



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Texas

November 11, 2024

Mayor Javier Joven
At-Large City Council Member Denise Swanner
District 1 City Council Member Mark Matta
District 2 City Council Member Steven P Thompson
District 3 City Council Member Gilbert Vasquez
District 4 City Council Member Greg Connell
District 5 City Council Member Chris Hanie

City of Odessa
411 W 8th Street
Odessa, TX 79760
(432) 335-3200

Sent Via E-mail

Re: Odessa Restroom Ordinance

Dear Mayor Joven and Odessa City Council:

We ask that you reject the proposed amendments to Section 8-1-6 of the Code of Ordinances because they are discriminatory, do not reflect the values of the City of Odessa, and impose significant legal liability on all private businesses and private property in Odessa that goes far beyond what was posted and considered at the October 22, 2024 council meeting. While there currently exist criminal ordinances that protect Odessans from people who enter bathrooms with the intent to harm or violate restroom users' privacy, these proposed amendments unfairly target transgender Texans, turn neighbor against neighbor, encourage overzealous advocates to drain the resources of civil courts, and create significant legal liability for the City of Odessa and its residents.

Transgender people are part of the fabric of our community, our families, our workplaces, and our neighborhoods. Like everyone else, they are small business owners and homeowners and should be allowed to use their private property without undue government interference. But the sweeping proposed changes affixed to your upcoming council agenda trample on their rights and threaten to create a gender-policing witch hunt on both public and private property across the City.

Most Odessans likely do not realize that the proposed changes apply to all private property in the City because the title of the agenda item—both at the upcoming November 12 meeting and on October 22—was “Amending the current restroom use regulations *in public buildings.*” But just hours before your October 22 council meeting, you received a revised version of the ordinance that creates civil liability for anyone who uses a restroom “designated for the opposite sex” on *both* public *and* private property. This expansion of the ordinance at the eleventh hour likely violates the Texas Open Meetings Act, since it failed to provide adequate notice to business owners and Odessa residents that the local government was exposing them to immense liability on private property. Moreover, the proposal to place a bounty of \$10,000 *per occurrence* on anyone using a restroom on private property could bankrupt many businesses and Odessa residents, as well as flood the courts with frivolous lawsuits.

We urge you to reject the proposed changes, or, at the very least, delay your consideration of them to give proper notice and receive public comment from every person and business that is impacted by these changes. We also ask you to reject any amendments, like these, that will foster discrimination, hatred, and legal liability in your city.

Background

The Odessa City Code already makes it “unlawful for any person to knowingly and intentionally enter any public restroom designated for the exclusive use of the sex opposite to his or her own without permission of the owner, tenant, manager, lessee or other person in charge of the premises.” Odessa City Code § 8-1-6. At the October 22 meeting, there were no reports of the City having any issues with enforcing this ordinance and no reasons offered for needing to expand it. A local news organization reported: “For the record, we reached out to OPD and asked how many times officers have responded to public restroom related calls in the last three years; *that records request yielded zero reports.*”¹ The City of Odessa already controls access to restrooms on public property, while business owners and others in charge of private premises currently have the freedom to regulate restrooms on their private property. Moreover, Texas criminal laws already make it unlawful to enter a restroom with the purpose of harming or invading the privacy of any person.²

Despite the lack of need for changing the laws governing public restrooms, the City Council’s agenda packet on October 22 contained seven pages of “legal mumbo jumbo,” in the words of one Odessa resident,³ that threatened to cruelly and unlawfully prevent transgender, non-binary, and intersex Odessans from using restrooms that align with their gender identity in all public buildings. ***The draft ordinance that was posted pursuant to the Open Meetings Act did not mention private buildings or private property at all.***

¹ Erica Miller, *City approves divisive restroom ordinance*, Your Basin (Oct. 23, 2024), https://www.yourbasin.com/news/city-approves-divisive-restroom-ordinance/?utm_medium=referral&utm_source=facebook.com&utm_campaign=socialflow (emphasis added).

² See, e.g., Texas Penal Code §§ 21.15; 42.01.

³ Video of Odessa City Council Meeting (“Video”) at 1:53:24 (Oct. 22, 2024), <https://www.youtube.com/watch?v=8d9h8c95B7c>.

