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Delivered via email to City Council members at the following addresses:

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CC: City Attorney

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RE: Dyersville Ordinance § 127.02(1)(G)

Dear Councilpersons:

I am writing on behalf of the ACLU of Iowa regarding the City of Dyersville ("the City") Ordinance § 127.02(1)(G) ("the Ordinance").

This Ordinance regulates any "adult entertainment cabaret" which includes "a public or private establishment that is licensed to serve food and/or alcoholic beverages, which features topless dancers, strippers, male or female impersonators, or similar entertainers." Dyersville, Ia. Mun. Code § 127.02(1)(G) (2022). It is unlawful for any person to engage in, conduct or carry on, or to permit to be engaged in, conducted or carried on, in or upon any premises in the City, the operation of an adult entertainment facility, without first having obtained a separate license from the City. Dyersville, Ia. Mun. Code § 127.12(1) (2022)."Any person, including but not limited to a licensee and a performer, who actually engages in the providing of goods or services to the public in connection with the adult entertainment facility must file an application for an adult entertainment employee permit with the police department upon a form provided by the police department and shall tender the correct permit fee, as provided in Section 127.11 to the City Clerk who shall issue a receipt which shall be attached to the application filed with the police department." Dyersville, Ia. Mun. Code § 127.13(1)(A) (2022). Individual business owners who violate this prohibition are subject to a penalty for a zoning violation, including the loss of permits. Dyersville, Ia. Mun. Code § 165.12 (2022).

The Ordinance states that the City Council's legislative purpose is "to ensure that residential and family-oriented uses and adult entertainment facilities will be located in separate and compatible locations" because, "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." Dyersville, Ia. Mun. Code § 127.01 (2022).

The Ordinance is unconstitutional under the U.S. and Iowa Constitutions for at least three reasons, as explained in detail below. First, the Ordinance is an unconstitutional government infringement on speech protected by the First Amendment to the United States Constitution and the Iowa Constitution, because it is a content-based restriction and is not narrowly tailored to serve a compelling government interest. Second, the Ordinance is overbroad because it encompasses all "male or female impersonators, or similar entertainers" under prohibited adult cabaret, regardless of whether the expression is sexually explicit or not. Third, it violates equal protection because it targets the LGBTQ community on the basis of sex and gender expression and is motivated by animus toward the LGBTQ community. The City should promptly amend the Ordinance to remove any reference to "male or female impersonators, or similar entertainers".

At least one other city has already repealed a similarly unconstitutional ordinance, and three other cities we've contacted are in the process of doing the same. Following a notification letter from the ACLU of Iowa, Eagle Grove amended its ordinance to remove "female and male impersonators" from the definition of adult entertainment. (See Ex. 1). Like the ordinance in Eagle Grove, the City's Ordinance raises serious freedom of speech concerns and attempts to regulate protected activities of residents in the City, which concerns ultimately prove fatal to the constitutionality of the Ordinance. This City should follow the example of Eagle Grove and amend the Ordinance at once.

I. The Ordinance is unconstitutional because it is a content-based restriction and is not narrowly tailored to further a compelling government interest.

The Ordinance violates free speech under the First Amendment and Iowa Constitution because it is a content-based restriction on protected expression and is not narrowly tailored. It restricts protected speech of a particular subject matter. The prohibited conduct cannot be defined without referencing the content of the speech.

Courts have reviewed challenges to the constitutionality of local regulations of sexual or adult-oriented businesses. *See Richland Bookmart. Inc. v. Knox County*, 555 F.3d 512, 520 (6th Cir. 2009); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 396 (6th Cir. 2001). While such speech is protected as free speech and expression by the First Amendment, the Supreme Court has held that governments may regulate sexual or erotic speech and expression if those regulations are intended to address the "adverse secondary effects of such expression, so long as the restrictions placed on expression survive intermediate scrutiny." *Entertainment Productions, Inc. v. Shelby County*, 588 F.3d 372, 378 (6th Cir. 2009) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986)). However, a federal court has recently recognized this doctrine did not apply to a similar anti-drag law. *Friends of Georges, Inc. v. Mulroy*, 2023 WL 3790583, at *26 (W.D. Tenn. June 2,

2023). The secondary effects doctrine did not save the law because the court found that the "predominate concerns involved the suppression of unpopular views of those who wish to impersonate a gender that is different from the one with which they were born." *Id.*

The Iowa Supreme Court has recognized that the right to free speech under article I, section 7 of the Iowa Constitution, while interpreted independently, is at least coextensive with the analogous federal constitutional right. *City of West Des Moines v. Engler*, 641 N.W.2d 803, 805 (Iowa 2002); *Bierman v. Weier,* 826 N.W.2d 436, 451 (Iowa 2013) (holding article I, section 7 "'generally imposes the same restrictions on the regulation of speech as does the federal constitution'") (quoting *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997)); *Iowans for Tax Relief v. Campaign Fin. Disclosure Comm'n*, 331 N.W.2d 862, 868 (Iowa 1983) (stating that "the applicable [F]irst [A]mendment standard" was "the same" as that for article I, section 7).

