime of indecent exposure. Again, this is just one example of the potential crimes that would be facilitated by passing this NDO.

#### **6. GENERAL OBSERVATIONS:**

- This ordinance is not about non-discrimination or civil rights – it is really about forced civil acceptance of conduct through the force of law. There is no comparison to the civil rights struggles of the African-American community. No gay/transgender person has been required to sit in the back of a bus or drink from a separate water fountain. No gay/transgender person has been denied entrance to a school or university. No gay/transgender person has been forced to live under Jim Crow laws. No gay/transgender person has been denied the right to vote or been enslaved. The comparison is not valid.
- Even if you agree with this proposed NDO, it does not give the City of Jackson the right to trample on the constitutional rights of others who don't agree.
- The NDO's preamble proclaims its purpose is to protect the public health, safety and welfare. Exactly how is promoting the conduct of individuals in the new protected classifications promoting the health, safety and welfare of Jackson's citizens? A simple review of the scientific/medical studies at the CDC's website does not support this purported purpose.
- All individuals already have the protections of the law and the right to fair and equal treatment under existing laws and under federal and state constitutions.

We respectfully oppose this NDO and urge the Jackson City Council to consider the above information before deciding whether to enact the proposed NDO.