However, at the start of the October 22 council meeting, the City Attorney explained that council members received a revised version of the ordinance earlier that afternoon.⁴ One of the primary differences, the Attorney explained, was that the revised version applies to *all* private property in Odessa, including private homes, churches, and businesses.⁵ When the Council voted on these changes, however, the Mayor said that they would “amend the current restroom use regulations *in public buildings*.”⁶ The Council voted to preliminarily approve the amendments 5-to-2.⁷

In addition to the confusion and lack of public notice regarding the scope of this ordinance, the October 22 council meeting was rife with discriminatory and contradictory statements from the amendments’ proponents. These statements indicate that the underlying justification for this ordinance is misunderstanding and discrimination towards transgender people. For example, in defending the ordinance, Council Member Chris Hanie said that if he happens to encounter “a man being in the bathroom with my grandkids,” he doesn’t want to have to “drag the guy out.”⁸ He went on to say, “I don’t care who you are, and what you do in the privacy of your home is your business, but I don’t need to see it in public.” Thus, even Council Member Hanie seemed to be under the impression that the proposed changes applied only to public, rather than private, property, and he may not have seen the reports from the Odessa Police Department that there were no reported incidents of anyone creating problems in City restrooms.

Mayor Joven insisted that these proposed changes are required for the protection of Odessans, particularly cisgender women and girls.⁹ But these safety concerns have no relationship to the presence of transgender people, who, like everyone else in the Odessa community, value their privacy and safety when using the restroom. It is already illegal to enter a restroom for the purpose of harming someone or invading someone’s privacy, and anyone who does so is subject to arrest and prosecution. On the other hand, this ordinance invites discrimination against transgender Texans while encouraging their neighbors, coworkers, and friends to target them with frivolous lawsuits. And because the private right of action triggers damages of \$10,000 *per violation*, there is a hefty financial incentive to file lawsuits under this unnecessary and harmful ordinance.

⁴ Video at 1:14:40.

⁵ Video at 1:33:20.

⁶ Video at 2:24:30.

⁷ Video at 2:25:25.

⁸ Rhyma Castillo, *Odessa aims to let residents sue a trans person for using bathroom that aligns with their gender*, San Antonio Express News (Nov. 1, 2024), <https://www.expressnews.com/news/texas/article/odessa-anti-trans-bathroom-ordinance-texas-law-19860318.php>.

⁹ See *id.*; Carlos N. Ramos, *Odessa bans transgender people from using restrooms that don’t match sex assigned at birth*, Texas Tribune (Oct. 23, 2024), <https://www.texastribune.org/2024/10/23/odessa-texas-transgender-bathroom-ban/>.

I. Allowing Transgender, Non-binary, and Intersex People to Use the Restrooms that Match Their Gender Identity Is Critical to Their Wellbeing, Privacy, and Safety

Being transgender means that a person’s gender identity is different than the gender they were assigned at birth. Gender identity is a person’s deeply held sense of their own gender. Everyone has a gender identity, and cisgender people are those whose gender identity aligns with the gender they were assigned at birth. People whose gender identity differs from the gender they were assigned at birth are transgender. Medical opinion is unequivocal that gender identity is not a choice.¹⁰

Countless transgender people thrive in our society and lead both ordinary and extraordinary lives.¹¹ Due to social stigma and a variety of factors, some transgender people experience gender dysphoria, which is a medical condition characterized by clinically significant distress associated with the incongruence between one’s gender identity and gender assigned at birth. Gender dysphoria is recognized as a serious medical condition, including by the American Medical Association, the Texas Medical Association, the American Psychiatric Association, the American Psychological Association, the Endocrine Society, the World Professional Association for Transgender Health, and courts across the country. There is medical consensus that appropriate treatment for gender dysphoria includes living in accordance with one’s gender identity in all aspects of life, which is known as social transition. Social transition includes using things like names, pronouns, hairstyles, clothing, and restrooms that match one’s gender identity.