Content-based laws, which target speech based on its communicative content, are subject to strict scrutiny: they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 434 (2002); *R.A.V. v. City of St. Paul*, 505 U.S. 377 ,382 (1992). By contrast, "[t]he principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)). Regulation of expressive activity is content-neutral if it is "justified without reference to the content of the regulated speech." *Clark*, 468 U.S. at 293.

"[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994). The Court has recognized a category of laws that, though facially seemingly content-neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward*, 491 U.S. at 791. Those laws, like laws that are content-based on their face, must also satisfy strict scrutiny. *Reed*, 135 S. Ct. at 2227. The courts have clarified that they don't rest on the government's assertion of a facially content-neutral purpose: "[E]ven when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry." *Whitton v. City of Gladstone*, 54 F.3d 1400, 1406 (8th Cir. 1995) (finding durational limits governing political signs but not commercial signs to be content-based, despite the city's assertion of a facially content-neutral purpose "in maintaining traffic safely and preserving aesthetic beauty") (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (rejecting city's argument that a restriction on the use of newsracks selling commercial handbills but not newspapers could be justified by a facially content-neutral purpose "to limit the total number of newsracks" for "safety and esthetics").

Recently a federal district court found a similar law was a facially content-based restriction and unconstitutional under a strict scrutiny analysis. *Friends of George's,* 2023 WL 3790583, at *1(granting a permanent injunction). Tennessee passed a law criminalizing the performance of "adult cabaret entertainment" in any location where the adult cabaret entertainment could be viewed by a person who is not an adult, and defining "adult cabaret entertainment" to include

"female and male impersonators". T.C.A. § 7-51-1401. The Court found that while the state has a compelling state interest in protecting the physical and psychological well-being of minors, the law was not narrowly tailored or the least restrictive means to serve its compelling interest. *Friends of Georges*, 2023 WL 3790583, at *28.

Like the law in *Friends of George's*, this Ordinance is a content-based restriction because it targets the speech of "male or female impersonators" (or "similar performers") based on its communicative content: the same speech or expression, if performed or expressed by non "male or female impersonators", is not prohibited. This Ordinance effectively prohibits all drag performances in the City. The inclusion of impersonators in the definition is not aimed at regulating sexually explicit or obscene expression, but rather to regulate expression by "impersonators" or "similar performers" only. By doing so, it targets only certain types of obscenity, as well as altogether non-obscene expression, and thus is a content-based restriction that warrants strict scrutiny.

Because the Ordinance is content-based and warrants strict scrutiny, it is the City's burden to demonstrate that the Ordinance furthers a compelling governmental interest and is narrowly tailored to that end. The City cannot do so. The Ordinance "seeks to ensure that residential and family-oriented uses and adult entertainment facilities will be located in separate and compatible locations." Dyersville, Ia. Mun. Code § 127.01 (2022). However, there are already laws regulate obscenity and sexually explicit conduct and materials. Lawmakers have not identified any other compelling interest in enacting this Ordinance. There is no justification for the law's treatment of "male and female impersonators" as "objectionable" without reference to the content of the speech being regulated. The motivation for this ordinance was plainly to further the City's desire to restrict "male or female impersonators" from performing because of a disagreement with the message they convey and regulate them entirely out of existence within the City.

Further, even if the City could identify a compelling governmental interest in prohibiting non-obscene expression by "male or female impersonators", the law fails strict scrutiny because it is not narrowly tailored. Instead of enforcing existing laws prohibiting obscenity or indecent exposure in front of minors, the City seeks to prevent any drag entertainment from being performed because of the content. Drag shows are predominantly not obscene. In fact they generally are characterized by clothed performers singing, dancing, and performing comedy.

Failing both prongs of strict scrutiny analysis, the Ordinance violates the free speech and expression guarantees of the U.S. and Iowa Constitutions.

II. The Ordinance is unconstitutionally overboard.

The Ordinance is also unconstitutionally overbroad, because artistic expression is not sexual or erotic in nature simply because it involves "male or female impersonators, or similar entertainers". A law is unconstitutionally overbroad if it sweeps in more speech than is necessary to satisfy the government's interest, regulating both protected and unprotected speech. *See Broadrick v. Oklahoma*, 413 U.S. 601,610 (1973). "Adult entertainment cabaret" is defined as "a public or private establishment that is licensed to serve food and/or alcoholic beverages, which features topless dancers, strippers, male or female impersonators, or similar entertainers." Dyersville, Ia. Mun. Code § 127.02(1)(G) (2022). In a recent case a court granted a permanent

injunction finding a similar law unconstitutionally overbroad. *Friends of George's,* 2023 WL 3790583, at *31-32.

