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City of Dyersville
Attn: City Council
340 1st Ave E
Dyersville, IA 52040

Re: ACLU Challenge to Dyersville Ordinance § 127.02(1)(G)

Dear Members of the Dyersville, Iowa City Council:

We have been asked to provide our opinion and recommendation regarding the letter received by the City of Dyersville from the American Civil Liberties Union ("ACLU") dated June 20, 2023 (the "Letter"), regarding § 127.02(1)(G) of the Ordinances of the City of Dyersville (the "Ordinance"), specifically the reference therein to "male or female impersonators, or similar entertainers." We have reviewed the letter from the ACLU, the referenced Ordinance, and the relevant cases and statutes and herein provide our opinion and recommendation.

The Letter raises three ways in which the ACLU seeks to challenge § 127.02(1)(G): as an unconstitutional content-based restriction, as overbroad, and as a violation of equal protection and targeted attack on the LGBTQ community. This opinion will address all three alleged issues.

Content-Based Restriction

The ACLU's claim that the Ordinance in question is unconstitutional because it is content-based and not narrowly tailored to further a compelling government interest is incorrect. The Ordinance at issue in this matter is not complete prohibition of adult entertainment facilities, but rather a "time, place, and manner" restriction. It does not

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prohibit the referenced facilities from existing within the city, it merely sets certain limitations as to where such an establishment can be located. It is a longstanding principal in US courts that this type of restriction can be permissible. See *City of Renton v. Playtime Theatres, Inc.* 475 US 41 (1986). After determining that the ordinance constitutes a time, place, and manner restriction, as defined by the Court in *Renton*, we must determine whether the Ordinance is content-neutral. Here, the courts have consistently held that similar ordinances, focused on the secondary effects of adult entertainment venues, are content-neutral because they do not target the content of speech, but rather they target those secondary effects. This is clearly the purpose of the City of Dyersville Ordinance, as stated in §127.01 Purpose, stating:

It is recognized that adult entertainment facilities have certain objectionable side effects which render these facilities incompatible with residential and family-oriented uses, when the adult facilities are located directly adjacent to such uses. This chapter seeks to ensure that residential and family-oriented uses and adult entertainment facilities will be located in separate and compatible locations.

Because the object of the Ordinance is to combat the side effects of adult entertainment facilities and not to simply prohibit the existence of such facilities, the Ordinance is a content-neutral time, place, and manner restriction.

The ACLU cites as support for its position a Tennessee District Court case that is not controlling on any Iowa state or federal courts or indeed any courts within the Eight Circuit. Additionally, the statute challenged in the Tennessee court is substantially different than the Ordinance at issue here; the Tennessee statute included language directly referencing the content of the behavior it sought to limit within the text of the statute (“‘Adult cabaret entertainment’ . . . Means adult-oriented performances that are harmful to minors . . .”). Because the case itself is not controlling and the laws referenced therein are substantially different than the Ordinance, this argument should be disregarded.

Applying the standards set out by the US Supreme Court in *Renton* and consistently upheld, it is clear that the Ordinance is a permissible content-neutral time, place, and manner restriction.

Overbreadth

The ACLU next asserts that the Ordinance is unconstitutional because it is overbroad. Here, the ACLU may be correct and we recommend an amendment to the

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Ordinance to ensure it cannot be challenged on constitutional grounds. As stated in the Letter, the Ordinance targets any establishment that “is licensed to serve food and/or alcoholic beverages, which features . . . male or female impersonators, or similar entertainers.” Because the Ordinance does not make reference to the type of performance, limiting such performances to explicit or obscene material, and targets any business that is licensed to serve food or alcohol, this language could be found to be overbroad.

In order to protect against this challenge, we recommend amending the Ordinance to include a definition of “Adult Content” and to reference such definition as applicable. We have enclosed herewith a red-lined draft of a proposed amendment for your review.

Violations of Equal Protection

The Letter alleges that the Ordinance violates both the Iowa and U.S. Constitutions because it targets the LGBTQ community and was enacted with animus toward such community. This allegation does not survive initial review. The Ordinance does not seek to place any burden on any person as a result of such person’s sex or gender, and nothing contained in the Ordinance or any records surrounding the adoption of the Ordinance suggests any animus toward any group as a fueling factor for the Ordinance.

The ACLU cites numerous cases in support of this allegation, however almost none of those cases are controlling in any state or federal court in Iowa. Further, many of the cases cited by the ACLU reference transgender or gender-nonconforming persons and discrimination against such persons. The only Iowa cases cited by the ACLU revolve around treatment of transgender persons. These factors are irrelevant to this matter. The Ordinance does not make reference to nor does it target transgender or gender-nonconforming persons.

Conclusion

Two out of the three challenges raised by the ACLU to the Ordinance are wholly inaccurate. The Ordinance is a permissible, content-neutral time, place, and manner restriction on certain types of businesses and does not prohibit such businesses from existing anywhere within the city, but rather limits available locations of businesses that the city has determined are incompatible with family-oriented activity. The Ordinance does not violate equal protections of LGBTQ persons and there is no indication that the Ordinance was motivated by animus toward any group.

We do recommend that the Ordinance be amended as it could be construed by a

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court as overbroad. We have enclosed herewith a proposed red-lined amendment to the Ordinance.

Than you for giving us the opportunity to assist in this matter and please do not hesitate to contact the undersigned should you have nay questions or require further assistance.

Very truly yours,

FUERSTE, CAREW,
JUERGENS & SUDMEIER, P.C.

BY:



EDWARD F. HENRY

EFH/
Enclosures