All of us, including transgender people, care about safety and privacy in restrooms and locker rooms. This ordinance not only threatens the ability of transgender people to live as their full, authentic selves, but it effectively bars them from public spaces all together. It is not possible to live safely in the world if you cannot access a restroom. You cannot use the library, report crimes to the police, or give public comment at city council if you do not have access to a restroom. And forcing people to use facilities based on the sex listed on their birth certificate—instead of their gender identity—will lead to harmful and untenable situations involving violence, discrimination, and discomfort for everyone.

II. The Proposed Amendments’ Reliance on “Official Birth Certificates” Is Scientifically Inaccurate and Risks Unlawful Privacy Violations

The amendments rely on a person’s “official birth certificate”— “issued at or near the time of birth”—to determine a their “biological sex.” But the concept of “biological sex” is scientifically complex, and reducing it to this rigid and overly simplistic definition

¹⁰ *Understanding transgender people, gender identity and gender expression*, American Psychological Association (July 8, 2024), <https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression>

¹¹ *See* Brief of Elliot Page, Major Griffin-Gracy, Gwendolyn Herzig, Jazz Jennings, and Fifty-Four Others as Amici Curiae In Support of Plaintiffs-Appellees, *Brandt v. Rutledge*, Case No. 21-2875 (8th Cir. Jan. 19, 2022), *available at* <https://www.aclu.org/legal-document/brandt-et-al-v-rutledge-et-al-amicus-brief-trans-adult-voices>.

will lead to inaccuracies, invasions of privacy, and discriminatory gender policing for everyone in Odessa.

The American Medical Association (AMA) and other scientific organizations recognize that sex designations based on birth certificates are problematic because sex is not “simple and binary,” and sex classifications “fail[] to recognize the medical spectrum of gender identity.”¹² Especially since approximately 1.7% of people are born intersex, with many possible variations in hormones, anatomy, and chromosomes,¹³ it is scientifically inaccurate and impossible for government entities to set policy based on a binary view of “biological sex.”

Further, the proposed ordinance not only seeks to categorize Odessans based on a rigid and unscientific system, but it would also allow strangers, courts, and law enforcement officials to challenge or second-guess people’s official birth certificates. The amendments would seemingly require their enforcers to ask whether the sex listed on a person’s birth certificate was “[e]ntered at or near the time of the person’s birth” or “[m]odified only to the extent necessary to correct any type of scrivener or clerical error in the person’s biological sex.” In some cases, it may not be possible to make these determinations without demanding access to the person’s medical and legal records. Thus, anyone accused of violating the ordinance—whether transgender or cisgender—would be at risk of invasive privacy violations and questions regarding their anatomy or chromosomes, medical documents, or invalid, outdated legal documents.

III. The Proposed Amendments Violate Odessans’ Rights to Be Free from Sex Discrimination

All Odessans, of every race, gender, and sexual orientation, have a constitutional right to equal treatment under the law, and a city council ordinance cannot reject or supersede the U.S. Constitution.

Across the country, federal courts of appeals and federal district courts have overwhelmingly found that government entities cannot exclude transgender people from multi-user, sex-separated facilities that align with their gender identity.¹⁴ Courts have repeatedly interpreted federal prohibitions on sex discrimination to protect transgender

¹² See Report 10 of the Board of Trustees, American Medical Association at 14 (June 2021), <https://www.ama-assn.org/system/files/2021-05/j21-handbook-addendum-ref-cmte-d.pdf>.

¹³ Caroline Medina and Lindsay Mahowald, *Key Issues Facing People with Intersex Traits*, Center for American Progress (Oct. 26, 2021), available at <https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/>.

¹⁴ See, e.g., *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050–54 (7th Cir. 2017) (providing a single-user bathroom to a transgender student while denying him access to the boys’ bathroom likely violated student’s rights under Title IX and the Equal Protection Clause); *Dodds v. United States Dep’t of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (injunctive relief was warranted to allow transgender female student to use the girls’ bathroom); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616, 619 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021).

people from discrimination. In June 2020, the U.S. Supreme Court ruled in a 6-3 decision that Title VII’s prohibition on discrimination “because of sex” protects transgender people from discrimination.¹⁵ This precedent bolsters the rationale relied on by federal courts of appeals to resoundingly find that federal nondiscrimination laws require government entities to grant transgender people access to sex-separated facilities in accordance with their gender identity.