Undoubtedly, the City may regulate businesses that regularly purvey "sexually explicit but non-obscene speech, such as adult publications and adult videos, and second, 'symbolic speech' or 'expressive conduct,' such as nude dancing" through zoning restrictions. *Richland Bookmart,* Inc., 555 F.3d at 520. However, the plain language of the Ordinance regulates speech and expression beyond that which could reasonably be considered "sexually explicit" expression.

The Ordinance regulates any production that includes "male or female impersonators" as a prohibited "adult cabaret", without regard for whether any such speech or expression has a "sexually explicit" component. It prohibits adult cabaret entertainment without any exceptions, sweeping broadly, without any narrowing language. An underlying issue with the Ordinance is that drag performances are not inherently sexually explicit by nature; they typically feature fully-clothed performers singing, dancing, and performing comedy bits. For example, in Des Moines drag performances have become a part of the annual *CelebrAsian* festival, which is a family friendly drag event that celebrates Asian cultures. At this festival the performance by "male or female impersonators" is catered to people of all ages and is used to showcase culture and tradition. Additionally, expression by "male or female impersonators" is a time-honored tradition in artistic works, going back millennia. Drag has been present in western culture dating back to Ancient Greek theatrical productions, and the earliest productions of William Shakespeare's plays. Speech by "male or female impersonators" is a form of artistic expression long protected by the First Amendment and the Iowa Constitution.

Because the Ordinance sweeps in far more protected speech than is necessary to satisfy the government's interest, it is unconstitutionally overbroad.

III. The Ordinance violates equal protection because it targets LGBTQ people based on sex and gender and is motivated by animus.

Finally, the Ordinance violates the both the U.S. and Iowa Constitution's equal protection guarantees because: (1) it facially discriminates against the LGBTQ community on the basis of sex and/or gender by regulating drag performances out of existence within the City and (2) was motivated by animus toward this group.

Because sex-based classifications are quasi-suspect, they are subject to a form of heightened scrutiny. *G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 654 F. App'x 606, 607 (4th Cir. 2016); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-441 (1985). Specifically, they are subject to intermediate scrutiny "with teeth", meaning that they "fail[ ] unless [they are] substantially related to a sufficiently important governmental interest." *See Id.* at 441. In addition, to survive intermediate scrutiny, the state must provide an "exceedingly persuasive justification" for its classification. *See United States v. Virginia*, 518 U.S. 515, 534 (1996). Federal courts across the country have recognized claims of sex discrimination brought under the Fourteenth Amendment by individuals, who, by definition, do not adhere to the stereotypes associated with their sex assigned at birth. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020), *cert. denied sub nom. Gloucester Cnty. Sch. Bd. v. Grimm*, No. 20–116, 2021 WL 2637992 (U.S. June 28, 2021) (declining certiorari in a case in which the Fourth Circuit expressly held that

"transgender people constitute a discrete group with immutable characteristics" subject to heightened scrutiny under Fourteenth Amendment equal protection); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016), *stay denied*, 845 F.3d 217, 222 (6th Cir. 2016); *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018); *F.V. v. 81 F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142–45 (D. Idaho 2018) and *decision clarified sub nom. F.V. v. Jeppesen*, 477 F. Supp. 3d 1144 (D. Idaho 2020); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019); *Ray v. McCloud*, No. 2:18–CV– 272, 2020 WL 8172750, at *8–9 (S.D. Ohio Dec. 16, 2020).

Applying a similar analysis, the U.S. Supreme Court and numerous federal circuit courts of appeal have recognized that discrimination against someone because they are transgender is sex discrimination under Title VII and Title IX. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020) ("holding that discrimination against someone because they are transgender is sex discrimination"). While these cases are often brought by transgender people, courts have used transgender status as an umbrella to also include drag queens and kings, and "male or female impersonators". *Oiler v. Winn–Dixie La., Inc.*, No. 00–3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002).