When North Carolina tried to prohibit transgender people from accessing public restrooms, that law was blocked by federal courts,¹⁶ and it resulted in substantial lost revenue for the state.¹⁷ And when Tennessee tried to force private businesses to discriminate against transgender people by denying them restroom access, a federal court held that law to be unconstitutional.¹⁸

IV. The Proposed Amendments Infringe on the Rights of Business and Property Owners and Imposes Limitless Legal Liability for All Odessans

As the federal court held in Tennessee, business owners typically have the right to control their own private property without being forced by the government to engage in prejudice and discrimination. The court explained that there is no “consensus on issues of sex and gender on which the [government] defendants seek to rely. Transgender Tennesseans are real. The businesses and establishments that wish to welcome them are real. And the viewpoints that those individuals and businesses hold are real, even if they differ from the views of some legislators or government officials. While those government officials have considerable power, they have no authority to wish those opposing viewpoints away.”¹⁹

The proposed amendments here go far beyond merely regulating public restrooms to encroach on all private property in Odessa. In an expansion from what was originally posted before the October 22 meeting, the private right of action in the proposed amendments allows any person to sue “any [other] person who knowingly or intentionally enters or uses a restroom in a public *or private building* in the city of Odessa designated for the exclusive use by persons that do not correspond to his or her biological sex, except in the circumstances described in Subsection (e), or who intends to engage in such conduct.”

The listed exceptions do not make any allowance for churches and houses of worship, small businesses, or any other private property in Odessa. Instead, the ordinance

¹⁵ *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).

¹⁶ *See, e.g., Carcano v. Cooper*, 350 F. Supp. 3d 388, 422 (M.D.N.C. 2018) (allowing plaintiffs’ equal protection claims to go forward before the state entered into a settlement agreement to stop enforcing North Carolina’s widely criticized bathroom ban).

¹⁷ ‘Bathroom bill’ to cost North Carolina \$3.76 billion, CNBC (March 27, 2017), <https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html>.

¹⁸ *Bongo Prods., LLC v. Lawrence*, 603 F. Supp. 3d 584, 611 (M.D. Tenn. 2022).

¹⁹ *Id.*

makes each of these places a magnet for litigation while depriving their owners of their right to regulate and control their private property the way they see fit.

Because the amendments seek to give *any person* standing to sue, regardless of whether that person is injured or even lives in Odessa, the civil courts could be flooded with lawsuits from people who live out of state and wish to win \$10,000 per alleged violation. As discussed above, any person who uses a restroom in Odessa could be sued, even if that person is not transgender, and they would have to reveal private and confidential medical information to try to defend against such frivolous lawsuits.

V. The Proposed Ordinance Also Exposes the City Itself to Liability, Including through Possible Violations of the Texas Open Meetings Act

Although the private right of action in the ordinance seems modeled after Senate Bill 8, which imposed civil liability for abortions in Texas in 2021, the City of Odessa is not subject to sovereign immunity like the State of Texas. And because the City itself is tasked with enforcing the civil provisions of this ordinance, the City is exposing itself to significant legal liability that the private right of action does not mitigate in any way.

In adopting the ordinance, the City also may be violating the Open Meetings Act by failing to provide adequate notice of the ordinance’s effect on private businesses and property across Odessa. The Open Meetings Act mandates that governmental bodies such as city councils “must give the public advance notice of the subjects it will consider in an open meeting or a closed executive session,”²⁰ and that this notice must be “sufficient to apprise the general public of the subjects to be considered during the meeting.”²¹

Notice is required to be specific if the topic is “of special interest to the community.”²² In this case, the meeting notice contained a draft ordinance that pertained only to “public buildings,” under an agenda item titled “Amending the current restroom use regulations *in public buildings*.”²³ However, the City Attorney explained during the October 22 meeting that City Council members received a revised copy of the ordinance earlier that day that expanded its scope to allow any person to be sued for accessing a restroom in any *private property or small business* in Odessa. Therefore, all residents of Odessa were deprived of the knowledge that their rights to visit or own private property or small businesses were up for debate. This topic is of critical, special interest to the

²⁰ The Office of the Attorney General of Texas, *Open Meetings Act Handbook 2024*, https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/openmeetings_hb.pdf. See also Tex. Gov’t Code § 551.041 (“A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.”).