The Iowa Constitution's equal protection guarantee, found in Art. I, sections 1 and 6, is at least as protective as its federal counterpart found in the Fourteenth Amendment to the United States Constitution. *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) ("legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution."). Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike under the law. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 351 (Iowa 2013). More precisely, the equal protection guarantee requires "that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law." *Varnum*, 763 N.W.2d at 882 (quotation marks omitted); *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

In two separate cases we've litigated, Iowa district courts have recognized that under the test set out by the Iowa Supreme Court in *Varnum*, classifications based on transgender status demand heightened scrutiny. *Vasquez et al. v. Iowa Dep't of Hum. Servs.*, No. CVCV061729 at *22-33 (Polk Co. Dist. Ct. Nov. 19, 2021), *available at* https://www.aclu-ia.org/sites/default/files/vasquez_covington_order.pdf, *appeal dismissed,* __ N.W.2d. __, 2023 WL 3397460 (Iowa May 12, 2023) (leaving district court decision undisturbed); *Good et. al v. Iowa Dep't of Hum. Servs.*, Nos. CVCV054956, CVCV055470 (consolidated) at *26 (Polk Co. Dist. Ct. Jun. 6, 2018), *available at* https://www.aclu.org/cases/good-v-iowa-dept-human-services?document=good-v-iowa-department-human-services-ruling-petitions-judicial-review, *aff'd* 924 N.W.2d 853, 862-63 (Iowa 2019) (affirming on state statutory civil rights grounds without reaching constitutional question). Applying a similar analysis under the Iowa Civil Rights Act as applied under equal protection, the Iowa Supreme Court has also found that discrimination against transgender employee in employer-provided healthcare benefits and use of restroom and locker room facilities at work was prohibited gender identity discrimination. *Vroegh v. Iowa Dep't of Corr.*, 972 N.W.2d 686, 704 (Iowa 2022) (upholding jury verdict and $120,000 damages award).

In sum, because the Ordinance facially classifies on the basis of sex, gender, and sex- and gender-based stereotypes, it violates federal and state constitutional guarantees of equal protection.

This Ordinance also violates equal protection for a second, independent reason: it targets a disadvantaged group, LGBTQ drag performers, based purely on animus toward that group as undesirable. Even absent a suspect classification, a statute that targets a disadvantaged group based purely on animus toward that group is categorically prohibited under equal protection. The U.S. Supreme Court has long recognized that a law is irrational, and categorically violates equal protection, if its purpose is to target a disadvantaged group. *See United States v. Windsor*, 570 U.S. 744, 770 (2013) ("'[A] bare [legislative] desire to harm a politically unpopular group cannot' justify disparate treatment of that group.") (quoting *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-535 (1973); *Cleburne*, 473 U.S. at 448 ("[M]ere negative attitudes, or fear . . . are not permissible bases for [a statutory classification]."); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (amendment that was "inexplicable by anything but animus toward the class it affect[ed] . . . lack[ed] a rational relationship to legitimate state interests").

Here, on its face the Ordinance targets LGBTQ drag performers based on dislike for the group. Drag has become specifically linked with the LGBTQ community, and drag performers often perform in bars and spaces that specifically cater to the community. The City Council's express purpose in passing the Ordinance is " to ensure that residential and family-oriented uses and adult entertainment facilities will be located in separate and compatible locations." Dyersville, Ia. Mun. Code § 127.01 (2022). As already discussed, there is nothing inherently obscene or even sexually explicit about "male or female imperson[ation]"—and nothing "objectionable" about "male or female impersonators"—including everything from drag comedy acts to Shakespearean productions, that the youth need to be protected from. The Ordinance simply perpetuates a history of animus against the LGBTQ community as demonstrated by the pretextual nature of the asserted motives for the Ordinance. There are already laws prohibiting obscenity and this Ordinance does not generally prohibit obscenity but rather targets only by LGBTQ drag performers. Thus, there is no reason offered for the facially discriminatory classification but bare animus, and the Ordinance cannot pass constitutional muster.

The City should promptly remove all references to "male or female impersonators" from the Ordinance.

This City should follow the recent example of Eagle Grove, Iowa. After the ACLU learned that the City was enforcing the unconstitutional ordinance, we contacted legal counsel for the city, which, to its great credit, agreed to repeal the unconstitutional ordinance to avoid future violations. (See Ex. 1). We have also reached out to three other cities that are currently in the process of repealing their own anti-drag ordinances. Had these cities not taken the step to amend the ordinances, they risked liability for officials that enforced them without realizing they were unconstitutional. The City faces similar risks here.

We encourage you not to allow the Ordinance to stay on the books with the intention not to enforce it. It is important to remove the unconstitutional ordinance from the municipal code to protect residents from constitutional violations, and to protect the city and its officers from liability.

For these reasons, we urge the City to, at minimum, remove all references to "male or female impersonators and similar entertainers" from the Ordinance. A court would likely find that the restriction of these performances under the Ordinance is content-based and overbroad in violation of free speech, and violates equal protection.

Thank you for your attention to this important matter. I ask that you inform me within 14 days of the date of this letter that you agree not to enforce the ordinance as written, and that you will promptly take the necessary action to amend the ordinance as requested.

Please contact me with any questions about this matter by phone or email at shefali.aurora@aclu-ia.org.

Sincerely,

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Staff Attorney

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