²¹ See The Office of the Attorney General of Texas, *Open Meetings Act Handbook 2024*, https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/openmeetings_hb.pdf.

²² *Id.*

²³ *Odessa City Council Meeting Agenda* (Oct. 22, 2024), https://www.odessa-tx.gov/AgendaCenter/ViewFile/Agenda/_10222024-757.

community because it affects their access to and control over every part of the city, and the posted notice should have made that clear.

Additionally, the Open Meetings Act requires a city council to allow the public to speak about items on the agenda at its meetings.²⁴ The Act also mandates that governmental entities refrain from viewpoint discrimination in facilitating the public comment period:

Section 551.007 expressly authorizes a governmental body to adopt reasonable rules regarding the public’s right to address the body, “including rules that limit the total amount of time that a member of the public may address the body on a given item.” ***In setting such rules, a governmental body may not unfairly discriminate among speakers for or against a particular point of view.*** Additionally, section 551.007 provides that “a governmental body may not prohibit public criticism of the governmental body, including criticism of any act, omission, policy, procedure, program, or service,” except criticism otherwise prohibited by law.²⁵

The City’s meeting notice for the October 22 meeting implemented the following rule for public comment: “Your remarks will be to three minutes.”²⁶ But at the meeting, the City Council appears to have discriminated against certain speakers by selectively applying this rule depending on the viewpoint of each speaker. The most egregious example of this occurred when Jonathan Saenz, “the president of Texas Values, a conservative and religious think tank who attended the meeting . . . spoke at length on behalf of the ordinance.”²⁷ At what was seemingly the beginning of the public comment period, Mr. Saenz was permitted to speak for approximately 28 minutes.²⁸ Later in the public comment period, he was allowed to speak again for 10 minutes.²⁹ It appears that Mr. Saenz was commenting as an ordinary member of the public, as he and others repeatedly noted that he was not invited by anyone on the City Council and was there by his own volition.³⁰ Thus, he should have been beholden to the same three-minute rule as any other public speaker. Additionally, one of the very few other speakers in favor of the ordinance was allowed to exceed the three-minute rule by approximately a minute.³¹ In contrast, the City Council cut off one of the speakers opposed to the ordinance at the three-minute mark.³² This pattern of behavior suggests that the City Council engaged in viewpoint

²⁴ Tex. Gov’t Code § 551.007.

²⁵ See The Office of the Attorney General of Texas, *Open Meetings Act Handbook 2024*, https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/openmeetings_hb.pdf (internal citations omitted) (emphasis added).

²⁶ *Odessa City Council Meeting Agenda* (Oct. 22, 2024), https://www.odessa-tx.gov/AgendaCenter/ViewFile/Agenda/_10222024-757.

²⁷ Carlos N. Ramos, *Odessa bans transgender people from using restrooms that don’t match sex assigned at birth*, Texas Tribune (Oct. 23, 2024), <https://www.texastribune.org/2024/10/23/odessa-texas-transgender-bathroom-ban/>.

²⁸ Video at 1:15:45-1:43:55

²⁹ Video at 2:04:00 – 2:14:25

³⁰ Video at 2:11:20 – 2:14:10

³¹ Video at 2:19:30 – 2:23:30.

³² Video at 2:18:45.

discrimination as it unevenly enforced its own speaking rule, thereby violating the Open Meetings Act.

In order to cure these defects, the Council should reject the proposed amendments and/or delay the vote to provide adequate notice and opportunity for everyone in Odessa to comment on the proposed changes, without engaging in viewpoint discrimination.

Conclusion

Transgender people live and thrive in Odessa, just as they do across our state. The proposed amendments threaten to deny them access to both public and private spaces and will lead to extreme gender policing, legal liability, and bigotry and discrimination against the people of Odessa. We urge you to reject such a cruel, irrational, and harmful policy and to uphold your responsibility to protect the rights and interests of every person, business, and entity in the City.

Thank you,

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